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.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Mandamus is a drastic remedy, warranted only in the most exceptional circumstances and never granted as of right. Parties seeking that extraordinary relief must show that they have a "clear and indisputable" right to it, that there is "no other adequate means to attain" it, and that it is "appropriate under the circumstances." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004). Applying that established standard, the Fourth Circuit, sitting *en banc*, denied President Trump's request to issue a writ of mandamus directing the district court to grant his motion to dismiss the plaintiffs' amended complaint with prejudice or, alternatively, to authorize an immediate interlocutory appeal of that dismissal under 28 U.S.C. § 1292(b).

The questions presented by the President are:

1. Whether a writ of mandamus is appropriate because, contrary to the holding of the court of appeals, the district court's denial of the President's motion to dismiss was clear and indisputable legal error.

2. Whether a writ of mandamus is appropriate, contrary to the holding of the court of appeals, where the district court's refusal to grant the President's motion to certify an interlocutory appeal was a clear abuse of discretion under 28 U.S.C. § 1292(b).

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INTRODUCTION

In his petition, President Trump asks this Court to decide whether it would be "appropriate" to issue either of two forms of entirely unprecedented mandamus relief. He first requests a writ directing immediate dismissal of this case with prejudice. This Court has never granted such relief. As a fallback, he requests a writ requiring the district court to reverse its denial of certification for interlocutory appeal under 28 U.S.C. § 1292(b). Every court of appeals to have considered this question has determined that such relief is improper.

This Court should deny review. President Trump begins by asking this Court to grant him mandamus relief because, in his view, the district court committed clear and indisputable error when it denied his motion to dismiss in two thorough opinions. But the mandamus posture of this litigation makes it a flawed vehicle to review the underlying legal issues, which present no circuit split. Moreover, even if the President could show a clear and indisputable error, it would not matter because he fails to satisfy the second and third prerequisites to mandamus. He cannot demonstrate that there are "no other adequate means to attain the relief he desires." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (citation omitted). And, because certified election results indicate his departure from federal office in a matter of weeks, he cannot show that mandamus relief is "appropriate under the circumstances." *Id.* at 381. Even if the President could surmount these hurdles, review should still be denied because the Fourth Circuit's *en banc* decision correctly determined that there was no

"clear and indisputable" error in denying the motion to dismiss.

The President's second extraordinary request is equally unsupported. No court has *ever* granted mandamus relief directing a district court to certify an appeal under Section 1292(b) where, as here, the district court considered the issue and declined to do so. That should be the end of the matter. But there is more: the vast majority of courts have held that it is *never* permissible to grant mandamus relief coercing certification under Section 1292(b); the text and structure of Section 1292(b) command that view; the *en banc* court concluded that the President was not entitled to relief even under a more permissive standard; and the district court did not clearly abuse its discretion in declining to certify pursuant to Section 1292(b). For those reasons, review is unwarranted.

In any event, the outcome of the recent presidential election eliminates any need for this Court's intervention. Based on certified election results, President-Elect Joseph R. Biden, Jr. will be inaugurated as the 46th President of the United States on January 20, 2021. At that point, the prospective injunctive relief sought by the District of Columbia and the State of Maryland will become unnecessary, and the case will become moot.

The petition should be denied.

STATEMENT OF THE CASE

A. The Foreign and Domestic Emoluments Clauses

The Constitution includes two clauses that expressly prohibit the President from receiving any "Emolument" from a foreign or domestic government. *See* U.S. Const. art. I, § 9, cl. 8.; *id.*, art. II, § 1, cl. 7.

The Foreign Emoluments Clause bars anyone holding any "[o]ffice of Profit or Trust under" the United States (including the President) from "accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" unless Congress consents. *Id.* art. I, § 9, cl. 8. The broad language in this Clause rests on the Framers' belief that if benefits from foreign states "were allowed to be received without number, and privately, they might produce an improper effect, by seducing men from an honest attachment for their country, in favor of that which was loading them with favors." 5 Annals of Cong. 1583 (1798) (Rep. James Bayard).

The Domestic Emoluments Clause entitles the President to receive a salary and benefits fixed in advance by Congress, but prohibits him from receiving "any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7. This restriction ensures that the President will "have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution" and prevents others, including any State in the Union, from "weaken[ing] his fortitude by operating on his necessities [or] corrupt[ing] his integrity by appealing to his avarice." *The Federalist* No. 73 (Hamilton).

The Framers' broad vision for the Emoluments Clauses is reflected in the language they employed. Founding-era dictionaries confirm that the term "emolument" encompassed "profit," "advantage," and "gain." *See* John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523-1806* (July 12, 2017), https://ssrn.com/abstract=2995693; *see also Himely v. Rose*, 9 U.S. (5 Cranch) 313, 318-19 (1809) ("profits and advantages"). The settled practice of the Executive branch, reflected in opinions from the Department of Justice's Office of Legal Counsel and the Comptroller General, supports this understanding of the Clauses. *Cf. Nat'l Lab. Rels. Bd. v. Noel Canning*, 573 U.S. 513, 533 (2014). As those offices have recognized, the Foreign Emoluments Clause is "a prophylactic provision," *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 98 (1986), intended "to have the broadest possible scope and applicability," B-169035, 49 Comp. Gen. 819, 821 (1970). Its domestic counterpart has similarly been read to prevent "Congress or any of the states from attempting to influence the President through financial awards or penalties." *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 189 (1981).

The word "emolument," as used in the Clauses, accordingly covers "any profits" accepted from a foreign or domestic government. *See Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 119 (1993). That is true even where the recipient had no "direct personal contact or relationship" with a foreign government, *id.*, and even when the amount accepted was small,

see, e.g., Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, OLC, to H. Gerald Staub, Office of Chief Counsel, NASA, *Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* (May 23, 1986) (applying the Foreign Emoluments Clause to the acceptance of a $150 stipend, but ultimately concluding that the Clause was not violated because the issuing university was not a "foreign state").

B. Proceedings Below

1. District Court Proceedings

On June 12, 2017, Respondents the District of Columbia and the State of Maryland filed this action alleging that President Trump's decision to maintain an ownership interest in, and to profit from, the Trump Organization while holding the Office of President violated the Emoluments Clauses of the Constitution. The complaint alleged that this conduct undermined the District's and Maryland's sovereign and quasi-sovereign interests in pursuing governmental objectives free of pressure to gain the President's favor, and that it had distorted competition for foreign and domestic government business. For these injuries, the District and Maryland sought prospective declaratory and injunctive relief.

The President moved to dismiss for lack of jurisdiction and failure to state a claim. The district court held two days of oral argument and issued two thorough, well-reasoned opinions rejecting his arguments.

a. The district court first declined to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Pet. App. 306a-307a. In so doing, it found "good reason" supporting the plaintiffs' standing to challenge the President's receipt of emoluments in connection with his ownership of the Trump International Hotel Washington, D.C. ("the Hotel"). Pet. App. 297a. It held that the President's conduct undermines the ability of the District and Maryland to pursue their government interests free of pressure to gain his favor by patronizing the Hotel or granting him tax-based or other concessions. Pet. App. 272a-274a. The court next held that the President's actions injure the economic welfare of the plaintiffs' residents, whose businesses suffer a competitive disadvantage. Pet. App. 277a-281a. Finally, the court concluded that "the President's ownership interest in the Hotel has had and almost certainly will continue to have an unlawful effect on competition," injuring plaintiffs directly through comparable properties in which they have proprietary interests. Pet. App. 281a; *see* Pet. App. 281a-286a.

In this opinion, the district court also held that the District and Maryland have an equitable cause of action because "[p]recedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution." Pet. App. 302a (citing *Bond v. United States*, 564 U.S. 211, 225-26 (2011); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010)). The court saw "a strong parallel" between this case and those where plaintiffs had a cause of action to challenge unconstitutional action that would expose them to injurious regulation. Pet. App. 302a-303a.

b. In a separate opinion, the district court declined to dismiss for failure to state a claim under Rule 12(b)(6). At the outset, the district court concluded that the President's proposed definition of the term "emolument" did "not make the grade"; instead, the court agreed with the plaintiffs that the "executive branch precedent and practice [is] overwhelmingly consistent" with an "expansive view of" the term. Pet. App. 237a. The district court next determined that the clear weight of the historical materials, common understanding, and prior executive practice support the definition of "emolument" as extending to any "profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments"—including "profits from private transactions, even those involving services given at fair market value." Pet. App. 242a-243a. Based on that understanding, the court held that President Trump's receipt of profits from foreign and domestic officials through his ownership interest in the Hotel stated a claim for relief.

c. President Trump sought leave from the district court to file an interlocutory appeal under 28 U.S.C. § 1292(b), and moved to stay the proceedings. Pet. App. 153a-154a. In a carefully reasoned thirty-page opinion, the district court denied certification, finding that the President had not carried his burden of meeting each of the elements under the statute. Pet. App. 176a-177a. The district court determined that, although the meaning of the term "emolument" was a question of first impression for the judiciary, the President was not entitled to an immediate interlocutory appeal because the definition he advanced was "exceedingly strained" and "not

necessarily one as to which fair minded jurists might reach contrary conclusions." Pet. App. 162a; *see* Pet. App. 163a. The district court also saw no substantial ground for a difference of opinion as to whether there is equitable jurisdiction to issue declaratory and injunctive relief against the President. Pet. App. 175a. It found "ample authority" to conclude that the President could be the subject of equitable relief where there was no suitable subordinate executive official to enjoin from violating "discrete constitutional prohibitions." Pet. App. 175a. Finally, the court found that an interlocutory appeal would not materially advance the litigation and would instead significantly delay the "ultimate resolution of the case." Pet. App. 166a.

d. In early December 2018, the District and Maryland served subpoenas seeking "business records as to hotel stays and restaurant expenses . . . from private third parties and low-level government employees." Pet. App. 18a. They did not—and have not—served President Trump with *any* discovery requests. *See* Pet. App. 18a ("The President has not explained, nor do we see, how requests pertaining to spending at a private restaurant and hotel threaten any Executive Branch prerogative."). Nor has the President sought relief "as to any discovery order" issued in this case. Pet. App. 18a.

2. Fourth Circuit Proceedings

Following the district court's denial of his Section 1292(b) motion, the President filed a petition for a writ of mandamus in the Fourth Circuit, seeking an order requiring the district court to grant certification pursuant to Section 1292(b) or, in the alternative, to dismiss the amended complaint with

prejudice. The President also sought a stay, which a panel of the Fourth Circuit granted. Pet. App. 116a.

a. Initially, a three-judge panel granted mandamus relief as to the district court's denial of Section 1292(b) certification, issued its own Section 1292(b) certification to treat the mandamus petition as an appeal, and considered that appeal on the merits. The panel reversed the district court's denial of the motion to dismiss for lack of Article III standing and remanded with instructions to dismiss the complaint with prejudice. *See* Pet. App. 112a-149a.

b. The Fourth Circuit granted the District and Maryland's petition for rehearing *en banc* and vacated the panel decision. On rehearing, the *en banc* court denied the President's request for mandamus relief. The court first observed that, "[g]iven the demanding criteria a petitioner must meet to obtain a writ of mandamus, appellate courts rarely grant mandamus relief, and even more rarely find it appropriate to issue a writ of mandamus to correct acts within the discretion of the district court." Pet. App. 6a.

The *en banc* court held that the President was not entitled to mandamus relief ordering the district court to certify an interlocutory appeal under Section 1292(b). It explained that Section 1292(b)'s plain language and legislative history evinced Congress's "clear intent to require both the district court and the court of appeals to agree to allow an interlocutory appeal and to provide both courts with discretion in deciding whether to do so." Pet. App. 8a. The *en banc* court thus found it "hardly surprising that appellate courts, generally reluctant to issue a writ of mandamus to correct a decision within the discretion of the lower court, have been particularly wary of

usurping the discretion Congress specifically vested in the district courts under § 1292(b)." Pet. App. 9a (collecting cases).

The *en banc* court also declined the President's invitation to replace the "clear and indisputable error" requirement for mandamus relief with an "abuse of discretion standard." Pet. App. 10a. It noted that the "contention that a naked error of law amounts to an abuse of discretion entitling a petitioner to mandamus relief has been repeatedly rejected by the Supreme Court." Pet. App. 10a. The *en banc* court then held that mandamus relief requiring Section 1292(b) certification "might" be proper, but only in narrow circumstances not alleged or present in this case, namely, if "the district court ignored a request for certification, denied such a request based on nothing more than caprice, or made its decision in manifest bad faith." Pet. App. 13a-14a.

The *en banc* court next rejected the President's "secondary argument" that mandamus relief was warranted to direct dismissal of the entire amended complaint. Pet. App. 14a. It determined that the President had shown no "clear and indisputable right" to such extraordinary relief, because reasonable jurists could conclude that the plaintiffs had a cause of action to maintain their Emoluments Clause claims. Pet. App. 14a-15a. The *en banc* court also determined that the District and Maryland's theory of Article III standing rests "on legal principles that the Supreme Court has expressly endorsed." Pet. App. 15a (collecting cases). And, as to the President's proposed definition of the term "emolument," the *en banc* court noted that "several Executive Branch and Comptroller General legal opinions . . . have arguably interpreted

the term consistently with [plaintiffs'] definition, not the President's." Pet. App. 16a.

Finally, the *en banc* court rejected the President's contention that separation of powers concerns required mandamus relief. Pet. App. 17a-19a. It held that, unlike in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), the District and Maryland's narrowly tailored requests for "business records as to hotel stays and restaurant expenses, sought from private third parties and low-level government employees" did not intrude on any Executive Branch prerogative. Pet. App. 17a-18a. Equally unconvincing, in the *en banc* court's view, was the President's assertion that "no court can order the President to comply with the Emoluments Clauses." Pet. App. 19a. It explained that the Emoluments Clauses—like many other constitutional provisions—impose "*restraints* on the President," Pet. App. 19a, and that the President's duty to obey those restraints "neither constitutes an official executive prerogative nor impedes any official executive function," Pet. App. 20a. Alternatively, the *en banc* court found that, even if obeying the Emoluments Clauses were an official duty, that duty would be "ministerial" rather than "discretionary." Pet. App. 20a.

Judge Wynn issued a concurring opinion to underscore that the "majority opinion's painstaking adherence to settled law in the staid domain of procedure exemplifies a conservative and traditional approach of deciding [only] those issues which need to be resolved." Pet. App. 24a. Judge Wilkinson and Judge Niemeyer issued separate dissenting opinions. Pet. App. 26a-64a (Wilkinson, J.); Pet. App. 65a-111a (Niemeyer, J.).

REASONS FOR DENYING THE PETITION

I. Petitioner Has Not Satisfied the Criteria for Certiorari

A. Petitioner is not entitled to mandamus relief requiring dismissal of the amended complaint

The petition's first question presented is whether it would be "appropriate" to grant mandamus relief because the district court supposedly committed "clear and indisputable legal error" in denying the motion to dismiss. Pet. I. But there is no circuit split on this issue. Nor is there a circuit split concerning the underlying legal issues as to which the petition asserts that the district court clearly and indisputably erred. Certiorari is therefore inappropriate, both because this case's mandamus posture makes it an improper vehicle through which to consider the underlying legal issues, and because the Fourth Circuit correctly decided that the President was not clearly and indisputably entitled to dismissal of the amended complaint. This Court should reject his invitation to engage in purely fact-bound error correction of the Fourth Circuit's straightforward denial of mandamus relief.

1. The mandamus posture of this case makes it an especially poor vehicle for consideration of the underlying issues

Mandamus is an extraordinary remedy, never granted as of right. *See Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."). It is permissible only when there is a clear "judicial usurpation of power." *Allied Chem. Corp. v. Daiflon,*

Inc., 449 U.S. 33, 35 (1980) (per curiam). Courts therefore think twice—and even then still hesitate—before issuing a writ of mandamus. Otherwise, mandamus "would undermine the settled limitations upon the power of an appellate court to review interlocutory orders" and "defeat[] the very policies sought to be furthered by" the final judgment rule. *Id.* (quoting *Will v. United States*, 389 U.S. 90, 98 n.6 (1967); *Kerr*, 426 U.S. at 403). Given these principles, writs of mandamus are exceedingly rare.

Rarer still is the relief that the President seeks here: a writ of mandamus directing a district court to dismiss a case with prejudice at the pleading stage. To Respondents' knowledge, this Court has never issued or affirmed such extraordinary relief. There is no compelling reason to break new ground now.

In asserting otherwise, the petition focuses almost entirely on the first prerequisite to mandamus relief: a clear and indisputable right to relief. Emphasizing that one requirement, the petition urges this Court to decide two underlying substantive issues: (1) whether plaintiffs have a cause of action to seek redress for violations of the Emoluments Clauses; and (2) whether the President is subject to such a lawsuit in his official capacity. But in its current posture, this case is an exceedingly poor vehicle to address those legal questions. That is true not only because of the high mandamus standard, but also because there are two independent, alternative grounds that would need to

be satisfied before mandamus relief could be granted. *See Cheney*, 542 U.S. at 380-81.[1]

First, the President is not entitled to a writ of mandamus because he failed to show that there is "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380-81 (citation omitted). As this Court has long made clear, mandamus "may never be employed as a substitute for appeal." *Will*, 389 U.S. at 97. In fact, the President acknowledges in his petition that "an appeal from final judgment is ordinarily an adequate means of relief from the erroneous failure to dismiss a complaint." Pet. 22. And there is no doubt here that the President could have sought review of the district court's decisions "on direct appeal after a final judgment has been entered." *Allied Chem. Corp.*, 449 U.S. at 36. That he is the President is no reason to discard the standard appellate process.[2]

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[1] The petition asserts that the Fourth Circuit "did not dispute that the second and third requirements were satisfied." Pet. 15. That is inaccurate. The Fourth Circuit had no need to reach those elements because it found that the President failed to show a clear and indisputable right to relief. Nowhere did the Fourth Circuit affirmatively state that the second and third prerequisites were satisfied. To the contrary, the Fourth Circuit stated that "[t]he President has not offered any independent argument that he meets the other two criteria for mandamus relief." Pet. App. 14a n.5. In any event, this Court could not decide the first question presented in the President's favor without assessing for itself whether the second and third prerequisites of mandamus relief are met.

[2] Granting mandamus at this interlocutory juncture would also contravene bedrock principles of finality and depart from this Court's ordinary practice of awaiting final judgment before granting certiorari to review important legal questions. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258

Second, mandamus relief is also unavailable because the unprecedented relief that the President seeks would not be "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. The district court's refusal to grant a motion to dismiss is simply not the sort of "really extraordinary" circumstance warranting the radical medicine of mandamus relief. *Id.* at 380. While litigation against a president may be "vexing," it does "not ordinarily implicate constitutional separation-of-powers concerns." *Clinton v. Jones*, 520 U.S. 681, 704 n.40 (1997); *see Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020) ("[B]urdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines.").

Moreover, the separation of powers concerns invoked by the petition pose no threat of materializing in this case, given that President Trump will no longer be President in a matter of weeks after this brief is filed. That material change in circumstances threatens not only to interpose jurisdictional obstacles to this Court's review, but also makes such an extraordinary writ prudentially ill-advised. *See infra* Part II.

(1916) ("[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree."); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (mem.) (Roberts, C.J., respecting denial of certiorari) ("The issues will be better suited for certiorari review" after "entry of final judgment."); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (mem.) (Alito, J., respecting denial of certiorari) ("Because no final judgment has been rendered[,] . . . I agree with the Court's decision to deny the petitions for certiorari.").

Against the above, President Trump cites to *Cheney*, but that case is nothing like this one. There, discovery was sought directly from the Vice President and other senior government officials as to the process by which they "give advice and make recommendations to the President." 542 U.S. at 385. Those requests implicated "the Executive Branch's interests in maintaining the autonomy of its office" by asking to examine the inner workings of "[t]he Executive Branch, at its highest level." *Id.* That is not true here. To date, discovery has been sought only from third parties, many of which are private businesses unrelated to the Trump Organization, and most of the requests seek standard business records. While some discovery has been served on executive agencies, there are no significant constitutional interests affected by targeted requests to the General Services Administration for communications about its leases, or by requests to the Commerce Department about where it booked event spaces. *Cf. In re Cheney*, 544 F.3d 311, 313-14 (D.C. Cir. 2008) (permitting discovery to proceed against the Office of the Vice President where the requests were "far more limited" than the discovery requested in *Cheney*, 542 U.S. 367).

For similar reasons, the President's reliance on *Mazars* is misplaced. *Mazars* involved subpoenas that were issued by one branch of the federal government (Congress) seeking information about another (the Executive). That unique context was pivotal, because "[c]ongressional demands for the President's information present an interbranch conflict no matter where the information is held" and thus necessarily "implicate special concerns regarding the separation of powers." 140 S. Ct. at 2035-36. Those concerns are not implicated by the third-party discovery issued by

the District and Maryland in this case.[3] *See Pierson v. Ray*, 386 U.S. 547, 564-65 (1967) (Douglas, J., dissenting) ("The doctrine of separation of powers is, of course, applicable only to the relations of coordinate branches of the same government, not to the relations between the branches of the Federal Government and those of the States." (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962))).

2. The decision below was correct

Even apart from the vehicle issues discussed above, this Court should not grant review of the first question presented because the Fourth Circuit correctly held that the district court did not commit "clear and indisputable" error in denying the motion to dismiss.

First, there is unquestionably a cause of action in equity to seek relief against a president for violating the Emoluments Clauses. As this Court has recognized, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional*

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[3] Of course, even if some *Cheney*-type injury could be imagined to arise in the future, the answer is not categorical immunity for the President. "The guard, furnished to the President to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a district court after those subpoenas have issued; not in any circumstance which is to precede their being issued." *United States v. Nixon*, 418 U.S. 683, 714 (1974) (citation omitted). Indeed, as the district court here recognized, there are multiple avenues for tailoring discovery. Pet. App. 179a ("[T]he [c]ourt is always available to limit given discovery to minimize an unusual impact."). Among other procedures, a party objecting to discovery can seek a protective order or challenge any specific discovery request.

Child Ctr., Inc., 575 U.S. 320, 327 (2015); *see Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."). Adhering to these settled principles, the Fourth Circuit rightly rejected the President's argument that equitable causes of action are available only as preemptive defenses to enforcement actions, reasonably concluding that the precedent is not so "obviously limited," and thus he "does not have a clear and indisputable right to dismissal of the complaint." Pet. App. 15a.

Second, separation of powers principles do not categorically foreclose an equitable suit against the President in his official capacity. As this Court has "long held," federal courts "ha[ve] the authority to determine whether [the President] has acted within the law." *Clinton*, 520 U.S. at 703. The amended complaint here seeks an injunction requiring President Trump to follow "a simple, definite duty" that is "imposed by law" and as "to which nothing is left to discretion." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866). As the Fourth Circuit noted, because the Emoluments Clauses impose "*restraints* on the President," his duty to obey those restraints "neither constitutes an official executive prerogative nor impedes any official executive function." Pet. App. 19a-20a (citing 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465 (Jonathan Elliot ed., 2d ed. 1836) ("The [Foreign Emoluments Clause] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state."). "[T]he notion that the President is vested with unreviewable power to both execute and

interpret the law is foreign to our system of government." Pet. App. 20a. To hold otherwise (as President Trump urges) would contravene the settled precept that in the United States, "no one is above the law." *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring in the judgment).

* * *

At bottom, the petition's first question presented requests deeply inappropriate relief. It asks this Court to engage with substantial legal issues—in the absence of a split in the circuits—that arise in an interlocutory and fact-bound mandamus posture. That intervention is unwarranted, particularly where the Fourth Circuit reasonably resolved those issues in accordance with precedent, and where the President failed to make any showing that he satisfies the second and third prerequisites for mandamus relief. For all these reasons, certiorari on this question should be denied.

B. Petitioner is not entitled to mandamus relief requiring Section 1292(b) certification

The second question presented is whether mandamus is "appropriate" where a district court's denial of Section 1292(b) certification was "a clear abuse of discretion." Pet. I. The correct answer to that question is "no," and not a single appellate court has ever said otherwise. Nor has any court ordered mandamus based on the novel "abuse of discretion" standard that the President urges this Court to apply. Finally, because this question presented does not implicate any circuit split, and because the Fourth

Circuit correctly denied mandamus relief, the Court should decline review.

1. There is no circuit split

As the President concedes, Pet. 31, nearly every court of appeals that has considered the issue has held that mandamus relief is *categorically* unavailable when a district court has denied a Section 1292(b) certification.

Specifically, the First, Second, Third, Seventh, Eighth, and Ninth Circuits have held that they cannot or will not review the denial of a Section 1292(b) certification through a mandamus petition. *See In re Mar. Serv. Corp.*, 515 F.2d 91, 92 (1st Cir. 1975) (per curiam) (noting that the court would have "little difficulty in denying the [mandamus] petition as wholly inappropriate"); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (Friendly, J.) (explaining that a request for mandamus to compel issuance of a Section 1292(b) certification "meets an insurmountable obstacle" because "Congress plainly intended that an appeal under § 1292(b) should lie only when the district court and the court of appeals agreed on its propriety"), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 755 n.1 (3d Cir. 1973) ("We note that the use of mandamus as a means of forcing the district court to make a certification under 28 U.S.C. § 1292(b) does not seem appropriate, for there are authorities holding that the district court's decision on this question is not reviewable." (collecting cases)); *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003) ("Most courts have held that mandamus is not appropriate to compel a district court to certify

under § 1292(b). We agree." (citations omitted)); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 n.4 (8th Cir. 1975) ("The defendants also challenge the propriety of the district court's refusal to certify this question under [Section] 1292(b). This court is without jurisdiction to review an exercise of the district court's discretion in refusing such certification."); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) ("Concurrence of both the district court and the appellate court is necessary and we are without power to assume unilaterally an appeal under section 1292(b)."); *see also In re Phillips Petroleum Co.*, 943 F.2d 63, 68 (Temp. Emer. Ct. App. 1991) (denying mandamus relief); *In re District of Columbia*, No. 99-5273, 1999 WL 825415, at *1 (D.C. Cir. Sept. 1, 1999) (same).[4]

This rule is no surprise given the clear meaning and structure of the statute. Section 1292(b) provides a limited exception to the requirement that appellate review is generally available only after a final judgment in the district court. *See* 28 U.S.C. §§ 1291; 1292(b). As Judge Friendly recognized, "Congress plainly intended that an appeal under § 1292(b)

[4] The scholarly commentary is in accord. *See* 16 Charles Alan Wright et al., *Fed. Prac. & Proc.* § 3929 (3d ed. 2020) ("Although a court of appeals may be tempted to assert mandamus power to compel certification, the temptation should be resisted. The district judge is given authority by the statute to defeat any opportunity for appeal by certification." (footnote omitted)); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 616-17 (1975) ("The courts of appeals have so far been unanimous in refusing to grant mandamus either to reverse the trial court's decision on certification or to review the underlying order on its merits. The statutory history of section 1292(b) plainly indicates that this is the correct result." (footnote omitted)).

should lie only when the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge." *Leasco*, 468 F.2d at 1344. In that respect, Section 1292(b) "create[s] a dual gatekeeper system for interlocutory appeals: both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden." *Ford Motor Co.*, 344 F.3d at 654.

In its decision here, the Fourth Circuit "d[id] not foreclose the possibility" that a writ of mandamus might issue to compel a Section 1292(b) certification if the district court "denied such a request based on nothing more than caprice, or made its decision in manifest bad faith." Pet. App. 13a (citing *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13-15 (1856); *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 376-77 (1868)). But it found no such extreme circumstances had been alleged or demonstrated in this case. Pet. App. 13a-14a. Accordingly, the second question presented does not implicate any division of authority among the circuits.

The President's attempt to drum up a circuit split based on inapposite decisions from the Fifth, Eleventh, and D.C. Circuits is unsuccessful. *See* Pet. 31-32. *First*, the Eleventh Circuit's decision in *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982), arose in an idiosyncratic procedural posture. The petitioners there "expressed their concern that the government might deport them during the pendency of" their case. *Id.* at 428. After attempting to obtain assurances from the government that it would provide notice prior to deporting the petitioners, the district

court entered a temporary restraining order, but did so without first deciding a threshold jurisdictional issue that the government had tried to assert. *Id.* at 428-31. The Eleventh Circuit construed the government's appeal from the temporary restraining order "as a petition for a writ of mandamus" and directed the district court to conduct additional proceedings to determine whether it had jurisdiction. *Id.* at 430-31. In so doing, the Eleventh Circuit directed the district court to certify those issues for appeal under Section 1292(b) following that antecedent jurisdictional determination. Nothing in that *sui generis* decision conflicts with the decision below. Here, unlike in *Fernandez-Roque*, the district court actually decided the Section 1292(b) issue and denied relief; here, unlike in *Fernandez-Roque*, the issues unfolded in a normal procedural posture and with adequate opportunity for district court and appellate decision making; and here, unlike in *Fernandez-Roque*, there was no evidence that the district court acted in bad faith or with caprice in adjudicating the case.

Second, the President's reliance on the Fifth and D.C. Circuit decisions is similarly misplaced. *See* Pet. 31-32. Neither circuit adopted the "abuse of discretion" rule that the petition urges this Court to apply. In fact, in the decisions the petition cites—one of which is unpublished, the other of which has not been relied on as stating a general rule—both courts *rejected* the mandamus petitions and remanded for further consideration. *See In re Trump*, 781 F. App'x 1, 2 (D.C. Cir. 2019) ("We instead exercise our discretion to deny the writ . . . and remand the matter to the district court for immediate reconsideration of the motion to certify . . . ."); *In re McClelland Eng'rs,*

Inc., 742 F.2d 837, 840 (5th Cir. 1984) (remanding with a "request that the district court certify its interlocutory order for appeal").

Accordingly, the President is incorrect in suggesting that there is a division of opinion in the circuits requiring this Court's intervention. He conspicuously does not seek—and has never requested—an order remanding to the district court for another assessment of whether certification is proper. Instead, he asks only that this Court announce that mandamus is "appropriate" where denial of Section 1292(b) certification is a "clear abuse of discretion." For reasons that should now be clear, there is no split on that question and no merit to the view of the law expressed in the petition.[5]

2. The decision below was correct

An independent basis for declining to review the petition's second question presented is that the Fourth Circuit correctly declined to issue a writ of mandamus requiring the district court to certify an interlocutory appeal under Section 1292(b).

The President's request for mandamus relief is foreclosed by Section 1292's text, structure, and legislative history. Under the plain text and statutory structure of Section 1292(b), an interlocutory appeal is

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[5] For similar reasons, the other case the petition cites, Pet. 32, generates no cert-worthy split. In *United States v. U.S. District Court*, No. 18A65 (July 30, 2018), this Court denied as premature an application for a stay pending the Ninth Circuit's disposition of a writ of mandamus following a Section 1292(b) denial where the district court had issued a three-paragraph opinion with no analysis (and with only one sentence addressing the decision to decline to certify the appeal).

permissible only when the district court and circuit court both independently agree that certification is appropriate. *See* 28 U.S.C. § 1292(b); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978) (noting that even if a district judge certifies under Section 1292, "the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment" (internal quotation marks omitted)).

Moreover, as the Fourth Circuit explained, the legislative history confirms what the text makes plain: that "Congress's clear intent" was "to require both the district court and the court of appeals to agree to allow an interlocutory appeal and to provide both courts with discretion in deciding whether to do so." Pet. App. 8a (citing S. Rep. No. 2434, 85th Cong., 2d Sess. 3 (1958) ("[T]he bill is cast in such a way that the appeal is discretionary rather than a matter of right. It is discretionary in the first instance with the district judge."); H.R. Rep. No. 1667, 85th Cong., 2d Sess. 3 (1958) ("The right of appeal given by the amendatory statute is limited both by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics, and by the resting of final discretion in the matter in the Court of Appeals.")).

Therefore, mandamus to compel issuance of a Section 1292(b) certification "meets an insurmountable obstacle." *Leasco*, 468 F.2d at 1344. "If someone disappointed in the district court's refusal to certify a case under § 1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper and

the statutory system will not operate as designed." *Ford Motor Co.*, 344 F.3d at 654.

In response to that wall of authority, the President retreats to *Cheney*. Pet. 13. But the decision below is entirely consistent with this Court's decision in *Cheney*. Although the Court in *Cheney* did say that mandamus is intended to protect against "a judicial usurpation of power or a clear abuse of discretion" by the district court, 542 U.S. at 371 (internal quotation marks and citations omitted), as the Fourth Circuit explained, that stray language was not meant to "transform[] the mandamus requirement that a petitioner establish a 'clear and indisputable' right to relief into a requirement that the petitioner show a legal error amounting to a 'clear abuse of discretion,'" Pet. App. 10a; *see Cheney*, 542 U.S. at 381 (noting that petitioner must show that right to relief is "clear and indisputable"). And, of course, the Court in *Cheney* did not confront the particular question presented here: whether mandamus is appropriate following the denial of a Section 1292(b) motion on substantive pleading issues. *Cheney*, 542 U.S. at 389-92.[6]

Finally, it bears emphasis that President Trump failed to demonstrate, and indeed has not claimed, an entitlement to mandamus relief based on "caprice" or "bad faith." Pet. App. 13a. The district court below "promptly" issued a thirty-page opinion and "ruled on the request for certification in a detailed written

[6] The 2018 discovery requests should have no bearing on this issue. The requests were issued approximately two weeks before the President sought mandamus in the Fourth Circuit; their return date has long passed, and, in the unlikely event that they are ever reissued, the President remains free to request relief or limitations on those requests from the district court.

opinion that applied the correct legal standard." Pet. App. 13a-14a. And the district court's decision here—that plaintiffs established standing, possessed an equitable cause of action, and stated a claim against the President based on a historically supported definition of "emolument"—was not "arbitrary or based on passion or prejudice; to the contrary, it 'was in its nature a judicial act.'" Pet. App. 14a (quoting *Ex parte Secombe*, 60 U.S. at 15). There is accordingly no entitlement to mandamus relief.

II. The Outcome of the Presidential Election Eliminated the Need for this Court's Intervention

This case arises from Donald Trump's decision to retain ownership of the Trump Organization while holding the Office of President. Based on the certified election results, however, President-Elect Joseph R. Biden, Jr. will be inaugurated as the 46th President of the United States on January 20, 2021. The moment that occurs, the prospective declaratory and injunctive relief sought by the District and Maryland with respect to President Trump's conduct regarding the Hotel will no longer be necessary. The case will be moot. *See United States v. Juv. Male*, 564 U.S. 932, 936 (2011) (per curiam); *Alvarez v. Smith*, 558 U.S. 87, 93 (2009); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-80 (1990); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116-17 (1920).

Nor will any exception to mootness apply. This is not an "'exceptional situation[],' where (1) 'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there is a reasonable expectation that the same complaining party will be subject to the same action again.'"

Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Presidents have historically complied with the Emoluments Clauses, and there is every reason to expect that future Presidents—including President-Elect Biden—will do so. In any event, were an issue concerning a President's compliance with the Emoluments Clauses to arise in the future, and if litigation were to be filed relating to that alleged noncompliance, the issues presented would not evade judicial review in the normal course. Indeed, as this very litigation demonstrates, the President has had every chance to obtain judicial review of his legal contentions. The same would surely be true in any future case. And it would be far preferable to address any such legal issues there, in a concrete factual setting and without the awkward strictures of a mandamus petition.

Because this case will become moot when President-Elect Biden assumes the Office of President in January 2021, this Court's intervention through extraordinary relief would be both pointless and unwarranted.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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