The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
March 23, 2018

INTRODUCTION

On July 26, 2017, President Trump unilaterally announced that he was categorically excluding transgender people from military service. The President's singlehanded reversal of military policy robs transgender individuals of their ability to serve their country on equal terms simply because of their gender identity and stigmatizes many committed and innocent men and women on the basis of a characterization that has no bearing on their fitness to serve. It is undisputable that this invidious, class-based discrimination is the *President*'s policy. *He* issued it via Tweet; *he* formalized it through a Presidential Memorandum over *his* signature. Relief against the President is both proper and necessary here, particularly with respect to the stigmatic injuries suffered by Plaintiffs from the President's unconstitutional actions.

Yet the government now argues that the President must be dismissed from this case, asserting that the President is immune from suit and that this Court has no jurisdiction to award Plaintiffs any relief against him. This extreme position is as breathtakingly broad as it is unsupported, and is contrary to both our constitutional tradition and the case law expounding it. "The government of the United States has emphatically been termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). And "it is emphatically the province and duty of the judicial department to say what the law is." *Id.* Granting relief against the President's unconstitutional actions would be comfortably in accord with the longstanding tradition of Article III courts entertaining suits for relief against the President—without any suggestion of the Presidential immunity that the government now claims. Moreover, the unique circumstances of this case demand such relief. This is the President's Ban. It is the President who stigmatized the honorable transgender men and women in our nation's service. Only relief that runs against the President himself could remedy that injury.

Ignoring this settled law and these undisputed facts, the government obscures the issues before the Court by conflating precedents dealing with injunctive relief against the President, on the one hand, and declaratory relief, on the other. This Court undoubtedly has jurisdiction to

issue the declaratory relief against the President sought by Plaintiffs. And while this Court has jurisdiction to issue the injunctive relief sought, Plaintiffs do not object to omitting the President from injunctive relief—so long as declaratory relief runs against the President, and his officers remain enjoined from implementing his unconstitutional policies.

BACKGROUND

Transgender people have always served in the military. Until recently, however, they were forced to serve in silence. On June 30, 2016, after lengthy studies, Secretary of Defense Ashton Carter issued a formal directive setting forth the policy that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness" and that "transgender individuals should be allowed to serve in the military." Dkt. 144 (hereinafter "Mabus Decl.") at 2; *see generally* Dkt. 129 at at 2–5. For more than a year after June 2016, numerous service members disclosed their transgender status to the military in reliance on this promise. Mabus Decl. ¶ 37.

On July 26, 2017, President Trump unilaterally and abruptly reversed that policy. In a series of Tweets, the President announced that he would "not accept or allow" transgender people to "serve in any capacity in the U.S. Military." Dkt. 103 (hereinafter "PI Order") at 3. Thereafter, he issued a Presidential Memorandum implementing this discriminatory policy (together with the tweets, "the Ban"). Dkt. 34-7 (hereinafter "Presidential Memorandum").

Plaintiffs—nine transgender individuals and three organizations—brought suit, claiming that the Ban violates their equal protection, due process, and First Amendment rights. *See* Dkt. 30 at ¶¶ 214–238. They sought injunctive and declaratory relief against President Trump, Secretary of Defense James Mattis and the United States Department of Defense. *Id.* ¶¶ 19–22.

On December 11, 2017, this Court granted Plaintiffs' motion for a preliminary injunction against all Defendants, finding that the Plaintiffs were likely to succeed on the merits of their constitutional challenge and that the Ban "denies them opportunity to serve in the military on the same terms as other service members, deprives them of dignity, and subjects them to stigmatization." PI Order at 8, 23.

Plaintiffs have now moved for summary judgment. *See* Dkt. 129. The government has opposed summary judgment, and has cross-moved for summary judgment for all claims that name President Trump as a defendant, arguing that "the Court has no jurisdiction to impose injunctive or declaratory relief" against the President. Dkt. 194 (hereinafter "Motion") at 22.

ARGUMENT

The government's assertion that "the Court cannot issue a declaratory judgment or an order enjoining the President for his official, discretionary action," Mot. at 1, is contrary to fundamental constitutional principles and settled law. "When the President takes official action, [a] Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). In accordance with that basic principle and the longstanding practice of federal courts, this Court has jurisdiction to adjudicate claims and issue relief against the President.

I. DECLARATORY RELIEF AGAINST THE PRESIDENT IS PROPER.

This Court clearly has jurisdiction to issue declaratory relief against the President. Contrary to the government's suggestions, the Supreme Court has *never* held that the President is immune from an action seeking declaratory relief. Quite the opposite, the Supreme Court has *affirmed* relief in a suit that named the President as a defendant and explicitly sought declaratory relief against him. *See Clinton v. City of New York*, 524 U.S. 417, 426 n.9 (1998) (noting that plaintiffs sought a "declaratory judgment that the Line Item Veto Act is unconstitutional"). *Clinton* is particularly instructive; the Court explicitly noted that the suit sought declaratory relief, yet it never even hinted that such a suit would be jurisdictionally improper—despite the fact that the Court thoroughly analyzed and satisfied itself of its jurisdiction to hear the case. *See id.* at 426–436.

Clinton's affirmance of declaratory relief against the President is comfortably in accord with the longstanding tradition of Article III courts entertaining suits for declaratory relief against the President, with no suggestion of the Presidential immunity that the government now claims. *See, e.g.*, *Romer v. Carlucci*, 847 F.2d 445, 449, 464 (8th Cir. 1998) (en banc)

(permitting claims for "declaratory relief" against President Clinton regarding missile siting decisions); *City of New York v. United States Dep't of Commerce*, 739 F.Supp. 761, 764–68 (E.D.N.Y. 1990) (granting declaratory judgment against President Bush that statistical adjustment of census was unconstitutional); *Schuchardt v. President of the United States*, 839 F.3d 336, 353–54 (3d Cir. 2016) (reversing dismissal of suit for declaratory relief against President Obama); *see also Murphy v. Ford*, 390 F.Supp. 1372 (W.D. Mich. 1975) (seeking declaration that President Ford's pardon of President Nixon was unconstitutional); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978) (seeking declaration that President Carter lacked authority to return Panama Canal Zone to Panama); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), *vacated* 444 U.S. 996 (seeking declaration that President Carter could not terminate defense treaty with Nationalist China); *McClure v. Carter*, 513 F.Supp. 265 (D. Idaho 1981) (seeking declaration that President Carter's appointment of Judge Mikva to D.C. Circuit was unconstitutional); *Lowry v. Reagan*, 676 F.Supp. 333 (D.D.C. 1987) (seeking declaration that President Reagan violated the War Powers Resolution); *Haw. v. Trump*, 859 F.3d 741 (9th Cir. 2017) (vacating injunctive relief against the President, but not dismissing him as defendant in suit for declaratory relief), *vacated as moot*, 874 F.3d 1112 (9th Cir 2017); *Int'l Refugee Assistance Project v. Trump ("IRAP I")*, 857 F.3d 554, 578–79 (4th Cir. 2017) (en banc) (same).

Indeed, in *National Treasury Employees' Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974)—a "leading case" on Article III review of Presidential Action, *see* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1679 (1997)—the D.C. Circuit found relief against the President to be "a most appropriate instance for the use of declaratory decree" under the Federal Declaratory Judgment Act.

The government's position that the President is completely immune from suits seeking declaratory relief is as unsupported as it is brazen. The government states that "[c]onsistent with *Mississippi* and *Franklin*, courts . . . have rejected demands to enjoin the President in the performance of his official duties, regardless of the claim." Mot. at 23 & n.8. But that argument speaks *only* to the availability of *injunctive* relief against the President—and says nothing about

the propriety of *declaratory* relief. *Mississippi v. Johnson*, 71 U.S. 475 (1867), does not discuss declaratory relief at all. *See* Laura Ray, From Prerogative to Accountability: The Amenability of the President to Suit, 80 KY. L. J. 739, 760 (1992) ("[N]othing in the holding of the case precluded courts from . . . entertaining suits against the President for non-injunctive relief."). And while Justice Scalia's *Franklin* concurrence reflects his opinion that declaratory relief against the President is improper, no other Justice joined that opinion. *See Franklin v. Mass.*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring).[1]

The government's reliance on *Hawaii v. Trump* exposes its dearth of supporting authority. In that case, plaintiffs filed suit against the President and lower executive branch officials seeking declaratory and injunctive relief from the President's "Travel Ban" Executive Order. The district court issued a nationwide preliminary injunction. *See* 859 F.3d 741, 788 (9th Cir. 2017). On appeal, the government "argue[d] that the district court erred by issuing an injunction that runs against the President himself." *Id.* at 788. The Ninth Circuit agreed, but *only to a limited extent*: While the Court "vacate[d] the district court's injunction to the extent the order runs against the President," *id.* at 788, it did not in any way limit (or even suggest a limit) on the plaintiffs' ability to obtain declaratory relief against the President, nor did it dismiss the President as a Defendant, *see id.*;[2] *accord IRAP I*, 857 F.3d at 578–79.

Not only does this Court have jurisdiction to issue the declaratory relief Plaintiffs seek, this case presents a "most appropriate use" for issuing that relief against the President. *NTEU*, 492 F.2d at 616. This is the President's Ban. The President announced the Ban via Twitter. *See* PI Order at 3 (republishing Tweets from "@realDonaldTrump"). The President formalized the Ban via a Presidential Memorandum sent under his signature, in which he announced that it was "*my* judgment" that transgender individuals could not serve. *See* Presidential Memorandum at 1

[1] While the D.C. Circuit observed in *Newdow v. Roberts*, 603 F.3d 1002 (2010) that "courts . . . have never submitted the President to declaratory relief," that statement: (i) is dicta, as the President was not even a defendant in that case, *see id.* at 1015 n.2, and (ii) is flatly mistaken in light of *Clinton*, *NTEU*, and the litany of cases that have done precisely that. *See, e.g.*, *NTEU*, 492 F.2d at 609 ("[N]o immunity established under any case known to this Court bars every suit against the President for injunctive, declaratory, or mandamus relief.").

[2] The Ninth Circuit then explicitly "affirmed to the extent that [the injunction] runs against" the remaining executive branch officials. 859 F.3d at 788.

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Seattle, Washington 98121
(206) 274-2800

(emphasis added); *see also id.* ("[B]y authority vested in *me* as President . . . *I* am directing . . . .") (emphasis added); *id.* at 3 (directing that accession ban will remain "until such time as the Secretary of Defense provides a recommendation . . . to the contrary that *I* find convincing") (emphasis added); *accord* Dkt. 69-1 (hereinafter "Interim Guidance") at 1 (stating that Department of Defense will "carry out the *President's* Policy and directives") (emphasis added). This Ban is not the act of a lower-level executive official or military commander. Indeed, the record shows that the military was caught entirely unaware by the President's unilateral action. *See* Everett Decl. Ex. 1, Email from General Joseph F. Dunford (USMC), Chairman, Joint Chiefs of Staff to Joint Chiefs of Staff Admiral John M. Richardson (USN), General Robert B. Neller (USMC), General David L Goldfein (USAF), General Mark A Milley (USARMY), and General Joseph L Lengyel (USAF) (July 27, 2017) ("Chiefs, I know yesterday's announcement [the Tweets] was unexpected . . . ."). As the Fourth Circuit observed in the Travel Ban litigation, "President Trump alone has the authority to issue the Proclamation; he is responsible for its substance and purpose." *Int'l Refugee Assistance Project v. Trump ("IRAP II")*, 883 F.3d 233, n.16 (4th Cir. 2018). So too here.

The very premise of the handful of judicial rulings that limit relief against the President is that limited relief may be appropriate where full relief can be obtained through rulings directed at subordinate officers. *See Franklin*, 505 U.S. at 803; *Haw.*, 859 F.3d at 741 (limiting injunctive relief to subordinate officers when doing so would accord full relief to plaintiffs). That is *not* the case here, at least for declaratory relief. As this Court has recognized, the President, through his Ban, publicly denigrated the sacrifices Plaintiffs have made for their country and consigned Plaintiffs to a second-class status in which they are presumed unfit to do what they have already been doing. *See* PI Order at 15 (finding that Plaintiffs suffer the "stigma of having been labeled by the Ban as presumptively unworthy of continued service"). Given the particular facts of this case, a declaration applicable to inferior officers would not suffice to remedy the stigmatic injuries inflicted by *the President himself*.

In this country, no person—the President included—is above the law. This Court has the power to issue declaratory relief against the President, and the unique circumstances of this case necessitate such a declaration.

II. PLAINTIFFS DO NOT OBJECT TO OMITTING THE PRESIDENT FROM THE INJUNCTIVE RELIEF SOUGHT.

While Plaintiffs believe this Court also has the authority to issue injunctive relief against the President, they do not object to omitting the President from the injunctive relief sought, provided the Court issues declaratory relief against the President and maintains injunctive relief against lower executive branch officials, as those tandem actions will provide them with the full relief they seek. But the authorities the government cites simply do not support the absolute immunity from injunctive relief that the President claims.

The government principally relies on *Mississippi v. Johnson*, 701 U.S. 475, in claiming that this Court entirely lacks jurisdiction to enjoin any and all official Presidential actions. But *Mississippi* stands only for the limited proposition that a Court generally cannot enjoin the President from executing the laws of Congress—nothing more.

In *Mississippi*, a state brought suit asking the Supreme Court to enjoin President Johnson from "executing, or in any manner carrying out," the Reconstruction Acts, 71 U.S. at 498—one of which Congress had passed "notwithstanding the President's veto of it as unconstitutional," *id.* The Court found it lacked jurisdiction, grounding its holding in the Constitutional crisis that could result were it to grant the injunction. *See id.* at 500–501. The case is readily distinguishable.

Here, Plaintiffs do not seek to enjoin President Trump from "carry[ing] into effect an act of Congress" *id.* at 498; rather, they seek to enjoin the President's *own* unconstitutional policy. That alone takes this case outside of *Mississippi*'s extremely limited holding.[3] Moreover, that

[3] Notably, the *Mississippi* court *explicitly* limited its holding to the to the facts of that case, notwithstanding entreaties by both sides to issue broader exposition on the relationship between the courts and the President. *See id.* at 498 ("We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument . . . . The single point which requires consideration is this: can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?").

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2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

distinction also takes it entirely outside the logic undergirding *Mississippi*. There, the Court was concerned that if President Johnson obeyed any injunction it issued to refrain from executing the laws of Congress, *contra* U.S. Const. Art. II § 3 ("[H]e shall take care that the laws be faithfully executed"), Congress would have a valid case for impeachment. *See* 71 U.S. at 500–501. Were the Court to issue the injunction, the President would have been in an impossible—and rather unfair[4]—dilemma: He could disobey a court order and ignore the injunction; or he could obey and face impeachment.[5] *See id.* The President's predicament, would, in turn, put the Court in an impossible situation: Should it just issue orders that were ignored? Or, were they not ignored and the President were impeached for obeying the Court's order, should it enjoin the Senate from trying the impeachment? *See id.* That potential Constitutional crisis—fewer than two years removed from the Civil War—was too much for the Court, which held that "[t]he impropriety of [an injunction] [was] clearly seen upon the consideration of its possible consequences." *Id.* at 500.

Not so, here. Because the injunction sought against the President seeks to enjoin only the *President's* unconstitutional policy—as opposed to enjoining the President from executing Congress's laws—there would be no showdown between Congress and the President. The President faces no threat of impeachment for complying with a Court order. The parade of constitutional horribles the *Mississippi* court found so troubling are entirely absent here.[6]

In short, *Mississippi* does not bar *all* injunctions against the President, as the government would have it. Rather, the government reads *Mississippi* in contradiction to 150 years of

[4] President Johnson had himself vetoed one of the Reconstruction Acts as unconstitutional. *See* 71 U.S. at 475.
[5] This was a very real concern. *See* Christopher May: Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative, 21 HASTINGS CONST. L. Q. 865, 910 n.188 (1994) ("The House of Representatives, which voted to impeach Johnson on February 24, 1868, had been searching for grounds to impeach him since late 1866. Three earlier impeachment drives failed in the House for want of 'charges that contained legal substance.'").
[6] Indeed, under the legal fictions adopted by the Supreme Court (in a different but related context), an injunction that restrains the President *himself* acting unconstitutionally would not even place any imposition on the President's powers: An injunction against unconstitutional action "simply prohibit[s] [the defendant] from doing any act which he had no legal right to do," and "[a]n injunction to prevent him from doing that which he had no legal right to do is not an interference with the discretion of an officer." *Ex Parte Young*, 209 U.S. 123, 159 (1908); *see also Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) ("[Plaintiff] alleges that the President violated a duty to comply with removal restrictions contained in the . . . statute . . . . This duty, if it exists, is ministerial and not discretionary, for the President is bound to abide by the requirements of duly enacted and otherwise constitutional statutes.").

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2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

subsequent legal history. The Supreme Court has regularly upheld injunctions against the President. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974); *Boumediene v. Bush*, 553 U.S. 723 (2008). Notably, in *Franklin v. Massachusetts*, the Court's most recent pronouncement on *Mississippi,* the Court explicitly declined to adopt the position the government now takes, holding that it "need not decide whether injunctive relief against the President [is] appropriate," because it could fashion full relief for the plaintiffs without deciding the issue. *See* 505 U.S. 788, 803 (1992) (plurality op.).

This Court can take a path similar to that adopted by the *Franklin* Court. It can provide full relief without enjoining the President here, provided that it issues declaratory relief against the President and maintains injunctive relief against all lower executive branch officials. Plaintiffs do not oppose this approach, which avoids any potential separation-of-powers concerns that an injunction against the President might implicate.

CONCLUSION

This court should deny the government's motion. Declaratory relief against the President is proper—and necessary—here. Limiting any permanent injunctive relief to Defendants other than the President will avoid the potential separation-of-powers concerns raised by Defendants.

Respectfully submitted March 19, 2018.

NEWMAN DU WORS LLP

Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA #36759
tborelli@lambdalegal.org

Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)

OUTSERVE-SLDN, INC.
Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP
James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on March 19, 2018.

Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800