UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

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

INTRODUCTION

As this Court has observed, "it is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Loumiet v. United States*, 225 F. Supp. 3d 79, 82 (D.D.C. 2016) (Kollar-Kotelly, J.). Defendants have filed a motion to dissolve the preliminary injunction arguing that, in light of the Department of Defense's ("DoD") new policy regarding military service by transgender individuals, Plaintiffs' claims are moot, and they lack standing. *See* ECF No. 96. Defendants are also preparing to file a motion to dismiss Plaintiffs' Second Amended Complaint that would be dispositive of all of Plaintiffs' claims. Defendants intend to file their motion to dismiss by April 20, 2018, *see* ECF No. 101, and to move for dismissal for lack of jurisdiction and failure to state a claim. Defendants' motion to dissolve the preliminary injunction and forthcoming motion to dismiss could completely resolve this case or, at least, narrow the issues that remain in dispute. The Court should, therefore, grant Defendants' motion for a protective order staying discovery until the Court has decided Defendants' two potentially dispositive motions.

A protective order staying discovery would prevent the parties from having to devote additional resources to discovery that may ultimately be irrelevant and would relieve third parties from having to litigate issues related to Plaintiffs' motion to compel compliance with subpoenas that may be rendered moot by the Court's decision on Defendants' dispositive motions. A stay of discovery would also relieve the Court from the burden of deciding discovery disputes that may be resolved, or at least narrowed, by Defendants' dispositive motions. In addition, because there is a preliminary injunction in place, Plaintiffs will not be harmed by a stay of discovery.

In their opposition, Plaintiffs do not contest that the resources of the parties and the Court could be preserved by a stay or establish how they would be prejudiced by a stay of discovery while the Court's preliminary injunction is in place. Instead, they largely focus their brief on attacking DoD's new policy and attempting to frame it as a "ban on military service by transgender people serving their country." ECF No. 108 at 7. Plaintiffs' attacks go to the merits of the litigation – not whether discovery should be stayed at this time. And their arguments highlight the threshold issues regarding the effect of the new policy on this litigation that 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 and forthcoming motion to dismiss.

ARGUMENT

I. A Protective Order Staying Discovery While the Court Decides Defendants' Dispositive Motions Would Further Justice and Efficiency and Prevent Waste.

"[C]ourts in this district have often stayed discovery while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Loumiet*, 225 F. Supp. 3d at 82. "A stay of discovery pending the determination of a dispositive motion is an eminently

logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001). Accordingly, "'[i]t is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.'" *Loumiet*, 225 F. Supp. 3d at 82 (quoting *Anderson v. U.S. Attorney's Office*, No. 91–2262, 1992 WL 159186, at *1 (D.D.C. June 19, 1992)). A stay of discovery in this case until the Court decides Defendants' dispositive motions plainly would further the most efficient use of the parties' and judicial resources.

For example, Plaintiffs are currently scheduled to depose Colonel Mary Krueger, Assistant Deputy for Health Affairs, Office of the Assistant Secretary of the Army, Manpower and Reserve Affairs, on April 17, 2018, and Anthony Kurta, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Under Secretary of Defense for Personnel and Readiness on April 20, 2018. Colonel Krueger's and Mr. Kurta's deposition testimony, however, may not be necessary or relevant after the Court decides Defendants' motion to dissolve the preliminary injunction and forthcoming motion to dismiss. A protective order staying discovery could save the parties from the time and expense of preparing for and taking unnecessary depositions, as well as prevent Colonel Krueger and Mr. Kurta from having to divert time and resources away from their military responsibilities to be deposed unnecessarily. If the Court denies Defendants' dispositive motions and discovery then proceeds, Plaintiffs could depose Colonel Krueger and Mr. Kurta at that time without suffering any prejudice from the delay.[1]

[1] Defendants maintain that further litigation of this case, if any, should be confined to the administrative record. *See* Defs.' Motion for a Protective Order, ECF No. 97. Record review applies to Plaintiffs' constitutional claims because § 706(2)(B) of the APA specifically

Similarly, Plaintiffs have filed a motion to compel compliance with the subpoenas they served on third parties the Family Research Council and the Heritage Foundation. ECF No. 109. A stay of discovery while the Court decides Defendants' dispositive motions could ultimately relieve the Family Research Council and the Heritage Foundation (and Defendants, if they elect to file a response) from having to devote resources to opposing Plaintiffs' motion to compel compliance with the subpoenas. A stay would, therefore, further the interests of justice for third parties.

In addition, if the Court ultimately determines that Plaintiffs' claims are moot, that they lack standing, or that their Second Amended Complaint should be dismissed on other grounds, it presumably will not need to decide Defendants' motion for a protective order regarding presidential communications, ECF No. 89; Defendants' partial motion for judgment on the pleadings and motion to partially dissolve the preliminary injunction, ECF No. 90; or Plaintiffs' motion to compel compliance with subpoenas, ECF No. 109. A protective order staying discovery while the Court decides Defendants' dispositive motions could, therefore, permit the Court to avoid having to address weighty constitutional issues regarding the relationship between the Executive and Judicial Branches, *see Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 389–90 (2004) (stating that "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible" (quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974))), and relieve the Court of the burden of deciding pending and future[2]

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contemplates adjudication of constitutional issues by "provid[ing] for judicial review of final agency action that is 'contrary to constitutional right, power, privilege, or immunity.'" *Chiayu Chang v. United States Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017) (quoting 5 U.S.C. § 706(2)(B)). However, Defendants submit that the Court need not decide the issue at this time in order to rule on the current motion for a protective order.

[2] Defendants have already alerted the Court to Plaintiffs' request to depose General Selva, the Vice Chairman of the Joint Chiefs of Staff. As we informed Plaintiffs, deposing the Vice

discovery motions. *See Loumiet*, 225 F. Supp. 3d at 84 (staying discovery and noting that "[i]t would not be a prudent use of the Court's—or the parties'—resources to litigate a discovery dispute while the dispositive motions, which may significantly change the nature of the case, are pending").

Finally, because there are preliminary injunctions in place in this case and the three related cases, *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Karnoski v. Trump*, No. 2:17-cv-01297 (W.D. Wash); and *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), Plaintiffs will not be harmed by a stay of discovery while the Court decides Defendants' dispositive motions. Indeed, as explained above, a stay of discovery would avoid the need for Plaintiffs to devote resources to seeking discovery, litigating discovery motions, and taking depositions that may ultimately be rendered moot by the Court's decision on Defendants' dispositive motions.

In sum, a protective order staying discovery in this case while the Court decides Defendants' dispositive motions would further the interests of justice and efficiency for the parties and third parties and would allow the Court to conserve judicial resources.

Chairman—who, as the nation's second highest ranking uniformed military official qualifies as a high-ranking Government official—is inappropriate at this point in the litigation. "[I]n the D.C. Circuit, there is a presumption against deposing high-ranking government officials," *Kelley v. FBI*, No. CV 13-0825 (ABJ), 2015 WL 13648073, at *1 (D.D.C. July 16, 2015), and Plaintiffs have not shown extraordinary circumstances necessary to overcome that presumption. *See In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985); *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998). We informed Plaintiffs that to the extent that the Vice Chairman has personal knowledge regarding this matter, Plaintiffs likely could obtain the same information through the deposition of Mr. Kurta, who served as chair of the Panel of Experts. Plaintiffs have refused to take the depositions of Mr. Kurta (and Colonel Krueger) before seeking the deposition of the Vice Chairman. Defendants have requested a telephone conference with the Court and are prepared to file a separate motion for a protective order to prevent the Vice Chairman's deposition.

II. Plaintiffs' Opposition Misses the Mark.

Plaintiffs devote the majority of their opposition to Defendants' motion to making two arguments that are factually incorrect and, at best, only tangentially related to Defendants' motion for a protective order staying discovery. First, Plaintiffs argue that Defendants have not adequately cooperated in discovery. ECF No. 108 at 2–3. Plaintiffs' claim is simply unfounded. Defendants have devoted significant financial resources and time to collecting, reviewing, and producing records responsive to Plaintiffs' expansive requests for documents. Defendants have reviewed over 143,000 pages of records and produced non-privileged records to Plaintiffs in an electronic format on a rolling basis. Defendants are continuing to process records and produce non-privileged records as quickly as possible. In addition, Defendants have responded to Plaintiffs' twenty-five interrogatories and twelve requests for admission. Three Government officials have already sat for depositions, and Defendants have made Colonel Krueger available for a deposition on April 17, 2018 and Mr. Kurta available for a deposition on April 20, 2018. Defendants have properly asserted privilege over privileged material and have attempted in good faith to resolve disputes regarding their privilege assertions without the need for Court intervention. Plaintiffs' claim that Defendants have failed to cooperate in discovery is entirely baseless and fails to undermine Defendants' showing that the Court should stay discovery pending decisions on Defendants' dispositive motions.

Plaintiffs' second claim is that DoD's new policy "does not constitute a new and different policy" and is "a ban on transgender people serving their country." ECF No. 108 at 7. Although Plaintiffs' focus on litigating the merits of DoD's new policy is misplaced in the briefing of this discovery motion, it underscores the fact that DoD's new policy presents threshold legal

questions that need to be fully briefed by the parties and decided by the Court.[3] The resolution of those questions, which have been presented to the Court in Defendants' motion to dissolve the preliminary injunction and will be further addressed in Defendants' forthcoming motion to dismiss, will dictate whether this case will proceed and, if it does, the scope of Plaintiffs' challenges.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motion for a protective order staying discovery while the Court considers Defendants' dispositive motions.

[3] DoD's new policy is not a "ban" on military service by transgender individuals. The new policy, which is the product of extensive work by DoD's Panel of Experts and represents DoD's best military judgment, is focused on addressing the issue of military service by individuals with a specific medical condition—gender dysphoria. ECF No. 96-1 at 2. Far from banning transgender individuals, under DoD's new policy, "[t]ransgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other service members, in their biological sex." *Id.* Plaintiffs' claims regarding DoD's new policy are plainly inconsistent with the documentation of the new policy that Defendants have provided to the Court.

April 12, 2018

Respectfully submitted,

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