

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al,
Plaintiffs,
v.
DONALD TRUMP, et al,
Defendants.

Case No: 2:17-cv-1297-MJP

WASHINGTON’S RESPONSE TO
DEFENDANTS’ MOTION FOR A
PROTECTIVE ORDER

NOTED FOR CONSIDERATION:
April 13, 2018

STATE OF WASHINGTON,
Intervenor-Plaintiff,
v.
DONALD TRUMP, et al,
Intervenor-Defendants.

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I. INTRODUCTION

Discovery should not be necessary if the Court grants the State of Washington’s (“Washington”) pending Motion for Summary Judgment. *See* ECF 150. This is because – as Washington has consistently maintained – Defendants’ own public statements and evidence in the Court record demonstrate that the Transgender Military Service Ban (“Ban”) violates the Fifth Amendment’s equal protection and substantive due process guarantees. The President’s recent approval of Secretary of Defense James Mattis’ final Implementation Plan for the Ban, purportedly based on an accompanying Department of Defense Report, finalizes the Ban but does nothing to provide a constitutional justification for it. Thus, from Washington’s perspective, Defendants’ Motion for a Protective Order is likely unnecessary. If Defendants survive summary judgment, Washington opposes Defendants’ request to unnecessarily delay the efforts to obtain any information Washington and private Plaintiffs may need to secure a full and final adjudication on the merits of the unconstitutional Ban.

Defendants remarkably ask the Court to “preclude discovery until resolution of Defendants’ pending Motion to Dissolve the Preliminary Injunction, *including any interlocutory appeal.*” Mot. for Protective Order at 4, ECF 225 (emphasis added). However, whether or not the preliminary injunction is dissolved or upheld has no bearing on the ultimate merits of Washington’s claims, or the need to prepare the case for trial. The Court should reject Defendants’ unreasonable request – their latest attempt to avoid or delay judicial review of the unconstitutional Ban – and permit any necessary discovery.

II. FACTUAL BACKGROUND

A. History of Defendants’ Efforts to Avoid Judicial Review of the Ban

This is not the first time Defendants seek to delay these proceedings to avoid judicial review of the unconstitutional Ban.

1. Defendants’ prior efforts to resist their discovery obligations

The Court ordered the parties to exchange Initial Disclosures on February 9, 2018. ECF 124. Despite Rule 26(a)(1)(A)’s requirement to disclose “each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses,” and “all documents . . . [they] may use to support [their] . . . defenses,” Defendants did not disclose any persons or documents. Instead, Defendants promised to supplement their disclosures “upon completion of [a] study” and “development of [] new policies.” Subsequently, Defendants twice supplemented their Initial Disclosures, but those disclosures continue to be deficient. ECF 191-2; ECF 191-2; ECF 191-3.

Private Plaintiffs moved to compel Defendants to provide Initial Disclosures that comport with Rule 26(a)(1)(A)’s requirements. ECF 190. The Court ordered Defendants to do so because “Defendants cannot reasonably claim there are *no* individuals likely to have discoverable information and *no* documents relevant to their claims and defenses regarding the current policy.” ECF 204 at 3 (emphasis added). Rather than comply with the Court’s plain Order, Defendants filed a Motion for Clarification and, If Necessary, for Reconsideration, resisting the mandatory disclosures required of all litigants under Rule 26(a)(1)(A). ECF 205.

The Court rejected Defendants’ attempt to avoid the litigation process and ordered Defendants to provide Initial Disclosures that meet Rule 26(a)(1)(A)’s requirements.

2. Defendants’ promise to change their policy and belated filing of the final Implementation Plan to “moot” Washington’s summary judgment motion

Rather than put forth evidence justifying the unconstitutional Ban, Defendants have defended this litigation by repeatedly promising to issue a “new” policy in late February 2018. ECF 216-1. Defendants did not file this Implementation Plan in February 2018, but instead waited until March 23, 2018 – a full month after the promised deadline, after filing their

1 opposition to Washington’s summary judgment motion, and only days before the hearing – only
2 to claim that it moots Washington’s constitutional challenges. ECF 216-1.¹

3 III. ARGUMENT

4 A. In the Unlikely Event This Case Proceeds to Trial, Defendants Fail to Meet Their 5 Burden to Justify a Protective Order Indefinitely Staying Discovery

6 “A party or any person from whom discovery is sought may move for a protective order
7 in the court where the action is pending[.]”² Fed. R. Civ. P. 26(c)(1). The Court may deny such
8 a request in its discretion, as “[t]he district court has wide discretion in controlling discovery.”
9 *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Under Federal Rule of Civil Procedure
10 26(c), the court may only limit the scope of disclosures or discovery on certain matters and
11 prevent certain matters from being inquired into “upon a showing of good cause or where ‘justice
12 requires to protect a party or person from annoyance, embarrassment, oppression, or undue
13 burden or expense.’” *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (citing
14 Fed. R. Civ. Pro. 26(c)). A simple showing that discovery may involve some inconvenience and
15 expense does not suffice to establish good cause for issuance of a protective order. *Id.* Rather, a
16 party seeking a protective order must show a particular and specific need for it, and broad or
17 conclusory statements concerning the need for protection are insufficient. *Gray v. First Winthrop
18 Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990).

19 Further, “[i]t is well-established that a party seeking a stay of discovery carries the heavy
20 burden of making a strong showing why discovery should be denied.” *Tradebay*, 278 F.R.D.
21 597, 601–02 (D. Nev. 2011) (citing *Turner Broadcasting Sys., Inc. v. Tracinda Corp.*, 175 F.R.D.
22 554, 556 (D Nev. 1997) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).
23 “[S]peculation does not satisfy Rule 26(c)’s good cause requirement” in seeking a stay of
24 discovery. *Rosario v. Starbucks Corp.*, 2017 WL 4122569 (W.D. Wash. 2017) (quoting *Gray*,

25 ¹ The “[u]nclassified” Implementation Plan is dated February 22, 2018. ECF 216-1 at 1.

26 ² When moving for a protective order, the movant must “include a certification that the movant has in good faith conferred or attempted to confer with the other affected parties.” Fed. R. Civ. P. 26(c)(1). Defendants did not meet and confer with Washington before filing their motion.

1 133 F.R.D. at 40 (finding that defendants’ argument that their motions to dismiss would succeed
2 did not constitute a showing of good cause to stay discovery).

3 Defendants fail to meet the heavy burden of showing that good cause or the interests of
4 justice warrant issuance of a protective order staying discovery pending resolution of their
5 Motion to Dissolve the Preliminary Injunction, including any interlocutory appeals. In the
6 unlikely event Washington’s pending motion for summary judgment does not resolve the case,
7 good cause does not exist for the indefinite delay of discovery Defendants seek.

8 **B. The Court Should Deny Defendants’ Request for an Indefinite Stay of Discovery as**
9 **Unwarranted**

10 Defendants fail to show that (1) there is good cause for a protective order indefinitely
11 staying discovery, or (2) that justice requires such a stay to protect a party or person from
12 annoyance, embarrassment, oppression, or undue burden or expense. Accordingly, their motion
13 for protective order should be denied.

14 Defendants argue that a stay is required because (1) Washington’s claims are moot; (2)
15 discovery should be limited to the purported administrative record; (3) the February 22, 2018
16 final implementation plan for the Ban meets constitutional muster; and (4) judicial economy
17 requires the Court to “avoid addressing constitutional separation-of-powers issues” presented by
18 the executive privileges they claim may prevent discovery in this case. ECF 225 at 4-5. These
19 arguments fail to justify a protective order under Rule 26(c).

20 **1. Washington’s challenge to the unconstitutional Ban is not moot**

21 Defendants contend that Washington’s legal challenge to the Ban is moot as a result of
22 the Memorandum for the Secretary of Defense and Secretary of Homeland Security regarding
23 Military Service by Transgender Individuals dated March 23, 2018 (“Second Presidential
24 Memorandum”), ECF 214-1; February 22, 2018 Department of Defense Implementation Plan,
25 ECF 216-1; and Department of Defense Report and Recommendations on Military Service by
26 Transgender Persons dated February 2018 (“DoD Report”), ECF 216, Ex. 2 (collectively “the

1 March 23rd filings”). They are mistaken. As previously explained, the March 23rd filings *finalize*
 2 the Ban; they do not *revoke* it. *See* Washington’s Suppl. Brief in Support of its Mtn. for Summary
 3 Judgment at 1-6, ECF 228.

4 “The burden of demonstrating mootness ‘is a heavy one.’” *Cty. of Los Angeles. v. Davis*,
 5 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33
 6 (1953)). Even if there were a motion pending that sought dismissal of Washington’s claims,
 7 which there is not, “dismissal of a case on ‘grounds of mootness would be justified only if it were
 8 absolutely clear that the litigant no longer had any need of the judicial protection that is sought.’”
 9 *Jacobus v. Alaska*, 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting *Adarand Constructors, Inc.*
 10 *v. Slater*, 528 U.S. 216, 224 (2000))

11 Following this guidance, courts consistently find claims are moot only where the
 12 challenged policy has been completely revoked or rescinded. *See Burke v. Barnes*, 479 U.S. 361,
 13 363 (1987) (mooting a claim that *only* sought to “litigate the validity of a statute which by its
 14 terms had already expired”); *U.S. Dep’t of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986)
 15 (finding claim moot *after* Congress altered the challenged statute and rectified the constitutional
 16 concerns raised by plaintiff’s lawsuit); *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (finding
 17 claim moot *after* statutory fix was made to protect plaintiffs’ constitutional rights); *Gulf of Me.*
 18 *Fisherman’s All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (finding claim moot *after* a regulation
 19 had been “replaced by a series of subsequent” regulations).³ Here, because the March 23rd filings
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21 ³ To the extent Defendants argue that they have voluntarily ceased implementation of the Ban, this Court
 22 should reject such empty claims for the same reasons. “It is well settled that a defendant’s voluntary cessation of a
 23 challenged practice does not deprive a federal court of its power to determine the legality of a practice.” *City of*
 24 *Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 287 (1982) This is especially true where a defendant stopped a
 25 challenged practice but implements another practice that causes substantially the same injury to plaintiff. *Ne. Fl.*
 26 *Chapt. of Assoc. Contractors of America v. City of Jacksonville, Fl.*, 508 U.S. 656, 662 (1993). Further, “[w]hen a
 challenged policy is repealed or amended mid-lawsuit – a ‘recurring problem when injunctive relief is sought’ – the
 case is not moot if a substantially similar policy has been instituted or is likely to be instituted.” *Smith v. Exec. Dir.*
of Ind. War Mem’ls Comm’n, 742 F.3d 282, 287 (7th Cir. 2014) (quoting *ADT Sec. Servs., Inc. v. Lisle-Woodridge*
Fire Prot. Dist., 724 F.3d 854, 864 (7th Cir. 2013)). *See also Bunker Ltd. P’ship v. United States*, 820 F.2d 308,
 312 (9th Cir. 1987) (noting that Defendants cannot moot a claim by implementing a variant of the challenged policy
 or law where the new variant does not manifestly change plaintiff’s likelihood of injury).

1 finalize the Ban, the Second Presidential Memorandum’s purported “revocation” of the Initial
 2 Presidential Memorandum does not and cannot moot Washington’s constitutional challenge to
 3 the Ban on summary judgment. *See generally* Washington’s Suppl. Brief In Support of its Mtn.
 4 for Summary Judgment, ECF 228.

5 **2. Discovery should not be limited to the administrative record**

6 Defendants also argue for a protective order based on the false premise that the March
 7 23rd filings constitute a “new” policy, and “any challenge to that new policy should be subject to
 8 the Administrative Procedure Act (“APA”), including the requirement that review of any
 9 challenge be based upon the administrative record.” ECF 225 at 5. This argument fails for at
 10 least three reasons.

11 *First*, Washington challenges the constitutionality of Defendants’ Ban on open service
 12 by transgender individuals. *See* Compl. at ¶¶ 27-41; Reply in Support of Washington’s Mtn. for
 13 Summary Judgment at 2, ECF 202. The March 23rd filings implement the Ban; they do not revoke
 14 it or create any “new” policy. *See* Washington’s Suppl. Brief in Support of its Mtn. for Summary
 15 Judgment at 1-6, ECF 228. Thus, Defendants’ apparent assumption that a new challenge will
 16 need to be brought is incorrect. And Washington does not assert an APA claim. *See* Compl.
 17 Instead, Washington challenges Defendants’ facially discriminatory longstanding policy – first
 18 articulated in President Trump’s July 26, 2017 tweet – and Defendants’ decision to abandon the
 19 military’s well-researched decision to allow open service by transgender individuals, as
 20 violations of the Fifth Amendment’s equal protection and substantive due process guarantees.

21 “Generally, *except* where a party challenges an agency action as violating a federal law
 22 – be it a statute, regulation, or constitutional provision . . . the APA is the sole means for testing
 23 the legality of federal agency action.” *Clouser v. Espy*, 42 F.3d 1522, 1527 n.5 (9th Cir. 1994).
 24 Washington “of course ha[s] the right to sue directly under the constitution” to enjoin Defendants
 25 independent of whether there may be an avenue to protect similar interests under the APA. *Porter*
 26 *v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979). And “[a] direct constitutional challenge is

1 reviewed independent of the APA,’ and ‘[a]s such the court is entitled to look beyond the
2 administrative record’ in regard to such a claim.” *Bolton v. Pritzker*, 2016 WL 4555467 (W.D.
3 Wash. Sept. 1, 2016) (Pechman, J.).

4 As Washington has not challenged the Ban under the APA, discovery into the Ban should
5 not be limited to the administrative record, and Defendants’ request should be rejected.

6 *Second*, Defendants fail to identify, and have not produced, the “administrative record”
7 they claim is all that Washington is entitled to in discovery. However, Defendants suggest they
8 are referring only to the “administrative record” underlying the February 22, 2018
9 Implementation Plan. ECF 225 at 5. But there is no basis to limit discovery to such a record
10 because Washington challenges the Ban first announced by the President’s tweet on July 26,
11 2017, and it has never revised its claims to limit them to the February 22, 2018 Implementation
12 Plan only. Furthermore, to the extent the “administrative record” to which Defendants refer
13 consists of the February 22, 2018 Implementation Plan, accompanying DoD Report, and the
14 Second Presidential Memorandum – or a similarly limited universe of documents – there is
15 likewise no basis to limit discovery to such a record. As Washington has consistently maintained,
16 the March 23rd filings are nothing but post-hoc evidence developed during the course of
17 litigation. Not only is such post-hoc evidence insufficient to defend the Ban against
18 Washington’s constitutional challenges, *see Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1697
19 (2017) (“It will not do to ‘hypothesiz[e] or invent[t]’ governmental purposes for gender
20 classifications ‘*post hoc* in response to litigation’”) (quoting *United States v. Virginia*, 518 U.S.
21 515, 533 (1996)), but it is also questionable. If the Court considers the March 23rd filings and
22 Defendants survive summary judgment, Washington is entitled to test the methodology, process,
23 representations, and conclusions contained in the DoD Report and February 22, 2018
24 Implementation Plan approved by the Second Presidential Memorandum.

25 *Third*, even if Washington asserted an APA claim in this action, which it does not, the
26 President’s actions are not reviewable under the APA. *See Franklin v. Massachusetts*, 505 U.S.

1 788, 801 (1992). As the President is not subject to the APA, there is no justification for limiting
 2 Washington’s discovery to an as-of-yet undisclosed administrative record likely consisting of
 3 post-hoc evidence for the President’s Ban.⁴

4 **3. The final Implementation Plan does not survive constitutional scrutiny**

5 Defendants contend that the February 22, 2018 Implementation Plan “withstands
 6 constitutional scrutiny[,]” relying on their unadjudicated Motion to Dissolve the Preliminary
 7 Injunction. ECF 225 at 5. However, the February 22, 2018 Implementation Plan is
 8 unconstitutional on its face as the final step in subjecting transgender individuals to differential
 9 treatment in military service solely because of their transgender status. *See generally* Suppl. Br.
 10 in Support of Its Mtn. for Summary Judgment, ECF 228.

11 Defendants’ self-serving and unsupported assertion that the Implementation Plan is
 12 constitutional does not constitute good cause for this Court to stay discovery to protect
 13 Defendants from “annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R.
 14 Civ. P. 26(c). To the contrary, as discussed above, *see* Section III.B.2., if the Court considers the
 15 March 23rd filings and Defendants survive summary judgment, Washington is entitled to test the
 16 methodology, process, representations, and conclusions contained in the DoD Report and
 17 February 22, 2018 Implementation Plan approved by the Second Presidential Memorandum.

18 **4. A stay of discovery would not further judicial economy**

19 Defendants demand that this Court issue a protective order because judicial economy
 20 requires that it “avoid addressing constitutional separation-of-powers issues” presented by the
 21 executive privileges Defendants claim prevent discovery in this case. ECF 225 at 5-6. However,
 22 such delay would be judicially inefficient, not economical. Any ruling on Defendants’ Motion
 23 to Dissolve the Preliminary Injunction will not, and cannot, dispose of the case nor Washington’s
 24 claims. Therefore, staying discovery in the meantime only causes delay. If the case proceeds to

25 _____
 26 ⁴ The Supreme Court has “long held that when the President takes official action, the Court has the
 authority to determine whether he has acted within the law.” *Clinton v. Jones*, 520 U.S. 681, 703 (1997). *See*
generally Washington’s Response to Defendants’ Cross-Motion for Partial Summary Judgment, ECF 209.

1 trial, Washington is entitled to conduct any discovery necessary to prepare their case. To the
2 extent executive privilege issues arise – which is purely hypothetical at this point, since
3 Washington has not served any discovery – the Court is well-equipped to do its job and rule on
4 any such issues. Thus, Defendants’ attempt to preemptively shield the Executive from discovery
5 is premature.

6 To the extent Defendants seek an anticipatory ruling exempting the President from *any*
7 discovery, such a request for an advisory opinion should be rejected. Moreover, the President is
8 not immune from discovery. *See Cheney v. U.S. Dist. Ct. of Columbia*, 542 U.S. 367, 389-91
9 (2004) (affirming that discovery may be directed at the President but scope of discovery requests
10 may need to be tailored depending on the breadth and scope of the requests) (citing *United States*
11 *v. Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989)).

12 Nor does the doctrine of constitutional avoidance in *Lyng v. Nw. Indian Cemetery*
13 *Protective Ass’n* justify a stay of discovery. 485 U.S. 439, 446-48 (1988). To the contrary, the
14 District Court below and the United States Supreme Court on appeal, performed a constitutional
15 analysis of the challenged policy in *Lyng* where – without such analysis – full relief could not be
16 afforded to the plaintiff. *Id.* The same is true here. If this matter were to proceed to trial,
17 Washington will need to engage in discovery to test the validity of the Ban and the asserted
18 governmental interests the Ban purportedly forwards. A stay of discovery while Defendants seek
19 interlocutory appeals of their Motion to Dissolve the Preliminary Injunction, would compromise
20 Washington’s ability to obtain full relief as the delay may jeopardize the availability and quality
21 of probative evidence, thereby harming Washington’s ability to explore and prove its claims.

22 IV. CONCLUSION

23 Defendants have not shown good cause for a protective order staying discovery
24 indefinitely pending final resolution of any interlocutory appeal if the Court denies their Motion
25 to Dissolve the Preliminary Injunction. Nor do the interests of justice or judicial economy
26

1 warrant depriving Washington of its ability to conduct discovery if summary judgment is not
2 granted in its favor.

3 For the foregoing reasons, Defendants' request for a protective order should be denied.

4 DATED this 9th day of April, 2018.

5
6 ROBERT W. FERGUSON
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7 */s/ La Rond Baker*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 11th day of April, 2018.

/s/ La Rond Baker
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