IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459-MJG

MEMORANDUM IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS, AND RESPONSE TO DEFENDANTS' MOTION TO PARTIALLY DISSOLVE THE PRELIMINARY INJUNCTION

INTRODUCTION

President Donald J. Trump made a decision to ban military service by transgender individuals (the "Transgender Service Member Ban" or "Ban"). He then declared that he was "doing the military a great favor" by short-circuiting the usual process for making such a consequential decision "and just saying it." ECF 40-12 at 2−3. But when Plaintiffs served discovery requests in an effort to identify the basis for President Trump's decision, he tried to shield his actions from scrutiny by asserting extensive (and overbroad) claims of privilege. After Plaintiffs made clear they intended to file a motion to compel, President Trump filed the pending Motion for Judgment on the Pleadings in an apparent effort to preempt Plaintiffs' motion by dismissing himself from the case.[1]

Defendants' motion conflates two distinct issues—the propriety of an injunction against the President, and the propriety of a declaration that the President has violated Plaintiffs'

[1] Defendants are wrong that dismissal of the President would have the litigation benefit they assume. *See infra* note 4.

constitutional rights. Plaintiffs have no objection to modifying the preliminary injunction so that it does not run against the President, so long as the President's subordinates remain enjoined from implementing his unconstitutional directives. But the Court should definitively reject Defendants' much more extreme position that the President has absolute immunity from suit. They insist, without authority, that President Trump be dismissed from this case at the threshold because federal courts lack authority to declare that he has violated the Constitution. This startling proposition should be rejected. Defendants cite no Supreme Court or Fourth Circuit case holding that the President is immune from judicial declarations, and ignore the many examples of presidents being named in actions for declaratory relief without objection.

In *Marbury v. Madison*, the Supreme Court emphasized "that every right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. (1 Cranch) 137, 163 (1803). The Court observed that even in England, where it is legally presumed that the King can do no wrong, "the king himself is sued" and "never fails to comply with the judgment of his court." *Id.* The President is no king, but he too may be sued. This Court has the power to determine whether the President has acted within the law, and to declare that the President violated the law. *See Clinton v. City of New York*, 524 U.S. 417, 426 n.9 (1998) (granting declaratory relief to plaintiffs in holding that the President may not exercise a line item veto). Plaintiffs have no objection to modifying the preliminary injunction as Defendants request, but Defendants are wrong to leap to the unsupported conclusion that President Trump may not be sued at all in a constitutional challenge to his own Transgender Service Member Ban.

BACKGROUND

On the morning of July 26, 2017, President Donald J. Trump announced on Twitter that "the United States Government will not accept or allow Transgender individuals to serve in any

capacity in the U.S. Military." Am. Compl., ECF 39, ¶ 4. He formalized the Transgender Service Member Ban in an August 25, 2017 memorandum. *Id.* ¶ 6. The memorandum stated that in the President's own "judgment," the Department of Defense had "failed to identify a sufficient basis to conclude" that permitting transgender individuals to serve in the military "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." *Id.* ¶ 106.

The President's decision to issue the Transgender Service Member Ban was a unilateral one. Key military officials, including the Secretary of Defense, were surprised by the announcement. *Id.* ¶¶ 96−97, 104. President Trump's motivations in abruptly announcing the Ban reflected a desire to placate legislators and advisers who bear animus and moral disapproval toward men and women who are transgender in order to gain votes to pass a defense spending bill that included money to build a border wall with Mexico—a well-known priority for President Trump. *Id.* ¶ 96. The announcement drew swift criticism from retired generals and admirals, senators, and more than 100 Members of Congress. *Id.* ¶¶ 100−102.

Plaintiffs challenged the Transgender Service Member Ban, filing suit against President Trump, Secretary of Defense James Mattis, Acting Secretary of the Army Ryan McCarthy, Secretary of the Navy Richard Spencer, and Secretary of the Air Force Heather Wilson. *Id.* ¶¶ 58−59. Plaintiffs requested that the Court "[i]ssue a declaratory judgment that the policies and directives encompassed in President's Trump's Memorandum" violate the Fifth Amendment's guarantee to equal protection and substantive due process. *Id.* ¶ 40, A−B. Plaintiffs also requested that the Court "[i]ssue an Order preliminarily and permanently enjoining the Defendants from implementing and enforcing the policies and directives encompassed in President Trump's Memorandum." *Id.* ¶ C. This Court has since ruled that Plaintiffs have established a clear likelihood of success on their claim that the decision to ban transgender people from serving their

country lacked justification and violates equal protection. ECF 85 at 41–44.

LEGAL STANDARD

In considering Defendants' motion for judgment on the pleadings, the Court must assume the facts alleged in the complaint are true and draw all reasonable factual inferences in Plaintiffs' favor. *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002).

ARGUMENT

Defendants' argument that the President has absolute immunity from a lawsuit challenging his own unconstitutional actions is based on little more than sleight-of-hand. Defendants rely on a line of cases addressing the availability of *injunctive* relief against the President to argue that this Court is prohibited from issuing *declaratory* relief against the President, and that the President therefore cannot even be sued. ECF 115 at 3−7. The cases on which Defendants rely do not support the remarkable contention that the President enjoys absolute immunity from declaratory relief, or from being named a defendant in court—even when he personally makes a decision that violates the Constitution. Indeed, Presidents are routinely named as defendants in action for declaratory relief without objection.

The Supreme Court has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). This Court is permitted to issue declaratory relief where, as here, (1) the complaint alleges an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment; (2) the court possesses an independent basis for jurisdiction over the parties (i.e., federal question jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction. *See* 28 U.S.C. §§ 2201−2; *Volvo Constr. Equip. N. Am.,*

Inc. v. CLM Equip. Co., 386 F.3d 581, 592 (4th Cir. 2004). None of these three jurisdictional prerequisites is contested here. *See* ECF 115 at 1−7.

The Supreme Court has never held that a President is immune from suit seeking a *declaration* that his actions are unlawful. To the contrary, it has *affirmed* declaratory relief in a case that named the President as a defendant, without any suggestion that doing so was an affront to the separation of powers. *See Clinton v. City of New York*, 524 U.S. at 426 n.9 (granting declaratory relief to plaintiffs in holding that the President may not exercise line item veto).

Defendants' reliance on the Fourth Circuit's decision in *International Refugee Assistance Project* ("*IRAP*") *v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), is telling. In that case, plaintiffs filed a lawsuit against President Trump as well as the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence, and their respective agencies, seeking declaratory and injunctive relief from an Executive Order that temporarily suspended entry of nationals from six predominantly Muslim countries. *Id.* at 574, 579; *see also* Plaintiffs' Amended Complaint, *IRAP v. Trump*, 8:17-CV-00361-TDC, ECF 93 (D. Md. Mar. 10, 2017) (seeking declaratory and injunctive relief). The district court issued a nationwide preliminary injunction. 857 F.3d at 578−79. On appeal, the Government argued that the district court erred in issuing the injunction against the President himself. *See id*. at 605. The Fourth Circuit agreed and "lift[ed] the injunction as to the President only," clarifying that the "court's preliminary injunction shall otherwise remain fully intact." *Id.* The court did not, however, in any way limit the plaintiffs' ability to obtain declaratory relief against the President, and it did not dismiss the President as a defendant in the litigation. *See id.*; *see also Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (determining that injunctive relief against the President would be inappropriate, but not directing that the President be dismissed or suggesting that the action against him for declaratory relief was

inappropriate). To the contrary, the Fourth Circuit noted that "[e]ven though the President is not 'directly bound' by the injunction, we 'assume it is substantially likely that the President would abide by an authoritative interpretation.'" 857 F.3d at 605–06 (quoting *Franklin v. Mass.*, 505 U.S. 788, 828 (1992)).

Although not binding on this Court, precedent from other circuits confirms that the President may be sued for declaratory relief. In what is described as a "leading case" on judicial review of Presidential action,[2] the D.C. Circuit denied mandamus relief ordering the President to comply with a statutory duty to implement a pay increase for federal employees, but found the case "a most appropriate instance for the use of declaratory decree" under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("*NTEU*")[3]; *see also Schuchardt v. President of the United States*, 839 F.3d 336, 353–

[2] *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1679 (1997).

[3] In a footnote, Defendants cite two D.C. Circuit opinions for the proposition that courts have rejected demands to enjoin the President in the performance of his official duties. ECF 115 at 5, n.2. Both cases are inapposite here. In *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996), the D.C. Circuit considered whether the President could be required by writ of mandamus to reinstate an official whom he had removed from his position. The court cautioned that it "not entirely clear" whether *NTEU* remained good law after *Franklin* as to the court's ability to issue an injunction against the President, but pointedly refrained from resolving that question because it was possible to provide the plaintiff with full relief by enjoining subordinate official. *Id.* at 978; *see also id.* at 988 (Silberman, J., concurring) ("It may well be, as the majority would strongly suggest . . . that a federal court may order the President to reverse an action or desist from action we determine is illegal, but the issue seems more complicated to me than it is put."). In *Newdow v. Roberts*, 603 F.3d 1002, 1010−12 (D.C. Cir. 2010), the D.C. Circuit considered whether plaintiffs had standing to enjoin the Chief Justice from using the words "so help me God" in administering the oath of office at past and future inaugurations. The court distinguished *Clinton v. City of New York*, 524 U.S. 417 (1998), by noting, among other things, that "plaintiffs in that case (unlike plaintiffs in this case) actually named the President in their suit." *Newdow*, 603 F.3d at 1012; *see also id.* at 1015 n.2 (Kavanaugh, J., concurring in the judgment) (noting that Plaintiffs never sought to restrict the President's own actions and instead challenged "the official Presidential oath articulated by the Chief Justice in a public ceremony, as well as the Inaugural prayers delivered by the selected clergy during that public ceremony"). Although the court then stated in passing that "courts . . . have never submitted the President to declaratory relief," *id.* at 1013, that non-binding dicta is simply mistaken, as demonstrated by *Clinton*, *NTEU*, and other cases.

54 (3d Cir. 2016) (reversing dismissal of lawsuit against President and other Executive Branch officials challenging the constitutionality of electronic surveillance program); *Romer v. Carlucci*, 847 F.2d 445, 449, 464 (8th Cir. 1988) (en banc) (permitting claims for "declaratory relief" against the President and other Executive Branch officials concerning the adequacy of environmental review of the Air Force's missile deployments); *Murphy v. Ford*, 390 F. Supp. 1372 (W.D. Mich. 1975) (considering request for declaratory judgment that President Ford's pardon of Richard Nixon was unconstitutional, and ruling on the merits that the pardon was a legitimate exercise of presidential power).

Defendants also rely on two decisions of the Supreme Court: *Mississippi v. Johnson*, 71 U.S. 475 (1866), a post-Civil War case brought by Mississippi to restrain President Johnson from enforcing the Reconstruction Acts, and *Franklin v. Massachusetts*, 505 U.S. 788 (1992), a challenge to U.S. census methodology in which the Court specifically left open the question of whether the President might be subject to injunctive relief for the performance of ministerial duties. Neither stands for the extreme proposition that a President cannot be subject to declaratory relief and cannot even be named as a defendant in a lawsuit challenging the constitutionality of his own actions.

In *Mississippi*, plaintiffs argued that the Reconstruction Acts passed by Congress following the Civil War were unconstitutional because they permitted military commanders to deprive persons of life, liberty, and property without trial by jury or any of the other usual constitutional protections. 71 U.S. at 475−76. The plaintiffs sought injunctive relief to prevent the President from carrying out the Acts. *Id.* at 500−01. The Court concluded that it lacked jurisdiction over a bill to enjoin the President in the performance of his official duties—but said nothing about its authority to issue declaratory relief against the President. *Id.*

In *Franklin*, Massachusetts and two registered voters sued the President, the Secretary of Commerce, and other federal officials. 505 U.S. at 790. At issue was whether the plaintiffs had standing to challenge the accuracy of the Secretary of Commerce's data for use in the census. *Id.* at 802. The plurality expressly "left open the question" whether "injunctive relief against the President was appropriate" because it determined that "the injury alleged is likely to be redressed by declaratory relief against the Secretary alone." *Id.* at 802−03. *Franklin* said nothing at all to limit declaratory relief against the President, let alone create a broad new doctrine of absolute immunity from suit. Only one concurrence opined that declaratory relief against the President should have been unavailable—a concurrence conspicuously not joined by any other Justice. *See Franklin*, 505 U.S. at 827–28 (Scalia, J., concurring).

If ever there were a case for recognizing a novel presidential immunity from suit, this is not it. This case uniquely concerns an unconstitutional decision *made by the President*. *See* Am. Compl., ECF 39, ¶¶ 96−97, 101−02, 104. As described in the Complaint, which on this motion must be taken as true, the Ban was the personal decision of President Trump; a declaration that the Ban is unconstitutional inescapably implicates the President. It is difficult to see how declaratory relief could issue without a declaration that the President violated the Constitution. As the Fourth Circuit has explained: "Our Constitution describes a unitary executive, and a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it. President Trump alone had the authority to issue the Proclamation; he is responsible for its substance and purpose." *IRAP v. Trump*, No. 17-2231, 2018 WL 894413, at *16 n.16 (4th Cir. Feb. 15, 2018), as amended (Feb. 28, 2018) (internal quotations and citation omitted).

Even if there were a way to craft a declaration that the President's Ban is unconstitutional but somehow not direct that declaration to the President, doing so would mean denying Plaintiffs the complete relief they are due. As this Court recognized, Plaintiffs have adequately alleged "[s]tigmatic injury" for being "singled out as unfit for service." ECF 85 at 31. An important facet of that injury is being singled out and stigmatized *by their Commander-in-Chief*. Am. Compl., ECF 39, ¶¶ 134, 143, 153, 161. Without a declaration that the Commander-in-Chief's own actions were unconstitutional, the stigma attached to Plaintiffs' continued service could not be fully remedied. The very premise of judicial rulings limiting injunctive relief against the President is that full relief can be obtained vis-à-vis subordinate officers. *See IRAP*, 857 F.3d at 605; *Franklin*, 505 U.S. at 803. It is remarkable to say, as Defendants do now, that the more modest remedy of declaratory relief cannot be directed at the President, *even though* such relief is necessary to a full remedy under the circumstances presented here.

Moreover, it is evident that this motion is a litigation tactic designed to make it more difficult for Plaintiffs to take discovery involving the President. Defendants have effectively acknowledged this by attempting to link the motion with ongoing discovery disputes. That is an especially inappropriate motivation for Defendants' novel argument for presidential immunity, because the Supreme Court has squarely ruled that the President may be ordered to comply with subpoenas. *See United States v. Nixon*, 418 U.S. 683 (1974) (upholding order directing President to produce certain tape recordings of conversations with aides); *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (Va. Cir. Ct. 1807) (Marshall, C.J.,) (presiding in the treason trial of Aaron Burr, Chief Justice Marshall ruled that a subpoena duces tecum could be directed to the President). Defendants apparently believe that even if the Court were to ultimately reject their privilege claims relating to the President, they can nonetheless insulate non-privileged materials from discovery by

having the President dismissed from the case. If that maneuver were successful, it would compromise the reviewability of the President's actions—exactly the result *IRAP* confirms should not be the result of limitations on relief against the President. *IRAP*, 857 F.3d at 605 ("To be clear, our conclusion does not 'in any way suggest[] that Presidential action is *unreviewable*.'" (quoting *Franklin*, 505 U.S. at 828 (Scalia, J., concurring)).[4]

Finally, even if at the end of the case the Court might conclude that no remedy against the President is warranted or appropriate, Defendants have no basis to demand that the President be immunized from suit at the threshold. Even as to injunctive relief against the President, the Supreme Court has held that such a remedy is "extraordinary"—not that it is categorically unavailable. *Franklin*, 505 U.S. at 802. Whether to grant the more modest remedy of a declaration is best decided at the end of the case when the facts and evidence have been received, and the Court can decide, *inter alia*, whether Plaintiffs are right that a declaration directed against the President is necessary to awarding full relief. No doctrine entitles the President to dismissal on the pleadings simply because specific forms of relief may or may not ultimately be warranted.

CONCLUSION

For these reasons, while Plaintiffs do not oppose Defendants' motion to modify the preliminary injunction, Defendants' motion for partial judgment on the pleadings should be denied.

[4] Contrary to Defendants' assumption, dismissal of the President from this suit would not insulate him from all discovery. If the President were dismissed based on Defendants' novel theory, and used that dismissal to defeat Plaintiffs' current discovery requests for non-privileged materials, Plaintiffs would promptly serve a third-party subpoena on the custodians of the documents Defendants are trying to insulate from discovery. *See United States v. Nixon*, 418 U.S. at 710 (requiring President provide documents in response to subpoena).

Dated: March 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2018, copies of the foregoing were served via CM/ECF on all counsel of record.

/s/ Peter J. Komorowski
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