

INTRODUCTION

1
2 Defendants move pursuant to Federal Rule of Civil Procedure 26(c) for a protective order
3 to preclude discovery pending the resolution of Defendants' Motion to Dissolve the Preliminary
4 Injunction. *See* Defs.' Mot., Dkt. 222. Resolution of that motion, which explains that Plaintiffs'
5 current challenge is moot and that Plaintiffs cannot demonstrate a likelihood of success on the
6 merits, should either obviate the need for any discovery in this case or, at the very least,
7 significantly narrow the issues that remain. Accordingly, it is in the interest of judicial economy
8 to preclude discovery until the motion to dissolve has been resolved, including through any
9 interlocutory appeal. This is particularly so because there is a significant dispute between the
10 parties concerning discovery directed to the President. This Court should therefore exercise its
11 discretion to prevent the unnecessary expenditure of time and resources that would be required to
12 engage in discovery and should enter a protective order precluding discovery until after the
13 litigation involving Defendants' Motion to Dissolve the Preliminary Injunction is complete.

14 Defendants originally filed their Motion to Dissolve the Preliminary Injunction and their
15 Motion for a Protective Order on March 23, 2018. *See* ECF Nos. 214, 217. Defendants refile this
16 motion for a protective order pursuant to the Court's order at the hearing held on March 27, 2018.

BACKGROUND

I. Procedural History of This Case

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19 Plaintiffs filed this action on August 28, 2017, raising constitutional challenges to what
20 they contend is a ban on the service of transgender individuals in the military. Compl., Dkt. 1.
21 Following the issuance of a Presidential Memorandum in August 2017, Plaintiffs amended their
22 complaint, Dkt. 30, and moved to preliminarily enjoin the "categorical[] exclu[sion of]
23 transgender people from military service." Pls.' Mot. at 1, Dkt. 32. Defendants opposed
24 Plaintiffs' motion for a preliminary injunction and moved to dismiss the amended complaint on
25 the grounds that Plaintiffs lacked standing and had failed to state a claim. Defs.' Mot., Dkt. 69.

26 On December 11, 2017, the Court granted Plaintiffs' motion for a preliminary injunction
27 and partially granted Defendants' motion to dismiss. Order, Dkt. 103. The Court preliminarily
28 enjoined Defendants "from taking any action relative to transgender individuals that is

1 inconsistent with the status quo that existed prior to President Trump's July 26, 2017
2 announcement," finding that Plaintiffs were likely to succeed on their equal protection,
3 substantive due process, and First Amendment claims. Order at 22–23, Dkt. 103. The Court also
4 dismissed Plaintiffs' procedural due process claim. *Id.* at 22.

5 Following the Court's ruling, the Plaintiffs sought extensive discovery against the
6 Government. Plaintiffs have had the opportunity to participate in three depositions of
7 Government officials, and have indicated their intention to seek additional depositions of
8 Government officials. Plaintiffs also have served 25 broad requests for the production of
9 documents, many of which implicate Executive privilege. Defendants have collected and
10 reviewed hundreds of thousands of pages of non-privileged records in response to Plaintiffs'
11 document requests, producing to Plaintiffs more than 80,000 pages of documents to date on a
12 rolling basis. Plaintiffs also have served 15 far-reaching interrogatories. Each of Plaintiffs'
13 discovery requests has been directed to all Defendants, including the President.

14 Plaintiffs' discovery requests directed at the President have led to a significant dispute.
15 Each of these requests seek information concerning the President's deliberations and
16 decisionmaking process. Defendants have objected to any discovery directed to the President on
17 several grounds, including that such discovery should be foreclosed based on separation-of-
18 powers principles and because virtually all of the specific discovery sought is subject to Executive
19 privilege, and in particular, the presidential communications privilege.

20 Moreover, in response to Plaintiffs' Motion for Summary Judgment, Defendants have filed
21 a Cross-Motion for Partial Summary Judgment on all claims against the President, arguing that
22 he is not a proper defendant in this case. *See* Defs.' Opp. to Pls.' and Intervenor's Mot. for Summ.
23 J. and Cross-Mot. for Partial Summ. J., Dkt. 194. That motion is still pending.

24 **II. Creation of New Policy Concerning Military Service by Transgender Individuals**

25 In February 2018, after considering the recommendations of a Panel of Experts along with
26 additional information, Secretary of Defense James Mattis, with the agreement of the Secretary
27 of Homeland Security, sent the President a memorandum proposing a new policy consistent with
28 the Panel's conclusions. *See* Declaration of Ryan Parker, at Exh. 1 (Mattis Memorandum), Dkt.

1 216-1. (Additional details regarding the Department of Defense’s new policy and the Panel of
2 Experts’ work is set forth in Defendants’ Motion to Dissolve the Preliminary Injunction. *See*
3 Defs.’ Mot. at 3–6.) The memorandum was accompanied by a 44-page report provided by the
4 Under Secretary of Defense for Personnel and Readiness setting forth in detail the bases for the
5 Department of Defense’s recommended new policy. Parker Decl., at Exh. 2 (Department of
6 Defense Report and Recommendations on Military Service by Transgender Persons (Feb. 2018)),
7 Dkt. 216-2.

8 On March 23, 2018, the President issued a new memorandum concerning transgender
9 military service. Parker Decl., at Exh. 3 (Presidential Memorandum (“2018 Memorandum”)),
10 Dkt. 216-3. The 2018 Memorandum revoked the 2017 Memorandum, thereby allowing the
11 Secretaries of Defense and Homeland Security to “exercise their authority to implement
12 appropriate policies concerning military service by transgender persons.” *Id.* Accordingly, the
13 August 2017 Presidential Memorandum that the Court has enjoined has been rescinded.

14 **III. Defendants’ Pending Motion to Dissolve the Preliminary Injunction**

15 Following the issuance of the 2018 Presidential Memorandum, Defendants filed a Motion
16 to Dissolve the Preliminary Injunction. *See* Defs.’ Mot., Dkt. 222. In that motion, Defendants
17 argue, among other things, that Plaintiffs cannot demonstrate a likelihood of success on the merits
18 for two reasons. *See id.* at 7–23. First, Plaintiffs’ current challenge to the 2017 Presidential
19 Memorandum is moot because that Memorandum was revoked by the 2018 Presidential
20 Memorandum and because military service by transgender individuals will be governed by the
21 Department’s new policy if it is implemented, rather than by the 2017 Presidential Memorandum.
22 *See id.* at 7–9. Second, even if Plaintiffs’ case were not moot, the Department’s new policy
23 withstands constitutional scrutiny. *See id.* at 9–23. With respect to this second argument, the
24 motion to dissolve raises controlling issues of law that impact all further proceedings. *See id.*
25 Defendants’ motion to dissolve is pending before the Court.

26 **STANDARD OF REVIEW**

27 The Court has wide discretion to control the nature and timing of discovery, and “should
28 not hesitate to exercise appropriate control over the discovery process.” *Herbert v. Lando*, 441

1 U.S. 153, 177 (1979); *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (“The District Court has
2 broad discretion to stay proceedings as an incident to its power to control its own docket.” (citation
3 omitted)). Courts have discretion to issue a protective order under Federal Rule of Civil Procedure
4 26(c) upon a showing of good cause in order to “protect a party from annoyance, embarrassment,
5 oppression or undue burden or expense.” Fed. R. Civ. P. 26(c)(1); *see also Seattle Times Co. v.*
6 *Rhinehart*, 467 U.S. 20, 36 (1984) (stating that “Rule 26(c) confers broad discretion on the trial
7 court to decide when a protective order is appropriate and what degree of protection is required”);
8 *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (“Rule 26 vests the trial judge with broad
9 discretion to tailor discovery narrowly and to dictate the sequence of discovery.”). This discretion
10 includes orders forbidding the requested discovery altogether. Fed. R. Civ. P. 26(c)(1)(A); *see*
11 *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (per curiam) (affirming district court’s
12 issuance of a protective order that suspended all discovery).

13 ARGUMENT

14 The Court should preclude discovery until resolution of Defendants’ pending Motion to
15 Dissolve the Preliminary Injunction, including any interlocutory appeal, for four reasons.

16 1. Plaintiffs’ challenge to the 2017 Presidential Memorandum is moot. *See* Defs.’ Mot.
17 at 7–9. The President has withdrawn that Memorandum, which formed the basis for the Plaintiffs’
18 Amended Complaint and was central to the Court’s preliminary injunction. Yet Plaintiffs have
19 served numerous, burdensome discovery requests directly related to the President’s statements on
20 Twitter on July 26, 2017, and the Presidential Memorandum issued on August 25, 2017. In
21 addition, Plaintiffs served discovery requests that do not explicitly mention the President’s
22 statements on Twitter or the 2017 Presidential Memorandum, but that implicate the statements or
23 the Memorandum by requesting documents or information before July 26, 2017 (the date of the
24 President’s statements on Twitter), or August 25, 2017 (the date of the Presidential
25 Memorandum). Because Plaintiffs’ challenge to the 2017 Presidential Memorandum is moot, any
26 discovery related to that Memorandum or to the President’s preceding statements on Twitter is
27 irrelevant and, in any event, disproportionate to the needs of the case. Fed. R. Civ. P. 26(b). In
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1 these circumstances, good cause exists for the Court to preclude discovery until resolution of the
2 Motion to Dissolve.

3 2. Further litigation should be confined to the administrative record provided by the
4 agency. Because the new policy resulted from an administrative process by the Department of
5 Defense, any challenge to that new policy should be subject to the Administrative Procedure Act
6 (“APA”), including the requirement that review of any challenge be based upon the administrative
7 record. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th
8 Cir. 2006). Even a constitutional challenge to the Department’s new policy would be constrained
9 to record review. *See Evans v. Salazar*, No. C08-0372-JCC, 2010 WL 11565108, at *2 (W.D.
10 Wash. July 7, 2010) (explaining that the APA “specifically contemplates review of agency
11 actions, findings, or conclusions found to be ‘contrary to constitutional right’ . . . and limits such
12 review to the administrative record”). Because this case should be reviewed on the administrative
13 record, there is a strong presumption against discovery. *See id.* (limiting review to the
14 administrative record and granting defendant’s motion for a protective order prohibiting
15 discovery); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (stating that “the focal
16 point for judicial review should be the administrative record already in existence, not some new
17 record made initially in the reviewing court”).

18 3. If implemented, the Department’s new policy will be the operative policy governing
19 military service by transgender individuals. In demonstrating that the Department’s new policy
20 withstands constitutional scrutiny, Defendants’ motion presents controlling questions of law that
21 should be resolved before allowing discovery to continue. *See Defs.’ Mot.* at 9–23.

22 4. A protective order would serve the interests of judicial economy because the Court
23 could avoid addressing constitutional separation-of-powers issues. Plaintiffs have requested
24 discovery directly from the President concerning his deliberations and decisionmaking process.
25 In response, Defendants have objected on several grounds, including that such discovery intrudes
26 on the separation of powers, and that virtually all of the discovery sought is subject to Executive
27 privilege, including the presidential communications privilege. If the Court enters a protective
28 order for the reasons explained above, then the Court would not need to address the parties’

1 current discovery dispute. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S.
 2 367, 389–90 (2004) (stating that ““occasion[s] for constitutional confrontation between the two
 3 branches’ should be avoided whenever possible” (quoting *United States v. Nixon*, 418 U.S. 683,
 4 692 (1974))); *cf. Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988) (“A
 5 fundamental and longstanding principle of judicial restraint requires that courts avoid reaching
 6 constitutional questions in advance of the necessity of deciding them.”). Therefore, it is in the
 7 interest of judicial economy to enter a protective order to preclude the Court from having to
 8 address these delicate constitutional issues.

CONCLUSION

9
 10 For the foregoing reasons, the Court should stay all discovery deadlines and preclude the
 11 parties from engaging in discovery until a final ruling on Defendants’ pending Motion to Dissolve
 12 the Preliminary Injunction, including through any interlocutory appeal.

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 14 Dated: March 29, 2018

Respectfully submitted,

15 CHAD A. READLER
 16 Acting Assistant Attorney General
 Civil Division

17 BRETT A. SHUMATE
 18 Deputy Assistant Attorney General

19 BRINTON LUCAS
 20 Counsel to the Assistant Attorney General

21 JOHN R. GRIFFITHS
 22 Branch Director

23 ANTHONY J. COPPOLINO
 24 Deputy Director

25 /s/ Ryan B. Parker

RYAN B. PARKER

Senior Trial Counsel

ANDREW E. CARMICHAEL

Trial Attorney

United States Department of Justice

Civil Division, Federal Programs Branch

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Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

1
2 I hereby certify that on March 29, 2018, I electronically filed the foregoing Motion for a
3 Protective Order using the Court’s CM/ECF system, causing a notice of filing to be served upon
4 all counsel of record.

5
6 Dated: March 29, 2018

/s/ Ryan Parker

7 RYAN B. PARKER
8 Senior Trial Counsel
9 United States Department of Justice
10 Civil Division, Federal Programs Branch
11 Telephone: (202) 514-4336
12 Email: ryan.parker@usdoj.gov

Counsel for Defendants

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The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

[PROPOSED] PROTECTIVE ORDER

Upon consideration of Defendants’ Motion for a Protective Order, the opposition, and reply, the Court ORDERS that the Motion is GRANTED and that, pending the Court’s resolution of Defendants’ Motion to Dissolve the Preliminary Injunction:

- 1) the discovery deadlines are stayed, and
- 2) the parties are precluded from engaging in discovery.

IT IS SO ORDERED.

DATED this ____ day of March, 2018

The Honorable Marsha J. Pechman
United States District Court Judge