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' PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO PARTIALLY DISSOLVE THE PRELIMINARY INJUNCTION

Defendants move pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for the Court to enter partial judgment on the pleadings and dismiss Plaintiffs' claims against the President. In addition, Defendants move to dissolve the preliminary injunction as to the President only. In support of this motion, the Court is respectfully referred to Defendants' accompanying memorandum of points and authorities.

March 1, 2018

Respectfully Submitted,

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

INTRODUCTION

Defendants move pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for the Court to enter partial judgment on the pleadings and dismiss plaintiffs' claims against President Donald J. Trump. As demonstrated below, the claims against the President should be dismissed because the President is not a proper defendant in this case. Plaintiffs seek the entry of a declaratory judgment and a permanent injunction against all Defendants, including the President. However, as the Supreme Court and the United States Court of Appeals for the Fourth Circuit have recognized, the Court may not issue a declaratory judgment or an injunction against the President in his official capacity and in the performance of discretionary actions.

For the same reasons, Defendants move to dissolve the preliminary injunction as to the President only. Just as the Court may not issue the requested permanent injunction against the President, the Court may not preliminarily enjoin the President.

BACKGROUND

Plaintiffs raise constitutional challenges to what they contend is a ban on the service of transgender individuals in the military. Am. Compl., ECF No. 39, ¶¶ 135–162. The complaint

named, in their official capacities, the President, the Secretary of Defense, and each of the service Secretaries. *Id.* ¶¶ 58–62. Plaintiffs request that the Court "[i]ssue an Order preliminarily and permanently enjoining the Defendants"—including the President—"from implementing and enforcing the policies and directives encompassed in the President's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017 and entitled 'Military Service by Transgender Individuals'" ("Presidential Memorandum"). *Id.* at 40. Plaintiffs also request that the Court "[i]ssue a declaratory judgment" that the policies and directives encompassed in the Presidential Memorandum, 82 Fed. Reg. 41,319 (Aug. 25, 2017), violate the Fifth Amendment's Due Process Clause and its equal protection component. *Id.*

Plaintiffs moved for a preliminary injunction, seeking to enjoin all Defendants—including the President—from "enforcing or implementing the policies and directives" encompassed in the Presidential Memorandum. Pl. Mot., ECF No. 40. Following briefing and oral argument on Plaintiffs' motion and Defendants' response and motion to dismiss, the Court issued a preliminary injunction. Prelim. Inj., ECF No. 84. The Court preliminarily enjoined all defendants—including the President—from implementing the policies and directives encompassed in the Presidential Memorandum. *Id.* at 1 (stating that "Defendants, Donald J. Trump, in his official capacity as President of the United States . . . Are hereby enjoined . . . .").

Defendants filed their answer to the Amended Complaint on December 15, 2017. Answer, ECF No. 96. The pleadings are now closed, and partial judgment on the pleadings is warranted for Defendants under Rule 12(c) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed[,] . . . a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A defendant may move for judgment on the pleadings under Rule 12(c) even if the defendant previously filed a

motion to dismiss under Rule 12(b)(6). *See* Fed. R. Civ. P. 12(h)(2)(B), (h)(3); *see also Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011).

A motion for judgment on the pleadings is analyzed under the same standards as a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) or a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002) (discussing Rule 12(b)(6)); *Lane v. Wynne*, No. CIV.PJM 04 1051, 2006 WL 4711891, at *2 (D. Md. June 23, 2006) (discussing Rule 12(b)(1)), *aff'd*, 218 F. App'x 262 (4th Cir. 2007). "The test applicable for judgment on the pleadings is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." *Alexander*, 801 F. Supp. 2d at 433 (M.D.N.C. 2011) (quoting *Smith v. McDonald*, 562 F. Supp. 829, 842 (M.D.N.C. 1983), *aff'd*, 737 F.2d 427 (4th Cir.1984), *aff'd*, 472 U.S. 479 (1985)).

ARGUMENT

Although Plaintiffs allege claims against the President, he is not a proper defendant in this case. Plaintiffs may not obtain—and the Court may not order—injunctive or declaratory relief directly against the President for his official conduct. Therefore, the Court should dismiss all of Plaintiffs' claims against the President.

To maintain the constitutional separation of powers, courts have long recognized that the non-ministerial conduct of the President when he acts in his official capacity cannot be enjoined. 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 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.'"[1] *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. 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

[1] 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*, 100 F.3d at 977 ("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) (quotation omitted). There can be no question here that Plaintiffs seek to enjoin the President from performing a discretionary duty—the formation of military policy—that goes to the heart of his authority as Commander in Chief.

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.[2]

[2] *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 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).

For 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 Donald 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."[3] *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).

This is not to say that Plaintiffs may not bring their claims against the other Defendants in this case or that the Court may not enjoin the actions of subordinate officials in the Executive Branch. To the contrary, "[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

[3] 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).

bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials." *Swan*, 100 F.3d at 978–79 (citing *Franklin*, 505 U.S. at 803; *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 n.4 (D.C. Cir. 1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)). Thus, in cases involving the President and other defendants, courts avoid granting relief against the President and instead grant relief only against subordinate officials in the Executive Branch. *See, e.g.*, *id.* at 976–80.

The *Mississippi v. Johnson* line of cases underscores that the President is not a proper defendant 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* Am. Compl., ECF No. 39, ¶ 58. It is also undisputed that Plaintiffs seek declaratory and injunctive relief against the President. *See id.* at 40. It is further undisputed that Plaintiffs brought suit against the Secretary of Defense and the Service Secretaries and could obtain full relief for their alleged injuries through injunctive relief against those other Defendants. Accordingly, because this Court cannot issue a declaratory judgment or an order enjoining the President for his official, discretionary action, the Court should grant partial judgment on the pleadings to Defendants on all of Plaintiffs' claims against the President.

For these same reasons, the Court should dissolve the preliminary injunction to the extent it runs against the President. *See Int'l Refugee Assistance Project*, 857 F.3d at 605 ("lifting the preliminary injunction as to the President only"); *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) (vacating the district court's injunction "to the extent the order runs against the President, but affirm[ing] to the extent that it runs against the remaining 'Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them'"); *Int'l Refugee Assistance*

Project, 265 F. Supp. 3d at 633 (issuing a preliminary injunction against "[a]ll Defendants with the exception of the President of the United States.").

CONCLUSION

For the foregoing reasons, 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.

March 1, 2018

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[PROPOSED] ORDER

Upon consideration of the Defendants' Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction, the opposition and replies thereto, and the entire record herein, it is hereby ORDERED that the Motion is GRANTED, all claims against the President are DISMISSED, and the Preliminary Injunction, ECF No. 84, is DISSOLVED to the extent that the order runs against the President.

Dated:

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MARVIN J. GARBIS
UNITED STATES DISTRICT JUDGE