IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; and U.S. DEPARTMENT OF TRANSPORTATION, Defendants.	Civil Action No. 1:17-1485 (ESH)

DEFENDANTS' RESPONSES TO INTERROGATORIES SET FORTH IN COURT'S ORDER OF JUNE 6, 2018

Pursuant to Fed. R. Civ. P. 26 and 33 and this Court's Order of June 6, 2018, Defendants respond to Interrogatories 1-8 set forth in the Court's Order of June 6, 2018, as follows:

GENERAL OBJECTIONS

Defendants continue to assert, and hereby incorporate herein, the objections previously set forth in Defendants' Objections to Plaintiffs' Proposed Interrogatories [ECF 25]. In particular, Defendants object to any discovery directed to the President of the United States or other senior Government officials who advise him on several grounds, including that such discovery should be foreclosed based on separation of powers principles and executive privilege, and in particular, the presidential communications privilege. Defendants appreciate that the Court has significantly narrowed the scope of permitted jurisdictional discovery and therefore provide responses, set forth in the following section, notwithstanding their continued objections. Defendants have not withheld any information in response to the interrogatories based on these

general objections. However, Defendants set forth these objections in further detail below in order to ensure that they are preserved and reserve the right to reassert them should there be further proceedings in this case.

First, discovery requests directed to the President and his advisers are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. Although the Court need not reach the issue in this case, applying FACA to the President or the putative "Infrastructure Council" that Plaintiff alleges exists would be unconstitutional. It is generally settled that courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief." (citations omitted)); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *see Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992) (plurality) (finding it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials and questioning whether such relief against the President was available); *id.* at 827-28 (Scalia, J., concurring) (recognizing that the President's immunity from injunctive and declaratory relief is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"); *see also Lovitky v. Trump*, 308 F. Supp. 3d 250 (D.D.C. 2018) (recognizing that, after *Franklin*, the D.C. Circuit has questioned the validity of older cases that suggested relief against the President may be available)..

Following the same principle, the Supreme Court has recognized that applying FACA to meetings between Presidential advisors and private citizens "present[s] formidable constitutional difficulties." *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989). Similarly, in *Ass'n of American Physicians & Surgeons, Inc. v. Clinton* ("*AAPS*"), 997 F.2d 898 (D.C. Cir. 1993), the D.C. Circuit found that applying FACA and its disclosure requirements to a task force set up by the President to solicit advice from private citizens intermixed, or not, with government officials, on an issue (health care reform) of utmost concern to his Presidency would seriously burden the President's Article II right to confidential communications. *Id.* at 908-10. As the Court of Appeals explained, "Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes." *Id.* at 909 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977)); *see also Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975) ("To hold that Congress intended to subject meetings of this kind to press scrutiny and public participation with advance notice on formulated agendas, etc., as required by [FACA], would raise the most serious questions under our tripartite form of government as to the congressional power to restrict the effective discharge of the President's business."). The Court of Appeals also recognized that FACA's requirement that an advisory committee must be fairly balanced in terms of the views represented would, if applied to groups of presidential advisors, restrict the President's ability to seek advice from whom he chooses. *AAPS*, 997 F.2d at 909.

As in *AAPS*, applying FACA to any attempt by the President to solicit input and advice from private citizens and government officials on an issue that the President has identified as of utmost importance—infrastructure reform—would unconstitutionally interfere with his right to receive confidential advice in the performance of his duties. Significantly, while the President

voluntarily subjected the anticipated infrastructure advisory council described in his Executive Order 13805 to function in accord with FACA, Plaintiff seeks to establish the existence of some other "Infrastructure Council" that, according to Plaintiff, operated outside FACA's framework. Plaintiff's assertions only serve to reinforce the conclusion that FACA could not constitutionally be applied to such a council if it did exist. Indeed, this Court has recognized that the fact that "the President has voluntarily subjected 'established' advisory committees . . . to FACA" does not suggest that FACA can constitutionally be applied to all committees that advise the President. *See Wash. Legal Found. v. U.S. Dep't of Justice*, 691 F. Supp. 483, 495 (D.D.C. 1988), *aff'd sub nom. Pub. Citizen*, 491 U.S. 440. Separation of powers concerns clearly would arise if a court applied FACA to a committee that the President had intended to operate outside the framework of FACA and to provide him with confidential advice. Thus, even if Plaintiff were able to establish that its alleged Infrastructure Council existed, FACA could not constitutionally be applied to such a council. Accordingly, no discovery could conceivably assist Plaintiff in its attempt to obtain Mandamus Act relief against the President for alleged FACA violations.

The limited and discretionary nature of Mandamus Act jurisdiction reinforces this conclusion. Jurisdiction under the Mandamus Act exists only if a plaintiff can establish that the defendant "has a clear obligation to perform a duty," that "the plaintiff has a clear right to relief," and that "there is no other adequate remedy available." *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 34 (D.D.C. 2011). Courts are properly reluctant to grant Mandamus Act relief against the President. *E.g.*, *Lovitky*, 308 F. Supp. 3d 250 ("In light of controlling precedent, the Court would hesitate to issue mandamus even if [the President's] duty . . . were ministerial[.]"); *CREW v. Trump*, 302 F. Supp. 3d 127, 137 (D.D.C. 2018) (refusing to grant Mandamus Act

relief "[i]n light of the overall discretion accorded the President to manage presidential records"). Although the court in *Freedom Watch* suggested that mandamus relief may be available against the President, it deferred consideration of the constitutionality of FACA as applied to the President, pending the parties' submission of additional evidence regarding whether any advisory committee under FACA existed. *See Freedom Watch, Inc.*, 807 F. Supp. 2d at 34, 36. The Court ultimately concluded that the President was entitled to judgment because there was no advisory committee falling within the scope of FACA, and it did so while rejecting the plaintiff's request for discovery. *See Freedom Watch, Inc. v. Obama*, 930 F. Supp. 2d 98, 102 (D.D.C. 2013), *aff'd* 559 F. App'x 1, 2 (D.C. Cir. 2014).

Second, the Supreme Court has made clear that discovery itself, when directed to the President or his advisers in civil litigation, raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367 (2004). the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was "not a routine discovery dispute." *Id.* at 385. The Court emphasized that "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." *Id.* The Supreme Court "has held, on more than one occasion, that '[t]he highest 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.'" *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of the litigation against it. *Id.* (quoting *Nixon v.*

Fitzgerald, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." *Cheney*, 542 U.S. at 375–76. In vacating the D.C. Circuit's decision, the Supreme Court described the "overly broad discovery requests" as "anything but appropriate" and "unbounded in scope," asking for "everything under the sky." *Id.* at 387–88 ("The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected 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." *Id.* at 391; *cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*, 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court's view that "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." *Id.* (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

Finally, discovery aimed at uncovering the substance of advice provided to the President and the identity of advisors is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *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; *see also In re Sealed Case*, 121 F.3d at 744 ("The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations."). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege "covers final and post-decisional material as well as pre-deliberative ones." *Id.* at 745.

In the context of a criminal case, the presidential communications privilege may in rare circumstances be overcome if a party can provide a "focused demonstration of need." *Id.* at 746; *see also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Even there, the bar to overcoming the privilege is high; it is "more difficult to surmount" than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. In a civil case, where "the right to production of relevant evidence . . . does not have the same 'constitutional dimensions,'" the burden to overcome the presidential communications privilege is even greater. *Cheney*, 542 U.S. at 384 (quoting *Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at

181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added). Indeed, the privilege has never been overcome in the civil context, and FACA's general records access provision would certainly provide no basis for doing so.

Accordingly, based on these compelling separation of powers concerns, Defendants object to any discovery requests in this case directed to the President of the United States or to the President's advisors and in particular object to discovery of information subject to the presidential communications privilege. Although, as indicated above, Defendants are responding to the interrogatories, Defendants believe that additional discovery beyond the narrow interrogatories permitted by the Court would likely implicate the concerns discussed above and be objectionable on those grounds.

SPECIFIC OBJECTIONS AND RESPONSES

INTERROGATORY NO. 1: Between January and August 2017, did any meeting occur involving non-government individuals[1] and government employees or only non-government individuals, in which recommendations or advice regarding infrastructure policy was proposed by, or on behalf of, a group or solicited from a group including two or more non-government individuals for the President, Secretary Chao, the Deputy Transportation Secretary, or persons from the White House, the Office of American Innovation, or the Department of Transportation's political appointees, including acting officials, and their staff?

OBJECTION: Defendants object that this Interrogatory is unduly burdensome to the extent it would require Defendants to go beyond review of calendar records and e-mail of the individuals within the White House Office and Department of Transportation, other than the President himself, who have been identified by Defendants as likely to have had meetings with any of the non-government individuals in connection with an infrastructure council, and consultation with those individuals to the extent feasible. For example, the two individuals in the White House Office who were primarily involved in the plans to establish an infrastructure advisory committee no longer work for the government. While current White House Office employees have consulted with those individuals in order to convey accurate and fulsome responses to this and other interrogatories, their access to those individuals has been limited. In addition, although the occurrence of meetings and telephone calls is generally documented, it is not always possible to identify with precision all topics discussed in each of those communications or all individuals who were in attendance. Defendants therefore provide responses to these interrogatories to the best of their ability based on the investigation they were able to conduct. In Defendants' assessment, any further efforts to uncover additional information are unlikely to yield

[1] "Non-government individuals" is defined as Richard LeFrak, Steven Roth, Joshua Harris, and/or Bill Ford.

relevant information. In particular, if group recommendations or advice had been provided by or on behalf of a group including at least two of the four non-government individuals, there would be some written reference to such recommendations or advice, but no such reference was identified. Any further efforts would therefore be disproportionately burdensome relative to their likely benefit.

RESPONSE: Defendants have identified no meeting that meets the criteria described in this Interrogatory. In particular, Defendants have identified no meeting at which a group recommendation or group advice regarding infrastructure policy was proposed by or on behalf of, or solicited from, a group including two or more of the four individuals identified in footnote 1.

INTERROGATORY NO. 2: If so, identify the dates of those meetings and all non-government participants.

RESPONSE: Defendants have identified no meeting that meets the criteria described in Interrogatory No. 1.

INTERROGATORY NO. 3: If so, did any non-government individual have the right to vote or veto any drafted or proposed recommendation, advice, or report?

RESPONSE: Defendants have identified no meeting that meets the criteria described in Interrogatory No. 1.

INTERROGATORY NO. 4: If so, did any non-government individual in fact vote on or veto any recommendation or draft any portion of a final or preliminary committee report?

RESPONSE: Defendants have identified no meeting that meets the criteria described in Interrogatory No. 1.

INTERROGATORY NO. 5: Was any recommendation, advice, or report regarding

infrastructure policy drafted, proposed, or issued by, or on behalf of, the group as a result of these meetings?

RESPONSE: Defendants have identified no meeting that meets the criteria described in Interrogatory No. 1. In addition, Defendants have identified no group recommendation or advice regarding infrastructure policy that was proposed by or on behalf of, or solicited from, a group including two or more of the four individuals identified in footnote 1.

INTERROGATORY NO. 6: Explain what the "preliminary discussions" that Reed Cordish referred to in ¶ 5 of his declaration involved. Did they consist of meetings, conference calls, or some other form of communication? State the dates of any discussions, identify any non-government individual who participated, and summarize what was discussed during these "preliminary discussions."

OBJECTION: Defendants object that this Interrogatory is unduly burdensome to the extent it would require Defendants to go beyond review of calendar records and e-mail of the individuals within the White House Office, other than the President himself, who have been identified by Defendants as involved in the preliminary discussions described by Mr. Cordish, and consultation with those individuals to the extent feasible. For example, the two individuals in the White House Office who were primarily involved in the plans to establish an infrastructure advisory committee, including Mr. Cordish, no longer work for the government. While current White House Office employees have consulted with those individuals in order to convey accurate and fulsome responses to this and other interrogatories, their access to those individuals has been limited. In addition, although the occurrence of meetings and telephone calls is generally documented, it is not always possible to identify with precision all topics discussed in each of those communications or all individuals who were in attendance. Defendants therefore provide responses to these interrogatories to the best of their ability based on the investigation they were able to

conduct. In Defendants' assessment, any further efforts to uncover additional information are unlikely to yield relevant information. Any further efforts would therefore be disproportionately burdensome relative to their likely benefit.

RESPONSE: As indicated in the Declaration of Reed Cordish, the President was interested in establishing a new infrastructure advisory council at the time he took office in January 2017. The President identified Richard LeFrak and Steven Roth as the anticipated leaders of the council once it was formed, and Josh Harris and William E. Ford were also informed that they were potential members of the anticipated council. White House staff therefore had some preliminary discussions with these four individuals and their staff, through in-person meetings, conference calls, and e-mail communications that included one or more of these individuals or their staff, about various aspects of how an infrastructure advisory council would be formed and how it would operate once it was formed. The Department of Transportation, including Secretary Chao, was not involved in these preliminary discussions.

Discussions in the period prior to July 19, 2017, when the President issued Executive Order 13805, focused on many of the administrative issues that ultimately were addressed in the Executive Order—what sectors of infrastructure would be represented in the council's membership; what the council's mission would be, particularly given that the White House was engaged in its own efforts in the area of infrastructure policy; whether the White House would provide financial support to the council; whether the council would have a dedicated staff; what federal entity would provide administrative support to the council; what the end product of the council's work would be. While some preliminary discussion identified specific infrastructure policy issues, such discussion was for the purpose of identifying topics that would be listed as areas of focus in the description of the council's mission that would be included in the Executive

Order. It was anticipated that the council, after it was formed, would discuss and decide which specific policy issues it would focus on most closely, and that any ultimate recommendation on those issues would be set forth in detail in a report.

In addition, discussions before and after the Executive Order was issued addressed what would be entailed in complying with FACA; who should be invited to join the council and how potential members would be vetted; how the members of the council, once it was formed, would address potential conflicts of interest; and what should be included in the council's charter. Once the Department of Commerce was identified as the federal entity that would provide the council with administrative support, Department of Commerce staff met with staff of the four identified potential council members to discuss the anticipated administrative support as well as FACA's requirements.

The two individuals in the White House Office who were directly involved in these preliminary discussions—D.J. Gribbin and Reed Cordish—have returned to the private sector and are no longer government employees. In addition, while they have been consulted in preparing these responses, they do not remember with specificity the date of every meeting or telephone call where preliminary discussions occurred, or each topic discussed at each particular meeting or telephone call. Based on the information available, including consultation with Mr. Gribbin and Mr. Cordish and review of White House Office ("WHO") staff calendars and e-mail records, preliminary discussions as described above took place through meetings, conference calls, or e-mails on the following dates:

- February 22, 2017 (telephone call between D.J. Gribbin and Mr. Ford)
- March 22, 2017 (meeting of Mr. LeFrak, Mr. Roth, Mr. Ford, and Mr. Harris, with later e-mail from Mr. Harris to Mr. Gribbin, Mr. Liddell, and Mr. Cordish)
- April 19, 2017 (meeting of Mr. Harris, Mr. Ford, Mr. Gribbin, and Mr. Cordish)

- April 28, 2017 (conference call between Mr. Cordish, Mr. Reed and/or Joseph McGeehin in the WHO and one or more of the four non-government individuals identified in footnote 1 and/or their staff assistants)

- May 8, 2017 (conference call between Mr. Harris, Mr. LeFrak, Mr. Gribbin, and Mr. Cordish)

- May 12, 2017 (conference call between Mr. Cordish, Mr. Reed and/or Mr. McGeehin in the WHO and one or more of the four non-government individuals identified in footnote 1 and/or their staff assistants)

- Mid- to late-May 2017 (series of emails between Mr. LeFrak's and Mr. Harris' staff assistants and Mr. Gribbin and Mr. Cordish)

- May 2017 (communications took place involving Mr. LeFrak, Mr. Roth, Mr. Ford, Mr. Harris, members of their staff, two attorneys from the White House Counsel's Office, and Mr. Gribbin and Mr. Cordish)

- June 23, 2017 (conference call between Mr. Cordish, Mr. Reed and/or Joseph McGeehin in the WHO and one or more of the four non-government individuals identified in footnote 1 and/or their staff assistants)

- July 6, 2017 (e-mail communication between staff of the non-government individuals identified in footnote 1, Mr. Gribbin Mr. Cordish; and Quellie Moorhead (WHO))

- July 10, 2017 (conference call between Mr. Cordish, Mr. LeFrak, Mr. Harris, and Mr. Roth)

- July 20 2017 (Mr. Gribbin e-mail to Mr. LeFrak, Mr. Roth, Mr. Harris, and Mr. Ford)

- July 27, 2017 (conference call between Mr. Cordish, Mr. Reed and/or Mr. McGeehin in the WHO and one or more of the four non-government individuals identified in footnote 1 and/or their staff assistants)

INTERROGATORY NO. 7: Was any recommendation, advice, or report regarding infrastructure policy drafted, proposed, or issued by, or on behalf of, the group as a result of these "preliminary discussions"?

RESPONSE: No draft, proposal, or issuance of any group recommendation, advice, or report regarding infrastructure policy as a result of these "preliminary discussions" has been identified.

INTERROGATORY NO. 8: Did any non-government individual have the right to vote on or veto any recommendation, advice, or report associated with these "preliminary discussions"?

RESPONSE: No group recommendation, advice, or report regarding infrastructure policy was identified in response to Interrogatory No. 7. Accordingly, this Interrogatory is not applicable.

As to Objections:

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VERIFICATION

I, Charles C. Herndon, declare:

1. I am Director of White House Information Technology.
2. The White House Office cannot warrant the complete accuracy of these interrogatory responses based on personal knowledge because the two individuals in the White House Office who were primarily involved in the plans to establish an infrastructure advisory committee, D.J. Gribbin and Reed Cordish, no longer work for the government and are outside the White House's control.
3. I verify that officials from the White House Office undertook a process to ensure the accuracy of these interrogatory responses to the best of their ability by consulting with Mr. Gribbin and Mr. Cordish, as well as searching and reviewing relevant records, including calendar entries and e-mail correspondence of Mr. Gribbin and Mr. Cordish.
4. I declare under penalty of perjury that the foregoing is true and correct.

Charles C. Herndon
Director
White House Information Technology

Dated: 23 July 2018

I declare under penalty of perjury that the Responses set forth above on behalf of Defendant the U.S. Department of Transportation are true and correct to the best of my knowledge.

Joy K. Park
Senior Trial Attorney
U.S. Department of Transportation