IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re DONALD J. TRUMP, in his official capacity as President of the United States, Petitioner.	No. 2018-_____ [No. 8:17-cv-1596-PJM]

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING MANDAMUS

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK R. FREEMAN
MICHAEL S. RAAB
MEGAN BARBERO
(202) 532-4631
Attorneys
Appellate Staff, Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Rule:

Other Authorities:

INTRODUCTION AND SUMMARY OF ARGUMENT

In this extraordinary case, the State of Maryland and the District of Columbia have brought suit directly under the Constitution against the President of the United States for alleged violations of the Foreign and Domestic Emoluments Clauses—one of a parallel set of suits that are the first ever filed by any plaintiff seeking judicial enforcement of the Emoluments Clauses. The complaint rests on a host of novel and fundamentally flawed constitutional premises, and litigating the claims would entail intrusive discovery into the President's personal financial affairs and the official actions of his Administration, including through third-party subpoenas to government agencies. Despite this remarkable complaint, the district court treated this case as a run-of-the-mill commercial dispute. Not only did it deny the President's motion to dismiss, but it refused even to certify for immediate appeal under 28 U.S.C. § 1292(b) its orders denying dismissal, instead insisting the case proceed to discovery.

Pursuant to 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21, the President respectfully requests that this Court issue a writ of mandamus directing the district court either to certify for interlocutory appeal pursuant to § 1292(b) the court's March 28 and July 25, 2018 orders denying the President's motion to dismiss, or alternatively to dismiss the complaint outright. In addition, we respectfully request that this Court promptly stay district court proceedings pending disposition of this petition.

A party seeking mandamus must demonstrate that it has a "clear and indisputable" right, there are "no other adequate means" of relief, and the writ is otherwise "appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). We recognize that a district court normally has wide discretion to determine whether the criteria for certification under § 1292(b) are satisfied. But as the Supreme Court has stressed, "[d]iscretion is not whim," *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016), and even broad discretion can be exercised in a manner that constitutes a "clear abuse of discretion" that "justif[ies] the invocation of th[e] extraordinary remedy" of mandamus, *Cheney*, 542 U.S. at 380. Mandamus is a necessary safety valve in the extraordinary situation here, where a district court has insisted on retaining jurisdiction over what all reasonable jurists would recognize is a paradigmatic case for certification of interlocutory appeal under § 1292(b). In short, "this case presents the truly 'rare' situation in which it is appropriate for [a circuit] court to require certification of a controlling issue of national significance." *Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir. 1982).

In denying the President's official-capacity motion to dismiss, the district court issued a pair of orders endorsing two critical premises of plaintiffs' complaint: (1) that plaintiffs may assert an implied equitable cause of action directly under the Constitution against the President for alleged violations of the Emoluments Clauses that purportedly cause them legally cognizable injuries unconnected to the President's official actions, and (2) that plaintiffs stated a claim because the Emoluments Clauses

prohibit the President from receiving essentially anything of value besides his salary from any government, including even proceeds from services rendered by private businesses in which he has a financial interest. In refusing to certify those orders for immediate appeal under 28 U.S.C. § 1292(b), the district court asserted that there was neither a substantial basis for disagreement with its legal conclusions nor any reason to believe an immediate appeal would materially advance termination of the litigation.

The failure to dismiss the complaint was clear legal error, and the refusal to certify an interlocutory appeal was a manifest abuse of discretion. Section 1292(b) provides that a district court "shall" certify an order that it determines involves a "controlling question of law as to which there is substantial ground for difference of opinion" if an immediate appeal "may materially advance the ultimate termination of the litigation." Here, that standard is indisputably met: The issues are purely legal threshold questions that, if resolved in the President's favor, would obviate (or at least significantly narrow) intrusive discovery into the President's personal financial affairs and the official actions of his Administration. And among myriad reasons that the district court's adverse resolution of those novel constitutional questions is at the very least legally debatable, it is notable that the justiciability decision conflicts with the holding in one of the parallel suits that the Emoluments Clauses do not protect against increased market competition, and the merits decision is contrary to the Founding-era history concerning federal officers' private business ventures. Yet the district court refused to grant certification, misconstruing the § 1292(b) standard and

thereby effectively usurping *this* Court's discretion under the statute to decide whether to conduct immediate appellate review of orders endorsing unprecedented legal theories that intrude on the separation of powers.

We therefore respectfully ask that this Court exercise its supervisory authority to direct the district court to certify its orders denying the motion to dismiss for interlocutory appeal, because there is no other adequate means to obtain immediate appeal of these controlling legal questions. Alternatively, if the Court determines that the district court's certification discretion under § 1292(b) is sufficiently broad that mandamus relief is unwarranted even here, it should directly order the district court to grant the President's motion to dismiss, because there is no other adequate means to vindicate these dispositive legal arguments given the separation-of-powers problems with litigating the case to final judgment.

Likewise, this Court should promptly stay further district court proceedings pending consideration of this petition. Plaintiffs have already propounded thirty-eight subpoenas to third parties, including to five federal agencies. Many of those requests require a response by January 3, 2019, and the President respectfully requests a stay prior to that date.

STATEMENT OF FACTS

1. In June 2017, Maryland and the District of Columbia filed this suit against the President in his official capacity alleging that he is violating the Constitution by receiving "Emolument[s]" from foreign and domestic governments, U.S. Const. art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7, due to his financial interests in his businesses, including the Trump Organization and the Trump International Hotel in Washington, D.C. To the government's knowledge, this suit represents the first ever attempt by any plaintiff to judicially enforce the Emoluments Clauses against any federal officer (much less the President), other than two roughly contemporaneous suits filed against President Trump based on similar allegations.[1]

As relevant here, Plaintiffs allege that the Foreign and Domestic Emoluments Clauses are violated when government officials patronize the Hotel, and that the Domestic Emoluments Clause is violated by the federal government's lease of the Old Post Office Building for the Hotel and by tax credits associated with the Hotel. Add. 151-54, 165-66. Plaintiffs claim that, under their interpretation of the Emoluments Clauses, the President violates the Clauses whenever the Hotel (or the BLT Prime

[1] *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018); *Blumenthal v. Trump*, No. 17-1154, 2018 WL 4681001 (D.D.C. Sept. 28, 2018).

restaurant within it) receives "anything of value" from a foreign or domestic government. Add. 139, 147-48, 150-55, 180-82.[2]

In September 2017, the President filed a motion in his official capacity to dismiss plaintiffs' complaint. The President principally argued that plaintiffs lack Article III standing; have no cause of action under the Emoluments Clauses, including because they are outside the Clauses' zone of interests; may not obtain equitable relief against a sitting President; and fail to state a claim on the merits under the correct interpretation of "emolument." Dkt. No. 21, 21-1. The district court bifurcated its hearing and decision on (1) the standing and cause-of-action arguments and (2) the merits argument.

2. On March 28, 2018, the district court denied in large part the President's motion to dismiss on Article III standing and cause-of-action grounds. Add. 1-49. Although it rejected some of plaintiffs' theories of injury, the court held that plaintiffs had established a cognizable injury in fact to at least their proprietary interests in entities that compete economically with the Hotel, Add. 20-25, and that, for similar reasons, they had established an injury to assorted *parens patriae* interests in protecting

[2] Plaintiffs' amended complaint added an individual capacity claim against the President. Add. 139, 146. The President has retained private counsel for that claim and filed a separate motion to dismiss. Dkt. No. 112. As the district court has declined to rule on that motion for nearly seven months, the President in his individual capacity has treated the motion as constructively denied and filed a collateral-order appeal of the denial of his absolute-immunity defense. Dkt. No. 147; *see also* Dkt. No. 148 at 1-2.

the economic welfare of their citizens, Add. 26-29. The court separately held that plaintiffs had established a cognizable injury to quasi-sovereign interests because they had been or could feel pressured to grant special concessions to the Trump Organization and the Hotel. Add. 18-20.

The district court also held that plaintiffs have an implied equitable cause of action under the Emoluments Clauses to sue the President for their alleged injuries in these circumstances. Add. 42. The court concluded that competitive injuries are within the zone of interests protected by the Clauses, which "were and are meant to protect all Americans." Add. 41. And the court found that injunctive relief was available against the President. Add. 36.

On July 25, 2018, the district court issued a second opinion and order denying the President's motion to dismiss with respect to the meaning of "Emolument." Add. 50-103. Plaintiffs had urged an expansive reading to cover essentially anything of value, while the President had argued for a narrower definition: a payment conferred and accepted as compensation for the official's services in an official capacity or employment relationship. Accepting plaintiffs' broad definition, Add. 67-96, the court held that plaintiffs had stated plausible claims that patronage of the Hotel by government officials, the GSA lease, and tax concessions from the D.C. government violated the Emoluments Clauses. Add. 97-100.

3. On August 17, 2018, the President filed a motion in his official capacity asking the district court to certify its motion-to-dismiss orders pursuant to § 1292(b)

and to stay proceedings pending appeal. Dkt. No. 127. As relevant here, the President sought certification of these orders based on the following controlling legal questions: (1) whether plaintiffs had an implied equitable cause of action under the Emoluments Clauses, including whether they had legally cognizable injuries falling within the Clauses' zone of interests and could obtain relief against the President in his official capacity; and (2) what is the correct interpretation of "Emolument." *See id.*

The district court denied the motion for § 1292(b) certification on November 2, 2018. Add. 104-35. As to the meaning of the Emoluments Clauses, the district court stated that there was no "substantial ground for difference of opinion *among courts*" because no court has accepted the President's view of the Clauses on this question of first impression for the judiciary. Add. 116, 119. The court reiterated its earlier conclusions that relevant authorities support its interpretation of the Clauses. Add. 117-18. The court additionally opined that resolving the Clauses' meaning in the President's favor would not materially advance the termination of the litigation because—in the court's view—plaintiffs have stated plausible claims even under the President's interpretation. Add. 118.

As to whether plaintiffs have an equitable cause of action under the Emoluments Clauses to sue the President for their alleged injuries, the court determined again that there was no substantial difference of opinion among courts. The court expressly disregarded the contrary decision in *CREW v. Trump*, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017), inaccurately describing the zone-of-interests

holding there as "pure dicta" given an alternative Article III holding. Add. 121. The court restated its prior conclusion that "[i]n a broad sense, all Americans fall within the zones of interest of the Clauses." Add. 122. Likewise, the court determined that plaintiffs' Article III standing was neither an issue on which judges disagreed nor a controlling question, because even if plaintiffs lack competitor standing, as the *CREW* court held, they purportedly could proceed on a *parens patriae* or quasi-sovereign theory of standing. Add. 124. Finally, the court held that the availability of equitable relief against the President in his official capacity was not a sufficiently difficult question as to warrant certification. Add. 128. The court distinguished this case from contrary Supreme Court precedent by noting that "there is obviously no subordinate official against whom equitable relief would make sense." *Id.* The district court accordingly denied the motion to stay proceedings pending appeal. Add. 130.

4. Plaintiffs' Rule 26(f) statement makes clear that they may seek what they assert will be "limited" discovery "from President Trump in his official capacity on the subject of his communications with foreign, state, and domestic government officials," and may additionally "seek limited discovery from President Trump in his individual capacity." Dkt. No. 132, at 3-4. While plaintiffs assert that they "plan to focus discovery primarily on" discovery against third parties, including federal agencies, even that discovery would be directed against the President's financial interest in his businesses and "President Trump's receipt of funds" from those business entities. *Id.* at 2-3.

On December 3, the district court entered a discovery schedule contemplating six months of fact discovery. Dkt. No. 145. To date, plaintiffs have propounded thirty-eight subpoenas to third parties, including to the Trump Organization and five federal agencies. Plaintiffs' subpoenas requested, inter alia, "[d]ocuments sufficient to show Donald J. Trump's or Trump Trust's current, historic, and future Financial Interest in the Trump International Hotel Washington, D.C." and "[d]ocuments sufficient to identify all Businesses doing business in the Washington D.C. metropolitan area in which Donald J. Trump or Trump Trust has a Financial Interest." Subpoena to The Trump Organization Inc., Attach. A at 7-8, *District of Columbia v. Trump*, No. 8:17-cv-1596 (Dec. 4, 2018). The subpoena recipients are required to respond beginning on January 3, 2019.

ARGUMENT

An appellate court has the power under 28 U.S.C. § 1651(a) to issue a writ of mandamus directing the conduct of a district court where (1) the petitioner has a "clear and indisputable" right to relief; (2) there are "no other adequate means to attain the relief"; and (3) mandamus relief is otherwise "appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). In short, only "exceptional circumstances amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion" will "justify the invocation of this extraordinary remedy." *Id.* at 380; *accord, e.g.*, *In re Catawba Indian Tribe of S.C.*, 973 F.2d

1133, 1136 (4th Cir. 1992). Although the standard for mandamus is, and should be, a high one, it is satisfied in the extraordinary circumstances presented here.

I. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING THE DISTRICT COURT TO CERTIFY ITS ORDERS DENYING DISMISSAL OF PLAINTIFFS' COMPLAINT FOR IMMEDIATE APPELLATE REVIEW

If the President has a "clear and indisputable right" to certification of an interlocutory appeal of the denial of the motion to dismiss, the other two elements for mandamus plainly are satisfied: There is "no other adequate means to attain the relief" of immediate appeal. *Cheney*, 542 U.S. at 380. And this is a manifestly "appropriate" circumstance for mandamus relief because proceeding to discovery "would threaten the separation of powers" in this suit directed against the President himself. *Id.* at 381 (cleaned up). Indeed, it is particularly appropriate insofar as the collateral-order appeal of the President's individual-capacity absolute-immunity defense will already be pending before this Court. *See supra* p. 6 n.2.

Accordingly, the sole remaining question is whether the President has a "clear and indisputable right" to certification of an interlocutory appeal by the district court. *See Cheney*, 542 U.S. at 381. As demonstrated below, in these "exceptional circumstances," he is entitled to mandamus to obtain that certification: although a district court has broad discretion in considering a § 1292(b) certification, the court here committed such a "clear abuse of discretion" that its retention of jurisdiction amounts to "a judicial 'usurpation of power.'" *Id.* at 380-81.

A. Mandamus Relief From The Denial Of § 1292(b) Certification Is Appropriate In Rare Circumstances

Section 1292(b) provides that a district court "shall" certify its order for interlocutory appeal "[w]hen a district judge … shall be of the opinion" that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also, e.g.*, *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011). A district court thus plainly has significant discretion in evaluating whether that standard is met. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 47 (1995). Nevertheless, the statute's operative language is mandatory: the district court "shall" grant certification when it determines the statutory criteria are present. Thus, appellate courts have "emphasize[d] the duty of the district court … to allow an immediate appeal to be taken when the statutory criteria are met." *Ahrenholz v. Board of Trs. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000); *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009).

Moreover, as the Supreme Court has stressed in general, "[d]iscretion is not whim." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016). "[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Id.* at 1932 (citation omitted). Accordingly, even where a statute confers broad discretion, the exercise of that

discretion can be reviewed for clear "abuse of discretion," especially where, as here, the Constitution's separation of powers cabins such discretion.

This fundamental principle of adjudication applies to certification decisions under § 1292(b) no less than to other discretionary district court orders that are subject to mandamus review for clear abuses of discretion, such as evidentiary privilege rulings. *See Mohawk Indus.*, 558 U.S. at 110-11. Indeed, it arguably applies more so, because a district court that clearly abuses its discretion in declining to certify an interlocutory appeal effectively usurps the appellate court's own discretion under § 1292(b) whether to accept jurisdiction over the case. Mandamus relief in such circumstances is, quite literally, "in aid of appellate jurisdiction." *Cheney*, 542 U.S. at 380.

The "safety valve" of appellate review under § 1292(b) is particularly important for cases like this one, which—in raising whether and when the President is subject to suit under the Emoluments Clauses—presents "serious legal questions taking the case out of the ordinary run." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994). There is a corresponding need for the "safety valve" of mandamus relief here, where the district court clearly abused its discretion in denying interlocutory appeal and ordering the case to discovery. As this Court has made clear, an "exercise of what has been called [its] advisory or supervisory mandamus power" is particularly appropriate in circumstances presenting "an issue of first impression that involves the power of the district court." *In re Pruett*, 133 F.3d 275, 280-81 (4th Cir. 1997)

(granting mandamus relief where district court ordered ex parte discovery without authority). An appellate court must possess the power in extraordinary circumstances to exercise the jurisdiction that Congress intended under § 1292(b), especially where continued litigation in trial court "would threaten the separation of powers." *Cheney*, 542 U.S. at 381.

Indeed, the Eleventh Circuit exercised its mandamus authority to compel § 1292(b) certification in circumstances similar to—and less extraordinary than—those presented here. *Fernandez-Roque v. Smith*, 671 F.2d 426, 432 (11th Cir. 1982). There, the appellate court required the district court to rule on the threshold question whether it had subject matter jurisdiction to adjudicate the asylum claims of refugees and immediately to certify that order for interlocutory appeal "pursuant to 28 U.S.C. § 1292(b)," before conducting a hearing on the merits of asylum claims that the government contended "would violate the separation of powers." *Id.* at 431-32. The Eleventh Circuit concluded that the case "present[ed] the truly 'rare' situation in which it is appropriate for this court to require certification of a controlling issue of national significance." *Id.* at 431; *cf. In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 839 (5th Cir. 1984) ("request[ing]" that district court "certify its interlocutory order for appeal").

Similarly, the government recently sought mandamus in the Ninth Circuit of, among other things, a district court's refusal to certify under § 1292(b) its summary-judgment denial in a wide-ranging challenge to the United States' alleged inaction on

climate change. The Ninth Circuit issued an order stating that the district court should "promptly resolve petitioners' motion to reconsider the denial of the request to certify [its] orders for interlocutory review." Order at 2, *In re United States*, No. 18-73014 (9th Cir. Nov. 8, 2018). That order pointedly noted that the Supreme Court had observed in an earlier order that "the justiciability of plaintiffs' claims 'presents substantial grounds for difference of opinion.'" *Id.* (quoting *United States v. United States Dist. Court for Dist. of Or.*, 139 S. Ct. 1 (2018)). Before the Ninth Circuit took further action on the mandamus petition, the district court reconsidered and certified an interlocutory appeal. *Juliana v. United States*, No. 6:15-cv-1517, 2018 WL 6303774 (D. Or. Nov. 21, 2018).

As demonstrated below, the President is entitled to at least as much judicial solicitude in obtaining appellate review of threshold legal defenses that would avoid subjecting both him and third parties (including government agencies) to litigation based on his public office, including wide-ranging discovery into his personal finances and the official actions of his Administration.

B. This Is A Rare Circumstance Where A District Court's Refusal To Certify An Immediate Appeal Warrants Mandamus Relief

Because the statutory "preconditions for § 1292(b) review" are indisputably satisfied in this case, which additionally "involves a new legal question" and "is of special consequence," the district court "should not [have] hesitate[d] to certify an interlocutory appeal." *Mohawk Indus.*, 558 U.S. at 110-11. The court's refusal to grant

certification is such a clear abuse of discretion and usurpation of jurisdiction that it warrants an exercise of this Court's mandamus authority.

1. This is a paradigmatic case for a § 1292(b) appeal

In allowing this unprecedented lawsuit to proceed, the district court answered two legal questions on which it rests: (1) Do plaintiffs have an implied equitable cause of action directly under the Emoluments Clauses to sue the President based on asserted injuries that are unconnected to the President's official actions and are alleged to be legally cognizable regardless? (2) Do they state a claim that the Emoluments Clauses prohibit payments by governmental customers for services rendered by businesses in which the President has a financial interest? When an order presents these types of questions, Congress intended a district court to certify under § 1292(b).[3]

First, these are clearly "controlling question[s] of law" for § 1292(b) purposes. Each is a "pure question of law, *i.e.*, an abstract legal issue that the court of appeals can decide quickly and cleanly" without the need "to delve beyond the surface of the record in order to determine the facts." *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340-41 (4th Cir. 2017) (cleaned up). Each is "controlling"

[3] The President's motion to dismiss and request for § 1292(b) certification raised the additional question of whether plaintiffs even adequately alleged the injury to competition on which they principally rely for Article III standing. This petition does not focus on that fact-intensive question, but an interlocutory appeal on the motion-to-dismiss denial will necessarily present that jurisdictional question.

because interlocutory review may be "completely dispositive of the litigation," *Fannin v. CSX Transp.*, 873 F.2d 1438 (4th Cir. 1989) (mem.), or at least "serious to the conduct of the litigation" by significantly narrowing the scope of the case and saving "time and expense for the litigants" and the courts. *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991).

Second, immediate appellate review clearly would "materially advance the ultimate termination of the litigation" within § 1292(b)'s meaning. Again, the resolution of the President's threshold defenses "would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004); *see In re Virginia Elec. & Power Co.*, 539 F.2d 357, 364 (4th Cir. 1976).

Finally, it is clear that § 1292(b)'s requirement of a "substantial ground for difference of opinion" is satisfied for each question. A "novel issue may be certified for interlocutory appeal" if "fair-minded jurists might reach contradictory conclusions." *Reese v. BL Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). That, at a minimum, is the case here, for the reasons discussed below.

a. To begin, neither the Constitution nor any statute provides an express cause of action for alleged violations of the Emoluments Clauses. And this is not "a proper case" for courts to provide the "judge-made remedy" of an implied cause of action in equity to enjoin unconstitutional action by public officials. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857

(2017). Equitable suits against the government traditionally have been recognized where a party seeks *preemptively to assert a defense* that would otherwise be available to it in an anticipated enforcement action by the government. *See, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 491 n.2 (2010); *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). This is a particularly inappropriate context to recognize a non-traditional equitable claim in an *affirmative enforcement suit* against the government, because there is neither a proper defendant nor a proper plaintiff.

As to the defendant, equitable relief against the President in his official capacity is contrary to the fundamental principle, rooted in the separation of powers, that federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 806 (1992) (plurality op.). As the D.C. Circuit has explained, "the President, like Congress, is a coequal branch of government, and for the President to be ordered to perform particular executive … acts at the behest of the Judiciary, at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (cleaned up).

As for the plaintiffs, their "alleged injur[ies]" are not "legally and judicially cognizable" under the Emoluments Clauses. *Raines v. Byrd*, 521 U.S. 811, 819 (1997). The Supreme Court "has required that the plaintiff's complaint fall within the zone of

interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (cleaned up). In the familiar context of the APA's "generous review provisions," the zone-of-interests limitation asks only whether "the plaintiff's interests are so marginally related to or inconsistent with the purposes" of the provision that they are not even "arguably" covered. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395, 399-400 (1987). But the zone-of-interests requirement is not limited to the APA context, because it is a "requirement of general application" that is "presumed" to apply to all causes of action unless "expressly negated," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), and the "breadth of the zone of interests varies according to the provisions of law at issue," *Bennett v. Spear*, 520 U.S. 154, 163 (1997). Of central importance, the Supreme Court has explained that the zone-of-interests limitation applies more strictly where a plaintiff seeks to sue directly under the Constitution rather than the APA, essentially equating the test in that context to the stringent requirements for implying "a private right of action under a statute." *Clarke*, 479 U.S. at 400 n.16; *cf. Armstrong*, 135 S. Ct. at 1383-85 (rejecting implied right of action directly under the Supremacy Clause).

As the district court in *CREW* correctly held, "[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition" in "the market for government business." 276 F. Supp. 3d at 187-88. Instead, as the court here acknowledged (Add.

82-84), the Emoluments Clauses were intended as prophylactic protection for the people generally against the potentially *corrupting influence* from the acceptance of emoluments *on official actions*. As Edmund J. Randolph explained, the Foreign Emoluments Clause "is provided to prevent corruption." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465-66 (2d ed. 1891). Likewise, Alexander Hamilton explained that the Domestic Emoluments Clause ensures the President has "no pecuniary inducement to renounce or desert the independence intended for him by the Constitution." *The Federalist No. 73*, at 493-94 (Jacob E. Cooke ed., 1961). Plaintiffs, however, do not allege any cognizable injury resulting from any official action taken by the President because of his alleged acceptance of Emoluments.

The interest plaintiffs assert in being free from increased competition with the President's businesses is so marginally related to the Emoluments Clauses' zone of interests that it would fail even the generous APA test, and does not remotely establish the type of private right needed under the constitutional test. Moreover, regardless of whether the Clauses would provide a basis of their own force to challenge an official action taken because of acceptance of a prohibited Emolument, plaintiffs here, shorn of their unavailing competitive injuries, are asserting only a generalized grievance shared by all members of the public in having an official comply with constitutional provisions adopted for the benefit of the public generally. *United States v. Richardson*, 418 U.S. 166, 176-78 (1974).

The district court thus clearly erred in holding that plaintiffs may sue the President directly under the Emoluments Clauses for their alleged injuries, and at a minimum it was a clear abuse of discretion for the court to deny the substantive grounds for disagreement and to deprive this Court of the opportunity to exercise jurisdiction over orders presenting this novel and important constitutional question.

b. So too for the merits question of the correct meaning of "Emolument." Although space does not permit a full treatment of this significant question, it is simple enough to show that the district court clearly erred by refusing to dismiss or even certify for interlocutory appeal.

The President urged the definition "profit arising from office or employ." This definition is supported by the etymology of the term, Walter W. Skeat, *An Etymological Dictionary of the English Language* 189 (1888) ("profit, what is gained by labour"); by contemporaneous dictionaries, *see, e.g.*, *Barclay's A Complete and Universal English Dictionary on a New Plan* (1774); and by intra-textual comparison with the Domestic Emoluments Clause itself, which focuses on the President's "services," U.S. Const. art. II, § 1, cl. 7, and the Incompatibility Clause, which treats an "Emolument" as an aspect of an "Office" and thus ties it to the official's employment, *id.* art. I, § 6, cl. 2.

But the district court rejected this well-supported interpretation and instead construed the term broadly to encompass "anything more than *de minimis* profit, gain, or advantage offered to a public official." Add. 88. That reading cannot be correct because interpreting the term "Emolument" to reach essentially anything of value

renders entirely superfluous the Foreign Emoluments Clause's prohibition on receipt of any "present." *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) ("no word [in the Constitution] was unnecessarily used, or needlessly added"). The court's "*de minimis*" exception also lacks any textual basis and was created to explain away inconvenient examples like President Obama's likely royalties from book sales to foreign governments. Dkt. No. 21-1, at 52 & n.69 (Motion to Dismiss, citing sources).

Indeed, the court's reading of the Emoluments Clauses is belied by Founding-era history and context. Most notably, George Washington directly transacted business with the federal government while he was President. For example, he bought several lots of federal land in the then-Territory of Columbia in a public sale, and he himself authorized the public sale, which was conducted by the Territory's Commissioners.[4] No concern was raised that such transactions conferred a benefit, and thus (on plaintiffs' view) a prohibited emolument, on the President. Similarly, several early Presidents owned plantations and continued to export cash crops overseas while in office, including Washington, who exported flour and cornmeal to "England, Portugal, and the island of Jamaica," and Thomas Jefferson, who exported

[4] *See* Certificate for Lots Purchased in the District of Columbia (Sept. 18, 1793), http://founders.archives.gov/documents/Washington/05-14-02-0074; Letter from Commissioners for the District of Columbia to George Washington (Sept. 16, 1793), https://founders.archives.gov/documents/Washington/05-14-02-0068.

tobacco to Great Britain.[5] Yet there is no evidence that they took steps to ensure that foreign governments were not among their customers. These actions of the Founders are entitled to considerable weight in construing the term "Emoluments." *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

2. The district court clearly abused its discretion in refusing to certify an interlocutory appeal under § 1292(b)

a. At the outset, the district court misunderstood the inquiry under § 1292(b), which asks whether there is "substantial ground for difference of opinion," 28 U.S.C. § 1292(b). The court interpreted that inquiry to require a pre-existing judicial disagreement. *Compare* Add. 116 (relying on lack of disagreement "*among courts*"), *with Reese*, 643 F.3d at 688 ("A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed."); *see United States v. Myers*, 593 F.3d 338, 347 (4th Cir. 2010) ("novel privilege ruling" may warrant certification). In short, in a case like this, where "novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese*, 643 F.3d at 688; *accord In re Trump*, 874 F.3d 948, 952 (6th Cir. 2017).

[5] *See Ten Facts about the Gristmill*, George Washington's Mount Vernon, Fact 9, http://www.mountvernon.org/the-estate-gardens/gristmill/ten-facts-about-the-gristmill; Letter from Thomas Jefferson to William A. Burwell (Nov. 22, 1808), *in* 11 *The Works of Thomas Jefferson* 75-76 (Paul Leicester Ford ed., 1905).

Even apart from that threshold error, the district court's analysis of § 1292(b) certification is fundamentally flawed. The court denied certification principally because it disagreed with the government's legal arguments on the merits. Particularly in a case in which the plaintiffs' complaint rests on an unprecedented legal theory, however, that is hardly a reason to deny § 1292(b) certification. If anything, as demonstrated below, the court's opinion underscores the existence of controlling legal questions about which there is substantial disagreement.

b. On the justiciability question, the district court never addressed the President's argument that implied equitable causes of action traditionally operate as preemptive defenses against government enforcement action rather than as affirmative enforcement suits against the government. *Supra* pp. 17-18. Moreover, on the President's specific argument that he is not a proper defendant in this case, the district court merely asserted a factual distinction from *Mississippi* and *Franklin*—that there is "no subordinate official against whom equitable relief would make sense." Add. 128. But that distinction is not relevant to the reasoning there that federal courts simply have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi*, 71 U.S. (4 Wall.) at 501.

Likewise, on the President's specific argument that the plaintiffs assert no legally or judicially cognizable interests under the Clauses, the district court erroneously dismissed the contrary zone-of-interests decision in *CREW* as "pure dicta" because that court had also held that plaintiffs lacked Article III standing. Add.

121. This reasoning is doubly mistaken. First, *CREW*'s zone-of-interests conclusion was not "dicta," but an "alternative holding[]." *United States v. Ford*, 703 F.3d 708, 711 n.2 (4th Cir. 2013). Second, the question under § 1292(b) is not whether courts have issued contradictory *holdings*, but whether there exists "substantial ground for difference of *opinion*."

The district court's reasoning is also fundamentally flawed on its own terms. The court declared that, "[i]n a broad sense, all Americans fall within the zones of interest of the [Emoluments] Clauses," and that "[n]othing in the Constitution precludes business competitors—a sub-class of Americans" from bringing suit under the Clauses. Add. 122. Yet there is no support for the proposition that the Clauses were intended to protect the public against competition from a government official's privately owned businesses, let alone to protect "all Americans" from any injury resulting from an alleged violation of those Clauses no matter how unrelated to their purposes. *Cf. Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011) (noting "absurd consequences" of similarly boundless theory that "any person injured" by a legal violation has a right to sue). Moreover, "the injury within the requisite 'zone of interests'" "must be *the same*" as "the injury that supplies constitutional standing," *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (emphasis added), and the alleged injury to "all Americans" from violations of the Emoluments Clauses is "only a generally available grievance … [that] does not state an Article III [injury]," *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

Finally, the district court erroneously suggested that resolving the cause-of-action question in the President's favor would not terminate or even substantially narrow the litigation because plaintiffs could still sue based on their "quasi-sovereign[]" injuries even if they could not on competitive injuries. Add. 121. That reasoning ignores the President's more general arguments that this is not a proper case to imply an equitable cause of action for *any* injuries and that the President is not a proper defendant *at all*. But even as to the zone-of-interests argument, the district court's reasoning is fundamentally flawed. Plaintiffs' asserted quasi-sovereign injuries are both inherently speculative and affirmatively inconsistent with an interest in preventing corruption in official decisionmaking: plaintiffs claim that the alleged competition for the President's favor from other governments pressures plaintiffs *to provide allegedly unlawful emoluments* in the form of concessions to the Trump Organization and patronage of the Hotel. *See* Add. 17-19. And regardless, it would narrow the scope of the case considerably to limit it to alleged emoluments provided by the plaintiffs or their alleged governmental competitors.

c. On the meaning-of-"Emoluments" question, the district court principally declared that there was "no point" responding to the President's anti-surplusage and historical arguments concerning the meaning of the Clauses. Add. 116-17. To the extent the court engaged with the President's arguments, it incorrectly found that his definition was unduly narrow as it was "tantamount to a bribe." Add. 115. Not true: while bribes certainly would be prohibited, the Foreign Emoluments Clause also

would prohibit, for example, an official from accepting separate employment with another nation. But that is a far cry from prohibiting the official from receiving "anything of value" from foreign governments, even indirectly as a result of patronage of a private business in which the official has a financial interest. *See* Add. 90.

The district court was equally wrong in concluding that the meaning of "Emolument" is not a controlling question that would materially advance the termination of the litigation because, even under the President's own interpretation, he would lose "if, [as] appears likely, the payments to his hotel [by foreign governments] are being made with an expectation of favorable treatment by the President in matters of foreign policy." Add. 118. A foreign government's mere subjective hope that its payments for services furnished by the Hotel might influence the President does not mean that his derivative financial interest in the Hotel's commercial profits are transformed into prohibited emoluments of his office. And the court did not and could not seriously dispute that, on this understanding, plaintiffs' claims would fail or, at the very least, be substantially narrowed.

* * *

Accordingly, the district court clearly abused its discretion and usurped this Court's jurisdiction to decide whether to hear an interlocutory appeal under § 1292(b). This Court should issue a writ of mandamus directing certification of the orders denying the motion to dismiss, so that it can resolve the merits of the motion to dismiss in the ordinary course of an interlocutory appeal.

II. IN THE ALTERNATIVE, THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING THE DISTRICT COURT TO DISMISS PLAINTIFFS' COMPLAINT OUTRIGHT

Even if this Court were to conclude that the district court's certification discretion under § 1292(b) was sufficiently broad that a writ of mandamus directing certification is unwarranted despite this extraordinary suit against the President, it nevertheless should grant mandamus directing the district court to dismiss plaintiffs' complaint. Whether the complaint should have been dismissed is a purely legal question. And for the reasons discussed, the President has a "clear and indisputable" right to dismissal on the grounds that plaintiffs assert no legally and judicially cognizable interests protected by the Emoluments Clauses and that he may not be sued for equitable relief; mandamus to direct such a dismissal is "appropriate under the circumstances" given the separation-of-powers concerns at stake. *Cheney*, 542 U.S. at 381; *see In re Pruett*, 133 F.3d at 281 (mandamus warranted where petition presents legal "issue[s] of first impression that involve[] the power of the district court").[6]

To be sure, mandamus generally may "not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 381-82; *accord In re Lockheed Martin Corp.*,

[6] The President here seeks dismissal via mandamus solely on the two grounds asserted above because this Court may dismiss on those grounds without first having to resolve all aspects of plaintiffs' allegations of Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92, 97 n.2 (1998) ("statutory standing"—*i.e.*, the zone-of-interests inquiry—may be determined before Article III standing); *cf. Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (same for the applicability of a public-policy bar on certain suits against the United States).

503 F.3d 351, 353 (4th Cir. 2007). But in these rare circumstances, litigating this case through discovery to final judgment, followed by an appeal in the ordinary course, is not an "adequate means" of obtaining relief. *Cheney*, 542 U.S. at 380.

In an official-capacity suit such as this, there should be "Presidential immunity from judicial process" given that, ultimately, "no court has authority to direct the President to take an official act." *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part and in the judgment). In light of "the constitutional tradition of the separation of powers," "it is incompatible with [the President's] constitutional position that he be compelled personally to defend his executive actions before a court," for many of the same reasons there is "an absolute Presidential immunity from civil damages for official acts." *Id.* at 827-28 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)). Moreover, in the specific context of mandamus, *Cheney* itself "g[ave] 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. Such separation-of-powers considerations are manifested by the intrusive discovery that has already begun. *Supra* pp. 9-10.

Notably, this Court has held it is consistent with the bedrock principle that "mandamus cannot be used as a substitute for interlocutory appeal" that mandamus may issue to address the type of "judicial usurpation of power" that occurs where a district court's refusal to dismiss a case creates a "conflict between the exercise of the district court's jurisdiction and that of an administrative agency." *In re Sewell*, 690 F.2d

403, 406-07 (4th Cir. 1982) (citation omitted). *A fortiori*, mandamus is appropriate where, as here, the district court disregards that it "has no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Franklin*, 505 U.S. at 802-03 (plurality op.) (quoting *Mississippi*, 71 U.S. (4 Wall.) at 501), much less at the behest of plaintiffs who assert no interests protected by the constitutional provisions they seek to judicially enforce against the President.

III. THIS COURT SHOULD STAY DISTRICT COURT PROCEEDINGS PENDING ITS CONSIDERATION OF THIS PETITION

This Court has previously granted stays of district court proceedings pending disposition of a petition for a writ of mandamus. *See, e.g.*, *In re Mills*, 287 F. App'x 273, 276 (4th Cir. 2008); *United States v. (Under Seal)*, 757 F.2d 600, 602 (4th Cir. 1985). A stay is likewise appropriate here. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (standard for stay pending appeal). As discussed above, the President is likely to obtain mandamus, and he is likely to suffer irreparable injury in the interim from the intrusive discovery into his personal finances and the official actions of his Administration (including through third-party subpoenas of government agencies).

No countervailing harm will result from the stay. Even setting aside that plaintiffs' alleged injuries are not cognizable, they are almost all financial in nature (directly or indirectly) and thus do not come close to outweighing the significant separation-of-powers defects in this suit against the President. Indeed, plaintiffs have not even sought a preliminary injunction, which underscores that they face no

immediate harm sufficient to outweigh the harm to the President. The government thus requests that this Court promptly issue a stay of district court proceedings.

CONCLUSION

This Court should issue a writ of mandamus directing the district court to certify for interlocutory appeal under 28 U.S.C. § 1292(b) the March 28 and July 25, 2018 orders denying the President's motion to dismiss, or alternatively to dismiss the suit. Additionally, this Court should stay district court proceedings, pending resolution of this petition, prior to the first discovery deadline of January 3, 2019.

Respectfully submitted.

JOSEPH H. HUNT
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK R. FREEMAN
MICHAEL S. RAAB
/s/ Megan Barbero
MEGAN BARBERO
(202) 532-4631
Attorneys
Appellate Staff, Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition for a writ of mandamus complies with the requirements of Fed. R. App. P. 21(d) and 32(c)(2). The petition is prepared in 14-point Garamond font, a proportionally spaced typeface; it is double-spaced; and it does not exceed 7,702 words, exclusive of certificates and documents required by Rule 21(a)(2)(C).

/s/ Megan Barbero
MEGAN BARBERO

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 21(a)(1), I hereby certify that on December 17, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties in the district court has been accomplished via notice filed through the district court's CM/ECF system attaching a copy of this filing. The district court has also been provided with a paper copy of this filing through hand delivery to the district court clerk's office.

/s/ Megan Barbero
MEGAN BARBERO