UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2 *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS DIRECTED TO NONPARTIES FAMILY RESEARCH COUNCIL AND HERITAGE FOUNDATION

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INTRODUCTION

Plaintiffs' Motion to Compel information from nonparties the Family Research Council ("FRC") and the Heritage Foundation ("Heritage") seeks plainly irrelevant information concerning any communications between these nonparties and the President, Vice President, their respective Executive Offices, and the Department of Defense ("DoD") regarding a Presidential Memorandum that is no longer in existence. Indeed, Plaintiffs acknowledge that their subpoenas seek information only between January 20, 2017 and September 1, 2017—which corresponds with the issuance of the President's first Memorandum concerning the military service of transgender individuals, and which was indisputably withdrawn by the President in March 2018. Because Plaintiffs' subpoenas are directed to the development of a Presidential Memorandum that is no longer in force, Plaintiffs' motion should be denied as seeking information that is irrelevant to any claim in this case. In the alternative, the Court should hold Plaintiffs' motion to compel in abeyance by first addressing Defendants' pending Motion to Dissolve the Preliminary Injunction, ECF No. 116, and Motion to Dismiss the Second Amended Complaint, or, in the Alternative, for Summary Judgment, ECF No. 115. Those motions raise issues that substantially overlap with and will impact Plaintiffs' motion to compel, including the mootness of certain of Plaintiffs' claims.

BACKGROUND

This case previously centered on Plaintiffs' challenge to the President's July 2017 Tweet and August 2017 Presidential Memorandum regarding military service by transgender individuals. *See* Mem. Op. at 1, ECF No. 61. However, on March 23, 2018, the Government's policy with regard to military service by transgender persons changed fundamentally. The President expressly rescinded the 2017 Memorandum as well as "any other directive" he may have issued with respect to transgender military service. The President deferred to the authority of the Secretaries of Defense and Homeland Security to implement a new policy on military service by transgender

individuals. *See* Memorandum on Military Service by Transgender Individuals ("2018 Memorandum") (March 23, 2018), ECF 96-3.

In light of DoD's new policy, Defendants recently moved for dissolution of the Court's preliminary injunction, which was based on the President's now-withdrawn 2017 Memorandum. ECF No. 116; *see also* Mem. Op. at 1, ECF No. 61. Defendants' motion shows that Plaintiffs' challenge to the 2017 Memorandum and Tweet is now moot, that Plaintiffs lack standing, and that the new policy is constitutional. ECF No. 116 at 1–2.

Recognizing that circumstances in this case have changed, on April 6, 2018, Plaintiffs filed a Second Amended Complaint which, among other things, seeks to challenge DoD's new policy concerning military service by transgender individuals. *See* ECF No. 106 at ¶¶ 85–89. Defendants have now moved to dismiss the Second Amended Complaint, or, in the alternative, for summary judgment. ECF No. 115.

On February 8 and 12, 2018, Plaintiffs served subpoenas on FRC and Heritage, respectively, seeking "[a]ll documents containing communications" between each organization and the President, the Executive Office of the President, the Vice President, the Office of the Vice President, and DoD, "concerning military service by transgender people and/or any restriction of military service by transgender people," from January 20, 2017 to September 1, 2017. Notice of Subpoena Sched. A at 5, ECF No. 109-8; *id.*, ECF No. 109-9. According to Plaintiffs, Heritage and FRC have each objected to the subpoena and refused to produce any communications. *See* Pls.' Mot. at 4, ECF No. 109. On April 6, 2018, Plaintiffs moved to compel compliance with the

subpoenas. *Id.* at 1. On April 9, 2018, the Court ordered that responses to Plaintiffs' motion, including from the Government, would be due on April 23, 2018. *See* Min. Order, April 9, 2018.[1]

STANDARD OF REVIEW

"Federal Rule of Civil Procedure 45 authorizes court-issued subpoenas to obtain discovery from third parties." *Watts v. SEC*, 482 F.3d 501, 507 (D.C. Cir. 2007). The rule "requires that district courts quash subpoenas that call for privileged matter or would cause an undue burden." *Id.* at 508; Fed. R. Civ. P. 45(d)(3)(A)(iii); Fed. R. Civ. P. 26(b)(5). Where a subpoena seeks discovery that is not relevant to the action, compliance with the subpoena necessarily imposes an undue burden. *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995 (D.C. Cir. 2014). Federal Rule of Civil Procedure 26 similarly requires that discovery be "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).

ARGUMENT

I. Plaintiffs' Motion to Compel Should be Denied Because Their Subpoenas Seek Information that is Irrelevant To Plaintiffs' Claims.

"A motion to compel for failure to provide relevant information sought through discovery requires the court to determine if the materials or testimony sought are relevant to the action . . ." *Alexander v. FBI*, 186 F.R.D. 21, 43 (D.D.C. 1998); *see also* Fed. R. Civ. P. 26(b)(1). The party seeking discovery bears the burden of demonstrating its relevance to the underlying litigation. *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 9 (D.D.C. 2007). The relevance requirement "should be firmly applied, and the district courts should not neglect their power to restrict discovery where justice requires protection for a party or person from annoyance,

[1] Plaintiffs recently served four additional subpoenas on FRC and Heritage, as well as two additional organizations, Liberty Counsel and the Center for Military Readiness, seeking similar communications, but with a different date range of September 1, 2017 to the present. These subpoenas are not at issue in Plaintiffs' present motion.

embarrassment, oppression, or undue burden or expense." *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (citation omitted). The requirement is "not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *St. John v. Napolitano*, No. 10-216, 2011 WL 1193009, at *16 (D.D.C. Mar. 31, 2011) (citation omitted).

Plaintiffs seek records of communications between the nonparty organizations and the President, Vice President, their Executive Offices in the White House, and DoD from January 20, 2017 to September 1, 2017. But any communications from this period are not relevant to Plaintiffs' pending challenge to DoD's new policy, issued in 2018. DoD did not establish its panel of experts until September 14, 2017, *see* Department of Defense Report and Recommendations on Military Service by Transgender Persons ("DoD Report") at 17 (Feb. 2018), ECF No. 96-2; Secretary Mattis did not deliver DoD's recommendation to the President until February 22, 2018, *see* Memorandum on Military Service by Transgender Individuals ("Mattis Memorandum") (Feb. 22, 2018), ECF No. 96-1; and the President did not withdraw the 2017 Memorandum until March 23, 2018, *see* 2018 Memorandum. Thus, on its face, the subpoenas seek information that predates the current policy being challenged.

In a footnote, Plaintiffs contend that the Secretary of Defense's February 22, 2018 memorandum is an "implementation" of the President's August 25, 2017 Memorandum and, as such, "the circumstances surrounding the President's decision to ban transgender people from the military, announced on July 26 and August 25, 2017, remain highly relevant to this case." Pls.' Mot. at 5 n.2. That is both incorrect and beside the point. Plaintiffs' contention that Secretary Mattis's February 2018 memorandum is an "implementation" of a Presidential memorandum is baseless. As set forth in Defendants' motions, *see* ECF Nos. 115, 116, the President rescinded the

2017 Memorandum, and DoD has developed a new policy, which is the product of an "independent multi-disciplinary review and study of relevant data," DoD Report at 17 (citation omitted), by a panel of military experts charged to provide their "best military advice" regardless of "any external factors," Mattis Memorandum at 1. As a result, Plaintiffs' challenge to the 2017 Memorandum and Tweet targets the wrong actor (the President, as opposed to DoD) and the wrong policy (the rescinded 2017 Memorandum, as opposed to DoD's new policy). Accordingly, that challenge is moot, *see* ECF Nos. 115 at 2–5, 116 at 9–12, and any communications relating to the 2017 Memorandum or Tweet are irrelevant to this case. *See Alexander*, 186 F.R.D. at 43; Fed. R. Civ. P. 26(b)(1). Plaintiffs tacitly acknowledged as much by seeking to amend their complaint to challenge the new DoD policy. *See* ECF No. 106.

Put another way, even if the new DoD policy could be said in some sense to "implement" prior policy statements from 2017, it remains indisputable that the current, operative policy is the new DoD policy, and the 2017 policy statements about which Plaintiffs specifically seek discovery have been superseded. Claims for prospective relief, and any discovery in connection with them, must be based on current policy and evidence. The new DoD policy plainly differs in significant respects from the 2017 policy statements and actions, and it is based on its own independent and comprehensive record. Thus, Plaintiffs' "implementation" theory, even if credible, does not advance their argument: they still seek discovery into past matters that have no relevance to the current DoD policy being challenged and the evidence amassed specifically to support that policy.

Plaintiffs advance two additional relevance arguments, neither of which have merit. First, Plaintiffs contend that "the circumstances surrounding the announcement of the ban strongly suggest that the President's decision was *not* based on legitimate military judgments," and thus the information sought in the subpoenas is relevant to Plaintiffs' assertion that DoD's decision

regarding service by transgender individuals is not entitled to deference as a military judgment. *See* Pls.' Mot. at 4 (emphasis in original). As an initial matter, the August 2017 Presidential Memorandum has been officially revoked and replaced by a new policy, supported by comprehensive evidence. Whatever Plaintiffs may contend about deference due to policy statements and actions in 2017, or about whether those statements and actions legitimately reflected military judgment, the new DoD policy plainly is the product of decision-making by military officials and is supported by a detailed record produced by those officials.

Moreover, judicial deference to Executive Branch decisions regarding the composition of the military are based on constitutional principles, not whether or to what extent Government officials communicated with third parties. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). "The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Id.* (emphasis omitted). Information regarding whether Executive Branch officials communicated with third parties is simply not relevant to whether the Court should defer to the judgment of the Executive Branch on matters related to the composition of the fighting force.

Second, Plaintiffs claim that the information they seek from FRC and Heritage is relevant because the communications requested may bear on whether "the decision to adopt the ban was motivated by unconstitutional animus against transgender individuals." Pls.' Mot. at 5. As explained above, the statements, policies, and decisions Plaintiffs appear to be seeking information about have been revoked, and information regarding them is no longer relevant to the claims in

this case. Again, DoD's new policy is the result of an exhaustive study by military experts and is focused on addressing a medical condition—gender dysphoria. It will stand or fall based on the strength of its own rationale and supporting record. Plaintiffs cannot make information about superseded actions relevant simply by raising baseless claims of potential animus.

Even assuming the 2017 Memorandum and Tweet were still at issue in this case, these communications could not bear on the question of animus. Plaintiffs contend that because FRC and Heritage are "well known to oppose" military service for transgender individuals, any evidence that the Government consulted with those groups would mean that the President's decisions were infected with animus. *Id*. The implications of this theory are startling: Plaintiffs essentially assert that mere communication between the Government and any organization that disagrees with Plaintiffs' position on transgender military service means that the President cannot reach any constitutionally sound decision on the issue. The Court should lend no credence to this novel theory. The Government's possible consultation with FRC or Heritage is no more relevant in this case than if the prior Administration had consulted with groups that share Plaintiffs' views. It is a normal and essential governmental function to consult with members of the public who may hold a variety of views. This is especially so here, where the position FRC and Heritage are alleged to support was, until just recently, the policy of the United States military for decades.

II. In the Alternative, the Court Should Hold Plaintiffs' Motion in Abeyance By First Resolving Defendants' Pending Motions.

The Court has before it two motions which, once ruled upon, may substantially alter the Court's analysis of the issues raised by Plaintiffs' motion to compel. If the Court does not intend to deny Plaintiffs' motion outright, Defendants request that the Court hold Plaintiffs' motion in abeyance until it has resolved the other pending motions. The Court recently took the same

approach in its order denying Defendants' Motion for a Protective Order. *See* Order, ECF No. 114.

Defendants have filed motions to dissolve the preliminary injunction and to dismiss the Second Amended Complaint, or, in the alternative, for summary judgment, which raise issues that implicate the relevance of the materials Plaintiffs seek. *See* ECF Nos. 115, 116. The motions assert that Plaintiffs' challenge to the 2017 Memorandum and Tweet is moot and should be dismissed because DoD's new policy is distinct from the policies that were at issue in the Court's preliminary injunction; the new DoD policy is the product of an extensive, independent review process; and the 2017 Memorandum has been explicitly rescinded. *Id*. Defendants also argue that Plaintiffs lack standing and have failed to state claims upon which relief can be granted. The Court's rulings on mootness and dismissal will inform its analysis of relevancy here. The subpoenas ask only for communications up to September 1, 2017—immediately after the President issued the 2017 Memorandum. Thus, the Court's resolution of Defendants' motions to dissolve the preliminary injunction and to dismiss the Second Amended Complaint will almost certainly inform the Court's approach to the present subpoena dispute. *See Bonnaffons v. U.S. Dep't of Energy*, No. CIVIL 79-2375, 1980 WL 1071, at *1 (D.D.C. Feb. 21, 1980) (holding motion to compel in abeyance because other motion was better vehicle for resolving the issues it raised); *Estate of Klieman v. Palestinian Auth.*, 18 F. Supp. 3d 4, 6 (D.D.C. 2014) (holding motion for reconsideration of discovery order in abeyance because other proceedings in the case could affect whether discovery at issue was appropriate); *cf. Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("In the exercise of a sound discretion [a court] may hold one lawsuit in abeyance to abide the outcome of another . . .").

Moreover, holding Plaintiffs' Motion to Compel in abeyance is consistent with the Court's approach in this litigation. Recently, in denying Defendants' Motion for a Protective Order, the Court decided that it "w[ould] not resolve" the issue of mootness "in the context of a discovery motion." Order at 1, ECF No. 114. The Court correctly observed that the issue was "being fully briefed in Defendants' pending Motion to Dissolve the Preliminary Injunction," and that it would "also be briefed in relation to Defendants' upcoming Motion to Dismiss." *Id.* The Court thus indicated that it would "wait to make a final decision on these important issues in the context of those substantive motions." *Id.* Likewise, in its discovery order dated February 18, 2018, the Court similarly stated that "[t]here are several substantive motions that are either pending or will be filed soon, the resolution of which may affect the scope of discovery." Order at 1, ECF No. 113. The Court concluded that with respect to the privilege disputes between the parties, the Court will "wait to resolve the[] issues until a later time." *Id.* The Court should take the same approach with respect to Plaintiffs' motion to compel.

Accordingly, if the Court does not intend to deny Plaintiffs' motion outright, then it should refrain from ruling on the motion until it has reached a decision on Defendants' (1) Motion to Dissolve the Preliminary Injunction, ECF No. 116; and (2) Motion to Dismiss the Second Amended Complaint, or, in the Alternative, for Summary Judgment, ECF No. 115. Absent outright denial of Plaintiffs' motion, holding it in abeyance until after ruling on these pending motions would best promote the efficient resolution of the issues in this case.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel should be denied outright, or else held in abeyance pending resolution of other pending motions.

April 23, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 23, 2018

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