

No. 18-72159

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Intervenor Plaintiff.

**REPLY IN SUPPORT OF RENEWED MOTION
FOR A STAY PENDING CONSIDERATION OF THE
GOVERNMENT'S PETITION FOR A WRIT OF MANDAMUS**

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER
TARA S. MORRISSEY
BRAD HINSHELWOOD
*Attorneys, Appellate Staff
Civil Division*

*U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530*

INTRODUCTION

Plaintiffs' argument rests on the deeply mistaken assertion that this Court is reviewing run-of-the-mill discovery orders that "impose[] no burden beyond the ordinary ones lawyers routinely undertake in discovery." Opp.2. But discovery "against the [P]resident" does not proceed as it would "against an ordinary individual," and thus "[t]his is not a routine discovery dispute." *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 381-82, 385 (2004). Rather, "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President." *Id.* at 382. Although plaintiffs disregard the Supreme Court's admonition that "all courts should be mindful of the burdens imposed on the Executive Branch," this Court cannot properly do so. *Id.* at 391.

Plaintiffs stress that the district court has given the government until October 10 to prepare a privilege log for the President and to prepare documents for production. But one of the constitutional concerns in *Cheney* was the requirement to create a privilege log, not the amount of time allocated for compliance. Unless the orders are stayed, the government will be forced to "bear the onus of critiquing [plaintiffs'] unacceptable discovery requests line by line." *Cheney*, 542 U.S. at 388. By contrast, plaintiffs would suffer no harm from a stay because they remain protected by a preliminary injunction.

It is particularly anomalous that the district court would make compliance due on the date that this Court will hear argument on both the mandamus petition and the

appeal of the preliminary injunction. In this way, the district court's order would frustrate this Court's ability to grant full relief on the petition and would compel compliance before this Court considers the preliminary-injunction appeal—which, as plaintiffs do not dispute, raises issues that are intertwined with the rationale of the district court's discovery order. Neither plaintiffs nor the district court have offered any plausible reason for denying a stay and establishing an arbitrary date by which (1) the White House must compile a privilege log that makes particularized objections of executive privilege on a document-by-document basis, and (2) the Department of Defense must certify that it has, perhaps pointlessly, prepared thousands of documents for production.

This Court should grant a stay of the district court's July 27 and August 20 orders, including the arbitrary command that the government certify that it is prepared to comply with the July 27 order by the day this Court is set to hear argument regarding that order. Given the extraordinarily time-consuming nature of the burden of complying with the district court's order by October 10, certainty as to the government's obligations is required immediately, and a swift decision on the stay motion will permit the Solicitor General to promptly seek Supreme Court review if necessary.

ARGUMENT

THIS COURT SHOULD STAY THE DISTRICT COURT'S JULY 27 AND AUGUST 20 ORDERS PENDING CONSIDERATION OF THE GOVERNMENT'S MANDAMUS PETITION

A. Plaintiffs' opposition confirms that the requested discovery is inextricably intertwined with the government's appeal of the preliminary injunction, and that this Court's decision may obviate the district court's rationale for ordering discovery and may, at a minimum, clarify the scope of the proper inquiry. Plaintiffs claim, for example, that the discovery is "essential to determining whether and to what extent the military was involved" in formulating the 2018 policy, which they contend is "a necessary predicate for . . . military deference." Opp.18. But a critical issue on appeal is whether the district court erred in concluding that judicial deference to military judgments depends on factual predicates such as the timing and thoroughness of military deliberations. *See* Pet.20-21; Mot.5-6. Similarly, this Court's decision will bear directly on plaintiffs' proposed inquiry into whether the 2018 policy "was developed independent of the President." Opp.18; *see also* Pet. 19-20; Mot.5. And although plaintiffs claim that evidence of "impermissible motives or actual animus" will be relevant "under any level of scrutiny" (Opp.18), this Court may uphold the challenged military policy based solely on its text and the extensive review process that preceded it—an argument that is also at issue in the pending appeal. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018); *see also* Pet.20-21; Mot.7-8.

Contrary to plaintiffs' assertions (Opp.18 n.4), these are threshold issues on which the discovery order was predicated, and resolution of these issues may eliminate the need for the requested discovery or, at a minimum, may substantially redefine the scope of discovery. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested discovery). In these circumstances, it makes little sense to require the government to comply with the district court's discovery orders before this Court even hears oral argument on the preliminary-injunction appeal and the mandamus petition.

B. A stay is warranted even apart from this Court's imminent consideration of the mandamus petition and the preliminary-injunction appeal. Plaintiffs' opposition devotes only one paragraph to the likelihood that the government will succeed on the merits of its petition, instead attempting to minimize the harms that the Executive Branch would suffer if forced to comply with the district court's orders by October 10. Plaintiffs' arguments regarding the purported absence of irreparable harm reflect a fundamental misunderstanding of the merits of the government's petition, ignore controlling Supreme Court precedent, and disregard the burdens that the district court's orders would impose on the Executive Branch, contrary to the public interest.

1. Plaintiffs describe the requirement to produce a “*document-by-document*” privilege log (Add.11) as merely a “routine,” preparatory step in litigation. Opp.8. Plaintiffs, however, fail to even cite the Supreme Court’s decision in *Cheney*, which makes clear that “[t]his is not a routine discovery dispute,” 542 U.S. at 385, and that mandamus relief may be warranted where, as here, a court orders the President (or Vice President) to prepare a privilege log and to “bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections,” *id.* at 388. The Court rejected the notion—embraced by the dissent and court of appeals in that case—that the government should simply produce a “privilege log” to allow the district court to examine the government’s claims of executive privilege. *Id.* at 402-03 (Ginsburg, J., dissenting); *see also In re Cheney*, 334 F.3d 1096, 1104 (D.C. Cir. 2003). Only by refusing to make reference to *Cheney* can plaintiffs assert (Opp.11) that mandamus is not warranted because the district court has not yet required the President to produce the privilege log. *Cheney* emphasized that requiring preparation of a log imposed the impermissible “onus of critiquing . . . unacceptable discovery requests line by line.” 542 U.S. at 388. This burden raises “separation-of-powers considerations [that] should inform a court of appeals’ evaluation of a mandamus petition involving the President.” *Id.* at 382.

Plaintiffs’ assertion that “the lion’s share of the work has already been done” (Opp.10) is simply inaccurate. As the President’s declarant explained, the court’s order would “require the creation of a *new* privilege log,” which “is expected to require

at least twice as much time” as the prior two logs combined, because it must “record[] the required information for approximately 9,000 individual entries instead of 66 categorical ones,” including “*specifi*” details about each communication. Add.82-83 (first emphasis added); Add.11. There is no basis for requiring the Executive Branch to undertake this “line by line” burden. *Cheney*, 542 U.S. at 388.

Plaintiffs erroneously attempt (Opp.10) to cast the privilege log as merely an obligation imposed on “government lawyers and paralegals, not Executive Branch officials charged with policymaking or other ‘constitutional duties.’” In *Cheney*, the Supreme Court properly focused on the “*subjects* of the discovery orders,” which included the Vice President and other senior executive officials, even though these officials undoubtedly would have sought assistance from government lawyers to comply with their legal obligation to “invok[e] executive privilege with sufficient specificity and . . . mak[e] particularized objections.” 542 U.S. at 381, 388 (emphasis added). The Supreme Court made clear that courts must be mindful of the unique burdens imposed when “discovery requests are directed to the Vice President and other senior Government officials,” observing that “special considerations control” when discovery requests implicate “the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications.” *Id.* at 385.

In this case, plaintiffs’ discovery requests are “directed to” the President himself, who is the “subject[] of the discovery orders.” *Cheney*, 542 U.S. at 381, 385.

Indeed, the district court expressly commanded that “*President Trump* must expressly assert the presidential communications privilege and must provide a privilege log that complies with Rule 26(b)(5).” SA.6 (emphasis added). This command directly implicates “separation-of-powers considerations” and imposes an intrusion into the Presidency and the Executive Branch that, once made, cannot later be undone. *Cheney*, 542 U.S. at 382.

2. Plaintiffs largely ignore the impact of the district court’s order on the Department of Defense, which would be required to undertake a potentially unnecessary diversion of scarce military resources to prepare thousands of documents for production by October 10. Plaintiffs offer no defense of the district court’s shifting rationales for ordering disclosure of the Department’s deliberative documents. *See* Mot.11-12. Nor do they engage with the substantial burdens the Department faces in complying with the district court’s orders. They mistakenly contend that, with regard to documents withheld on grounds of deliberative process, the burden is minimal because “custodians have already been identified, files have been searched, and responsive documents have been collected and reviewed.” Opp.10. In doing so, plaintiffs simply disregard the realities described in our motion. Mot.14-15. Within one component of the Department alone, the Office of the Secretary of Defense, there are 19,770 documents that must be prepared for production, in addition to many thousands of others that are held by other components throughout the Department. Add.101. The Department must review all

of these documents and redact information not relevant to this case, Add.101-02—a burden that is heightened by particular features of many of the documents, some of which contain sensitive information unrelated to this litigation, Add.103-04. The Department’s limited resources for document review would be severely strained, perhaps unnecessarily so, by the obligations the military services would face in responding to the district court’s order. Add.104.

C. The balance of harms and the public interest strongly militate in favor of a stay. The injuries resulting from the district court’s orders cannot be undone, and plaintiffs do not argue otherwise.

Plaintiffs, by contrast, will suffer absolutely no injury by the granting of a stay. They do not dispute (Opp.12) that they are protected by a preliminary injunction in the interim, but urge instead that they desire certainty and finality as soon as possible (Opp.12-14). But finality depends on the ultimate resolution of the merits by this Court or the Supreme Court, and plaintiffs cannot predict that the date of final resolution will be affected by a potential discovery delay of “several additional months.” Opp.12. Indeed, the State of Washington, which has intervened as a plaintiff and has an equal interest in certainty and finality, has seen no need to oppose the government’s renewed stay motion or mandamus petition, or even to request this discovery in the first place.

Plaintiffs’ assertion that the government has engaged in “serial delay and repeated failure to comply with the district court’s prior orders” (Opp.16) is quite

wrong. There is nothing dilatory about the government seeking relief from discovery obligations that flout the Supreme Court’s decision in *Cheney*. The government repeatedly argued that separation-of-powers principles protect the President from “making particularized objections” to plaintiffs’ vastly overbroad document requests, *Cheney*, 542 U.S. at 388, and properly sought a protective order to preclude discovery of the President and of information concerning presidential communications and deliberations. *See* Doc.205, at 5-6; Doc.217, at 5; Doc.268; Doc.281; *see also In re Cheney*, 334 F.3d at 1100 (noting that government moved for a protective order and “argu[ed] that discovery against the Vice President would violate the separation of powers”). And although *Cheney* protects the President from preparing any privilege log at all in these circumstances, the government provided plaintiffs with a privilege log for the President, which it later supplemented. *See* Doc.268, at 8 n.3. That privilege log covered a total of 9,000 documents grouped into 66 categories and described the documents in a manner that avoided revealing privileged information. Add.80-82, 91-97. This is not, as plaintiffs would have it, a “history of delay.” Opp.17. Rather, “[t]he Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives.” *Cheney*, 542 U.S. at 385.

Plaintiffs’ argument (Opp.14) that the public interest “favors deference to district courts’ attempts to ready cases for trial” is a generality that provides no guidance to the issues posed by orders in a particular case. What is known here, however, is that a stay will avoid a potential waste of limited government resources

and prevent unwarranted intrusions of the kind specifically condemned in *Cheney*, where the Supreme Court emphasized that “the public interest requires that a coequal branch of Government ‘afford Presidential confidentiality’” great protection and that the judiciary “give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.” 542 U.S. at 382. No public interest is served by exacting these costs before this Court even holds argument on the government’s mandamus petition.

CONCLUSION

For the foregoing reasons, this Court should immediately grant a stay of the district court’s July 27 discovery order and of its August 20 order—which commands the government to prepare to comply with the discovery order and to certify that it has done so by October 10—pending this Court’s consideration of the government’s petition for a writ of mandamus.

Respectfully submitted,

JOSEPH H. HUNT

Assistant Attorney General

HASHIM M. MOOPAN

Deputy Assistant Attorney General

BRINTON LUCAS

Counsel to the Assistant Attorney General

MARK R. FREEMAN

MARK B. STERN

MARLEIGH D. DOVER

s/ Tara S. Morrissey

TARA S. MORRISSEY

BRAD HINSHELWOOD

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice, Room 7261

950 Pennsylvania Ave., NW

Washington, DC 20530

202-353-9018

SEPTEMBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it totals 2,323 words. I further certify that this reply complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Tara S. Morrissey

TARA S. MORRISSEY

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. All of the real parties in interest are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey

TARA S. MORRISSEY