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-MJG Hon. Marvin J. Garbis

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

"It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Loumiet v. United States*, 225 F. Supp. 3d 79, 82 (D.D.C. 2016) (quotation omitted). Defendants have filed a motion to dissolve the preliminary injunction arguing that, in light of the Department of Defense's ("DoD") new policy regarding military service by transgender individuals, Plaintiffs' claims are moot, and even if Plaintiffs' claims were not moot, the new policy raises controlling issues of law that impact all further proceedings. Defs.' Mot. to Dissolve the Prelim. Inj. at 12–33, ECF No. 120. Additionally, after Defendants filed the Motion for a Protective Order, Plaintiffs filed an unopposed motion for leave to file a second amended complaint on April 23, 2018. *See* ECF No. 135. If the Court grants Plaintiffs' motion, Defendants will file a motion to dismiss Plaintiffs' Second Amended Complaint, which would be dispositive of all of Plaintiffs' claims. The Court should, therefore, grant Defendants' motion for a protective order staying discovery until the Court has decided Defendants' two potentially dispositive motions.

ARGUMENT

I. The Court Should Stay Discovery Pending the Resolution of Defendants' Dispositive Motions.

Courts routinely stay discovery while a motion that would be dispositive of the claims in the complaint is pending. *See, e.g.*, *Oce N. Am., Inc. v. MCS Servs., Inc.*, No. CV WMN-10-984, 2011 WL 13217390, at *2 (D. Md. Mar. 1, 2011); *see also Thigpen v. United States*, 800 F.2d 393, 396–97 (4th Cir. 1986) (endorsing the trial court's decision to stay discovery pending disposition of a Rule 12(b)(1) motion), *overruled on other grounds by Sheridan v. United States*, 487 U.S. 392 (1988). A stay of discovery pending the determination of a dispositive motion is "an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." *Wymes v. Lustbader*, No. CIV. WDQ-10-1629, 2012 WL 1819836, at *4 (D. Md. May 16, 2012) (quotation omitted). "When considering a stay of discovery pending the outcome of a dispositive motion, courts may consider: the potential for the dispositive motion to terminate all claims in the case or all claims against a particular party; the merits of the dispositive motion; and the irrelevancy of the discovery to the dispositive motion." *Oce N. Am.*, 2011 WL 13217390, at *1 (citing *Yongo v. Nationwide Affinity Ins. Co.*, No. 07–94–D, 2008 WL 516744 (E.D.N.C. Feb. 25, 2008)). Here, the Court should stay discovery because Defendants' pending Motion to Dissolve the Preliminary Injunction and forthcoming motion to dismiss the second amended complaint should terminate Plaintiffs' claims on jurisdictional grounds, and discovery is not needed to resolve these motions.

Plaintiffs argue that their challenge to the 2017 Presidential Memorandum is not moot because the new DoD policy is merely an implementation of that Memorandum. *See* Pls.' Opp. at 5–6, ECF No. 128; *see also* Pls.' Notice of Supp. Authority, ECF No. 130.[1] But, as set forth more

[1] Plaintiffs filed two separate notices of supplemental authority in support of their opposition to Defendants' Motion for a Protective Order. *See* ECF Nos. 130, 143. With the notices, Plaintiffs submitted decisions on various motions in *Karnoski v. Trump*, No. C17-1297 (W.D. Wa.) and *Doe v. Trump*, No. 17-1597 (D.D.C.). To the extent the *Karnoski* and *Doe* Courts' decisions concern issues

fully in Defendants' pending Motion to Dissolve the Preliminary Injunction and in Defendants' forthcoming reply in support of that motion, Plaintiffs' challenge to the 2017 Presidential Memorandum is moot because that Memorandum has been expressly revoked. *See* Defs.' Mot. to Dissolve the Prelim. Inj. at 9–11; *see also* 2018 Presidential Memorandum, ECF No. 119-1 ("revok[ing] [the] memorandum of August 25, 2017, "Military Service by Transgender Individuals," and any other directive [the President] may have made with respect to military service by transgender individuals"). Any dispute over the DoD policy presents a substantially different controversy than their challenge to the 2017 Memorandum because the new policy was issued by DoD, is the product of independent military judgment following extensive study, and contains several exceptions allowing some transgender individuals—including many, if not all, of the Plaintiffs—to serve in the military. *See* Mattis Memorandum, ECF No. 120-1; DoD Report, ECF No. 120-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. at 4–8 (providing additional details about the DoD policy). Thus, far from being a categorical ban on military service by transgender individuals, the new policy, like the policy adopted by then-Secretary of Defense Carter (hereafter "Carter policy") before it, limits the service of only some transgender individuals on the basis of a medical condition (gender dysphoria) and permits current service members who have been diagnosed with gender dysphoria and who have relied on the Carter policy to continue to serve in the military. *See* Mattis Memorandum at 2–3; DoD Report at 4–6; AR3059–3060, ECF No. 133.

In sum, any dispute over the Department's new policy presents a substantially different controversy than Plaintiffs challenge to the President's 2017 Memorandum and, as a result, Plaintiffs' challenge to the 2017 Presidential Memorandum is moot. Any discovery related to that

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such as standing and mootness, Defendants will address them in Defendants' forthcoming reply in support of Defendants' Motion to Dissolve the Preliminary Injunction and Motion to Dismiss Plaintiffs' Second Amended Complaint. With regard to this motion, the *Doe* and *Karnoski* Courts' decisions to allow discovery to continue were not based on the application of Fourth Circuit law or a consideration of the facts of this case and have little, if any, persuasive value.

Memorandum or to the President's preceding statements on Twitter is therefore irrelevant and, in any event, disproportionate to the needs of the case. Fed. R. Civ. P. 26(b).

Plaintiffs also argue that Defendants' pending Motion to Dissolve the Preliminary Injunction is not a dispositive motion. Pls.' Opp. at 6. But Defendants' motion argues that Plaintiffs' challenge to the 2017 Presidential Memorandum is moot and that Plaintiffs lack standing to challenge the new DoD policy. *See* Defs.' Mot. to Dissolve the Prelim. Inj. at 9–11, 32. Mootness and standing are threshold jurisdictional issues, and the Court must dismiss the case if it is moot or if Plaintiffs lack standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (stating that whether the plaintiff "has standing to sue" is a "threshold jurisdictional question"); *Sec. & Exch. Comm'n v. Med. Comm. for Human Rights*, 404 U.S. 403, 407 (1972) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."); *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 232 (4th Cir.), *cert. denied*, 137 S. Ct. 374, 196 L. Ed. 2d 292 (2016) (finding that the district court should not have reached the merits of certain claims because they were moot and remanding those claims to the district court for dismissal pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure); *Kimberlin v. McConnell*, No. GJH-16-1211, 2016 WL 8667769, at *1 (D. Md. June 3, 2016), *aff'd*, 671 F. App'x 128 (4th Cir. 2016) (citing to Rule 12(h)(3) and dismissing the case because the plaintiff lacked standing); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Thus, contrary to Plaintiffs' assertion, Defendants' pending Motion to Dissolve the Preliminary Injunction raises dispositive issues. Moreover, if the Court grants Plaintiffs' pending Motion for Leave to File a Second Amended Complaint, *see* ECF No. 135, Defendants will file a motion to dismiss the second amended complaint on the threshold jurisdictional grounds of

mootness and standing. A motion to dismiss is clearly a dispositive motion that would justify a stay in discovery pending its resolution. *See Oce N. Am.*, 2011 WL 13217390, at *1.

II. Plaintiffs Cannot Evade Review Under The Administrative Procedure Act By Asserting Constitutional Claims.

Plaintiffs argue that because they assert constitutional claims, discovery should continue as review of those claims is not limited to an administrative record. Pls.' Opp. 7–9. Plaintiffs are wrong. The new policy is an agency action created by DoD following months of study and deliberation. *See generally* Mattis Memorandum; DoD Report. The Administrative Procedure Act (APA) provides the proper vehicle to raise constitutional challenges to agency action. *See* 5 U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity."); *see also Robbins v. BLM*, 438 F.3d 1074, 1085 (10th Cir. 2006) (reviewing a procedural due process claim "under the framework set forth in the APA"). Thus, to the extent Plaintiffs are now challenging DoD's new policy, their claims are subject to the APA, which is generally the only avenue for judicial review of the actions of Executive Branch agencies. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014) (quoting *Webster v. Doe*, 486 U.S. 592, 607 n.1 (1988) (Scalia, J., dissenting) (["A]t least with respect to all entities that come within the Chapter's definition of 'agency,' *see* 5 U.S.C. § 701(b), if review is not available under the APA it is not available at all."). Because challenges to agency action under the APA are generally limited to an administrative record, and the administrative record has been filed with the Court, *see* ECF No. 133, continued discovery is inappropriate, *see* 5 U.S.C. § 706 (in determining whether an agency action is unlawful because it is "contrary to a constitutional right," the "court shall review the whole record or those parts of it cited by a party"); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802–03 (E.D. Va. 2008) (finding that "the administrative record is sufficient for the Court to render a final decision as to the constitutionality of the Final Rules under the Patent Clause" of the Constitution and that "the wide-

ranging discovery [the plaintiff] seeks exceeds the scope of what is permitted by 5 U.S.C. § 706(2)(B) review"); *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1171 (D. Wyo. 2015) (finding that "when conducting constitutional review of agency action, a court must limit its review to the administrative record unless an exception applies"). At a minimum, the voluminous administrative record provides Plaintiffs with ample discovery of the basis of DoD's new policy relevant to litigating their claims, and Plaintiffs have not shown that that additional discovery is needed or would be commensurate to the needs of the case.

III. Plaintiffs are not Prejudiced by a Stay of Discovery.

Plaintiffs argue that they will be prejudiced by a stay of discovery, and indeed, contend that Defendants have attempted to evade discovery in this matter. *See* Pls.' Opp. at 9–11. But that is not the case. Defendants have performed extensive searches for documents in multiple governmental components (e.g., DoD, the Services, the Defense Health Agency) and have produced over 90,000 pages of documents to Plaintiffs. Defendants have continued to review and produce documents on a rolling basis.[2] In addition, Defendants have produced witnesses for depositions and have responded to written discovery requests.

Moreover, regardless of the status of discovery, Plaintiffs will not be prejudiced by a stay pending the resolution of Defendants' dispositive motions. If the Court denies Defendants' dispositive motions, a stay of discovery pending the resolution of those motions and any appeal would result only in a suspension of the discovery period while the motions are resolved. Indeed, Plaintiffs moved (unopposed) to suspend the discovery deadlines, which the Court granted. *See* Pls.'

[2] As Plaintiffs are aware, because of the overlap between the subject matters of these cases, Defendants are producing discovery materials initially in the first-filed case, *Doe v. Trump*, and subsequently producing documents in the other cases. The parties had agreed previously that it was "efficient and appropriate to permit discovery produced by parties and non-parties in [the other cases] to be used in" this case. Uniform Protective Order and Cross-Use Agreement at 2, ECF No. 111.

Mot., ECF No. 142; Order, ECF No. 145. Thus, a suspension of discovery will not impact any immediate deadlines now in place.

Far from prejudicing Plaintiffs, a stay of discovery would preserve the parties' resources and promote judicial economy by avoiding the need for the parties to devote resources to seeking discovery, litigating discovery motions, and taking depositions that may ultimately be rendered moot by the Court's decision on Defendants' dispositive motions.

IV. Even if Local Rule 104.7 Applies, the Court Should Decide the Motion for a Protective Order.

Plaintiffs argue that the Court should deny the motion for a protective order because Defendants did not confer with Plaintiffs prior to filing the motion, in violation of Local Rule 104.7. Pls.' Opp. at 5. Local Rule 104.7 requires counsel to "confer with one another concerning a discovery dispute." L.R. 104.7 (D. Md.). Here, Defendants did not believe that the meet and confer requirement was applicable because their motion does not put at issue a particular discovery dispute but rather to preclude discovery generally pending the resolution of dispositive matters. But if Local Rule 104.7 was applicable, Defendants regret the oversight but respectfully request that the Court exercise its discretion to resolve the motion because the parties will not be able to resolve the dispute without Court intervention. *See Fid. & Guar. Life Ins. Co. v. United Advisory Grp., Inc.*, No. JFM-13-40, 2016 WL 632025, at *2 n.3 (D. Md. Feb. 17, 2016) ("cho[osing] to resolve the disputes on their merits so that the litigation may proceed" even though the parties failed to comply with Local Rule 104.7); *Humane Soc. of U.S. v. Nat'l Union Fire Ins. Co.*, No. CIV.A. DKC 13-1822, 2014 WL 3055568, at *4 n.4 (D. Md. July 3, 2014) (declining to deny a motion for failure to comply with Local Rule 104.7); *Crouch v. City of Hyattsville*, No. CV DKC 09-2544, 2011 WL 13223820, at *4 (D. Md. Aug. 15, 2011) ("waiv[ing] the procedural defects in the motion to compel and reach the merits of this discovery dispute").

CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Motion for a Protective Order, the Court should grant Defendants' motion to stay discovery pending the resolution of Defendants' dispositive motions.

April 25, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2018, I electronically filed the foregoing Defendants' Reply in Support of Their Motion for a Protective Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 25, 2018

/s/ Ryan Parker

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