IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-MJG Hon. Marvin J. Garbis

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

For the reasons set forth in the attached Memorandum of Points and Authorities, Defendants move pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure for a protective order to: (1) preclude discovery directed at the President of the United States; (2) preclude discovery from other sources that seeks information concerning presidential communications and deliberations. In addition to their Memorandum of Points and Authorities, Defendants have filed a proposed order with this motion, as well as a Certificate of Compliance with Local Rule 104.7.

Dated: June 18, 2018

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Plaintiffs have issued multiple, burdensome discovery requests directly to the President of the United States seeking information that goes to the heart of presidential deliberations about the formulation of military policy. Specifically, Plaintiffs have served interrogatories and requests for production of documents on the President that seek not only documents and information that the President considered concerning military service by transgender individuals, but also the identities of individuals within the White House, Department of Defense ("DoD"), the Armed Forces, and elsewhere with whom the President consulted in considering military policy. These discovery requests are extraordinary, as they are directed to the sitting President in a civil suit brought against the President in his official capacity. By separate motion, Plaintiffs have also asked the Court for a declaration that the deliberative process privilege does not apply to large swaths of material, including material in the possession of the White House and material reflecting presidential communications. *See* Pls.' Mot., ECF No. 177-3; Defs.' Opp., ECF No. 177-27; Pls.' Reply, ECF No. 177-33.

Discovery directed at the President—especially discovery concerning his deliberations as Commander-in-Chief—should not be permitted because the President is not a proper party to this lawsuit, *see* Defendants' Partial Motion For Judgment On The Pleadings, ECF No. 115, and because such discovery raises serious separation-of-powers concerns, *see Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). Established separation-of-powers principles also provide that the President should not be required to formally assert executive privilege until Plaintiffs exhaust other sources of non-privileged discovery, meet a heavy, initial burden of establishing a heightened, particularized need for the specific information or documents sought, and at a minimum substantially narrow any requests directed at presidential deliberations. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 388 (2004); *Dairyland Power Coop. v. United States*, 79 Fed. Cl. 659, 660 (2007). The Court should resolve this motion

before ruling on Plaintiffs' recently filed Motion to Compel Supplemental Interrogatory Answers and Production, ECF No. 177-3, which seeks to bypass the above threshold requirements.

For all of these reasons, set forth further below, the Court should grant Defendants' motion for a protective order and preclude discovery directed at the President and discovery from other sources that seeks information concerning presidential communications and deliberations.

BACKGROUND

Plaintiffs have served numerous broad requests for discovery against all Defendants, including the President. First, Plaintiffs served 24 interrogatories, of which 22 were addressed to the President. *See* ECF No. 177-5. Plaintiffs concurrently served 21 requests for production of documents on all Defendants, including the President. *See* ECF No. 177-6. Collectively, these requests seek to probe sensitive communications and deliberations related to the President and his advisors' formation of policy concerning military service by transgender individuals. The requests purport to require the President and his advisors to catalog and disclose the totality of his deliberations concerning this policy—including who was involved, when they were involved, how they were involved, and what advice was communicated to the President. Among other things, Plaintiffs seek:

- The identification and production of all documents and communications concerning military service by transgender individuals that the President requested, received, drafted, or considered (Interrog. 15; Req. for Prod. 1);
- The production of all communications concerning military service by transgender individuals between the President and his advisors on the one hand, and the Secretaries of Defense and Homeland Security, the Military Service Chiefs, and their advisors, on the other hand (Req. for Prod. 6);
- The identification and production of all documents and communications reviewed, considered, or relied upon by the President as a basis for, and the identification of all

individuals involved in the drafting of, the President's statement on Twitter or his August 2017 Presidential Memorandum (Interrogs. 2, 10, 17; Req. for Prods. 7–8);

- The identification of all individuals with whom the President and his advisors communicated, and any legal advice the President received, concerning his statement on Twitter or his August 2017 Presidential Memorandum (Interrogs. 6, 8);
- The identification of each one of the "Generals and military experts" the President consulted prior to issuing his statement on Twitter, and identification (including descriptions) of all communications between those generals and experts and the President (Interrogs. 3–4);
- Descriptions of every meeting the President attended where military service by transgender individuals was discussed, including the participants and the topics discussed, and the identification of any documents considered at those meetings (Interrog. 16);
- The production of all communications concerning military service by transgender individuals between the President or his advisors and the Vice President or his advisors (Req. for Prod. 12).

The President did not provide substantive responses to Plaintiffs' requests, and instead objected to each request "on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege." ECF No. 177-10, 177-11. The President also variously objected on grounds of the deliberative process privilege, attorney-client privilege, and work product privilege. *Id.*

Defendants Secretary Mattis and the Military Service Chiefs have substantively responded to Plaintiffs' first set of requests, *see, e.g.*, ECF No. 177-7, 177-8, including by collecting and reviewing hundreds of thousands of pages of records and producing to Plaintiffs over 30,000 non-privileged,

responsive documents (consisting of over 150,000 pages), and by responding to interrogatories that call for non-privileged information, *see, e.g.*, ECF No. 177-7.

On May 21, 2018, Plaintiffs served additional interrogatories and document production requests on certain Defendants, including the President,[1] *see* ECf No. 177-30; Exh. 1, which similarly target the President's communications and policy deliberations, s*ee, e.g.*, Exh. 1 at Req. for Prod. 26 (requesting production of "Documents and Communications Concerning the Implementation Plan between July 25, 2017, and the present between President Trump or Persons acting or purporting to act on President Trump's behalf (Including, but not limited to, Vice President Pence, White House officials, and senior staff to the President) on the one hand, and the Department of Defense, Department of Justice, or other federal government agency, and any military service, or any non-government individual or group, on the other"). Responses to these additional requests are not yet due under the Federal Rule of Civil Procedure.

On May 13, 2018, counsel for the parties met in person and discussed a number of discovery issues, including Defendants' position that because the President was not a proper party to this case, discovery directed against him was inappropriate. On June 13, 2018, counsel for the parties again conferred telephonically and discussed the separation-of-powers concerns implicated by Plaintiffs' discovery requests, that Plaintiffs should first be required to exhaust alternative sources of discovery and meet an initial burden of establishing a heightened, particularized need for the specific information sought, and that Plaintiffs' discovery requests implicate the presidential communications privilege. On both May 23, 2018 and June 13, 2018, counsel for Plaintiffs indicated that Plaintiffs oppose this motion.

[1] Although Plaintiffs state in a footnote on page 1 of their Second Set of Interrogatories to Certain Defendants that the "interrogatories [were] propounded to Defendant[] Trump," Plaintiffs did not direct President Trump to respond to any interrogatories. Accordingly, it does not appear that Plaintiffs in fact have served any interrogatories specifically on President Trump.

On May 25, 2018, Plaintiffs filed a cross-motion for summary judgment and also argued that they are entitled to further discovery under Federal Rule of Civil Procedure 56(d), including discovery of presidential communications. *See* Pls.' Cross-Mot. for Summary Judgment 49–50, ECF No. 163-2.

On June 15, 2018, Plaintiffs filed their fully briefed Motion to Compel Supplemental Interrogatory Answers and Production, ECF No. 177-3, including Defendants' Opposition to Plaintiffs' motion, ECF No. 177-27, and Plaintiffs' Reply, ECF No. 177-33. Plaintiffs' motion argues that the Court should declare that the deliberative process privilege does not apply to large categories of records, including "[d]eliberative materials regarding the President's original July 2017 Tweets and August 2017 Memorandum," and "[d]eliberative materials regarding . . . the President's acceptance of [DoD's recommendations] in his March 23 memorandum." Pls.' Mot. 2.[2]

STANDARD OF REVIEW

Rule 26(b) of the Federal Rules of Civil Procedure allows the parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Rule 26(c) provides that the Court has broad discretion, for good cause shown, to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (stating that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required"). This discretion includes orders forbidding the requested discovery altogether. Fed. R. Civ. P.

[2] In their motion to compel, Plaintiffs also "request that the Court order Defendants to supplement their prior interrogatory responses and document production," arguing that Defendants' responses were not compliant with Rule 33(d) of the Federal Rules of Civil Procedure. Pls.' Mot. 3, 6, 6 n.4, 26. Defendants produced more than 13,000 documents to Plaintiffs on May 22, 2018. Shortly thereafter, Defendants served supplemental interrogatory responses. *See* Exhs. 2–5. During a June 13, 2018 call, Plaintiffs' counsel stated that Plaintiffs no longer contend that Defendants' responses are not in compliance with Rule 33(d) of the Federal Rules of Civil Procedure.

26(c)(1)(A); *see also CineTel Films, Inc. v. Does 1-1,052*, 853 F. Supp. 2d 545, 557 (D. Md. 2012) ("protective orders may forbid disclosure altogether").

ARGUMENT

I. Discovery of the President Should be Precluded on Separation-of-Powers Grounds.

As a threshold matter, Plaintiffs should not be permitted to request—and the Court should not order—the President to respond to discovery because he is not a proper party to this case. In light of established separation of powers principles, Plaintiffs may not receive any relief directly against the President in this case. *See Mississippi*, 71 U.S. at 501. Accordingly, Defendants have moved for partial judgment on the pleadings to dismiss the President as a defendant. *See* Defs.' Mot. for Partial J. on the Pleadings, ECF No. 115. The Court should rule on at least that motion before addressing any issue regarding discovery of the President. If the Court dismisses the President from the case, as a nonparty, the President would have no obligation to provide responses to Plaintiffs' interrogatories and document production requests served pursuant to Federal Rule of Civil Procedure 34; such discovery is only appropriate against parties, not nonparties. *See, e.g.*, 177-30 (citing Rule 33), Exh. 1 (citing Rule 34). Thus, the issue of whether the President must respond to Plaintiffs' pending requests would be moot.[3]

In any event, even if the President remains a party to this lawsuit in some capacity, he is not properly subject to discovery. To maintain the constitutional separation of powers, courts have long recognized that they cannot enjoin the non-ministerial conduct of the President when he acts in his official capacity. In *Mississippi v. Johnson*, the Supreme Court held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties." 71 U.S. at 501. In that case, the State of Mississippi sought to enjoin President Andrew Johnson from executing the Reconstruction

[3] Resolution of this case on the parties' cross-motions for summary judgment, ECF Nos. 158, 163, also would obviate the need for the discovery at issue here.

Acts, which Mississippi claimed were unconstitutional. *See id.* at 497. In barring injunctive relief against the President, the Court reasoned that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion." *Id.* at 499. Just as courts cannot enjoin Congress in exercising its legislative function, they cannot enjoin the President in exercising the executive function. *Id.* at 500 ("Neither can be restrained in its action by the judicial department . . . ."). To do so, the Court observed, would be "without a precedent." *Id.*

A "majority of the Justices" in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), reaffirmed these fundamental principles. *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). In *Franklin*, a district court issued an injunction requiring the President to take certain actions related to the census. *See* 505 U.S. at 791. Writing for a four-Justice plurality, Justice O'Connor explained that "the District Court's grant of injunctive relief against the President himself [was] extraordinary, and should have raised judicial eyebrows." *Id.* at 802 (citation omitted). The plurality reiterated that "in general, '[the] court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'"[4] *Id.* at 802–03 (quoting *Mississippi*, 71 U.S. at 501). "At the threshold," it said, "the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803.

Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28.

[4] The Supreme Court in *Franklin* "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely ministerial duty." 505 U.S. at 802. A ministerial duty is "a simple, definite duty" that is "imposed by law" where "nothing is left to discretion." *Mississippi*, 71 U.S. at 498; *see also Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) ("A ministerial duty is one that admits of no discretion, so that the official in question has no authority to determine whether to perform the duty." (citing *Mississippi*, 71 U.S. at 498)). In contrast, "a duty is discretionary if it involves judgment, planning, or policy decisions." *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (citation omitted).

Therefore, just as the President is absolutely immune from official capacity damages suits, so too is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 ("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions."). Justice Scalia reasoned that the principle that the President "may not be ordered to perform particular executive . . . acts at the behest of the Judiciary" is "implicit in the separation of powers" and is supported by Supreme Court precedent. *Id.* at 827–28. "Permitting declaratory or injunctive relief against the President personally would not only distract him from his constitutional responsibility to 'take Care that the Laws be faithfully executed,'" but also "would produce needless head-on confrontations between district judges and the chief executive." *Id.* at 828 (quoting U.S. Const., Art. II, § 3). Based on these separation-of-powers concerns, Justice Scalia concluded that "[u]nless the other branches are to be entirely subordinated to the Judiciary, [the courts] cannot direct the President to take a specified executive act." *Id.* at 829.

In line with *Mississippi* and *Franklin*, courts in this and other circuits have rejected plaintiffs' demands to enjoin the President in the performance of his official duties, regardless of the claim.[5] For

[5] *See, e.g.*, *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.), *vacated and remanded on other grounds*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief."); *Swan*, 100 F.3d at 978 (stating that "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539–40 (N.D. Cal. 2017), *appeal docketed* No. 17-16886 (9th Cir. Sept. 18, 2017); *Settle v. Obama*, No. 15-cv-365, 2015 WL 7283105, at *6 (E.D. Tenn. Nov. 17, 2015); *Day v. Obama*, No. 15-cv-00671, 2015 WL 2122289, *1 (D.D.C. May 1, 2015); *Willis v. Dep't of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014) (finding that "[l]ongstanding legal authority establishes that the judiciary does not possess the power to issue an injunction against the President" and dismissing the complaint as to the President); *McMeans v. Obama*, No. 11-cv-891, 2011 WL 6046634, at *3 (D. Del. Dec. 1, 2011); *Shreeve v. Obama*, No. 10-cv-71, 2010 WL 4628177, at *5 (E.D. Tenn. Nov. 4, 2010); *Anderson v. Obama*, No. CIV. PJM 10-17, 2010 WL 3000765, at *2 (D. Md. July 28, 2010); *Carlson v. Bush*, No. 6:07CV1129ORL19UAM, 2007 WL

example, in a recent Fourth Circuit case, *International Refugee Assistance Project v. Trump*, the plaintiffs sought to enjoin implementation and enforcement of the President's Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States." 857 F.3d 557, 573, 579 (4th Cir. 2017) (en banc). In their complaint, the plaintiffs named multiple defendants, including President Trump in his official capacity as the President of the United States. *Id.* at 579. Upon concluding that the plaintiffs were likely to succeed on their Establishment Clause claim, the district court issued a nationwide injunction barring enforcement of Section 2(c) of the Executive Order. *See id.* The court issued the injunction against all of the defendants, including the President. *See id.* at 605. On appeal, the Government argued, among other things, that the district court erred by issuing the injunction against the President himself. *See id.* The Fourth Circuit agreed, stating that "[i]n light of the Supreme Court's clear warning [in *Mississippi* and in *Franklin*] that such relief should be ordered only in the rarest of circumstances[,] we find that the district court erred in issuing an injunction against the President himself." *Id.* The Court then "lift[ed] the preliminary injunction as to the President only."[6] *Id.* In subsequent litigation related to a different Executive Order, the district court followed the directive of the Fourth Circuit and issued a preliminary injunction against "[a]ll Defendants with the exception of the President of the United States." *See Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017), *appeal docketed*, No. 17-2231 (4th Cir. Oct. 20, 2017), *stay granted*, 138 S. Ct. 542 (Dec. 4, 2017).

3047138, at *3 (M.D. Fla. Oct. 18, 2007); *Comm. to Establish the Gold Standard v. United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Nat'l Ass'n of Internal Revenue Emps. v. Nixon*, 349 F. Supp. 18, 21–22 (D.D.C. 1972); *Reese v. Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972); *S.F. Redevelopment Agency v. Nixon*, 329 F. Supp. 672, 672 (N.D. Cal. 1971); *Suskin v. Nixon*, 304 F. Supp. 71, 72 (N.D. Ill. 1969).

[6] Based on subsequent events, the Supreme Court vacated the judgment on other grounds and remanded the case to the Fourth Circuit with instructions to dismiss the case as moot. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).

The principle derived from the *Mississippi v. Johnson* line of cases—that the President himself may not be subject to judicial relief for his official actions—underscores that the President should not be subject to discovery in this case. It is undisputed that Plaintiffs brought suit against the President in his official capacity, challenging actions he took concerning military policy in his role as Commander-in-Chief. *See* Sec. Am. Compl., ECF No. 148, ¶¶ 107. It is also undisputed that Plaintiffs seek declaratory and injunctive relief against the President. *Id.* at 55–56. An order directing the President himself to respond to discovery, where he is not properly subject to declaratory or injunctive relief on the merits in this case, raises the same separation-of-powers concerns the Supreme Court identified in *Mississippi v. Johnson*. *See also Fitzgerald*, 457 U.S. at 753 (recognizing the "President's constitutional responsibilities and status as factors counseling judicial deference and restraint"). Forcing the President to respond to discovery where he is sued in his official capacity, would "not only distract him from his constitutional responsibility to 'take Care that the Laws be faithfully executed,'" but "would produce needless head-on confrontations between district judges and the chief executive." *Franklin*, 505 U.S. at 828. Although the Supreme Court did not categorically foreclose discovery of the President in *United States v. Nixon*, 418 U.S. 683, 711–12 (1974), *Nixon* is distinguishable because it involved a subpoena in a criminal case and this case involves civil discovery. *See Cheney*, 542 U.S. at 384 (explaining that "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case) (quoting *Nixon*, 418 U.S. at 713); *U.S. Dep't of Treasury v. Black*, 719 F. App'x 1, 3 (D.C. Cir. 2017) (same); *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (subpoena against the President in a criminal case). Accordingly, the Court should order that the President may not be subject to injunctive or declaratory relief and, similarly, that he should not be compelled to respond to discovery requests.

This is not to say that Plaintiffs may not obtain non-privileged discovery from the other Defendants in this case that does not pertain to presidential communications and deliberations. Just as Plaintiffs may seek injunctive relief against subordinate executive officials to assuage "any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law," *Swan*, 100 F.3d at 978, Plaintiffs may seek non-privileged discovery that does not touch on presidential communications and deliberations from subordinate officials like the Secretary of Defense and the Service Secretaries—as they have readily done in this case.

II. Civil Discovery Directed At The President's Communications and Deliberations Must Be Strictly Circumscribed To Comply With The Separation Of Powers.

The burdensome, far-reaching discovery requests that Plaintiffs have served on the President also should not be permitted for related separation-of-powers reasons, under which Plaintiffs must exhaust other sources of discovery and meet a heavy, initial burden of establishing a heightened, particularized need for the specific information or documents sought before the President should be required to formally assert the presidential communications privilege to protect his deliberative process. At a minimum, the Court must substantially narrow the requests directed at presidential deliberations.

Unlike other civil litigants, the President comes to court with unique "constitutional responsibilities and status." *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). The President is "the chief constitutional officer of the Executive Branch," and is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. As a result, the Supreme Court "has held, on more than one occasion, that '[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)); *see also Fitzgerald*, 457 U.S. at 753 ("Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint."). The President's "communications and activities" also "encompass a vastly wider range of sensitive material than would

be true of any 'ordinary individual.'" *Cheney*, 542 U.S. at 381 (quoting *Nixon*, 418 U.S. at 715). Indeed, "'special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.'" *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 182 (D.D.C. 2005) (quoting *Cheney*, 542 U.S. at 385).

Discovery directed against the President implicates these weighty separation-of-powers concerns. *Cheney*, 542 U.S. at 383. The Executive has a powerful interest in protecting confidential information, as well as in shielding itself from litigation demands "that might distract it from the energetic performance of its constitutional duties." *Id.* at 382. Discovery targeting the President threatens these interests, with the potential to upset the balance between the Judicial and Executive branches. *Id.*

In *Cheney*, the Supreme Court addressed how lower courts should handle civil discovery requests directed at the Executive Office of the President or Vice President, given these separation-of-powers concerns. The Court held that when discovery requests are submitted to the Executive, lower courts should not force the Executive to respond by invoking privilege. The Court explained:

> Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These 'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible.

Id. at 389–90 (quoting *Nixon*, 418 U.S. at 692). To prevent such clashes, the Court held that before the Executive is forced to "bear the burden" of formally asserting executive privilege, lower courts must consider whether "other avenues" exist for disposing of discovery demands. *Cheney*, 542 U.S. at 388, 390; *see also id.* at 391 (rejecting the D.C. Circuit's "mistaken assumption that the assertion of

executive privilege is a necessary precondition to the Government's separation-of-powers objections").

Cheney thus compels lower courts to strictly circumscribe discovery requests made to the Executive Office of the President and Vice President. Such requests should be allowed only when plaintiffs can show that they are absolutely necessary to their case, and any requests should be limited in scope to only the necessary parts. *See Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL758267, at *9 (D.D.C. Mar. 31, 2005) (citing *Cheney* for the proposition that "a court must screen a request for presidential documents to ensure that the discovery is essential to the proceedings"); *Citizens for Responsibility & Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 180 (D.D.C. 2008) (describing *Cheney* as "specifically distinguish[ing]" between broad discovery and "more narrow discovery requests that would safeguard against unnecessary intrusion into the operation of the Office of the President" (citation omitted)).

These considerations apply with even greater force with respect to discovery directed to the President himself. The decision in *Wagafe v. Trump*, No. C17-94 RAJ, 2017 WL 5990134 (W.D. Wash. Oct. 19, 2017), is instructive. The plaintiffs there sought discovery directly from the President concerning two executive orders he had issued. *Id.* at *3. Citing *Cheney* and noting that it "is mindful that intruding on the Executive in this context is a matter of last resort," the Court rejected the requested discovery of the President, and instead ordered the parties to meet and confer "to discuss alternative . . . sources of information for any discovery over which the Government asserts [Executive] privilege." *Id.*

The Court should take similar steps to avoid discovery of the President here. As set out in detail above, the broad discovery requests Plaintiffs have served on the President would, among other things, require him to identify all individuals with whom he has discussed issues of military transgender policy and when each discussion took place, as well as to produce all documents and communications

related to transgender policies. (Interrog. 16; Req. for Prod. 1). Responding to such requests would require the President and his advisors to comb through their records, notes, and memories to track down every person with whom the President spoke about the military's policies regarding transgender individuals, to determine every person present at meetings where those policies were discussed, and to identify and produce countless documents. Doing so would in itself intrude on the President's deliberative process and would require a substantial diversion of time and resources on the part of the President and his staff. This in itself is precisely the sort of "distract[ion] [] from the energetic performance of [the President's] constitutional duties" that *Cheney* sought to prevent. 542 U.S. at 369.[7]

Accordingly, consistent with *Cheney*, at a minimum the Court should require Plaintiffs to exhaust discovery relevant to their claims that does not concern the President's communications and deliberations from sources other than the President and his immediate White House advisors and their staff. *See United States v. McGraw-Hill Cos., Inc.*, No. 13-779, 2014 WL 1647385, at *13 (C.D. Cal. Apr. 15, 2014) (holding discovery motion in abeyance "to the extent that it is directed at the Executive Office of the President" and in the meantime requiring only discovery of documents not covered by the presidential communications privilege). In this regard, Plaintiffs have received and will continue to receive substantial amounts of non-privileged information related to the merits of their claims from other Defendants. Only upon exhausting these alternative sources of non-privileged discovery should the Court consider whether the President must formally invoke executive privilege. *See Cheney*, 542 U.S. at 390.

[7] Additionally, because the issues in this case are now centered on DoD's new policy, any discovery of the President and of presidential communications and deliberations is irrelevant. Accordingly, Plaintiffs do not need any alternatives to discovery of the President and of presidential deliberations.

III. The President Should Not Be Required to Formally Invoke Privilege Until the Court Rules that Plaintiffs Have Met Their Initial, Heavy Burden.

The foregoing considerations should foreclose Plaintiffs' requested discovery concerning the President's deliberations over military policy. However, if the Court believes that discovery of the President and his deliberations is potentially available at this stage, it should first require Plaintiffs to meet their heavy, initial burden of establishing a heightened, particularized need for the specific information sought before requiring the President to formally invoke privilege. *See Dairyland Power Co-op*, 79 Fed. Cl. at 660.

A. The Presidential Communications Privilege Encompasses Information Sought in Plaintiffs' Discovery Requests.

The presidential communications privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708; *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir 1997) (describing the privilege's "constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities," *Nixon*, 418 U.S. at 711, as well as "documents or other materials that reflect presidential decisionmaking and deliberations," *In re Sealed Case*, 121 F.3d at 744. Thus, for example, Plaintiffs' broad request encompassing information concerning the President's communications with his advisors on issues of the military's transgender policies, *see* Req. for Prod. 1, squarely implicates the privilege. The privilege also extends to communications authored or solicited and received by immediate White House advisors in the Executive Office of the President and their staff. *See In re Sealed Case* at 754. And the privilege "covers final and post-decisional material as well as pre-deliberative ones." *Id.* at 745.

In addition to the substance of deliberations and communications, the presidential communications privilege protects facts and whether particular "sources of information" were considered by the President and his immediate advisors. *See id.* at 745, 750; *Loving v. Dep't of Defense*,

550 F.3d 32, 38 (D.C. Cir. 2008). Such information plainly "reflect[s] presidential decisionmaking and deliberations," and disclosure of this information would intrude on presidential deliberations and impede the President's ability to perform his constitutional duty. *See In re Sealed Case*, 121 F.3d at 744, 751. For example, Plaintiffs' interrogatories request the President to identify documents and communications on which the president relied, and individuals with whom the President consulted, in formulating transgender policy—all of which implicate facts and information subject to the privilege. (Interrogs. 2–4, 6, 10, 15–17). Discovery about the nature and scope of the President's decisionmaking process—including the details about whom the President decided to meet with or not, which advisors the President chose to consult with and rely on for advice or not, and what information the President relied on or did not—would reveal the President's deliberative process in the performance of his constitutional responsibilities. Disclosure of such information plainly would intrude upon the confidentiality afforded to presidential decisionmaking. *In re Sealed Case*, 121 F.3d at 750.

B. Plaintiffs Have Not Met Their Initial Burden to Demonstrate Heightened Need for the Privileged Information, and Thus the Burden Has Not Shifted to the White House to Formally Invoke the Presidential Communications Privilege Through An Affidavit.

In light of separation-of-powers considerations discussed above, the Supreme Court in *Cheney* expressly rejected the notion that the Executive Branch at its highest level should bear the initial burden of invoking executive privilege with specificity or making particular objections to discovery on a line-by-line basis. 542 U.S. at 383, 388. The Court noted that the criminal subpoenas at issue in *United States v. Nixon* "were [first] required to satisfy exacting standards of '(1) relevancy; (2) admissibility; [and] (3) specificity.'" *Id.* at 386 (quoting *Nixon*, 418 U.S. at 700). This process served "as an important safeguard against unnecessary intrusion into the operation of the Office of the President," *id.* at 387, and was the means by which "the party requesting the information—the special

prosecutor [in *Nixon*, 418 U.S. at 683]—had satisfied his burden of showing the propriety of the [subpoena] requests." *Id.* at 388.

These "exacting standards" apply *a fortiori* in this case where Plaintiffs are seeking *civil* discovery from the Executive Branch at its highest level. As noted by the Supreme Court in *Cheney*, "[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*." *Id.* at 384. Because it is a "'primary constitutional duty of the Judicial Branch . . . to do justice in criminal prosecutions,'" the withholding of information "from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks 'conflict[s] with the function of the courts under Art[icle] III.'" *Id.* (citations omitted). "Such an impairment of the 'essential functions of [another] branch' . . . is impermissible." *Id.* (citation omitted). In contrast, the withholding of information in a civil case "does not hamper another branch's ability to perform its 'essential functions' in quite the same way." *Id.* (citation omitted).

In this case, Plaintiffs have not attempted to satisfy the "exacting standards" of "relevancy," "admissibility," and "specificity," pursuant to the Supreme Court's analysis of this issue in *Cheney*. *See* 542 U.S. at 386. Moreover, "[a] party's need for information is only one facet of the problem." *Id.* at 385. The burden imposed on the White House by discovery orders is an "important factor" to be considered by the courts owing to the special deference and "'[t]he high respect that is owed to the office of the Chief Executive." *Id.* Preparing and executing an affidavit formally invoking the presidential communications privilege with specificity is a burdensome, time-consuming process that would detract from the many constitutional responsibilities of the White House. The Court also must be particularly cognizant of the fact that the Executive Office of the President is, because of its high visibility, an easily identifiable target for civil suits and corresponding discovery orders. *Id.* at 386. In contrast to the criminal justice system, where "there are various constraints, albeit imperfect, to filter

out insubstantial legal claims, . . . there are no analogous checks in the civil discovery process." *Id.* Because of these considerations, the Court must hold Plaintiffs to their initial burden before shifting the burden to the White House to formally assert the presidential communications privilege.

Accordingly, parties seeking discovery from the President must satisfy an initial burden of demonstrating a heightened, particularized need for the information they seek. *See In re Sealed Case*, 121 F.3d at 746 (requiring a "focused demonstration of need"); *U.S. Dep't of Treasury v. Black*, 719 F. App'x 1, 3 (D.C. Cir. 2017) (holding that plaintiffs "bear the burden to demonstrate with specificity that each discrete group of the subpoenaed materials likely contains important evidence," and "bear the further burden of demonstrating" that they have "first" made diligent efforts "to determine whether sufficient evidence can be obtained elsewhere") (quotation marks omitted). Until Plaintiffs have met this initial burden, the burden does not shift to the White House to formally invoke the presidential communications privilege by means of affidavit. *See Dairyland Power Co-op.*, 79 Fed. Cl. at 662 ("The Court agrees with the Government that, in the case of a discovery request aimed at the President and his close advisors, the White House need not formally invoke the presidential communications privilege until the party making the discovery request has shown a heightened need for the information sought. This is the teaching of both *Cheney* [542 U.S. at 367] and [*In re*] *Sealed Case* [121 F.3d at 720]."). Only after the Court has found that Plaintiffs have properly satisfied the requirements of relevance, admissibility, and specificity should the President be required to undertake the burdensome process of formally invoking the presidential communications privilege, and only then should the Court balance the public interest served by protecting the President's confidentiality in this context against Plaintiffs' need for the privileged information.

IV. Plaintiffs' Motion To Compel Conflicts With These Principles.

Plaintiffs' recently filed Motion to Compel Supplemental Interrogatory Answers and Production, ECF No. 177-3; *see also* ECF No. 177-32, observes none of the above precepts. In that

motion, Plaintiffs ask the Court to resolve the application of the deliberative process privilege over large categories of documents which plainly reflect Presidential communications and deliberations, including "[d]eliberative materials regarding the President's original July 2017 Tweets and August 2017 Memorandum," and "[d]eliberative materials regarding . . . the President's acceptance of [DoD's recommendations] in his March 23 memorandum." Pls.' Mot. 2. Plaintiffs make this request without first complying with any of the steps set forth in *Cheney* as necessary prerequisites to the President being forced to assert privilege. Plaintiffs have not exhausted alternative sources of discovery, demonstrated a heightened need for the information at issue, or substantially narrowed Plaintiffs' broad requests. More fundamentally, Plaintiffs' motion seeks to resolve issues of privilege over documents in the custody of the President—a request this Court should dismiss out of hand in light of separation-of-powers concerns and because the President is not a proper party to this case.

Plaintiffs insist that their motion "is confined to the dispute regarding the deliberative process privilege," and does not implicate the presidential communications privilege. Pls.' Mot. 2 n.1. But that frames the issue much too narrowly and incorrectly. As Defendants explained in their opposition to Plaintiffs' motion to compel, Plaintiffs' motion plainly puts at issue information concerning presidential communications and deliberations. *See* Defs.' Opp. 13 n.8, ECF No. 177-27. And Plaintiffs' attempt to address the privileges in piecemeal fashion does not resolve inconsistencies with *Cheney*, which stands for the proposition that Courts must address threshold separation-of-powers concerns before addressing *any* issues of privilege concerning presidential communications and deliberations. *See* 542 U.S. at 388–390. It is obvious why this is so. Even if the deliberative process privilege were the only privilege at issue, in order for the President to assert that privilege over the relevant documents, the President and his advisors would still have to engage in the painstaking process of searching for and collecting responsive records and perfecting the privilege through an affidavit. Once that happens, "coequal branches of the Government are set on a collision course."

Id. at 389. Accordingly, Defendants respectfully request that the Court rule on the instant motion before addressing Plaintiffs' motion to compel, which ignores the threshold issues raised here.

* * *

In sum, the Court should conclude that discovery of the President is precluded because the President is not a proper party to this litigation and because such discovery intrudes on the separation of powers. In the alternative, the Court should require Plaintiffs to exhaust non-privileged discovery from alternative sources, should require Plaintiffs to meet their initial, heavy burden of heightened need for the relevant discovery and, at a minimum, should substantially narrow the broad requests at issue. Only then might Defendants be required to come forward with a formal invocation of the privilege to protect information concerning presidential deliberations and communications. Defendants also respectfully request that the Court resolve this motion before addressing Plaintiffs' motion to compel, ECF No. 177-3, which seeks to bypass these threshold requirements.

CONCLUSION

For the foregoing reasons, the Court should enter a protective order to preclude Plaintiffs from seeking discovery from the President of the United States and discovery from other sources that seeks information concerning presidential communications and deliberations.

Dated: June 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, the foregoing Motion for a Protective Order was electronically filed using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: June 18, 2018

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