[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE 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; Delta Salaried Retirees Association,** **Respondents-Appellees.**	**No. 17-5142**

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

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GLOSSARY

Pension Benefit Guaranty Corporation	PBGC

INTRODUCTION AND SUMMARY

This action concerns enforcement of a subpoena against the Department of the Treasury (Treasury), which was dismissed from respondents' underlying litigation in a different court, in a difference circuit, against a different defendant—the Pension Benefit Guaranty Corporation (PBGC). Treasury has produced over 70,000 pages of documents to respondents. At issue now are 63 documents that the district court correctly held are protected by the presidential communications privilege.

Respondents' opposition leaves no doubt that, absent a stay, the harm to the government resulting from release of the documents will be irreparable. Respondents declare that the Sixth Circuit might consider limiting the admissibility of the documents in the underlying litigation. But Treasury is not a party in that case and an order excluding the documents from use in that case would have no bearing on the harm to Treasury and the public at issue here (which will occur the moment these privileged and confidential documents are disclosed to respondents).

Respondents' opposition likewise confirms that no basis exists for the district court's blanket conclusion that respondents' interest in obtaining the 63 documents outweighs the interests protected by the privilege. Indeed, neither respondents nor the district court explain how *any* of the documents provide information critical to respondents' claim in the underlying litigation, much less information uniquely obtainable from these documents.

ARGUMENT

I. The Balance of Harms Strongly Favors a Stay.

Relying on *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 106 (2009), respondents mistakenly declare that an erroneous disclosure of privileged documents is "harmless" because the harm of disclosure can be remedied by the exclusion of the evidence from the Michigan proceedings. Resp. 18, 20. But Treasury is not a party to the underlying litigation, and has no stake in its outcome. Even assuming that the Sixth Circuit were to have occasion to consider the privileged status of the documents, an evidentiary ruling in the PBGC's favor would not remedy the harm posed by disclosure itself. (Indeed, in a footnote, respondents recognize that there are instances where "there might be harm to a party in disclosing privileged material that is not sufficiently protected by *Mohawk*'s mechanisms." Resp. 21 n.10.)

In attempting to discount the harm to the government, respondents invite this Court to examine whether, in this particular case, the President and his advisors will be chilled by a court ruling requiring disclosure. Resp. 19. But there is no dispute that the documents at issue here are protected by the presidential communications privilege. And concern about the chilling effects of disclosing privileged presidential communications does not turn on the time elapsed since the documents were created, the subject matter of the documents, or the presence of a new administration. Rather, the point is that disclosure of confidential presidential decisionmaking documents to private parties during discovery, or publicly when used as evidence at trial, would

inhibit the candor of the deliberative communications of the now-sitting or future Presidents and their advisors. In short, it is enough that the President and his advisors know that a court may, in the future, require disclosure of their internal communications and deliberations.

A potential protective order does not alter the relevant analysis. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2010); *see also In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992). Such selective disclosure runs counter to the principles underlying the presidential communications privilege, and, of course, a protective order is no guarantee against broader disclosure, even if disclosure is inadvertent. Recognizing the limited value of a protective order, the Federal Circuit recently held that the Court of Federal Claims improperly relied on a protective order to discount the government's interest in not disclosing documents covered by the deliberative process and presidential communications privileges. *See In re United States*, 678 F. App'x 981, 988-89 (Fed. Cir. 2017) (quoting *Perry*, 591 F.3d at 1163-64).

While the harm resulting from disclosure is irreparable, the requested stay would minimally harm respondents. Respondents declare that "[c]ompletion of discovery in the Michigan case is dependent on resolving the resolution of the Treasury's motion to quash." Resp. 19. But respondents are, of course, free to proceed in the Michigan case on the basis of the extensive materials they have already obtained, including more than one million pages they have received from the PBGC

and 70,000 pages of documents Treasury has disclosed. Respondents cannot use their own litigation decisions to foreclose effective appellate review in this matter. And, in any event, it is unclear how permitting appellate review would materially affect the timing of the resolution of respondents' dispute with the PBGC.

II. Treasury Has Demonstrated a Likelihood of Success on the Merits.

A. Respondents urge that the government is unlikely to succeed because this Court lacks jurisdiction over the appeal and may only review the final disclosure order under a mandamus standard, if at all. Resp. 8-10. These arguments fail at every turn.

1. Consistent with the text of 28 U.S.C. § 1291, the Supreme Court recently reiterated that a "final order" is one "by which a district court disassociates itself from a case." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) (quoting *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42 (1995)). The final decision by the district court here adjudicated the remaining disputes before that court. The underlying litigation takes place in a different circuit, and the only issue before this district court was whether and to what extent Treasury was required to disclose documents to respondents. Such orders directed at third parties in a different circuit are final, appealable orders subject to appeal under section 1291. *See Linder v. Department of Defense*, 133 F.3d 17, 22-24 (D.C. Cir. 1998).

Respondents note that several out-of-circuit decisions have suggested a distinction between orders granting and denying discovery. Resp. 8-9. But those courts failed to grapple with the plain text of section 1291, and their discussions of the

finality of orders granting discovery against a third party in a different circuit are largely dicta.[1]

2. Even assuming that the order concluding these proceedings were not a final order, it would be reviewable under the collateral order doctrine, which gives finality a "practical rather than a technical construction." *Mohawk*, 558 U.S. at 106 (quotation marks and citation omitted). The Supreme Court reserved the question of whether the doctrine would apply to the presidential communications privilege, *id.* at 113 n.4, but it is clear that orders to produce presidential communications fall within the "narrow class of decisions" that "are sufficiently important and collateral to the merits that they should . . . be treated as final," *Will v. Hallock*, 546 U.S. 345, 347 (2006). The privilege is rarely invoked, and an order to disclose documents acknowledged to be within its scope implicates several "value[s] of high order"—"honoring the separation of powers" and "preserving the efficiency of government and the initiative of its officials." *Id.* at 353; *see United States v. Nixon,* 418 U.S. 683, 708 (1974). And where, as here, the privilege is invoked by an entity that is not even a party to the underlying litigation, there is no risk of piecemeal appeals or other strategic litigation choices. *Cf.*

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[1] Respondents are mistaken in urging that the order is not final because the district court's later denial of a stay instructed the parties to negotiate a protective order. Resp. 9 n.4. "[T]he fact that the district court may retain jurisdiction over the parties to enforce its judgment does not convert the judgment to an interlocutory order." *Tyler v. City of Manhattan,* 118 F.3d 1400, 1402 n.1 (10th Cir. 1997). "An order or judgment is final for purposes of appeal if it resolves all substantive issues on the merits and effectively ends the litigation." *Ibid.*

Mohawk, 558 U.S. at 106, 108. None of the cases cited by respondents (Resp. 9) concerned the presidential communications privilege, and respondents' argument that disclosure orders are never appropriate for collateral order review sweeps far too broadly. *See Al Odah v. United States*, 559 F.3d 539, 543 (D.C. Cir. 2009) (applying collateral order review in case involving disclosure of classified documents); *cf. Perry*, 591 F.3d at 1155-56 (explaining that the strong interest in preserving First Amendment privilege renders collateral order a "very close question," but granting mandamus without deciding the issue).

3. In any event, mandamus would be appropriate to correct the district court's clear error and to protect presidential communications if the order were not otherwise subject to appellate review. *See, e.g., In re United States*, 678 F. App'x at 988-89. Contrary to respondents' contention (Resp. 11 n.5), requiring a federal official to go into contempt has never been thought an adequate remedy sufficient to defeat mandamus jurisdiction, and respondents cite no authority for that proposition. *See In re United States*, 678 F. App'x at 988-89*; see also Mohawk*, 558 U.S. at 102 (presenting mandamus and contempt as two alternative courses to appellate review); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014); *cf., e.g., In re F.D.I.C.*, 58 F.3d 1055, 1060 n.7 (5th Cir. 1995) (granting mandamus and noting inappropriateness of forcing federal officials to incur contempt to obtain review of discovery order).

B. Respondents' effort to defend the district court's decision on its own terms also fails. As our motion explained, the court's blanket order disregarded settled legal

principles. The court relied on the wrong legal standard for overcoming the privilege; provided virtually no explanation for its decision, even under the erroneous standard it applied; failed to distinguish among the 63 different documents at issue; and disregarded the voluminous materials already obtained by respondents. Any one of these errors plainly warrants vacatur, and thus warrants a stay pending this Court's review.

1. Respondents acknowledge that *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), established the standard for overcoming the presidential communications privilege when materials are sought for use in a criminal case. As our motion explained, under *In re Sealed Case*, a party must demonstrate that the privileged presidential communications it seeks are likely to contain evidence "directly relevant to issues that are expected to be central to the trial"—a standard that excludes materials that are "only tangentially relevant or would relate to side issues." *Id.* at 754. The party must also show that the information sought "is not available with due diligence elsewhere." *Id.* at 755. That is, the party must show that, notwithstanding other sources for information, the privileged documents are "still needed." *Ibid.* (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

Respondents suggest that the *In re Sealed Case* standard is essentially the same as the "diminished" standard (Resp. 16) articulated in *Dellums* v. *Powell*, 561 F.2d 242, 249

(D.C. Cir. 1977). In *Dellums*, however, it was of "cardinal significance" that the privilege was asserted only by a former President who had left office, and the government was not supporting that assertion. *Dellums*, 561 F.2d at 244-48. This case involves not a "diminished" standard applicable to assertions by former Presidents,[2] but the even more stringent standard applicable when the privilege is asserted in a civil case and does not implicate "the public interest in assuring fair trials and enforcing the law" present in criminal cases. *Sealed Case*, 121 F.3d at 753. Respondents likewise all but disregard (Resp. 16 n.8) the Supreme Court's admonition in *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 383-84 (2004), that "civil proceedings" do not present the same "urgency" and "constitutional dimensions" that might otherwise warrant overriding executive privilege in response to criminal subpoena requests.

2. The district court's analysis fails under any standard. Respondents do not dispute that the district court provided virtually no explanation for its decision and made no distinctions among the various categories of documents, let alone the individual documents furnished for *in camera* review. These errors alone—which respondents do not address—establish a likelihood of success on the merits, no matter the applicable standard.

[2] Here, in contrast with *Dellums*, the privilege was invoked in the first instance on behalf of a sitting President, and the government continues to defend its assertion in this litigation.

Respondents argue that the requested documents are relevant to their case. Resp. 13, 15. A blanket assertion of this kind, which does not distinguish among documents or even categories of documents cannot cure the district court's failure to undertake the necessary inquiry. Respondents speculate at the highest level of generality that the documents contain evidence of political pressure, but do not explain in any but the most conclusory terms why the information they seek would likely be sufficiently critical to the determinations in the underlying litigation to overcome a valid assertion of the presidential communications privilege.

Inasmuch as respondents do not establish that the requested documents are likely to contain important evidence that bears directly on their central claim against the PBGC, it is unsurprising that they cannot explain why the 63 documents are a unique source of such information. As discussed in our motion, the district court—despite having full access *in camera* to the privileged documents—uncritically credited respondents' assertion that "the materials are unavailable through any other means." Dkt. No. 45, at 11 (Add. 27). But the question is not whether the very same documents are otherwise available; the question is whether the presidential communications at issue would add new, important, relevant information not available elsewhere. *See, e.g.*, *Sealed Case*, 121 F.3d at 755, 757.

Respondents do not come to grips with this question. Instead they contend that Treasury has somehow forfeited the argument that respondents were required to

demonstrate that the requested materials remained necessary notwithstanding other available evidence.

In moving to quash, however, the government repeatedly urged that respondents had obtained more than one million pages of documents from the PBGC; had depositions from a related bankruptcy proceeding; and had access to testimony at seven congressional hearings discussing the termination of the Delphi plan. *E.g.,* Dkt. No. 15, at 11-13, 23-24. After the district court denied the motion and respondents moved to compel, the government argued that respondents failed to "make the 'focused demonstration of need'" necessary to overcome the privilege. *See* Dkt. No. 35, at 24.[3] The government was not required to repeat its discussion of the extensive materials available to respondents. Rather, it was respondents' burden to make[4]—and the district court's responsibility to find—an "adequate showing of need." *Sealed Case*, 121 F.3d at 745, 757.

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[3] In any event, the volume of materials available to respondents then grew substantially when—as a result of the district court's first ruling on respondents' motion to compel—Treasury disclosed 120 documents that had previously been withheld under the deliberative process privilege (and which respondents had claimed would reveal the same alleged wrongdoing as the 63 documents now at issue). *See* Dkt. No. 42, at 4 (Add. 39). The government cannot have forfeited an argument by failing to anticipate this development.

[4] Insofar as respondents have described the documents they have received in discovery, those statements highlight the breadth of information available to respondents. *See, e.g.*, Dkt. No. 36, at 13-14.

CONCLUSION

We respectfully request that the Court issue a stay pending appellate review.

Respectfully submitted,

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JULY 2017

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 27(d)

I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 2548 words according to the count of Microsoft Word.

/s/ Samantha L. Chaifetz
Samantha L. Chaifetz

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 25, 2017, I electronically served and filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Samantha L. Chaifetz
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