No. 20-331

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

DISTRICT OF COLUMBIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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As the petition explained, the narrowly divided decision below by the en banc court of appeals allowed the State of Maryland and the District of Columbia to bring a novel suit under the Emoluments Clauses seeking intrusive discovery and injunctive relief against President Trump in his official capacity. And the decision allowed this extraordinary suit to proceed only by adopting a restrictive view of mandamus at odds with the decisions of this Court and other courts of appeals. Respondents contend that certiorari should be denied in light of the election results. But setting aside the mootness issue that respondents anticipate, they lack any persuasive argument that the decision below would not have warranted this Court's review, and it plainly would have. Thus, if Congress accepts the votes of the Electoral College, the Court should hold the petition until it becomes moot after the inauguration, and then grant certiorari

and vacate under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), as the decision below should not be allowed to stand without this Court's review.

A. Absent Mootness Considerations, The Decision Below Would Have Warranted Further Review

Setting aside the mootness issue anticipated by respondents, each question presented here plainly would have merited both this Court's review and the reversal of the court of appeals' denial of mandamus.

1. Although respondents note (Br. in Opp. 12) that there is no circuit conflict on the first question presented, they have no meaningful response to the fact that the court of appeals' failure to grant mandamus with respect to the denial of the President's motion to dismiss was both exceptionally important and in significant tension with this Court's precedents.

a. As a threshold matter, respondents do not seriously dispute the separation-of-powers concerns threatened by the decision below. Respondents acknowledge (Br. in Opp. 5, 8, 18-19) that they sought, and the district court contemplated, an injunction against a sitting President in his official capacity. They do not dispute that they propounded 38 third-party subpoenas, including on five federal agencies, commencing a broad-ranging inquiry into the President's personal finances and official actions. Pet. 6; see Br. in Opp. 16, 26 n.6. And respondents never deny that they contemplated still further discovery into the President's financial interests and communications with various officials, both foreign and domestic. Pet. 6-7. Although respondents contend that these separation-of-powers concerns will "no longer" exist in the near future, Br. in Opp. 15, that

has no bearing on whether the petition would otherwise have been worthy of this Court's review.

b. Respondents also do not meaningfully contest that the underlying justiciability rulings were themselves exceptionally important and in significant tension with this Court's precedents.

Like the en banc court of appeals, respondents fail to identify a single case creating a cause of action against a governmental official for a plaintiff who is subject neither to any enforcement action nor to any direct regulation of his own property or liberty interests—much less one under a structural provision of the Constitution like the Emoluments Clauses. Pet. 18-19. Respondents suggest (Br. in Opp. 18) that it is the President's burden to find a decision from this Court expressly foreclosing such a cause of action, but that gets matters backward. Under this Court's precedents, it is clear and indisputable that a decision "[t]o accord a type of relief that has never been available before" exceeds the constraints of "traditional equitable relief," and authorization for such "a wrenching departure from past practice" must be left to "Congress." *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999); see Pet. 16-19. Respondents never grapple with this defect in their suit.

Nor do respondents make any attempt to square the decision below with this Court's holding that, at a minimum, "an express statement by Congress" is necessary before a generally available cause of action—even an express statutory cause of action—may be applied to the President. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992); see Pet. 21-22. And they do not deny that it is clear and indisputable that the Judiciary

"has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin*, 505 U.S. at 803 (O'Connor, J.) (quoting *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)); see *id.* at 826 (Scalia, J., concurring in part and concurring in the judgment) (finding it "clear" that "no court has authority to direct the President to take an official act"). Although respondents contend that courts may enjoin the President here on the theory that the Emoluments Clauses impose "*restraints* on" him, Br. in Opp. 18 (citation omitted), they never address that this Court's decision in *Mississippi* rejected a comparable argument. See 71 U.S. (4 Wall.) at 498-499; Pet. 20.

c. Respondents contend that the first question presented would have been unworthy of this Court's review given the "high mandamus standard" to demonstrate "clear and indisputable" error. Br. in Opp. 13; see *id.* at 12-17. But in light of the separation-of-powers concerns posed by this extraordinary suit against the President, the court of appeals' application of the mandamus standard was itself exceptionally important and in significant tension with this Court's decision in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004). See Pet. 22-25. Respondents contend that the separation-of-powers concerns here are less significant than in *Cheney* because discovery "[t]o date" has been limited to "third parties," Br. in Opp. 16, but again, that gets matters backward: Unlike in *Cheney*, this suit is brought directly against the President in his official capacity, such that discovery is added insult to that more fundamental injury. And even as to discovery, respondents neither disavow their contemplated discovery from the President himself, Pet. 6-7, nor acknowledge that

"separation of powers concerns are no less palpable" when subpoenas for the President's information are "issued to third parties," *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020). Respondents emphasize (Br. in Opp. 16) that *Mazars* involved congressional subpoenas, but allowing Maryland and D.C. to "declare open season on the President's information" held by third parties is similarly problematic, *Mazars*, 140 S. Ct. at 2035.

Respondents further contend (Br. 14-15) that the President did not establish the second and third criteria for mandamus—that he has "no other adequate means to attain the relief" and that mandamus relief is "appropriate under the circumstances." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (alteration and citation omitted). But not even the court of appeals took that position, and respondents' contention fails given the unrefuted problems with the decision below. Because this suit is clearly and indisputably nonjusticiable (not to mention meritless), an appeal from final judgment would by definition not be an "'adequate means'" to ensure that the President is no longer exposed to any further litigation, including unwarranted and distracting discovery; and it therefore is "appropriate" to provide mandamus relief to eliminate that "threat[] [to] the separation of powers." *Cheney*, 542 U.S. at 380-381 (citation omitted); see Pet. 22-23.

2. The second question presented would have merited certiorari not only for all of the reasons above, but also because it deepened a conflict among the circuits concerning the availability of interlocutory appeals under 28 U.S.C. 1292(b). Pet. 30-33. Respondents fail to

show that this Court would not have resolved the conflict, especially in a suit against the President.

The decision below squarely conflicts with the Eleventh Circuit's decision in *Fernandez-Roque* v. *Smith*, 671 F.2d 426 (1982), to grant mandamus and direct the district court to rule on a threshold jurisdictional issue and then certify its order for interlocutory appeal under Section 1292(b). *Id.* at 431-432; see Pet. 31. Respondents try to distinguish *Fernandez-Roque* on the ground that the Eleventh Circuit issued mandamus relief *before* "the district court actually decided the Section 1292(b) issue," Br. in Opp. 23, but that observation only *heightens* the conflict here. That the Eleventh Circuit directed the district court to certify its jurisdictional order without even affording it the opportunity to exercise its discretion to rule on the Section 1292(b) question merely underscores an appellate court's authority to compel certification in truly extraordinary cases.

The decision below also conflicts with the approach taken by the Fifth and D.C. Circuits—including in a parallel suit against the President—under which those courts of appeals have declared that a district court clearly abused its discretion in denying certification and then remanded for reconsideration, which inevitably led the district court to certify an appeal. See *In re Trump*, 781 Fed. Appx. 1, 2 (D.C. Cir. 2019) (per curiam); *In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 837-838 (5th Cir. 1984); Pet. 32-33. Respondents entirely ignore that aspect of those decisions. See Br. in Opp. 23-24. It therefore remains the case that in the circumstances here, the President would have obtained some form of relief

from the district court's refusal to certify an interlocutory appeal had respondents brought suit in the Fifth, Eleventh, or D.C. Circuits.

Respondents fare no better on the merits. Like the decision below, they never dispute that the district court's refusal to certify an interlocutory appeal under Section 1292(b) was a clear abuse of discretion. See Br. in Opp. 26-27. Instead, respondents take the position that "mandamus relief is *categorically* unavailable when a district court has denied a Section 1292(b) certification." *Id.* at 20; see *id.* at 24-26. Not even the court of appeals went that far. See Pet. App. 13a. Respondents offer no persuasive reason why the discretion that Section 1292(b) vests in district courts is uniquely unfettered and unreviewable, even for clear abuse rising to the level of mandamus, see Pet. 25-26, especially given that *Cheney* itself emphasized that "courts should be sensitive to requests by the Government for interlocutory appeals" in cases involving "[s]pecial considerations applicable to the President," 542 U.S. at 391-392.

B. The Appropriate Response To The Mootness That Respondents Anticipate Would Be To Vacate The Decision Below Under *Munsingwear*

Given that the decision below would have warranted further review apart from any anticipated mootness, if Congress accepts the votes of the Electoral College, see 3 U.S.C. 15, this Court should hold the petition until it becomes moot after the inauguration, and then grant and vacate the decision below under *Munsingwear*. As this Court recently confirmed, vacatur under *Munsingwear* is available if a case becomes "moot before certiorari" when the decision below would have been

worthy of further review absent mootness. *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam); see *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (explaining that vacatur under *Munsingwear* is appropriate when the court of appeals' decision was independently "appropriate for review").

The equitable remedy of vacatur would be amply warranted for the mootness anticipated by respondents. That mootness would be "due to circumstances unattributable to any of the parties"—namely, the election outcome. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (citation omitted). Such "vagaries of circumstance" warrant vacatur, because neither the Office of the President nor anyone else should continue to be governed by a precedential decision that likely would not have survived this Court's review but for "mootness by happenstance." *Id.* at 25 & n.3. That is particularly true here because allowing the decision below to stand would be harmful not just to this President, but to the Presidency itself, given the legal rulings below that failed to accord that constitutionally unique office the deference it is due in opposing suits and seeking appellate relief. Respondents do not even mention *Munsingwear*, much less explain why this Court could not simply wait several days for the anticipated mootness to materialize and then grant certiorari and vacate the decision below.

Respectfully submitted.

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