ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5142 (consolidated with No. 17-5164)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY,

Petitioner-Appellant,

v.

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREES ASSOCIATION,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia (Judge Emmet G. Sullivan)

APPELLEES' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE CONSOLIDATED APPEALS, FOR SUMMARY AFFIRMANCE IN ANY APPEAL, OR FOR DENIAL OF ANY MANDAMUS PETITION INSOFAR AS THE COURT CONSTRUES ANY APPEAL AS A MANDAMUS PETITION

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I. THE COURT SHOULD DISMISS TREASURY'S APPEALS FOR LACK OF JURISDICTION

A. Consistent with longstanding and well-defined principles, Treasury's consolidated appeals must be dismissed for lack of jurisdiction. Over a century ago, the Supreme Court "held that an order compelling nonparties to produce subpoenaed documents is a non-appealable interlocutory order," *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 471 (6th Cir. 2006) (citing *Alexander v. United States*, 201 U.S. 117, 121 (1906)), and this principle has been repeatedly reaffirmed since then. *See*, *e.g.*, *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 204 n.4 (1999) ("[W]e have repeatedly held that a [non-party] subject to a discovery order, but not held in contempt, generally may not appeal the order.") (collecting cases).

Treasury questions the rationale for these decisions, claiming that the "language" of 28 U.S.C. § 1291, which authorizes final-order appellate jurisdiction, must, on its face, allow for an appeal by a non-party of an order requiring discovery in an ancillary proceeding once that proceeding ends. Resp. 9. But Justice Frankfurter explained many years ago that

> finality . . . is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. As an instrument of such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be to halt in the orderly progress of a cause

> and consider incidentally a question which has happened to cross the path of such litigation.

Cobbledick v. United States, 309 U.S. 323, 326 (1940) (internal quotation marks and citation omitted).

Thus, as a sort of practical protection against "clog[ging] the courts of appeals with matters more properly managed by trial courts familiar with the parties and their controversy," *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994), district court rulings ordering discovery from third parties have not been deemed to be encompassed within the final orders envisioned by Congress in § 1291. *E.g.*, *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 180 (2d Cir. 1979). "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice," *Cobbledick*, 309 U.S. at 325, such third-party discovery orders are among the category of rulings that may enjoy only a single level of adjudication in a typical case. Things change, however, when there is a contempt ruling:

> "Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case . . . . This power to punish being exercised the matter becomes personal to the witness and a judgment as to him."

Cobbledick , 309 U.S. at 327 (quoting *Alexander*, 201 U.S. at 121-22).[1]

[1] *Cobbledick*, harkening to *Alexander,* rejected the exact argument Treasury makes here – namely, that a district court order "conclud[ing] the controversy" (Resp. 2)

Treasury cites not a single case casting doubt on this line of authorities. It points only to *Linder v. Department of Defense*, 133 F.3d 17 (D.C. Cir. 1998), which involved an ancillary discovery order *denying* discovery, and an appeal brought by the *party* (the plaintiff) who had requested it. *Id*. at 19. For better or worse, in such circumstances, a different set of rules governs, allowing for appeals, seemingly because an order *denying* discovery cannot prompt an appeal-triggering contempt proceeding. Conversely, a non-party – including in out-of-circuit ancillary proceedings – objecting to a discovery order requiring production may "resist [the] order, be cited for contempt, and then challenge the propriety of the discovery order in the course of appealing the contempt citation." *Chevron Corp. v. Page (In re Naranjo)*, 768 F.3d 332, 343 (4th Cir. 2014) (internal quotation marks omitted and citation); *e.g.*, *Alexander*, 201 U.S. at 119-121.

Finally, the District Court's order here is, in addition, not final because the District Court has instructed the parties to negotiate the terms of a protective order, which the court will then review. Facing a similar scenario, in which "negotiations regarding the parameters of [a] protective order were not completed," the Fourth Circuit determined that "[a] merits review of th[e] discovery issue" was

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between the parties in the ancillary proceeding must, just as a matter of logic, be "final" under § 1291. *See Cobbledick*, 309 U.S. at 327 ("'In a certain sense finality can be asserted of the orders under review, . . . but from such a ruling it will not be contended there is an appeal.'") (quoting *Alexander*, 201 U.S. at 121).

impermissible because it was "uncertain what documents will be turned over and what protection those documents will be afforded under the confidentiality order." *MDK*, 27 F.3d at 122 n.4.

B. The collateral-order doctrine cannot here sustain jurisdiction. For an order to be appealable, it must be "effectively unreviewable on appeal from a final judgment." *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1996). Again, a third party "can gain the right of appeal from the discovery order by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to [it]." *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 257 (1st Cir. 1989) (citing *Alexander*, 201 U.S. 117); *see Kessler*, 100 F.3d at 1016-17 (requiring same from government officials). Treasury's attempt to distinguish *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), on its facts is unavailing, as it does nothing to undermine the principle for which the retirees cited it. Requiring non-parties to incur a contempt citation and appeal from that final judgment is indeed what the Supreme Court has "had in mind" since its 1906 decision in *Alexander*. Resp. 12.

And contrary to Treasury's assertion (*see id.* at 11 n.2), the retirees *do* also contest that the other requirements for collateral-order review are satisfied, for the issues at stake are not "'too important to be denied [such] review.'" *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citation omitted). As the retirees emphasized

in their dispositive motion, *see* Mot. 18-19, this matter is *not* one of paramount importance to Treasury, as it involves commercial matters discussed years ago with members of a prior Presidential administration.

II. ASSUMING THERE IS APPELLATE JURISDICTION, THE DISTRICT COURT DID NOT ERR AND THEREFORE SUMMARY AFFIRMANCE IS WARRANTED

A. Treasury's continued assertion that Judge Sullivan relied on "the wrong legal standard," Resp. 14, is meritless. The District Court analyzed the retirees' need for these documents under the standards this Court laid out in *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), and *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), and found the retirees' showing sufficient under both. *See* TA26-27. Indeed, Treasury's contention that the District Court employed the wrong legal standard is undercut by its own assertion that the "even more stringent standard" supposedly applicable here, Resp. 16, required a demonstration of the documents being "likely to contain important evidence that bears directly on [the retirees'] central claim against the PBGC." Resp. 17. Tellingly, Treasury fails to articulate how its proposed "important evidence" standard differs in any meaningful way from the District Court's analysis.

Nor is there any reason for the Court to apply a more stringent needs analysis here than it employed in *Dellums*, and, in arguing otherwise, Treasury seeks an expansion of the presidential communications privilege, in contravention

of this Court's caution against "the dangers of expanding it too far." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1115 (2004); *see also In re Sealed Case*, 121 F.3d at 752. Here, the privilege was invoked by a former White House Counsel on behalf of the "Office of the President," TA51, unlike in *Dellums*, where the privilege was invoked personally by former President Nixon. Assuming, for argument's sake, that this is adequate to invoke the privilege in the first instance, such a general invocation is not sufficiently weighty as to require a civil litigant to make a demonstration of need beyond that demonstrated by the plaintiffs in *Dellums*. *See, e.g., In re Sealed Case*, 121 F.3d at 744 n.16 (noting that in previous cases, the President has personally asserted the privilege, and that in the case before it, an affidavit indicated that President Clinton had directed the former White House Counsel to invoke the privilege); *accord Judicial Watch*, 365 F.3d at 1114. Plus, the Executive's purported interest in maintaining the confidentiality of these documents is further diminished given the commercial nature of the documents, as opposed to documents touching on sensitive national security matters or nondelegable presidential powers. *See* Mot. 19.

Moreover, because of the special nature of the privilege, in no event may it be asserted by "staff outside the White House in executive branch agencies." *Judicial Watch*, 365 F.3d at 1116. Yet, here, the Treasury asserts that the

"government" continues "to assert the privilege on behalf of the Office of the President." *See* C.A.D.C. Doc. #1686682 at 1 (Aug. 1, 2017).

B. With there being no real challenge to the legal standard employed by the District Court, the issue on the merits is whether the District Court's relevance determination amounted to an abuse of discretion. *See Mohawk, Indus., Inc., v. Carpenter*, 558 U.S. 100, 110 (2009). Treasury's response to the dispositive motion provides no basis for overturning the District Court's determination.

1. Treasury's attempt to dismiss Judge Sullivan's analysis as "perfunctory" Resp. 16, cannot withstand scrutiny. Judge Sullivan ordered production based upon "Treasury's motions, the responses and replies thereto, the relevant case law, the representations of the parties in open court, and the entire record." TA13. That record was compiled over five years; consisted of twenty-three substantive briefs, scores of exhibits, two hearings, three *in camera* reviews, supplemental *ex parte* privilege justifications by Treasury; and required Judge Sullivan to issue three memorandum opinions. "[A]ppellate deference is the norm" for decisions like these, *Mohawk*, 558 U.S. at 110, especially where, like here, the "district court's decision rests on detailed factual findings that developed over a five-year period." RA15 (Sixth Circuit reasoning similarly in denying PBGC's request for mandamus).

2. The District Court's incorporation of the retirees' analysis in its decision-making was entirely appropriate. Treasury's critique of this incorporation, *see* Resp. 16, ignores the context of the proceedings as a whole, and the disparity between the parties' respective showings. By the time the April 2017 order was issued, the District Court had "expended considerable judicial resources in evaluating Treasury's various claims of privilege over th[e] documents," TA14, the vast majority of which were found to have been "miserably" deficient, even after Treasury was allowed multiple opportunities to cure. TA47. Further, the District Court had before it extensive briefing from the retirees as to the relevance of these documents in general, D.D.C. ECF No. 30 at 12-16, and why the retirees' need for the documents overcame any assertion of the presidential communications privilege, *id*. at 25-32; in contrast, Treasury offered three paragraphs in opposition, D.D.C. ECF No. 35 at 23-24, and even those paragraphs failed to "substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rel[ied.]" TA27. Given the District Court's previous determination that Treasury had "essentially wasted [the District Court's] precious and limited time," TA47, its decision not to expend still more judicial resources rearticulating what the retirees had already demonstrated was entirely understandable and proper.[2]

[2] Treasury's criticism (Resp. 16) of the retirees' reliance on various pages of the

3. The retirees then offered an additional summary of the points in the record supporting the District Court's decision in their opposition to Treasury's motion for reconsideration (D.D.C. ECF No. 51). In that submission, the retirees showed particularly why each of the four categories of withheld documents was likely to contain information of substantial relevance to the central issue in the retirees' case against the PBGC, namely whether the PBGC could have demonstrated in July 2009 that termination of the retirees' pension plan was necessary under the criteria in 29 U.S.C. § 1342(c). *Id.* at 16-28. Treasury has *never* offered a refutation of this relevance analysis, either in the District Court below, or here in this Court.

4. Last, Treasury's assertion that the District Court erred in determining the requested documents were unavailable through other means, *see* Resp. 17, is easily disposed of: Treasury "d[id] not challenge" below the retirees' assertion that the material was unavailable through other means. *See* TA27. To the extent Treasury believed that its supplemental production, in January 2017, changed the calculus, *see* Resp. 17, it was incumbent on Treasury to at least flag the issue for the retirees and the District Court in subsequent proceedings, which Treasury did not do. *See*

April 2017 opinion is unfounded. There, the District Court, in first describing in detail why the presidential communications privilege applied to the categories of documents withheld by Treasury, *also* of necessity described their context and substantial relevance to the case.

D.D.C. ECF No. 50 at 6-11 (in moving for reconsideration, failing anywhere to argue that the retirees had not made a sufficient showing of the material in question being unavailable through other means). Of course, even if Treasury had not waived the argument, it would still have had to grapple with the District Court's previous fact-finding that the retirees' subpoenas sought information from Treasury that was distinct from that available from other sources, TA74-75, as well as the retirees' demonstration in opposing reconsideration that each discrete group of the subpoenaed materials likely contains important evidence that is not available with due diligence elsewhere. *See* D.D.C. ECF No. 51.

III. THERE IS NO BASIS FOR MANDAMUS

This case is not a candidate for mandamus relief, because here there are "other adequate means to attain the relief [Treasury] desires." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (internal quotation marks and citation omitted). That is, Treasury may refuse to comply with the order and appeal a contempt sanction. Indeed, requiring contempt procedures, as opposed to mandamus review short of contempt, assists efficient judicial administration, since it ensures that only the most substantial causes reach the appellate level (as, in only those, would a litigant risk contempt). *See MDK, Inc. v. Mike's Train House*, 27 F.3d 116, 122 (4th Cir. 1994). And in *In re Kessler*, 100 F.3d 1015 (D.C. Cir. 1996), this Court found nothing unseemly about requiring Executive Branch

officials – like Treasury here – to be held in contempt to secure appeals (so as to nullify a need for mandamus), given the "constitutional distinction between the President himself and subordinate officers in the executive branch." *Id*. at 1017.

Treasury's citations to two cases involving Vice President Cheney do not support its position on mandamus. First, in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 381 (2004), the Court recognized the mandamus analysis would be different if the Vice President himself had not been both a defendant and the subject of the discovery orders. Second, *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008), which blocked a deposition of the Vice President's chief of staff, was based not on any privilege, but on the principle that "[t]he duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere."

Dated: August 9, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS

The undersigned hereby certifies that the foregoing motion complies with the length limits of Fed. R. App. P. 27(d)(2) and contains 2,596 words as calculated by Microsoft Word 2010, the word processing system used to prepare this document.

August 9, 2017 /s/ Anthony F. Shelley

CERTIFICATE OF SERVICE

I hereby certify that, on August 9, 2017, I electronically filed the foregoing **APPELLEES' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE CONSOLIDATED APPEALS, FOR SUMMARY AFFIRMANCE IN ANY APPEAL, OR FOR DENIAL OF ANY MANDAMUS PETITION INSOFAR AS THE COURT CONSTRUES ANY APPEAL AS A MANDAMUS PETITION** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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