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' NOTICE OF SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Plaintiffs respectfully submit (1) the attached Order issued on April 18, 2018, in *Doe 2 v. Trump*, No. CV 17-1597 (CKK), ECF No. 114 ("*Doe* Order", attached as Exhibit A), and (2) the attached Order issued on April 19, 2018, in *Karnoski v. Trump*, No. C17-1297-MJP (W.D. Wa.), ECF No. 235 ("*Karnoski* Order", attached as Exhibit B), in further support of Plaintiffs' Opposition to Defendants' Motion for Protective Order, ECF 128. Like Plaintiffs in this case, the plaintiffs in the *Doe* and *Karnoski* cases challenge the Transgender Service Member Ban on constitutional grounds. A cross-use agreement permits sharing of discovery materials between those cases and this case. *See* ECF 111. In *Doe* and *Karnoski*, as in this case, the government moved for a stay of all discovery pending the resolution of motions to dissolve the preliminary injunctions entered in those cases, based on arguments virtually identical to those Defendants offered in support of their Motion for Protective Order in this case (ECF 121).

In the attached orders, the *Doe* and *Karnoski* courts denied the motions for protective order, rejecting all of the government's arguments for staying discovery. Both courts rejected the government's argument that discovery should halt because the "new policy" Defendants unveiled on March 23, 2018, allegedly moots all constitutional challenges to the Transgender

Service Member Ban. The *Doe* court declined to resolve the government's mootness argument in the context of a discovery motion, but said it was "not sufficiently persuaded by" the government's arguments to halt all discovery pending resolution of the motion to dissolve the preliminary injunction. *Doe* Order at 1. The *Karnoski* court went further, stating "Plaintiffs' and Washington's challenge is not 'moot,' and discovery related to President Trump is not 'irrelevant.' The 2018 Memorandum and Implementation Plan are not a 'new policy,' but rather a plan to implement, with few exceptions, the directives of the 2017 Memorandum." *Karnoski* Order at 2 (internal citations omitted).

The *Doe* and *Karnoski* courts also both rejected the government's position that the litigation should be limited to an administrative record provided by the agency. The *Doe* court concluded that the government's arguments "that recent presidential and agency actions . . . have transformed Plaintiffs' constitutional challenge into a lawsuit under the Administrative Procedure Act ("APA"), and accordingly the APA's limitations on discovery should now apply . . . is not correct." *Doe* Order at 2. The *Karnoski* court pointed out that "Plaintiffs and Washington do not challenge the policy under the APA, but instead raise direct constitutional claims," going on to note that "Defendants have not demonstrated that the policy excluding openly transgender people from military service constitutes an 'agency action' that 'resulted from an administrative process by the Department of Defense.'" *Karnoski* Order at 2 (internal citations omitted).

Both courts rejected the government's argument that halting all discovery would conserve judicial economy. *Doe* Order at 2; *Karnoski* Order at 3.

Dated: April 24, 2018

Respectfully submitted,

/s/ Peter J. Komorowski III

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2018, copies of the foregoing were served via CM/ECF on all counsel of record.

/s/ Peter J. Komorowski III

EXHIBIT A

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. 17-1597 (CKK)

ORDER
(April 18, 2018)

Presently before the Court is Defendants' [97] Motion for a Protective Order ("Defs.' Mot."). Through this motion Defendants seek a stay of all discovery pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction (including any interlocutory appeal of the Court's ruling on that motion). Federal Rule of Civil Procedure 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Court will exercise this broad discretion to DENY Defendants' Motion for a Protective Order.

None of the reasons Defendants give for halting discovery at this point are persuasive. First, Defendants argue, in effect, that discovery should be stayed because they are likely to succeed on the merits of their Motion to Dissolve the Preliminary Injunction.[1] Defendants argue that "Plaintiffs' challenge to the 2017 Presidential Memorandum is moot," given that "[t]he President has withdrawn that Memorandum," and that the "new policy" set forth in a recent memorandum prepared by Secretary of Defense James N. Mattis "withstands constitutional scrutiny." Defs.' Mot. at 6-7. Plaintiffs do not agree with either of these arguments, *see* Pls.' Opp'n to Defs.' Mot., ECF No. 108, at 5-9, and the Court will not resolve these disputes in the context of a discovery motion. These disputes are being fully briefed in Defendants' pending Motion to Dissolve the Preliminary Injunction, and will presumably also be briefed in relation to Defendants' upcoming Motion to Dismiss. The Court will wait to make a final decision on these important issues in the context of those substantive motions. In the context of this Motion for a Protective Order, the Court merely holds that—on the current record—it is not sufficiently persuaded by Defendants' arguments such that it is inclined to halt all discovery pending the resolution of Defendants' motions.[2]

Second, Defendants argue that discovery is no longer appropriate *at all* in this case and that "[f]urther litigation should be confined to the administrative record provided by the agency."

[1] In their reply brief, Defendants also argue that a stay of discovery is justified because Defendants are likely to succeed on a Motion to Dismiss that they will soon file. *See* Defs.' Reply in Support of Mot. for a Protective Order, ECF No. 110, at 1.

[2] *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6-7 (W.D. Wash. Apr. 13, 2018) (rejecting Defendants' mootness argument).

Defs.' Mot. at 6. Effectively, Defendants argue that recent presidential and agency actions in this case have transformed Plaintiffs' constitutional challenge into a lawsuit under the Administrative Procedure Act ("APA"), and accordingly the APA's limitations on discovery should now apply. This is not correct. Plaintiffs assert claims under the Fifth Amendment to the United States Constitution. *See* Second Am. Compl., ECF No. 106, ¶¶ 90-101. They do not assert any claim under the APA. None of the cases cited by Defendants hold that Plaintiffs are required to proceed under the APA, nor do they hold that discovery in this constitutional challenge should be limited to an administrative record.[3]

Finally, the Court is not persuaded that bringing this case to a standstill by staying all discovery while the Court considers Defendants' most recent motions would "serve the interests of judicial economy." Defs.' Mot. at 7. As noted in a separate Order issued April 18, 2018, ECF No. 113, the Court will temporarily defer consideration of the parties' numerous privilege disputes until Defendants' motions have been resolved. Beyond this, any additional delay in discovery is not justified.

For the foregoing reasons, in an exercise of its discretion, the Court DENIES Defendants' Motion for a Protective Order. Discovery shall continue.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

[3] Some of these cases merely state the general rule that judicial review in APA cases is limited to the administrative record. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that, when applying the APA's arbitrary or capricious standard of review, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (stating the general rule that courts confine their review of APA cases to the administrative record); *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 271 (D.D.C. 2013) (same). Other of Defendants' cases address the overlap of APA and constitutional claims, but do not hold that discovery is inappropriate in a case where plaintiffs' only claims arise under the Fifth Amendment and are fundamentally different than APA claims. *See Chiayu Chang v. United States Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160 (D.D.C. 2017) (denying motion for discovery in APA case despite the presence of constitutional claims in addition to plaintiff's APA claims because the constitutional claims were "fundamentally similar to [plaintiffs'] APA claims," noting in particular that discrimination against a suspect class had not been alleged); *Trudeau v. Fed. Trade Comm'n*, 384 F. Supp. 2d 281, 295 (D.D.C. 2005), *aff'd,* 456 F.3d 178 (D.C. Cir. 2006) (expressing no view on whether APA restrictions applied to First Amendment claim because plaintiff had failed to state a claim under the First Amendment).

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297-MJP ORDER DENYING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

THIS MATTER comes before the Court on Defendants' Motion for a Protective Order. (Dkt. No. 225.) Having reviewed the Motion, the Responses (Dkt. Nos. 230, 231), and the Reply (Dkt. No. 232), the Court DENIES the Motion in its entirety.

Defendants seek to preclude discovery pending the resolution of their motion to dissolve the preliminary injunction, including through any interlocutory appeal. (Dkt. No. 222.) Defendants claim (1) that Plaintiffs' and Washington's current challenge is moot because the "new policy" (i.e., the policy set forth in President Trump's 2018 Memorandum) is the "operative policy" governing military service by transgender persons; (2) that any challenge to the "new policy" is subject to the Administrative Procedures Act ("APA"), including the

requirement that review be confined to the administrative record; and (3) that it is in the interest of judicial economy to preclude discovery until their motion to dissolve the preliminary injunction has been resolved. (Dkt. No. 225 at 2, 5-7.)

In light of the Court's recent order—which directed the parties to proceed with discovery and prepare for trial and which struck Defendants' motion to dissolve the preliminary injunction in its entirety—the Court finds that entry of a protective order is not warranted. (See Dkt. No. 233.)

First, as explained in further detail in that Order, Plaintiffs' and Washington's challenge is not "moot," and discovery related to President Trump is not "irrelevant." (Id. at 11-14.) The 2018 Memorandum and Implementation Plan are not a "new policy," but rather a plan to implement, with few exceptions, the directives of the 2017 Memorandum. (Id. at 11-14.)

Second, there is no reason for discovery to be confined to the administrative record. Plaintiffs and Washington do not challenge the policy under the APA, but instead raise direct constitutional claims. (Dkt. No. 230 at 5-6; Dkt. No. 231 at 10-12); see also Bolton v. Pritzker, Case No. 15-cv-1607MJP, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016) (noting that "a direct constitutional challenge is reviewed independent of the APA and as such the court is entitled to look beyond the administrative record in regard to such a claim") (internal quotation marks and citation omitted). Further, Defendants have not demonstrated that the policy excluding openly transgender people from military service constitutes an "agency action" that "resulted from an administrative process by the Department of Defense." (Dkt. No. 223 at 6.) Indeed, the policy was announced by President Trump, and whether the DoD was even consulted prior to its announcement is disputed. (See Dkt. No. 233 at 28-29.)

Finally, Defendants have not demonstrated that precluding discovery will serve the interests of judicial economy in any way.

Accordingly, the Court DENIES Defendants' motion and ORDERS that discovery in this case proceed. Such discovery shall not be confined to the administrative record. To the extent that Defendants intend to claim Executive privilege, they must "expressly make the claim" and provide a privilege log "describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(i)-(ii).

The clerk is ordered to provide copies of this order to all counsel.

Dated April 19, 2018.

Marsha J. Pechman
United States District Judge