IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459-MJG

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

Defendants' Motion for a Protective Order ("Motion" or "Mot."), ECF 121, seeks to halt all discovery pending resolution of Defendants' Motion to Dissolve the Preliminary Injunction ("Motion to Dissolve"), ECF 120, and any resulting interlocutory appeal. Defendants' primary argument for shutting down discovery is their view that this case is now moot because the latest version of the ban on military service by transgender persons applies only to those who have not yet joined the military and permits all Plaintiffs in this case to continue serving under a "grandfather" clause. *See* Defs' Mem. at 5, ECF 121 ("Mem."). This is incorrect. As Plaintiffs will show in their forthcoming Opposition to Defendants' Motion to Dissolve, currently serving transgender service members continue to have grounds to challenge both the President's original Transgender Service Member Ban and the steps Defendants have recently taken to implement that Ban. Furthermore, no later than April 23, 2018, Plaintiffs intend to move to amend their complaint to add new plaintiffs who hope to enlist but would be barred by the latest version of the policy. The case will, therefore, proceed irrespective of how the Court resolves Defendants' contention that the current Plaintiffs' claims are moot.

Relying on their unfounded mootness argument, Defendants fail to address the need for Plaintiffs to take discovery regarding all aspects of this case. Because the case will continue, Defendants cannot establish the good cause that is required for a stay of all discovery. Unfortunately, the instant motion for a protective order is the latest in a series of maneuvers by Defendants to delay the progress of this case—maneuvers that have already prejudiced Plaintiffs. The Court should not permit further delay.

BACKGROUND

On July 26, 2017, President Trump announced on Twitter that the U.S. Government would no longer accept or allow transgender individuals to serve in any capacity in the U.S. military. *See* First Am. Compl., ECF 39 at 3–4. On August 25, 2017, the President formalized this policy in a memorandum directed to the Secretaries of Defense and Homeland Security. *Id.* at 4–5. Plaintiffs filed their Complaint on August 28, 2017, as well as a First Amended Complaint on September 14, 2017, asserting that President Trump and the other Defendants' actions violate Equal Protection and Substantive Due Process under the Fifth Amendment to the U.S. Constitution. *Id.* at 32–38.

Plaintiffs moved for a preliminary injunction on September 14, 2017, urging this Court to "prevent Defendants from enforcing this facially unconstitutional ban and restore the status quo as it existed the morning of July 26, 2017." Pls.' Mem. at 3, ECF 40-2. The Court found that a preliminary injunction was warranted and enjoined Defendants from enforcing or implementing the policies and directives encompassed by the August 25, 2017 Memorandum. *See* Prelim. Inj., ECF 84; Mem. and Order, ECF 85 at 46.

Following the issuance of the preliminary injunction, Defendants sought a stay of all discovery until February 21, 2018. *See* Declaration of Marianne F. Kies ("Kies Decl.") ¶ 3. The Court denied that request and on December 27, 2017, ordered that discovery be completed by

April 24, 2018. *See* Order Confirming Conference, ECF 94*; see also* Scheduling Order, ECF 100. In compliance with the Court's order, Plaintiffs served discovery requests and initial disclosures in early January 2018. Kies Decl. ¶¶ 4–5. Defendants, however, have failed to file adequate initial disclosures and have rebuffed Plaintiffs' discovery requests with sweeping claims of deliberative process and presidential communications privilege.[1]

On March 23, 2018, Defendants unveiled another Presidential memorandum (the "Implementation Memo," ECF 120-3), along with a memorandum from Secretary Mattis dated February 22, 2018 (the "Recommendations," ECF 120-1) and a report from the Department of Defense dated February 2018 (the "Report," ECF 120-2). The Implementation Memo characterizes the Recommendations and the Report (collectively the "Implementation Plan") as part of Defendants' ongoing efforts to implement the policies and directives of the July 2017 Tweets and the August 2017 Memorandum. Indeed, the President stated in his March 23 Memorandum that the Recommendations and the Report were provided "[p]ursuant to my memorandum of August 25, 2017." ECF 120-3. Relying on the materials made public on March 23, Defendants simultaneously moved to dissolve this Court's preliminary injunction and filed the instant Motion. ECF 120; ECF 121.

LEGAL STANDARD

A party seeking a protective order staying discovery pursuant to Fed. R. Civ. P. 26(c) bears the burden of showing good cause and reasonableness. *Wymes v. Lustbader*, No. WDQ-10-1629, 2012 WL 1819836, at *3–4 (D. Md. May 16, 2012) (citing John Kimpflen et al., Fed.

[1] This Opposition does not detail all the deficiencies in Defendants' discovery responses. Various problems—including President Trump's blanket refusal to answer any of Plaintiffs' discovery requests and all Defendants' failures to respond to interrogatories and to comply with Federal Rule of Civil Procedure 33(c)—will likely be the subject of forthcoming motions to compel, assuming Defendants continue to refuse to engage on these issues.

Proc., L. Ed. § 26:334 (2012)); *see also Clinton v. Jones*, 520 U.S. 681, 708 (1997) ("The proponent of a stay bears the burden of establishing its need."). A party that moves to stay all discovery must make a particularly strong showing to satisfy this burden, especially in the absence of a pending motion that would dispose of the entire case. *See Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) ("a request to stay all discovery pending resolution of a motion is rarely appropriate where resolution of the motion will not dispose of the entire case") (citing *Lugo v. Alvarado*, 819 F.2d 5 (1st Cir. 1987)); *see also Painter v. Atwood*, No. 2:12-CV-01215-JCM, 2013 WL 756569, at *2 (D. Nev. Feb. 26, 2013) (holding that a pending motion that "is not potentially dispositive of the entire case . . . provides no justification for staying all discovery" and that "conclusory statements regarding judicial economy and the preservation of litigation resources" are insufficient to show good cause to stay all discovery).

This good cause requirement "creates a rather high hurdle," *Baron Fin. Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. Md. 2006), and the moving party "may not rely upon 'stereotyped and conclusory statements'" to establish good cause. *Id.* "The moving party must come forward with a specific factual showing that the interest of justice and considerations of prejudice and undue burden to the parties require a protective order and that the benefits of a stay outweigh the cost of delay." *Wymes*, 2012 WL 1819836, at *3 (citations and internal quotation marks omitted). Courts "must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case." *Innovative Therapies, Inc. v. Meents*, 302 F.R.D. 364, 377 (D. Md. 2014) (quoting Fed. R. Civ. P. 26 advisory committee's note).

ARGUMENT

I. Defendants Filed Their Motion Without Complying With Local Rule 104.7.

At the outset, the Court should deny this motion due to Defendants' failure to comply with Local Rule 104.7. Defendants made no effort to meet and confer prior to filing this motion and failed to provide the required certification, which is grounds for striking a motion regarding discovery. *See, e.g.*, *Brethren Mut. Ins. Co. v. Sears*, No. WDQ-12-0753, 2014 WL 3428931, at *4 (D. Md. July 10, 2014) (denying defendants' Rule 37 motion for sanctions because "defendants have not filed the required certification or described any attempts to confer with [plaintiff and] no such attempts were made before the defendants filed the motion").

II. The Case Is Not Moot.

Defendants' claim that Plaintiffs' "challenge to the 2017 Presidential Memorandum is moot" is incorrect. Mem. at 4. Although the Implementation Memo purports to revoke the 2017 Presidential Memorandum, the revocation was accompanied by release of the Implementation Plan that was expressly required by the 2017 Memorandum and that proposes to implement the directives of the 2017 Memorandum in almost their entirety. Any purported revocation is irrelevant; the new Implementation Plan is a direct outgrowth of (and is tainted by) the 2017 Memorandum, and simply represents the latest version of the policy President Trump announced in 2017. As Plaintiffs will explain in greater detail in their forthcoming opposition to the Motion to Dissolve, under the Implementation Plan Plaintiffs, as currently serving transgender persons, are left with many questions as to, *inter alia*, whether deployment standards and advancement opportunities will be applied to them in a discriminatory fashion. In addition, the Implementation Plan provides that the grandfather clause—which is the basis for Defendants' mootness argument—could be rescinded without notice. Furthermore, quite apart from the issue of whether the claims of the existing Plaintiffs are moot, Plaintiffs intend to amend their

Complaint to join as additional plaintiffs transgender persons who wish to enlist in the military but are clearly barred from service under the Implementation Plan.

Regardless of whether Plaintiffs' claims are moot—which they are not—Defendants' pending Motion to Dissolve is not a dispositive motion, which is a prerequisite for a motion to stay all discovery. Even if the motion were granted, which it should not be, the core constitutional claims will still need to be litigated, and the parties will need to continue to engage in discovery on those claims. Accordingly, a stay of all discovery is inappropriate. *See Simpson*, 121 F.R.D. at 263.

III. Defendants Have Failed To Show Good Cause For A Stay Of Discovery.

Apart from their fallacious mootness arguments, Defendants have not shown good cause for any protective order. Their sole suggestion that they will suffer any burden if discovery proceeds is their assertion that Plaintiffs have served "numerous, burdensome discovery requests directly related" to the President's July 26 Tweets and the August 25 Presidential Memorandum. Mem. at 5.[2] This wholly conclusory statement fails to set forth any specific facts showing that Defendants will be unfairly burdened by costs or futile activities. *See Wymes*, 2012 WL

[2] Most of Plaintiffs' requests are not limited to the July 2017 Tweets or the August 2017 Memorandum. Many require a supplemental response regarding Defendants' recent attempts to implement the ban. For example, interrogatory No. 15 requests that Defendants "Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants–Including the Panel of Experts–since January 20, 2017." This interrogatory continues to be highly relevant, as the Panel of Experts provided the Report that Secretary Mattis cited as the basis for his recommendations for implementation of the Transgender Service Member Ban. *See* ECF 120-1 at 2–3. As a further example, request for production No. 16—which seeks "All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018"—bears directly on the recently announced process by which Defendants intend to implement the President's ban on military service by transgender persons.

1819836, at *3–4. Moreover, the discovery requests that Plaintiffs have propounded concerning the July 2017 Tweets and the August 2017 Presidential Memorandum continue to be relevant because the evidence of the invidious animus at the heart of this case goes back to those pronouncements and the activity that preceded them. *See* ECF 85 at 43.[3] Plaintiffs are entitled to explore the original policy statements that Defendants are now moving ahead to implement. Fed. R. Civ. P. 26(b)(1).

IV. Further Litigation Will Not Be Confined To The Administrative Record.

Defendants' argument that further review of the Transgender Service Member Ban should be confined to an administrative record under the Administrative Procedure Act ("APA") is fundamentally flawed. Mem. at 5–6. The core issues in this case involve Plaintiffs' constitutional claims. ECF 39. While Plaintiffs may add an APA count in an amended complaint, both the existing Plaintiffs and the transgender individuals who will seek to join this suit will continue to press independent, facial constitutional claims, including the equal protection claim on which the Court has already found that existing Plaintiffs have a likelihood of success. ECF 85 at 47. Accordingly, Plaintiffs are entitled to discovery on the constitutional claims. Fed. R. Civ. P. 26(b)(1).

The two cases Defendants cite, Mem. at 6, are APA cases where plaintiffs sought discovery beyond the administrative record on the ground that they were also asserting constitutional claims. The courts refused to permit such discovery because the constitutional

[3] "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President's announcement and the departure from normal procedure, the Court agrees with the D.C. Court that there is sufficient support for Plaintiffs' claims that 'the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.'" ECF 85 at 43 (quoting *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017)).

claims were insubstantial. In *Trudeau v. FTC*, 384 F. Supp. 2d 281 (D.D.C. 2005), the court dismissed the constitutional claim for failure to state a claim. *Id.* at 295. Accordingly, the court did not need to decide whether a constitutional claim entitles a plaintiff to take discovery in an APA case. *Id.* In *Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160 (D.D.C. 2017), the court held that discovery was unnecessary because plaintiffs' due process and equal protection claims "were fundamentally similar to their APA claim" that the agency's action was arbitrary and capricious. *Id.* at 162. Indeed, plaintiffs did not even allege a suspect class in support of their equal protection claim, "meaning that the government need only present a rational basis for its decisions." *Id.* Here by contrast, the Court has already ruled that "transgender individuals appear to satisfy the criteria of at least a quasi-suspect classification, and the Directives are a form of discrimination on the basis of gender." *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017). Accordingly, the Court ruled, intermediate scrutiny applies to Plaintiffs' claims, *id.*, which is a distinctly more demanding standard of review than the APA's arbitrary and capricious standard.

In sum, the cases cited by Defendants do not suggest that discovery is foreclosed in a case like this one, where discriminatory motive and the process by which a policy was developed are issues central to the constitutional claim. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997) (explaining that facial constitutional claims are not bound by an administrative record). As in *City of Chicago*, Plaintiffs have raised facial constitutional challenges—a substantive due process claim and a claim that Defendants have denied equal protection based on suspect classifications, requiring heightened scrutiny—that are independent of any potential future APA claim. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding that where plaintiff's APA claim was foreclosed by the statutory discretion conferred on defendant, the plaintiff could

litigate colorable claims of constitutional violations and take discovery to support those claims). Defendants' argument that their recent unveiling of the Implementation Plan exempts them from discovery under the Federal Rules is misguided.

V. A Stay Of Discovery Will Not Serve The Interests Of Judicial Economy.

Defendants argue finally that a protective order would serve the interests of judicial economy. Mem. at 6–7. They fail to support this conclusory statement with any factual specifics. *Id*. It is well established that stays, especially stays of <u>all</u> discovery, are disfavored as they create delays, lead to unnecessary case management problems, add to litigation expenses, and drain judicial resources. *Simpson*, 121 F.R.D. at 263 (motions to stay discovery are "not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems."); *see also Kron Med. Corp. v. Groth*, 119 F.R.D. 636, 638 (M.D.N.C. 1988) ("Disruption or prolongation of the discovery schedule is normally in no one's interest. A stay of discovery duplicates costs because counsel must reacquaint themselves with the case once the stay is lifted. Matters of importance may be mislaid or avenues unexplored."). Thus, if anything, Defendants' requested stay would impair the interests of judicial economy.

VI. Defendants' Motion Is The Latest In A Series Of Efforts To Evade All Discovery.

Defendants' motion to stay discovery should be seen for what it is–the latest maneuver in their campaign to evade their discovery obligations. Defendants have tried repeatedly to delay this litigation. *See, e.g.*, ECF 94 (denying Defendants' oral request at status conference to stay discovery for two months and ordering parties to complete discovery by April 24, 2018). Defendants' tactics already have denied Plaintiffs a fair opportunity to develop and prepare their

case, and Defendants' requested stay would compound that prejudice. *See Innovative Therapies*, 302 F.R.D. at 377.

As the Court is aware, Defendants' original Initial Disclosures did not comply with Federal Rule of Civil Procedure 26(a)(1). *See* Pls.' Mem., ECF 105-2 at 4–5. Although the Court ordered Defendants to file "a Rule 26(a) compliant statement," ECF 107 at 2, their amended initial disclosures, served on February 16, 2018, again failed to comply with the Federal Rules. Kies Decl. ¶ 9, Exh. 3. The amended disclosures asserted that Defendants "are unable to identify any witnesses, documents, or other discoverable material" with relevant information until the "implementation plan" due to be presented to the President on February 21, 2018 is complete. *Id*. This statement, made on February 16, is highly dubious, and even suggests bad faith, in light of the fact that Secretary Mattis's memorandum is dated February 22, 2018, and the Department of Defense Report on which Secretary Mattis relied had to have been completed in advance of that date. It is highly doubtful that no witnesses (*e.g.*, the members of the Department of Defense Panel of Experts) or documents (*e.g.*, the materials considered by the Panel of Experts) could be identified on February 16.

In any event, Defendants promised to "provide any necessary supplementation" to their disclosures once that implementation plan was complete. Kies Decl. ¶ 9, Exh. 3. But they have not done so to date, even though that implementation plan was complete on February 22, 2018, the date of Secretary Mattis's memorandum. *Compare* ECF 120-1 *with* Kies Decl. ¶¶ 13–14.

Defendants have been similarly obstructive in their responses to Plaintiffs' requests for production and interrogatories. Defendants claim to have produced "more than 80,000 pages of

documents to date" in this litigation. Mem. at 2.[4] But their sweeping claims of deliberative process and presidential communications privilege have rendered this production largely useless. Of the approximately 40,000 documents Defendants have produced to date, they have withheld in full more than 50%, apparently on grounds of privilege, and Defendants' privilege logs are woefully deficient. Kies Decl. ¶ 15. And only a very small number of produced documents have sufficiently recent dates that they could relate to the finalization of plans to implement this latest version of the Transgender Service Member Ban that Defendants announced on March 23. Kies Decl. ¶ 16. Moreover, after withholding thousands of documents under the cloak of the "deliberative process" privilege, Defendants have now selectively unveiled portions of those supposedly privileged deliberative materials through citations ostensibly supporting portions of the Department of Defense Report released on March 23, presenting a one-sided account of the development of the "study" and implementation plan President Trump ordered last summer.

Defendants' discovery gamesmanship has already prejudiced Plaintiffs by preventing them from developing their case. Defendants now seek to delay discovery further, not only pending a ruling on the Motion to Dissolve, but "through any interlocutory appeal" (Mot. at 1; Mem. at 1)—potentially months of additional delay. The Court should deny the instant motion and require Defendants to fulfill their discovery obligations under the Federal Rules of Civil Procedure.

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[4] Defendants have not produced documents responding specifically to Plaintiffs' discovery requests in this litigation. Instead, they have merely re-produced the documents that they have already produced in the parallel proceeding in the United States District Court for the District of Columbia, *Doe 1 v. Trump,* No. CV 17-1597 (CKK), in response to different requests served by the Doe Plaintiffs. All of the documents Defendants claim to have produced "in response to Plaintiffs' document requests" are stamped with *Doe* Bates numbers.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for a Protective Order.

Dated: April 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2018, copies of the foregoing and any exhibits were served via CM/ECF on all counsel of record.

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