No. 18-2488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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, Judge)

DISTRICT OF COLUMBIA AND MARYLAND'S OPPOSITION TO MOTION TO STAY THE MANDATE

The President asks this Court to stay its mandate so that he can pursue Supreme Court review over a narrow, factbound question of appellate jurisdiction regarding claims that are all but dead. That request should be denied.[1]

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[1] The President curiously claims that the stay of district court proceedings entered by this Court in the mandamus case concerning the *official-capacity* claims, No. 18-2486, somehow extends to this independent, non-consolidated appeal concerning the *individual-capacity* claims, No. 18-2488. Tellingly, the President cites no authority for this proposition, nor for the notion that he can "join" the stay motion filed by the Department of Justice in an appeal to which he is not a party in his individual capacity. *See* Mot. 1 n.1.

The District of Columbia and Maryland have unilaterally dismissed and disclaimed any intent to continue litigating against the President in his individual capacity. Indeed, they have already filed a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41 that, in their view, was effective the moment it was filed. If, once the mandate issues, the district court concludes that any additional step is necessary, the District and Maryland will immediately effectuate dismissal. Whatever the procedure, because the very next step in the district court will be the dismissal of the claims against the President in his individual capacity, staying the issuance of the mandate only artificially prolongs litigation that plaintiffs do not intend to pursue.

Even putting all that to one side, a stay of the mandate is inappropriate in this case. None of the "important" issues that the President proposes as potential candidates for Supreme Court review were actually addressed in this Court's decision and, as the President acknowledges, there is no circuit split concerning any of them. Mot. 4. The only question that this Court sitting en banc actually decided is a narrow, factbound question of appellate jurisdiction that has nothing to do with the fact that the unsuccessful appellant here is the President. The stay motion strives to manufacture a circuit split on this question, but that purported split rests on a false premise—namely, that the district court's scheduling order opening discovery into the official-capacity claims had any bearing on the individual-capacity claims. But,

as the en banc Court recognized, the district court "issued no discovery order or any other order as to the individual capacity claims." Op. 5.

That discovery against the President in his individual capacity has not been sought or authorized distinguishes this case from the cases on which the President relies—all of which challenged specific discovery requests or subpoenas concerning the President or Vice President. Nor can the President justify a stay by retreating to abstract questions that have no practical significance in this case and were not actually presented on appeal. Because the motion for a stay demonstrates no substantial question on which certiorari is likely to be granted and no possibility of irreparable harm if the mandate is not stayed, the motion should be denied.

ARGUMENT

A party seeking to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court must show that the "petition would present a substantial question and set forth good cause for a stay." Fed. R. App. P. 41(d)(1). This Court, moreover, does not grant a motion to stay the mandate "simply upon request." Local Rule 41; *see* 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3987.1 (4th ed. 2020). "[T]he standard for presenting a 'substantial question' is high," and even then the Court's decision to grant a stay "'is a matter of discretion.'" *United States v. Silver*, 954 F.3d 455, 458

(2d Cir. 2020) (quoting *Khulumani v. Barclay Nat'l Bank Ltd.*, 509 F.3d 148, 152 (2d Cir. 2007)). Under that standard, a stay is not warranted here.

I. There Is Not A Reasonable Probability That The Supreme Court Will Grant Certiorari To Decide Whether This Court Lacks Jurisdiction Over This Interlocutory Appeal—The Only Issue Decided In This Court's En Banc Opinion.

The motion to stay contends that the President's forthcoming petition for certiorari "will present multiple issues" to the Supreme Court. Mot. 3. But this Court decided only a single, case-specific question of appellate jurisdiction: whether the district court's alleged delay in ruling on the motion to dismiss the individual-capacity claims constituted an effective denial of immunity, thus creating an immediately appealable order.

This Court, sitting en banc, correctly held that it did not. The Court explained that the district court "did not make *any* rulings with respect to the President in his individual capacity" and "stated in writing that it intended to rule on the President's individual capacity motion." Op. 8. Moreover, the district court had "issued no discovery order or any other order as to the individual capacity claims." Op. 5. And given that the district court had to "manage[] the many aspects of this complex litigation"—including argument and decision on the motion to dismiss the official-capacity claims as well as a motion to certify an interlocutory appeal—the fact that seven months had elapsed since the President filed his motion to dismiss did not "evince[] an unreasonable delay or a desire to needlessly prolong this litigation."

Op. 9. In other words, this Court reached a narrow decision, rooted in the specific facts and procedural posture of this case, that it lacked appellate jurisdiction.

Perhaps recognizing that this factbound conclusion is not sufficiently important to warrant certiorari, the President instead asserts that this Court's decision created a circuit split. Mot. 3. Citing two cases in which other circuits concluded that a district court had effectively denied immunity by holding motions raising claims of immunity in abeyance pending the completion of discovery, the President claims that "Supreme Court intervention is needed" to resolve the conflict between those cases and the en banc Court's decision. Mot. 3 (citing *Smith v. Regan*, 841 F.2d 28 (2d Cir. 1988), and *Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009)). That contention, however, is premised both on a mischaracterization of this Court's ruling and a distortion of what qualifies as a circuit split for purposes of Supreme Court review.

In *Smith*, the State of New York filed a motion to dismiss an action brought against the State and a number of federal defendants under the Administrative Procedure Act, claiming immunity under the Eleventh Amendment. *Smith*, 841 F.2d at 28. The district court issued an order in which it declined to rule on the motion and instead held it in abeyance until the completion of discovery. *Id.* at 29. The Second Circuit concluded that it had jurisdiction over the State's interlocutory appeal because "[b]y holding the decision in abeyance pending the completion of all

discovery in the case, the district court effectively denied" the immunity claim. *Id.* at 31.

In *Everson*, the plaintiff filed an action under 42 U.S.C. § 1983 against various county officials stemming from his treatment during an arrest following an epileptic seizure. *Everson*, 556 F.3d at 490. After discovery, in which plaintiff's counsel failed to participate, the defendants filed a motion for summary judgment claiming qualified immunity. *Id.* The district court granted a subsequent request by the plaintiff to reopen discovery for 90 days and held the defendants' motion in abeyance until discovery closed. *Id.* The Sixth Circuit held that it had appellate jurisdiction under these circumstances, because the district court "permit[ted] additional discovery without first resolving the question of qualified immunity." *Id.* at 491.

By contrast, in this case, "the district court *never* issued a discovery order against the President in his individual capacity." Op. 8 n.4 (emphasis added). The district court, moreover, expressly stated "that it intended to rule on the President's individual capacity motion." Op. 8, 10. These facts not only distinguish this case from *Smith* and *Everson*, but also demonstrate that what the President seeks to characterize as a circuit split is nothing more than an application of a clear and undisputed legal principle to very different factual scenarios. Indeed, this Court expressly reaffirmed the principle that governed in those cases, recognizing that "[a] district court's actual refusal to rule on immunity is treated as a denial of immunity

and is immediately appealable." Op. 7; *see also* Op. 7-8 (noting that "[a]n implicit refusal to rule on an immunity question can also provide a basis for appellate jurisdiction," but explaining that such a refusal must "be clear, establishing that the ruling is the court's final determination in the matter" (citing, *inter alia*, *Smith* and *Everson*)); *cf. Kimble v. Hoso*, 439 F.3d 331, 333-36 (6th Cir. 2006) (concluding that appellate jurisdiction was lacking where a district court delayed ruling on qualified immunity for nearly four months but did not order discovery on those claims).

Given that there is no split on the narrow question of appellate jurisdiction at issue here, the President cannot demonstrate a "reasonable probability that four Justices will consider [this] issue sufficiently meritorious to grant certiorari," much less a "fair prospect that a majority of the Court will conclude that" any decision by this Court "was erroneous." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation and internal quotation marks omitted).

II. The Remaining Questions Identified In The Stay Motion Were Not Decided By The En Banc Court And Have No Practical Significance To Resolving This Appeal.

Apart from the factbound question of appellate jurisdiction, the President passingly claims that his petition will raise three additional questions that he deems worthy of certiorari. He concedes, however, that "the circuits are not" split on these questions, and he offers no specific legal analysis of any of them. Mot. 3-4. Instead,

he claims that they still warrant certiorari because, in a general sense, they are "unsettled," Mot. 3, and "easily qualify as 'important,'" Mot. 4.

As an initial matter, the Court did not decide any of these questions in its en banc opinion. The Court held only that it lacked appellate jurisdiction because the district court had not issued an immediately appealable order on the individual-capacity claims against the President. Op. 10. Because neither the district court nor this Court has "ruled adversely" to the President on the issues he identifies, his "application for Supreme Court review" on those issues would be "premature." *Khulumani*, 509 F.3d at 152-53; *see Senne v. Vill. of Palatine, Ill.*, 695 F.3d 617, 622 (7th Cir. 2012) (denying stay of mandate, in part because district court had yet to address one of the "important question[s]" movant intended to raise, making it "a very poor candidate for a grant of certiorari").

Even if the three questions that the President identifies *were* presented here (and they are not), there is no reasonable probability that the Supreme Court would grant review, for at least two reasons. First, if the Supreme Court were to grant certiorari, it would need to decide the antecedent question of appellate jurisdiction, which, as explained, is not independently worthy of certiorari and was correctly decided by this Court. Indeed, "reaching that determination would require a deeply factbound analysis of the procedural history unique to this protracted litigation . . . [and] would provide little guidance to litigants or the lower courts." *Wellness Int'l*

Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015); *see Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2, 3 (2017) (statement of Gorsuch, J.) (explaining that "the proper course is to deny certiorari in [a] particular case even [if] the issues lying at its core are surely worthy of consideration in a case burdened with fewer antecedent and factbound questions").

Second, regardless of whether the questions identified by the President are important in a theoretical or academic sense, they have no practical consequence in this case. The District and Maryland have voluntarily dismissed all claims against the President in his individual capacity, and they are committed to ensuring that those claims remain dismissed. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (explaining that review is not warranted where resolution of the questions presented is "of virtually no practical consequence in fact"). For this reason, too, the President's petition will likely be denied.

III. Because The Plaintiffs Seek To Dismiss These Claims, There Is No Possibility Of Irreparable Harm.

A showing of "good cause" requires a showing that "irreparable injury will take place if the stay is not granted." *Books v. City of Elkhart*, 239 F.3d 826, 827-28 (7th Cir. 2001) (Ripple, J., in chambers). The President's assertion that he will "suffer irreparable harm absent a stay" relies entirely on the prospect that "extensive discovery will immediately begin." Mot. 7. "Allowing this discovery to proceed,"

he insists, would "eradicate" his immunity, permit an inquiry into his "personal finances," Mot. 8, and require his counsel to perform more work, Mot 9-10.

But the President identifies only one alleged injury specific to the individual-capacity claims in this case: that his personal counsel will have "to review, analyze, and advise him on the scope of the subpoenas, any objections to them," and engage in "any subsequent motion practice." Mot. 9. Even setting aside that "the expense and annoyance of litigation . . . does not constitute irreparable harm," *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (citations omitted), the President cannot show an "actual and imminent" injury here. Although the district court repeatedly stated its intent to issue an opinion "address[ing] the individual capacity claims and the arguments to dismiss them," it has not yet done so. Op. 5. In "the absence of an adverse ruling," the President's claim to "have demonstrated a likelihood of irreparable injury without a stay is unpersuasive." *Khulumani*, 509 F.3d at 153.

And, once again, the plaintiffs have made clear that they do not intend to pursue any claims or seek any discovery against the President in his individual capacity. With no individual-capacity claims remaining in the case, the President cannot possibly suffer any injury from litigation that no longer exists. *See, e.g.*, *Maersk Container Serv. Co. v. Jackson*, 131 F.3d 135 (4th Cir. 1997) (holding that, where claim is dismissed, a litigant's "fear of future injury will be moot").

That remains true irrespective of the President's dubious claim that voluntary dismissal here would "be ineffective." Mot. 10 n.2 (claiming that the plaintiffs have "refused to dismiss their claims against the President in his individual capacity *with* prejudice—leaving open an obvious path to engage in discovery without him but strategically bring him back into the case at a later date"). The plaintiffs will not prosecute these claims against the President in his individual capacity, and will seek to dismiss with prejudice if that becomes necessary. That representation itself is sufficient to defeat any claim of the potential for future injury. *See Nken v. Holder*, 585 F.3d 818, 821 (4th Cir. 2009) (government's representation at oral argument that it would not remove the defendant from the country "render[ed] moot the question of whether" a stay would be justified under "traditional criteria").

CONCLUSION

This Court should deny the motion to stay the mandate.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
Solicitor General

LEAH J. TULIN
Assistant Attorney General

200 Saint Paul Place
20th Floor
Baltimore, Maryland 21202
T: (410) 576-6962 | F: (410) 576-7036
ltulin@oag.state.md.us

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

STEPHANIE E. LITOS
Assistant Deputy Attorney General
Civil Litigation Division

441 Fourth Street, NW
Washington, D.C. 20001
T: (202) 727-6287 | F: (202) 730-1864
loren.alikhan@dc.gov

DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, D.C. 20036
T: (202) 888-1741 | F: (202) 888-7792
deepak@guptawessler.com

JOSHUA MATZ
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
T: (212) 763-0883
jmatz@kaplanhecker.com

NOAH BOOKBINDER
LAURA C. BECKERMAN
STUART C. MCPHAIL
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1101 K Street, NW, Suite 201
Washington, D.C. 20005
T: (202) 408-5565 | F: (202) 588-5020
smcphail@citizensforethics.org

JOSEPH M. SELLERS
CHRISTINE E. WEBBER
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW
Washington, D.C. 20005
T: (202) 408-4600 | F: (202) 408-4699
jsellers@cohenmilstein.com

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CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,513 words. This brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a) 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 June 17, 2020, I electronically filed the foregoing opposition 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.

/s/ Leah J. Tulin
Leah J. Tulin