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' REPLY IN SUPPORT OF THEIR PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO PARTIALLY DISSOLVE THE PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs have conceded two out of the three issues Defendants raised in their Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction. *See* Defs.' Mot., ECF No. 115. First, Plaintiffs state that they "have no objection to modifying the preliminary injunction so that it does not run against the President." Pls.' Resp. at 2, ECF No. 117. Second, by making no argument to the contrary, Plaintiffs implicitly concede that the Court does not have authority to enter their requested permanent injunction against the President. *See generally id.* Therefore, the Court should dissolve the preliminary injunction as it runs against the President and find that it does not have authority to enjoin the President in this case.

Only one issue remains for the Court to decide: whether the Court may issue a declaratory judgment against the President for discretionary action that he took in his official capacity in a case where a declaratory judgment entered against subordinate Executive officials would provide full relief to the Plaintiffs. The case law is clear—it cannot. Because the Court may not issue Plaintiffs' requested relief against the President, the Court should dismiss the President from the case.

ARGUMENT

As a preliminary matter, Plaintiffs misstate Defendants' argument. Defendants do not argue, as Plaintiffs contend, that the President has "absolute immunity from suit." Pls.' Resp. at 2; *see also id.* at 4. Instead, Defendants argue that a court may not grant injunctive or declaratory relief against the President for his official, non-ministerial conduct, particularly where, as here, relief granted against subordinate Executive officials would provide full relief to Plaintiffs.

As explained in Defendants' motion, courts lack authority to issue injunctive relief against the President for non-ministerial actions that he has taken in his official capacity. *See* Defs.' Mot. at 3–7 (citing, *inter alia*, *Mississippi v. Johnson*, 71 U.S. 475, 499 (1866); *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992)). The rationale behind this doctrine, the D.C. Circuit found, is "painfully obvious":

> the President, like Congress, is a coequal branch of government, and for the President to 'be ordered to perform particular executive . . . acts at the behest of the Judiciary,' at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers.

Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996) (quoting *Franklin*, 505 U.S. at 827 (Scalia, J., concurring)); *see also Clinton v. Jones*, 520 U.S. 681, 718–19 (1997) (Breyer, J., concurring) (acknowledging "the apparently unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts" (citation omitted)).

With respect to Executive Branch officials, a "declaratory judgment is the functional equivalent of an injunction." *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985)). Therefore, "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment." *Swan*, 100 F.3d at 976 n.1. As Justice Scalia explained in *Franklin*:

> For similar reasons, I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he can be compelled personally to defend his executive actions before a court . . . . The President's immunity from such judicial relief is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."

505 U.S. at 827–28 (Scalia, J., concurring) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)). Following *Franklin*, the D.C. Circuit determined that "declaratory relief" against the President for his discretionary conduct "is unavailable." *Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010) ("The only apparent avenue of redress for plaintiff's claimed injuries would be injunctive or declaratory relief against all possible President-elects and the President himself. But such relief is unavailable."); *see also Newdow v. Bush*, 391 F. Supp. 2d 95, 106 (D.D.C. 2005) (determining that there was no "viable alternative to enjoining the President" because "only an injunction or declaratory judgment against the President [could] redress plaintiff's injury," and holding that the court was "without the authority to grant such relief," despite also concluding that the case was moot).

Plaintiffs' arguments to the contrary are unavailing. Plaintiffs rely on a case from 1974, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) ("*NTEU*"), which they contend is the "leading case on judicial review of Presidential action." Pls.' Resp. at 6–7 (quotation omitted). Because *NTEU* pre-dates *Franklin*, "[i]t is not entirely clear, of course, whether, and to what extent, [this] decision[] remain[s] good law after *Franklin*." *Swan*, 100 F.3d at 978.

Even if *NTEU* remains good law, that case is readily distinguishable in two ways. First, as the D.C. Circuit repeatedly acknowledged, *NTEU* involved a Presidential action that allegedly was "ministerial" and not discretionary. 492 F.2d at 591 (stating that the plaintiff "seeks declaratory and injunctive relief and mandamus to require President Nixon to perform what is alleged to be a ministerial act under the Federal Pay Comparability Act"); *id.* at 601 ("After the President received the necessary comparability studies, his obligation to adjust pay under the [statute] was mandatory, involving no discretion."); *id.* at 602 ("The fact in and of itself that the President was required to

interpret both [statutes] . . . did not render his duty to effect an October, 1972 pay adjustment other than ministerial."); *id.* at 605 ("[T]he remedy sought in this case is mandamus to compel the President to perform a single ministerial act and does not require any court supervision over the performance of duty by the executive branch."); *id.* at 606 n.42 (distinguishing *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1979), by stating, "in that case, the President's duties under the challenged statute were found to be executive and discretionary rather than ministerial"). As the *NTEU* Court recognized, the Supreme Court in *Mississippi* "specifically left open" the question of "whether a court can compel the President to perform a ministerial act." *Id.* at 607 (citing *Mississippi*, 71 U.S. at 498–99); *see also Franklin*, 505 U.S. at 802 (finding same) (citing *Mississippi*, 71 U.S. at 498–99). 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*, 100 F.3d at 977. There can be no question here that the President's actions involving the formation of military policy involve "judgment, planning, or policy decisions" and are not ministerial. *See Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (defining discretionary duties) (quotation omitted). Indeed, by making no argument to the contrary, Plaintiffs implicitly concede this point. *See generally* Pls.' Resp.

The *NTEU* case differs from this suit against the President in a second way. In *NTEU*, the D.C. Circuit found that there were no other defendants the plaintiffs could sue in lieu of the President. 492 F.2d at 614–15. In that case, the plaintiffs suffered their alleged injuries because the President failed to take a statutorily required action, and he had not delegated authority to take the action to any subordinate Executive official. *Id.* at 615. To afford the plaintiffs a remedy, the Court concluded that "the sole defendant they can appropriately name in asserting their claims is the President of the United States." *Id.* The Court contrasted the facts of that case with those of *Mississippi* and *Suskin v. Nixon*, where dismissal of claims against the President did not leave the plaintiff without redress because "other defendants were suable." *Id.* at 606 n.42, 614–15. Indeed,

as *NTEU* and other courts have recognized, because the President often acts through subordinate Executive officials, courts ordinarily can rule on the legality of the President's actions and rectify a plaintiff's injuries by issuing injunctive or declaratory relief against those subordinate officials. *See id.* at 613; *see also Franklin*, 505 U.S. at 803 (concluding that the "injury alleged is likely to be redressed by declaratory relief against the Secretary [of Commerce] alone"); *Swan*, 100 F.3d at 979–80 (finding that injunctive relief against subordinate officials could substantially redress the plaintiff's injury); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (stating that "courts have power to compel subordinate executive officials to disobey illegal Presidential commands"). The Court could do the same here. Even assuming, *arguendo*, that the President, as Plaintiffs contend, "unilateral[ly]" decided to "ban" transgender individuals from military service,[1] Pls.' Resp. at 3, the President would necessarily act through the Secretary of Defense and the Service Secretaries to effectuate any policy regarding military service by transgender individuals. Therefore, Plaintiffs may challenge the constitutionality of the operative policy governing military service by transgender individuals and, if successful, the Court may redress Plaintiffs' injuries by issuing an injunction and/or a declaratory judgment against the Secretary of Defense and the Service Secretaries.

Plaintiffs argue that the Court should not dismiss the President from the case because "doing so would mean denying Plaintiffs the complete relief they are due." *Id.* at 9. "Without a declaration that the Commander-in-Chief's own actions were unconstitutional," Plaintiffs contend that "the stigma attached to [their] continued service could not be fully remedied." *Id.* But maintaining the President as a defendant merely to vindicate a purported stigmatic injury finds no support in the law. Plaintiffs may receive the relief they seek—"a declaratory judgment that the policies and directives encompassed in [the Presidential Memorandum] violates the equal protection

[1] Defendants contest Plaintiffs' characterization of the President's actions. *See* Answer, ¶¶ 106–18, 137, 159, ECF No. 96; Defs.' Mem., at 5–7, ECF No. 52-1; Defs.' Reply, at 3–6, ECF No. 77.

component of the Fifth Amendment to the U.S. Constitution, [violates the Fifth Amendment's guarantee of substantive due process], and is invalid on its face and as applied to Plaintiffs" and an order enjoining "implement[ation] and enforc[ement] [of] the policies and directives encompassed in [the Presidential Memorandum]," Am. Compl. at 40, ECF No. 39—without the President as a named defendant in this case.

This course of action was taken by the district court and affirmed by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, the Supreme Court considered "whether the President was acting within his constitutional power when he issued an [executive] order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills." *Id.* at 582. Although the President was not a defendant in the case, the Court held that the President's order was unconstitutional and affirmed the district court's decision enjoining the Secretary of Commerce from carrying out the order. *See id.* at 585–89. Similarly, here, the Court could dismiss the President from the case and then find that the policy regarding military service by transgender individuals is unconstitutional and issue injunctive or declaratory relief against the Secretary of Defense and the Service Secretaries. Doing so would avoid the fundamental separation-of-powers intrusion that arises with the Judiciary enjoining or entering declaratory relief against the head of the Executive branch. *See Swan*, 100 F.3d at 978–79 (stating that "[i]n most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials" (citing *Franklin*, 505 U.S. at 803; *Reich*, 74 F.3d at 1328, 1331 n.4; *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)).

Plaintiffs also argue that because other courts have issued declaratory judgments against the President, it is proper for the Court to do so in this case. *See* Pls.' Resp. at 5–7. Although the courts in the cases cited by Plaintiffs issued declaratory judgments against the President or permitted a suit

against the President to continue where the plaintiffs sought a declaratory judgment against the President, only *NTEU* discussed whether it was proper to do so.[2] *See Clinton v. City of New York*, 524 U.S. 417, 425 n.9 (1998) (stating only that "the plaintiffs sought a declaratory judgment that the Line Item Veto Act is unconstitutional and that the particular cancellation was invalid; neither set of plaintiffs sought injunctive relief against the President"); *Schuchardt v. President of the United States*, 839 F.3d 336, 353 (3d Cir. 2016) (stating that the court's decision was "narrow" and "hold[ing] only that [the plaintiff's] second amended complaint pleaded his standing to sue for a violation of his Fourth Amendment right to be free from unreasonable searches and seizures"); *Romer v. Carlucci*, 847 F.2d 445, 447, 464 (8th Cir. 1998) (reversing a district court's finding that a claim challenging the adequacy of the Air Force's environmental impact statement was nonjusticiable because a statute defines the scope of the statement, noting that "justicability presumes the availability of declaratory relief," and remanding the case to the district court for further proceedings); *Murphy v. Ford*, 390 F. Supp. 1372, 1372–75 (W.D. Mich. 1975) (dismissing the plaintiff's claim that President Ford's pardon of President Nixon was void upon finding that President Ford had the constitutional power to pardon President Nixon for his offenses against the United States). In addition, in the cases contesting the Executive Order that temporarily suspended the entry of certain foreign nationals into the United States, neither the Fourth Circuit nor the Ninth Circuit, in considering appeals from the granting of injunctive relief, addressed the availability of declaratory relief against the President or considered whether the President should be dismissed from the case.[3] *See Int'l Refugee Assistance*

[2] As explained above, *NTEU* was decided before *Franklin* and may no longer be good law, and, in any event, is readily distinguishable from this case.

[3] Nor did the Government present these issues to the courts in its briefs. The Government was challenging preliminary injunctive relief that had actually been entered, and it argued that those injunctions could not run against the President. *See* Brief for Appellants at 55, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 557 (4th Cir. 2017) (No. 17-1351), ECF No. 36 (arguing that the nationwide preliminary injunction was overbroad because it "violates the 150-year-old rule that federal courts cannot issue an injunction that runs against the President himself" (citing *Mississippi*,

Project v. Trump, 857 F.3d 557, 605 (4th Cir.), *vacated and remanded on other grounds sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (finding only that the district court erred by entering a preliminary injunction against the President); *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) (same).

The Court may not infer from these courts' silence that they found they had authority to issue a declaratory judgment against the President for his official conduct. Indeed, as the Supreme Court has repeatedly stated, even when a potential defect is "jurisdictional" and the defect "is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011) (citing *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power of jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*."); *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63, n.4 (1989) (finding that although the "[p]etitioner cites a number of cases from this Court that he asserts have 'assumed' that a State is a person," because "the Court did not address the meaning of person in any of those cases, and in none of the cases was resolution of that issue necessary to the decision," the Court was not bound by the prior *sub silentio* holdings); *see also United States v. Stoerr*, 695 F.3d 271, 277 n.5 (3d Cir. 2012) ("A drive-by jurisdictional ruling, in which jurisdiction has been assumed by the parties,

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71 U.S. at 501)); Reply Brief for Appellants at 26, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 557 (4th Cir. 2017) (No. 17-1351), ECF No. 221 (same); Brief for Appellants at 56, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-15589), ECF No. 23 (making the same argument as in appellants' opening brief before the Fourth Circuit); Reply Brief for Appellants at 29, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-15589), ECF No. 281 (same).

and assumed without discussion by the court, does not create binding precedent." (citation omitted)). Because the cases cited by Plaintiffs are silent on whether a court may enter a declaratory judgment against the President for his official, discretionary conduct, Plaintiffs' reliance on them is misplaced.

Plaintiffs also argue that Defendants' motion "is a litigation tactic to make it more difficult for Plaintiffs to take discovery involving the President." Pls.' Resp. at 9. But the separation-of-powers principles that warrant dismissal of the President cannot be set aside merely in an attempt to facilitate discovery. In any event, the issue of whether the President may be subject to discovery in a civil case is not presently before the Court. And, even if that question were before the Court, a determination that the President was a proper defendant would not necessarily permit Plaintiffs to seek discovery from him: discovery directed to the President in civil litigation regarding his official conduct raises significant separation-of-powers concerns, *see Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 385 (2004), and the discovery directed at the President in this case is also subject to privileges, including the presidential communications privilege, *see In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997).

Although Plaintiffs argue that "the Supreme Court has squarely ruled that the President may be ordered to comply with subpoenas," the two cases that Plaintiffs cite are *criminal* cases, and are thus readily distinguishable from this civil case. *See* Pls.' Resp. at 9 (citing *United States v. Nixon*, 418 U.S. 683 (1974) (criminal trial subpoena); *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (Va. Cir. Ct. 1807) (same)). Unlike this case, which concerns Plaintiffs' requests for information to use in a civil suit, criminal cases such as *Nixon* "involve[] the proper balance between the Executive's interest in the confidentiality of its communications and the 'constitutional need for production of relevant evidence in a criminal proceeding.'" *Cheney*, 542 U.S at 383 (quoting *Nixon*, 418 U.S. at 713). Simply put, "the right to production of relevant evidence in civil proceedings does not have the same

'constitutional dimensions'" as it does in criminal proceedings. *Id.* at 384 (quoting *Nixon*, 418 U.S. at 711). The Sixth Amendment provides a criminal defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor," U.S. Const. amend. VI, and the Fifth Amendment guarantees that no person shall be deprived of liberty "without due process of law," *id.* amend. V; *see Nixon*, 418 U.S. at 711–13 (discussing the constitutional rights of criminal defendants). The Supreme Court has recognized that "[w]ithholding materials 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'" because "a 'primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions.'" *Cheney*, 542 U.S at 384 (quoting *Nixon*, 418 U.S. at 707). Thus, to withhold information that is needed in a criminal trial based on the Executive's generalized assertion of privilege could result in an "impermissible" "impairment of the 'essential functions'" of the Judicial Branch. *Id.* (quoting *Nixon*, 418 U.S. at 707. These criminal-case constitutional concerns are not presented in civil cases. Therefore, even if issues involving discovery served on the President were properly before the Court at this juncture—which they are not—the criminal cases relied on by Plaintiffs are inapposite.

Finally, Plaintiffs argue that it is premature to dismiss the President from this case because "[n]o doctrine entitles the President to dismissal on the pleadings simply because specific forms of relief may or may not ultimately be warranted." Pls.' Resp. at 10. But, as shown above, because Plaintiffs challenge the President's official, non-ministerial actions, Plaintiffs may not receive *any* relief directly against the President in this case. And here, there are other defendants in this case against whom the Court may enter a declaratory judgment or an injunction. Moreover, because the issue must be decided "[a]t the threshold," *Franklin*, 505 U.S. at 803 (plurality opinion), the Court should not defer ruling. Despite Plaintiffs' assertion, there is simply no need to develop "facts and

evidence" to resolve this legal argument. *See* Pls.' Resp. at 10. Accordingly, the Court should dismiss the President from the case.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' motion, Defendants' motion for partial judgment on the pleadings should be granted, and the President should be dismissed as a defendant in this case. The Court should also dissolve the preliminary injunction as to the President.

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