Nos. 18-2486, 18-2488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE DONALD J. TRUMP, President of the United States of America, in his official capacity,
Petitioner.

DISTRICT OF COLUMBIA AND STATE OF MARYLAND,
Plaintiffs-Appellees,
v.
DONALD J. TRUMP, in his individual capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
(Peter J. Messitte, District Judge)

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The District of Columbia and the State of Maryland file this supplemental brief pursuant to the Court's order to address "any developments . . . not covered in the original briefs." Doc. 82 (No. 18-2486); Doc. 69 (No. 18-2488).[1] For the District and Maryland, the pertinent legal developments—two appellate decisions concerning related emoluments litigation and another on mootness—all point in the same direction: they reinforce that the extraordinary mandamus relief sought by President Trump should be denied, and that the individual-capacity appeal should be dismissed as moot. Factual developments since the original briefing also support these conclusions.

I. THE D.C. CIRCUIT RECENTLY RECOGNIZED THAT THE PANEL IN THIS CASE CREATED A "DIVIDE[]" WITH OTHER CIRCUITS, WHICH HAVE CONSISTENTLY REJECTED THE USE OF MANDAMUS TO CIRCUMVENT 28 U.S.C. § 1292(b).

After the District and Maryland filed their original briefs in this case, the D.C. Circuit recognized—in a case brought by Members of Congress challenging the President's violations of the Foreign Emoluments Clause—that the panel's decision accepting appellate jurisdiction had "divided the courts of appeals." *In re Trump*, 781 F. App'x 1, 2 (D.C. Cir. 2019). This acknowledgement underscores that a decision by this en banc Court to use mandamus to take appellate jurisdiction under 28 U.S.C. § 1292(b) would be an extreme outlier.

[1] "Doc." refers to documents filed in this Court. "Dkt." refers to the ECF docket numbers of filings in the district court.

Indeed, until the panel's now-vacated decision in this appeal, no appellate court had *ever* accepted jurisdiction under Section 1292(b) where the district court had considered and rejected certification. Doc. 59 at 5-9 (No. 18-2486); Doc. 35 at 15-19 (No. 18-2486) (collecting cases). Rather, every court to squarely consider the question had held that obtaining appellate jurisdiction through mandamus is improper. *See* Doc. 59 at 5-9 (No. 18-2486); Doc. 35 at 15-19 (No. 18-2486); *see also, e.g.*, *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). Nor is mandamus to direct the district judge to exercise his discretion to certify the question an appropriate remedy." (internal citation omitted)).[2]

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[2] The D.C. Circuit declined to "wade into th[e] dispute," created by the panel's decision, instead remanding the matter to the district court to reconsider whether to certify the matter under Section 1292(b). 781 F. App'x at 2. That approach is consistent with cases relied upon by both President Trump and the panel in its opinion. Doc. 2-1 at 14 (No. 18-2486) (citing *In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 839 (5th Cir. 1984) (declining to issue a writ of mandamus to direct the district court to certify an interlocutory appeal under Section 1292(b) because it would be a "drastic" "intervention" and instead remanding with the "request" that the district court certify); *In re Trump*, 928 F.3d 360, 372 (4th Cir. 2019) (citing *McClelland*). The difference in approach is not one of form but substance. As this Court has recognized, it lacks appellate jurisdiction under Section 1292(b) in the absence of a district court certification for interlocutory review. *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 137 (4th Cir. 1997) ("Section 1292(b) does not provide us with subject matter jurisdiction in this case because the district court expressly declined to certify its order compelling arbitration under § 1292(b)."). If the Court believes that the district court erred in its Section 1292(b) analysis, the

Rather than create a split of authority with its sister circuits, this Court, sitting en banc, should reaffirm that "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," because "[i]t would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge." *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (emphasis added), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank*, 561 U.S. 241 (2010); *see 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)); *Green*, 541 F.2d at 1338 (similar); *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.").

Even if this court had the power to mandamus Section 1292(b) certification, the President has offered no basis to conclude that such relief is appropriate. *Compare* Doc. 67 at 13-16 (No. 18-2486), *with* Doc. 59 at 5-9 (No. 18-2486) *and* Doc. 35 at 15-19 (No. 18-2486). The district court issued a detailed opinion that

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most it can do is remand for further consideration of the certification question. It cannot, as the panel purported to do, "take the district court's orders as certified." 928 F.3d at 372.

correctly stated the legal standard for Section 1292(b) and reasonably applied it to the facts. Doc. 2-2 at 104-34 (No. 18-2486) (Dkt. 135). Nothing about that decision, or the detailed decisions underlying it (Doc. 2-2 1-47, 50-101 (No. 18-2486) (Dkt. 101, 123)), amount to a "usurpation" of the judicial power, *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980)). Indeed, that is a central difference between this case and the emoluments case in the D.C. Circuit, where that court concluded that the district court's reconsideration of the certification question was warranted because it had not "adequately address[ed] . . . the separation of powers issues present in a lawsuit brought by members of the Legislative Branch against the President of the United States." 781 F. App'x at 2. Here, President Trump merely disagrees with the outcome of the district court's certification decision, which falls far short of establishing a usurpation of judicial power.

II. THE SECOND CIRCUIT'S DECISION IN *CREW V. TRUMP* CONFIRMS THAT THE DISTRICT AND MARYLAND HAVE STANDING.

Another development since the parties' briefing and the panel argument is that, in September, the Second Circuit issued an opinion concluding that hospitality-industry plaintiffs have Article III standing to sue President Trump for violating the Emoluments Clauses. *Citizens for Responsibility and Ethics in Wash. v. Trump*, 939

F.3d 131 (2d Cir. 2019) ("*CREW*"), *petition for reh'g filed* (Oct. 28, 2019).[3] The Second Circuit concluded that the plaintiffs in that case—whose factual allegations that court described as "almost identical" to those made by the District and Maryland here, *id.* at 148 n.9—had sufficiently pleaded facts satisfying the competitor standing doctrine. In so holding, the Second Circuit expressly addressed and disagreed with the conclusion of this Court's now-vacated panel decision that the District and Maryland could not rely on that doctrine to establish standing. *Id.* at 148-52.

Although President Trump never sought this Court's mandamus review of the district court's standing decision—and the District and Maryland's interest in equal sovereignty is also fully sufficient to support their standing—the Second Circuit's decision persuasively sets out why the District and Maryland's proprietary interests are independently sufficient to establish standing in this case. In particular, the Second Circuit's discussion of traceability and redressability carefully refutes the reasoning on which the panel relied (*see* Doc. 57 at 27-32 (No. 18-2486)), and affirms the District and Maryland's proprietary (and *parens patriae*) interests.

With respect to traceability, the Second Circuit's opinion explains why establishing the requisite causal link between the President's acceptance of emoluments and the District and Maryland's competitive injury does not "require[]

[3] The parties initially informed the Court of this decision through supplemental letters pursuant to Fed. R. App. P. 28(j). *See* Docs. 69-1, 71 (No. 18-2486); Docs 60-1, 69 (No. 18-2488).

speculation into the subjective motives of independent actors." *CREW*, 939 F.3d at 144-47, 150-52. Even if some officials might continue patronizing the President's businesses absent the opportunity to provide President Trump with a direct financial benefit, the Second Circuit explained, plaintiffs do not need to "rul[e] out all possible alternative explanations" for their injury to demonstrate that they have standing. *Id.* at 144. Instead, "Plaintiffs need only establish a substantial likelihood that the President's receipt of emoluments . . . has some favorable effect on government officials' demand for the Trump establishments (and, by extension, some unfavorable effect on their demand for Plaintiffs' competing properties)." *Id.* at 151.

As the Second Circuit acknowledged, the threshold for showing traceability in the competitor standing context can be met through "common sense and basic economics," such as by showing "that the President's receipt of emoluments generates an unlawful competitive advantage for the Trump establishments." *Id.* "It is eminently plausible," the court explained, "that if two establishments provide otherwise comparable services, but one establishment offers an inducement that the other cannot offer, then the inducement will attract at least some patronage that might otherwise have gone to the other establishment." *Id.* at 147. No more is required to "connect" the alleged injury "to the challenged actions." *Id.* at 144 (internal quotation marks omitted). Just as in "suit[s] for trademark infringement, unfair competition, or violation of the antitrust laws"—all of which "involve[] harm

that results from the decisions of third-party customers," *id.* at 151—a party's standing cannot be "defeat[ed] . . . merely by pointing to the possibility that customers' preference for [the President's] products or services was attributable to something other than the [President's] illegal conduct," *id.* at 145.

Indeed, as the Second Circuit notes, the Supreme Court's recent decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), reinforces this articulation of Article III's requirements, even outside the competitor standing context. In *Department of Commerce*, the Court held that the plaintiffs had met their burden to show standing where they demonstrated that third parties' conduct "is likely attributable at least in part" to the defendant's challenged action, based on the "predictable effect" of that action. 139 S. Ct. at 2566; *see CREW*, 939 F.3d at 151. That test is readily satisfied here, where—as in *CREW*—foreign diplomats are alleged to have candidly stated that they chose the President's establishments to curry favor with the President, and the President has said publicly that he likes foreign officials and governments who do business with him. *See, e.g.*, Doc. 2-2 151-52 (No. 18-2486) (Am. Compl. ¶ 39) ("Diplomats and their agents have voiced their intent to stay at (or hold events at) the Trump International Hotel. 'Believe me, all the delegations will go there,' one 'Middle Eastern diplomat' told the Washington Post about the Hotel. An 'Asian diplomat' agreed: 'Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new President, "I love your new

hotel!" Isn't it rude to come to his city and say, "I am staying at your competitor?""""); *see also CREW*, 939 F.3d at 151-52.

The Second Circuit also rejected the President's argument that plaintiffs' competitive injuries were not redressable, concluding that relief from the court directing the President to stop violating the Emoluments Clauses "would eliminate the inducement to [government] patrons to favor his businesses, and would therefore eliminate, or at least diminish, the competitive injury." *CREW*, 939 F.3d at 148. To satisfy standing requirements, the Second Circuit made clear, the "requested remedy need only remove from the equation the *improper* competitive advantage." *Id.* at 152. Thus, even if the remedy "will not by itself reverse" the entire alleged injury, so long as it reduces the injury "to some extent," that is sufficient. *Id*. (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007)).

The Second Circuit also dismissed as "besides the point" the panel's observation that, even in the wake of an injunction, some government officials may "continue to patronize Trump establishments to curry the President's favor." *Id.* As the court explained, "the mere possibility that customers might continue to favor the defendant's product or service after a court enjoins the violation does not defeat Article III standing." *Id.* If it did, the court reasoned, whole categories of cases—including trademark infringement, unfair competition, and antitrust claims—"could never be heard before Article III courts." *Id.*

Turning to whether injunctive relief could be fashioned to eliminate the illegal competitive advantage created by the President's violation of the Emoluments Clauses, the Second Circuit observed that there are "many different lines" along which such relief could be granted, from enjoining certain transactions to requiring the President to establish a blind trust, which "would adequately reduce the incentive for government officials to patronize Trump establishments." *Id.* at 152 & n.12. So too here.

Finally, the Second Circuit squarely rejected the contention that *Already LLC v. Nike Inc.*, 568 U.S. 85 (2013), foreclosed claims of competitor standing based on the President's unlawful receipt of emoluments. 939 F.3d at 143-44, 149 n.10. As the *CREW* court explained, the plaintiff in *Already* sought to challenge a trademark held by Nike "despite the fact that Nike had issued a covenant that it would refrain from making any claims against" the plaintiff based on the mark, and despite the fact that the plaintiff "did not plan to sell any product" that might infringe on the mark. *Id.* at 144. In that specific context, the Supreme Court held that the plaintiff could not assert standing simply because Nike, as its competitor, might gain from an unlawful act that by covenant could not harm the plaintiff. *Id.* The Second Circuit accordingly distinguished *Already* because the plaintiffs before *it*—just like the District and Maryland here—"plausibly allege[d] precisely how the President's allegedly unlawful conduct harms their ability to attract patrons to their

establishments." *Id.* at 149. That presents "very different circumstances" from the *Already* case. *Id.*

The decision in *CREW* thus reinforces the correctness of the district court's conclusion that the District and Maryland have proprietary standing to challenge the President's unlawful receipt of emoluments from foreign and domestic government officials. Although the en banc Court need not reach that question to resolve this appeal, *see supra* Part I; *see also* Doc. 35 at 15-19, 39-44 (No. 18-2486), to the extent that it does, this Court should conclude that the District and Maryland have adequately alleged facts to support standing.

III. RECENT CASE LAW CONFIRMS THAT THE PRESIDENT'S APPEAL IN THE INDIVIDUAL-CAPACITY CASE SHOULD BE DISMISSED AS MOOT.

The District and Maryland moved to dismiss the President's appeal in their case against President Trump in his individual capacity because that appeal was rendered moot when they voluntarily dismissed the individual-capacity action under Federal Rule of Civil Procedure 41(a)(1)(A)(i). That motion remains pending before the en banc Court. *See* Doc. 16 (No. 18-2488) (motion); Doc. 23 (No. 18-2488) (opposition); Doc. 24 (No. 18-2488) (reply).[4]

[4] The panel's ruling denying the motion to dismiss the appeal is contained within the panel's opinion and order dismissing the appellees' claims with prejudice. Doc. 48 at 10 (No. 18-2488). Local Rule 35(c) specifies that "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." Accordingly, the denial of the motion to dismiss the appeal has been vacated and the motion remains

Cases decided since the parties' original briefing confirm that dismissal of the appeal is appropriate. Courts continue to hold that Rule 41(a)(1) may be used to dismiss all claims against a single party in a multi-party case (*see* Doc. 16 at 5-7 (No. 18-2488)), and does not, as the President has argued, require dismissal of all claims against all parties (*see* Doc. 23 at 13-15 (No. 18-2488)). *See Welsh v. Correct Care, L.L.C.*, 915 F.3d 341, 344 (5th Cir. 2019) ("[T]he Rules permit voluntary dismissal by notice and without a court order of any defendant who has not served an answer" and the plaintiff "is entitled to dismissal by notice under Rule 41(a)(1)(A)(i) without prejudice and without a court order against all defendants other than [the party that filed an answer]."); *City of Warren Police & Fire Ret. Sys. v. SCANA Corp.*, No. 18-509, 2019 WL 3780267, at *2 (D.S.C. Aug. 12, 2019) (holding that Rule 41(a)(1)(A)(i) dismissal of some, but not all, of the defendants is effective and "[finding] persuasive the observation that permitting a plaintiff to dismiss fewer than all of the named defendants is consistent with the purpose of Rule 41(a)(1)(A)(i)").

As the District and Maryland explained in their briefing on the motion to dismiss the appeal, this Court's decision in *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993), makes clear that the Rule 41(a) notice

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pending. *See, e.g.*, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 212 (4th Cir. 2012) (en banc) (considering motions to dismiss for lack of appellate jurisdiction that were initially denied by the panel).

of dismissal was "effective at the moment [it was] filed with the clerk" and did not require the district court to exercise its jurisdiction. *Id.* at 546. This Court's recent decision in *Dominion Energy, Inc. v. City of Warren Police and Fire Retirement System*, 928 F.3d 325 (4th Cir. 2019), does not undermine that conclusion. In *Dominion Energy*, this Court sought full briefing on the removability of the plaintiff's action pursuant to the Class Action Fairness Act. After the district court entered a stay pending appeal, the appeal was fully briefed, and the time for filing motions with this Court had expired, the plaintiff filed a Rule 41(a)(1)(A)(i) notice and a motion to dismiss the appeal as moot. *See* Dominion Energy Inc. and Sedona Corp.'s Opposition to Plaintiff's Motion to Dismiss the Appeal, *Dominion Energy* at 3-4, No. 18-276 (Feb. 20, 2019).

Importantly, no party in *Dominion Energy* cited *Marex Titanic* in the briefing on the motion to dismiss the appeal, nor was there any discussion about or reference to the self-executing nature of a Rule 41(a) notice. This Court briefly addressed the plaintiff's motion in a footnote, noting that it was "satisfied to deny [the] motion to dismiss" because the plaintiff's actions were "contrary to the stay entered by the district court." 928 F.3d at 335 n.8. Here, by contrast, no stay order was in effect when the District and Maryland entered their Rule 41 notice. *See* Dkt. 154, 157. *Dominion Energy* thus sheds little light, if any, on the present case. The appropriate

course of action is for the en banc Court to dismiss the President's appeal in the individual-capacity case as moot.

IV. FACTUAL DEVELOPMENTS UNDERSCORE THE IMPROPRIETY OF DISMISSING WITH PREJUDICE.

In the petition for rehearing en banc, the District and Maryland noted that the panel's decision to dismiss the complaint with prejudice conflicts with this Court's usual instruction that a "dismissal for lack of standing—or any other defect in subject matter jurisdiction—must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013). Facts that have come to light since the pleadings, and even since the filing of the appellate briefs, underscore the importance of this point. In the event of a dismissal *without* prejudice, the District and Maryland could seek leave to file an amended complaint with additional facts relevant to their standing. These include:

- In 2018 and 2019, Kuwait held its National Day Celebrations at the Trump International Hotel Washington, D.C. ("the Hotel").[5] This event used to be held at the Four Seasons. *See* Doc. 2-2 152 (No. 18-2486) (Am. Compl. ¶ 40).

[5] David A. Farenthold & Jonathan O'Connell, *Kuwaiti embassy returns to Trump hotel in D.C. for its national celebration*, Wash. Post (Jan. 26, 2018), http://wapo.st/2nEScpm; Embassy of the State of Kuwait in Washington, *Kuwait Embassy in Washington marks nat'l celebrations*, Kuwait News Agency (Feb. 27, 2019), https://bit.ly/2JGGqqm (reporting that the 2019 event was attended by top

- In 2018, the Philippines held its Independence Day Celebration, which used to be held at its embassy, at the Hotel.[6] In an interview at the event, its Ambassador commented that having the celebration at the Hotel "is a statement. It's a statement that we have a good relationship with this president."[7]

- FOIA requests analyzed by NBC News reveal that, as of August 2018, federal agencies have spent nearly $56,000 at the Hotel, including $29,000 by the Department of Defense and $12,000 by the Department of Agriculture.[8]

- Recent statements and actions by foreign dignitaries bolster the District and Maryland's allegations that patronizing Trump-owned properties creates an opportunity to curry favor with President Trump by providing him with emoluments, and that foreign dignitaries, in fact, leverage such opportunities.[9]

U.S. officials including Secretary of Commerce Wilbur Ross, Secretary of Housing and Urban Development Ben Carson, Environmental Protection Agency Administrator Andrew Wheeler, and Counselor to the President Kellyanne Conway).

[6] Sam Stein and Lachlan Markay, *Trump's Washington D.C. Hotel Is Hosting Yet Another Foreign Government*, The Daily Beast (Apr. 19, 2018), https://bit.ly/335n2uO.

[7] Video of Interview with Ambassador Jose Manuel del Gallego Romualdez, at 0:45 (Jun. 14, 2018), *available at* https://bit.ly/324pQ9W.

[8] Anna Schecter, Rich Gardella & Cynthia McFadden, *Trump's D.C. hotel, a clubhouse for his fans, may also be a 5-star conflict of interest*, NBC News (Aug. 8, 2018), https://nbcnews.to/2C0xXtN.

[9] *See, e.g.*, Memorandum of Telephone Conversation between President Zelenskyy of Ukraine and President Trump (July 25, 2019), at 4-5, *available at* https://bit.ly/36odcpK (Zelenskyy: "Actually last time I traveled to the United States, I stayed in New York near Central Park and I stayed at the Trump Tower."). Lobbyists representing Zelenskyy also spent $1,912.90 at BLT Prime, the restaurant in the Hotel, on April 16, 2019. *See* Signal Group Consulting, LLC, Supplemental Statement Pursuant to the Foreign Agency Registration Act of 1938, as amended (July 17, 2019), *available at* https://bit.ly/325iMdl. The gathering, which occurred during Zelenskyy's presidential campaign, reportedly included Zelenskyy campaign officials and supporters, as well as a former Trump campaign advisor and a current State Department employee. Brian Schwartz, *Former Trump officials and lobbyists*

CONCLUSION

The President's petition for a writ of mandamus should be denied. The individual-capacity appeal should be dismissed; if not, the President's request for relief should be denied.

dined with Zelensky[y] campaign at Trump hotel months before infamous phone call, CNBC (Oct. 7, 2019), https://cnb.cx/2ov2jkU; Anna Massoglia and Reid Champlin, *Ukrainian election shakes up foreign influence operations targeting the US*, OpenSecrets.org (Aug. 13, 2019), https://bit.ly/34hEaha.

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November 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's supplemental briefing order because it is fewer than 15 pages. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Leah J. Tulin
Leah J. Tulin

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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