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

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

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INTRODUCTION

Although Plaintiffs and Intervenor moved for summary judgment on the basis that there are no genuine disputes as to any material fact and opposed Defendants' attempt under Rule 56(d) to take discovery of their declarants, they nevertheless insist that discovery continue in this case. *See* Pls.' Opp., Dkt. 230, Int.'s Opp., Dkt. 231. Their litigation position is inherently contradictory and should be rejected outright. Plaintiffs and Intervenor have no legitimate reason to continue to seek discovery after moving for summary judgment on all of their claims.

But even if Plaintiffs and Intervenor had not moved for summary judgment, a stay of discovery is warranted pending resolution of Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot., Dkt. 223. As explained in that Motion, Plaintiffs' and Intervenor's challenge to the Presidential Memorandum issued on August 25, 2017 ("2017 Presidential Memorandum") is moot, and they lack standing to challenge the Department of Defense's ("DoD") new policy as set forth in the memorandum issued by Secretary of Defense James Mattis on February 22, 2018 ("Mattis Memorandum"). *See id.* at 7–9, 23–24; *see also* Defs.' Supp. Br. at 3–8, Dkt. 226. And even if their challenges were still justiciable, Plaintiffs and Intervenor ignore that the new DoD policy at issue should be reviewed on an administrative record under the Administrative Procedure Act ("APA"). These threshold issues should be resolved before the parties and the Court devote additional resources to discovery.

The Court should, therefore, grant Defendants' Motion for a Protective Order and stay discovery in this case until it has had the opportunity to decide Defendants' Motion to Dissolve the Preliminary Injunction.

ARGUMENT

I. The Court Should Rule on Threshold Jurisdictional Issues Before Permitting Discovery to Continue.

The Court should stay discovery because Defendants' Motion to Dissolve the Preliminary Injunction raises threshold jurisdictional issues of mootness and standing, and no additional

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discovery by Plaintiffs and Intervenor is necessary for the resolution of these issues.[1] "A court may relieve a party of the burdens of discovery while a dispositive motion is pending." *Curtis v. Benda*, No. 08-5109 FDB/KLS, 2009 WL 2876173, at *2 (W.D. Wash. Sept. 8, 2009) (citing *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989), *amended at* 906 F.2d 465 (9th Cir. 1990); *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984)); *see also Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (stating that "before forcing the parties to undergo the expense of discovery," the Court should "determine whether there is any reasonable likelihood that plaintiffs can construct a claim"); *Todd v. Cities of Aberdeen*, No. C09-1232-JCC, 2009 WL 10676365, at *1–2 (W.D. Wash. Nov. 19, 2009). Courts routinely stay discovery when a motion presenting threshold jurisdictional issues—such as mootness and standing—is pending. *See Williams v. Sampson*, No. C17-0092-JCC, 2017 WL 1330502, at *1–2 (W.D. Wash. Apr. 11, 2017); *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989).

As set forth in Defendants' Motion to Dissolve the Preliminary Injunction, *see* Defs.' Mot. at 7–9, Plaintiffs' and Intervenor's challenge to the constitutionality of the 2017 Memorandum is moot because the President explicitly "revoke[d]" the 2017 Memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." Dkt. 216-3. "[T]he Supreme Court and [the Ninth Circuit] have repeatedly held that a case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011). When the Government repeals and replaces one of its policies, the relevant question is "whether the new [policy] is sufficiently similar to the repealed [one] that it is permissible to say that the challenged conduct continues," or, put differently, whether the policy "has been sufficiently altered so as to present a substantially different controversy from the one . . . originally decided." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (quotation omitted). Although Plaintiffs and Intervenor argue that the new DoD policy is merely an implementation of the revoked 2017

[1] Defendants' request to conduct discovery on standing prior to filing its response to Plaintiffs' and Intervenor's motions for summary judgment was denied. *See* Dkt. 178, 179, 189.

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Presidential Memorandum, *see* Pls.' Opp. at 2–4; Int.'s Opp. at 4–6, any dispute over the new policy presents a substantially different controversy than their challenge to the President's 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 to serve. *See* Mattis Mem., Dkt. 224-1; DoD Report, Dkt. 224-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. at 3–6, Dkt. 223 (providing additional details).

In addition, as set forth in Defendants' Motion to Dissolve the Preliminary Injunction, *see* Defs.' Mot. at 23–24, Plaintiffs and Intervenor lack standing because they have not suffered an injury in fact, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Five of the nine individual Plaintiffs (Cathrine Schmid, Lindsey Muller, Terece Lewis, Philip Stephens, and Meghan Winters) are currently serving and have been diagnosed with gender dysphoria within the relevant time period. *See* Schmid Decl. ¶¶ 4, 9, Dkt. 131; Muller Decl. ¶¶ 4, 15, Dkt. 133; Lewis Decl. ¶¶ 4, 10, Dkt. 134; Stephens Decl. ¶¶ 3, 10, Dkt. 135; Winters Decl. ¶¶ 3, 10, Dkt. 136. Under the new policy, these Plaintiffs would not suffer any injury because they would be able to continue serving in their preferred gender, change their gender marker, and receive all medically necessary treatment.[2] *See* Mattis Mem. at 2; DoD Report at 43. The three individual Plaintiffs who are not in the military (Ryan Karnoski, D.L., and Connor Callahan) may apply for a waiver to access into the military under the new DoD policy, *see* DoD Report at 5, 9–10, 32, 42, but these Plaintiffs have not alleged that they would seek such a waiver, nor that they were denied entry into the military, *see* Karnoski Decl., Dkt. 130; D.L. Decl., Dkt. 132; Callahan Decl., Dkt. 137. As for the remaining litigants, they cannot establish standing to challenge, or irreparable injury from, the new policy for the same reasons they failed to satisfy these requirements with respect to the 2017 Memorandum. *See* Defs.' Opp. 4–5, 7–9, Dkt. 194; *see also* Defs.' Reply at 2–7, Dkt. 90. Thus, Plaintiffs cannot show they would sustain any injury from the new policy.

[2] Jane Doe is currently serving and may have been diagnosed with gender dysphoria. Doe Decl. ¶ 2, Dkt. 138. ¶¶ 8, 13. If she receives such a diagnosis from a military medical provider, she would qualify for the reliance exception in the new policy, which has not yet gone into effect. *See* Mattis Mem. at 2. She cannot manufacture standing by choosing not to obtain such a diagnosis at this time. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415–18 (2013).

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If the Court finds that it lacks jurisdiction, then the case must be dismissed, *see* Fed. R. Civ. P. 12(h)(3), and further discovery would be unnecessary and inappropriate. Accordingly, the Court should resolve the threshold mootness and standing arguments raised in Defendants' Motion to Dissolve the Preliminary Injunction before allowing the parties to engage in additional discovery.

II. Any Challenge to the New DoD Policy Should Be Reviewed on an Administrative Record Under the Administrative Procedure Act.

Because Plaintiffs' and Intervenor's challenge must now center on the new policy issued by DoD, the current litigation is subject to the Administrative Procedure Act, including the requirement that review of any challenge be based upon the administrative record. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006); Defs.' Mot. at 5. Plaintiffs' argument that "[t]his case involves action taken by President Trump, who ordered the Ban on Twitter and then directed its implementation in the Presidential Memorandum," Pls.' Opp. at 5; *see also* Int.'s Opp. at 6, and their argument that the APA does not apply to the President's actions, Pls.' Opp. at 5; Int.'s Opp. at 7–8, ignore the changed circumstances of the case. As explained in Defendants' Motion to Dissolve the Preliminary Injunction, the President's 2018 Memorandum explicitly "revoke[d]" the 2017 Memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." Dkt. 216-3. Thus, the only live controversy in this case is a challenge to the new policy, which resulted from an administrative process by DoD.

Plaintiffs and Intervenor argue that they are asserting constitutional claims, not APA claims, and thus record review does not apply. Pls.' Opp. at 4–5; Int.'s Opp. at 6–7. However, record review applies to Plaintiffs' and Intervenor's constitutional claims because § 706(2)(B) of the APA specifically contemplates adjudication of constitutional issues by providing for judicial review of final agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B); *see also Evans v. Salazar*, No. C08-0372-JCC, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010) (explaining that the APA "specifically contemplates review of agency actions, findings, or conclusions found to be 'contrary to constitutional

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right' . . . and limits such review to the administrative record"); *Chiayu Chang v. United States Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017). Thus, "courts must still respect agency fact-finding and the administrative record when reviewing agency action for constitutional infirmities." *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1232–33 (D.N.M. 2014). Accordingly, courts have applied the APA's record review requirement even where Plaintiffs bring constitutional claims. *See, e.g., Ketcham v. U.S. Nat'l Park Serv.*, No. 16-CV-00017-SWS, 2016 WL 4268346, at *1–2 (D. Wyo. Mar. 29, 2016), *reconsideration denied*, No. 16-CV-00017-SWS, 2016 WL 4257509 (D. Wyo. May 5, 2016), *and motion to certify appeal denied*, No. 16-CV-0017-SWS, 2016 WL 4257439 (D. Wyo. June 21, 2016) (rejecting plaintiffs' assertion that "the Court should respect their decision to bring this action as a constitutional claim rather than as an APA claim" and holding that the Court was "obligated" to analyze the suit under the APA and limit the scope of the evidence considered to the administrative record).

Nor should the Court be persuaded by Plaintiffs' argument that even if they brought claims under the APA in addition to their constitutional claims, they would still be entitled to conduct discovery on those constitutional claims. *See* Pls.' Opp. at 5 n.2. Courts have rejected this argument, reasoning that permitting discovery for constitutional challenges to agency action would "'incentivize every unsuccessful party to agency action to allege . . . constitutional violations' in order to 'trade in the APA's restrictive procedures for the more evenhanded ones of the Federal Rules of Civil Procedure.'" *Chiayu Chang*, 254 F. Supp. 3d at 162 (citation omitted); *see also Charlton Mem'l Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993). Indeed, "[t]he APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies was entitled to broad-ranging discovery." *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004).

Plaintiffs and Intervenor complain that Defendants have not produced an administrative record. Pls.' Opp. at 4; Int.'s Opp. at 7. Defendants have been compiling the administrative record and plan to file that record with the Court shortly. Far from being *post hoc* evidence, the

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record will contain the information that was before the agency decisionmaker when promulgating the DoD policy.

Because this case, if allowed to go forward, should be reviewed on the administrative record, there is a strong presumption against discovery. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Therefore, good cause exists for the Court to stay discovery, at least until the resolution of Defendants' Motion to Dissolve the Preliminary Injunction.

III. The Interest in Judicial Economy Favors Staying Discovery.

Given the nature of Plaintiffs' and Intervenor's discovery requests, the interest in judicial economy favors staying discovery. Plaintiffs and Intervenor have sought broad discovery against the President that implicates constitutional separation-of-powers issues and the presidential communications privilege. Similar requests from the plaintiffs in the related case *Doe v. Trump*, 1:17-cv-01597-CKK, have led to numerous discovery disputes between the parties, and to Defendants filing a motion for a protective order to prevent the disclosure of information covered by the presidential communications privilege. *See* Defs.' Mot. for Protective Order, 1:17-cv-01597-CKK, Dkt. 89 (D.D.C. Feb. 27, 2018). Citing to the *Doe* proceedings, Plaintiffs argue that "other courts handling litigation over the Ban have already engaged with Defendants' privilege objections and easily rejected their untenably broad formulation of the presidential communications privilege." Pls.' Opp. at 7. But Plaintiffs are incorrect that the *Doe* Court "easily rejected" Defendants' position. *Id.* Rather, Defendants' motion for a protective order—which does not, as Plaintiffs imply, argue that the presidential communications privilege is an absolute privilege—remains pending in that case. *See* Defs.' Mot. for Protective Order, 1:17-cv-01597-CKK, Dkt. 89 (D.D.C. Feb. 27, 2018). Because similar disputes in this case are likely to arise if discovery is permitted to continue, it is in the interest of judicial economy to stay discovery pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and stay discovery pending a final ruling on Defendants' pending Motion to Dissolve the Preliminary Injunction, including any appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically filed the foregoing Reply in Support of Defendants' 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 13, 2018

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