The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

NOTED FOR CONSIDERATION: June 1, 2018

ORAL ARGUMENT REQUESTED

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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, requests for production of documents, and requests for admission 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 that 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.

Discovery directed at the President—especially discovery concerning his deliberations as Commander-in-Chief—should not be permitted because it raises serious separation-of-powers concerns. The law is clear, and this Court has agreed, that in light of separation-of-powers concerns the President cannot be subject to direct injunctive relief. *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); ECF No. 233 at 30. The same separation-of-powers concerns apply to whether the President may be subject to discovery when sued in his official capacity, even for declaratory relief.

Moreover, established separation-of-powers principles also provide that before the President should be required to formally assert the presidential communications privilege, Plaintiffs must 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). 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.

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BACKGROUND

Plaintiffs have served numerous broad requests for discovery against all Defendants, including the sitting President. First, Plaintiffs served on all Defendants 15 interrogatories, many of which contained multiple discrete subparts, and 25 requests for production of documents. *See* ECF Nos. 246-1, 246-2. Plaintiffs followed with 16 requests for admission directed to each Defendant. *See* ECF No. 246-3. With respect to the President, these requests seek to probe sensitive communications and deliberations related to his 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 of "all individuals" with whom President Trump has discussed policies related to military service by transgender individuals and the dates of each discussion (Interrog. 4);
- The President's explanation of the process he used to formulate military policies regarding transgender individuals, including identification of "all sources of fact or opinion" the President "consulted, considered, or otherwise referred to" in formulating those policies and the dates on which he first consulted, considered, or referred to them (Interrog. 7);
- The identification and production of all communications between the President (or immediate Presidential advisors and their staff) and any members of Congress concerning military service by transgender individuals (Interrog. 15; Req. for Prod. 10);
- The production of "[a]ll Documents and Communications" in possession of the President related to the military's policies regarding service members who are transgender (Req. for Prod. 1);
- The production of all documents and communications "relating to, including all drafts of," the President's August 25, 2017 Memorandum (Req. for Prod. 6);

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- The production of all documents and communications related to the President's consultations with the military regarding military service by transgender individuals (Req. for Prod. 7).

The President did not provide substantive responses to Plaintiffs' requests, and 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 Nos. 246-6, 246-7, 246-10. 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 Department of Defense have substantively responded to Plaintiffs' first set of requests, *see* ECF Nos. 246-4, 246-5, 246-9, including by collecting and reviewing hundreds of thousands of pages of non-privileged records and producing to Plaintiffs (or will soon produce) over 150,000 pages, and by responding to interrogatories that call for non-privileged information, *see* ECF No. 246-5.

On April 26, 2018, Plaintiffs served additional interrogatories and document production requests on all Defendants, including the President, *see* Parker Decl., Exhs. 1–2, which similarly target the President's communications and policy deliberations, s*ee, e.g.*, *id.*, Exh. 2 at Req. for Prod. 32 (requesting production of "[a]ll Documents or Communications relating or referring to" the President's March 23, 2018 Memorandum, "including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the [Memorandum]; and (b) all drafts of the [Memorandum]."). Because responses are not yet due under the federal rules, neither the President nor the other Defendants have yet responded to these additional requests.

By letter to Defendants also dated April 26, 2018, Plaintiffs asserted that "the President is not immune from responding to properly propounded civil discovery based on separation-of-powers principles or matters of executive privilege," and demanded that the President produce a

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privilege log.[1] ECF No. 246-28; *see also* ECF No. 246-8. On May 1, 2018, the parties conferred telephonically in a good faith effort to resolve the issues of discovery directed to the President and discovery of Presidential communications and deliberations, but were unable to do so.

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." Rule 26(c)(1). This discretion includes orders forbidding the requested discovery altogether. Rule 26(c)(1)(A).

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 doing so would intrude on established separation of powers principles. Indeed, this Court has already concluded that Plaintiffs may not seek injunctive relief against the President based on the *Mississippi v. Johnson*, 71 U.S. at 501, line of cases. *See* ECF No. 233 at 30; ECF No. 194 at 22–24. An order directing the President to respond to discovery raises the same core separation-of-powers concerns as the Court identified in *Mississippi v. Johnson*. *See* 71 U.S. at 499 (reasoning that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (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"). Forcing the President to respond to discovery where he is sued in his official capacity, even where declaratory relief is at issue or

[1] A similar dispute over discovery of the President is currently pending in the related case *Doe v. Trump*. *See* ECF Nos. 89, 93, No. 17-cv-01597 (D.D.C.).

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otherwise, 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." *Id.* at 828; *see Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996) ("[S]imilar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment."). In light of these concerns, the Court should order that Plaintiffs may not seek discovery from the sitting President or any discovery of information concerning presidential communications and deliberations.

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 can be successfully bypassed," *Swan*, 100 F.3d at 978, Plaintiffs may seek non-privileged discovery that does not touch on presidential deliberations from subordinate officials like the Secretary of Defense—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, and, 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

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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) (Kollar-Kotelly, J.) (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

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> '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").[2]

Cheney thus stands for the principle that the separation of powers 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").

These considerations apply with even greater force with respect to discovery directed to the President himself. The court's 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,

[2] For these reasons, the Government respectfully submits that the Court's suggestion, in its order denying an overall stay of discovery, that privilege must be perfected as it pertains to presidential communications and deliberations, *see* ECF No. 235 at 3, is in conflict with the Supreme Court's decision in *Cheney*.

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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. 4; 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 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.

The same holds true with regard to the creation of a privilege log. Plaintiffs demand that the President produce a privilege log of records withheld from discovery, but *Cheney* makes clear that doing so is not required at this time. *See id.* at 390; *see also United States v. McGraw-Hill Cos., Inc.*, No. 13-0779, 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014) (declining to consider party's request for a privilege log of communications with the Executive Office of the President until "[a]fter all other discovery related to the [party's] defense is completed").[3]

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 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 already, and will continue to, receive substantial amounts of non-

[3] Defendants opted to produce a privilege log of broad categories of information concerning presidential communications and deliberations in the related cases *Doe v. Trump*, No. 17-cv-01597 (D.D.C.), and *Stone v. Trump*, No. 17-cv-02459 (D. Md.). Plaintiffs have been in possession of that log for at least several weeks. *See* ECF 246-28. *Cheney* makes clear, however, that absent the exhaustion of non-privileged discovery, neither a log nor the perfection of the presidential communications privilege should be required at this stage.

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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 to force the President to invoke executive privilege or produce a privilege log. *See Cheney*, 542 U.S. at 390.

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 of documents and information concerning the President's deliberations over military policy. However, if the Court believes that discovery against the President 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 the 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 (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.

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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 (a) communications, (b) individuals with whom the President consulted, and (c) "all sources of fact or opinion" on which the President relied in formulating transgender policy—all of which implicate facts and information subject to the privilege. (Interrogs. 4, 7, and 15). 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 (as well as whom the President chose not to consult with and rely on for advice), 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

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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

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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"). 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 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.

In sum, the Court should conclude outright that discovery of the President is precluded on separation-of-powers grounds. 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 discovery at issue, and, at a minimum, should substantially narrow the broad requests at issue. Only then are Defendants required to come forward with a formal invocation of the presidential communications privilege to protect information concerning presidential deliberations and communications.

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 at this time.

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Dated: May 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing document, causing a notice of filing to be served upon all counsel of record.

Dated: May 21, 2018

/s/ Ryan B. Parker
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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

For the reasons set forth in Defendants' Motion for a Protective Order, Defendants' motion is GRANTED, and it is ORDERED that discovery directed to Defendant President Donald J. Trump, and discovery of presidential communications and deliberations, is hereby precluded.

IT IS SO ORDERED.

DATED this____day of _____, 2018

_____
The Honorable Marsha J. Pechman
United States District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing Proposed Order Granting Defendants' motion for a protective order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 28, 2018

/s/ Ryan Parker

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