No. 18-2486

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE DONALD J. TRUMP, in his official capacity and in his individual capacity,
Petitioner.

On Appeal from the United States District Court for the District of Maryland
Case No. 8:17-cv-1596-PJM (Hon. Peter J. Messitte)

RESPONDENTS' OPPOSITION TO MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING MANDAMUS

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INTRODUCTION

The President's motion fails to establish either that he will be irreparably harmed by the absence of a stay, or that he can make the requisite demonstration that he is entitled to relief.[1] First—and dispositively—the President has identified *no* harm sufficient to justify a stay. He vaguely claims an injury through discovery "into his personal finances and . . . official actions." But the District of Columbia and Maryland have issued subpoenas *exclusively to third parties*, and they have focused their inquiry on basic business information: receipts for hotel stays, ownership records, communication regarding leases, and similar materials. They have not subpoenaed the President himself and have sought no discovery into Executive branch policymaking. Nor has the President offered a legal basis to object to discovery directed to third parties. Seeking blanket intervention by this Court before even attempting to seek specific relief in the district court, which that court has invited if necessary, is both unwarranted and premature.

[1] The President cites *Nken v. Holder*, 556 U.S. 418 (2009), as setting forth the stay standard, but given that he is seeking a stay of discovery rather than a stay of an order granting substantive relief with injunctive force, it is not clear that *Nken* applies. *See, e.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *Mullins v. Suburban Hosp. Healthcare Sys., Inc.*, No. 16-1113, 2017 WL 3023282, at *1 (D. Md. July 17, 2017) (identifying judicial economy, hardship and equity to the moving party, and potential prejudice to the non-moving party as the factors to be considered in deciding whether to grant a motion to stay discovery). Under either standard, however, the President fails to meet his burden because he does not—and cannot—demonstrate hardship in the absence of a stay or that the need for a stay outweighs the harm it would impose on plaintiffs.

Next, the President cannot show a likelihood of success without—at the threshold—breaking the ground rules of appellate procedure. No court of appeals has *ever* issued a writ of mandamus to allow an interlocutory appeal under 28 U.S.C. § 1292(b) after the district court declined to certify one. Doing so for the first time here would countermand Section 1292(b)'s text and structure, which alone is an insurmountable obstacle to the President's request. But there is more: the President has also failed to make a "strong showing" that he is entitled to a writ of mandamus dismissing this entire litigation. Indeed, his merits arguments fail on multiple fronts.

ARGUMENT

I. THE PRESIDENT HAS NOT SHOWN THAT HE WILL SUFFER ANY HARM, LET ALONE SIGNIFICANT OR IRREPARABLE HARM, ABSENT A STAY.

The President recognizes that he bears the burden of demonstrating that he will be harmed in the absence of a stay, yet he makes nothing more than a conclusory assertion that irreparable injury will result from "intrusive discovery into his personal finances and the official actions of his Administration (including through third-party subpoenas of government agencies)." Pet. 30. But the President must point to an injury that is "actual and imminent," not "remote [or] speculative," *Direx Israel Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991), and notably absent from his motion are factual allegations or legal authority supporting a claim of irreparable harm. His motion should fail for this reason alone.

Even if this deficiency were not enough to reject his request, no stay is warranted because the President's vague factual assertions do not establish significant or irreparable harm. First, the President's assertion of harm relies on a mischaracterization of the discovery below. The District of Columbia and Maryland have issued subpoenas *exclusively to third parties*; they have not subpoenaed the President himself. *See In re United States*, 884 F.3d 830, 836 (9th Cir. 2018) (rejecting argument that defending against litigation "would unreasonably burden" the President where no formal discovery had been sought against him); *see also United States v. U.S. Dist. Court for Dist. of Oregon*, 139 S. Ct. 1 (2018) (denying stay request in the same case); *In re U.S.*, No. 18A410, 2018 WL 5778259 (U.S. Nov. 2, 2018) (same).

Next, there is no "Presidential privilege of immunity from judicial process under all circumstances." *Clinton v. Jones*, 520 U.S. 681, 704 (1997). Here, any intrusion is minimal. No personal participation by the President in discovery is necessary, nor does he contend otherwise. The President has also invoked no privilege—and instead appears to be arguing that his interests justify a prohibition of *all* discovery into third-party businesses that may have records documenting proceeds originating from foreign governments or other covered entities under the Emoluments Clauses. That is an extraordinary position, and the President has

provided no authority of any kind to support it. Nor does he explain why this discovery would cause him any legally cognizable harm.

To the extent the President's concern is potential public disclosure of certain financial records, generalized and speculative concerns about disclosure are insufficient to show irreparable harm. *See, e.g.*, *Kemlon Prod. & Dev. Co. v. United States*, 638 F.2d 1315, 1322 (5th Cir. 1981), *modified*, 646 F.2d 223 (5th Cir. 1981) (holding that allegations "in conclusory fashion" of harm stemming from disclosure of financial information were insufficient to demonstrate irreparable harm). That is particularly true where there are procedures available, such as protective orders, to limit the dissemination of information. *See Kaplan v. Bd. of Educ. of City Sch. Dist. of City of New York*, 759 F.2d 256, 260 (2d Cir. 1985) (finding no irreparable injury where harm to public officials from disclosure of personal financial information was "too speculative" and where procedures existed to mitigate any privacy concerns); *see infra* pp. 6-7.

Nor is there any justification for the President's request for a halt of all subpoenas addressed to federal agencies in this litigation. Just as the District and Maryland have sought no discovery from the President himself, they have sought no discovery into Executive branch policymaking. Plaintiffs have focused their inquiry on basic business information: receipts for hotel stays, ownership records, communication regarding leases, and similar materials. The President has provided

no factual basis from which this Court could conclude that this discovery constitutes an injury, irreparable or otherwise. "Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases" even if they disagree with the underlying claims. *In re United States*, 884 F.3d at 836. And it is well established that the normal burden attendant to litigation is not an irreparable injury. *DiBiase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.").

Additionally, the third-party discovery sought by the District and Maryland nowhere raises the kind of separation-of-powers concerns discussed in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), which the President cites throughout his petition. In that case, unlike in this one, discovery was sought directly against the Vice President and other senior government officials, and it related to the process by which they "give advice and make recommendations to the President." *Id.* at 385. Those requests—which also "ask[ed] for everything under the sky"—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.* at 385, 387. Not so here.

No significant constitutional or interests are implicated by targeted requests to the General Services Administration for communications about its leases or 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 it was "far more limited" than the discovery requested in *Cheney v. U.S. District Court*). Nor are they implicated by requesting business records of hotel stays or restaurant dining from private companies, which clearly have no bearing on "the Executive Branch's interests in maintaining the autonomy of its office." *Cheney*, 542 U.S. at 385.

Finally, even if the President were to face some harm from the plaintiffs' third-party discovery requests, there are numerous avenues for tailoring discovery available in the district court. The President can, among other procedures, seek a protective order as circumstances require or challenge any specific discovery request in the district court. Indeed, the district court has expressly invited him to return to that court should the need arise. *See* Dist. Ct. ECF No. 135, at 29 ("[T]he [c]ourt is always available to limit given discovery to minimize an unusual impact."). "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) (quoting *United States v.*

Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807)) (internal quotation marks and parentheses omitted); *cf. In re United States*, 884 F.3d at 835 (declining to intervene in discovery where the government "will have ample remedies" if it believes that "a specific discovery request from the plaintiffs is too broad or burdensome").

In sum, the President has not identified any cognizable injury sufficient to justify a stay. There has been no discovery directed against him, he has provided no legal basis to object to the discovery directed to others, and any concern about disclosure or unusual discovery, should it arise, may be addressed with the district court. That is sufficient to deny the motion.[2]

II. The President Cannot Demonstrate That He Is Likely To Succeed In Obtaining Either Of Two Unprecedented Forms Of Mandamus Relief That He Seeks.

The President next—and erroneously—contends that he is entitled to a stay because he is likely to succeed in obtaining one of two forms of unprecedented mandamus relief: (1) directing the district court to certify its decisions for interlocutory review under 28 U.S.C. § 1292(b) despite its express decision not to,

[2] The leisurely pace at which the President has sought this relief also cuts against his claims. Given that he waited more than four months after the district court denied his motion to dismiss and more than 40 days after the court denied his motion for a stay and certification under Section 1292(b), there is hardly any reason to believe that any injury is actual or imminent. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (movant's delay negates irreparable harm).

or (2) directing the court to dismiss the complaint in its entirety. But neither form of mandamus is warranted.

Mandamus is not "a substitute for the ordinary appeals process mandated by Congress." *Beasley v. Shinseki*, 709 F.3d 1154, 1159 (Fed. Cir. 2013). "[O]ne seeking a writ of mandamus carries the burden of showing both that he had no other adequate means to attain the relief he desires and that his right to issuance of the writ is clear and indisputable." *In re Ralston Purina Co.*, 726 F.2d 1002, 1004 (4th Cir. 1984). The error at issue must be "considerably more strained . . . [than] a mere abuse of discretion," *id.* at 1005, and must constitute a "judicial usurpation of power," *Allied Chem. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). The President's arguments do not come close to satisfying these stringent requirements.

A. The President Is Not Likely To Succeed In His Request For An Order Directing Certification.

1. Certification Decisions Are Not Reviewable Through Mandamus.

The President argues at length that this Court should issue a writ directing the district court to grant certification under Section 1292(b) despite that court's careful and considered decision not to. In his view, this case is no different from any other involving an alleged abuse of district court discretion, and it is especially appropriate for an appellate court to exercise its mandamus authority to review a district court's

discretionary Section 1292(b) certification decision. Pet. 11-15. None of this is correct.

The President's contention that mandamus is an appropriate mechanism for obtaining review of a district court's decision not to certify under Section 1292(b) is contrary to both the statutory scheme and the overwhelming weight of appellate authority. Indeed, no appellate court appears to have *ever* issued a writ of mandamus to command Section 1292(b) certification after the district court has declined to certify. That is unsurprising given the text and structure of Section 1292(b), which "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." *In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 654 (7th Cir. 2003) (emphasis added). As Judge Friendly observed decades ago, "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. It 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), *abrogated on other grounds by Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010); *see also D'Ippolito v. Cities Serv. Co.*, 374 F.2d 643, 649 (2d Cir. 1967).

Other circuits have likewise held that they cannot or will not review Section 1292(b) certification decisions through mandamus petitions. *See Green v. Occidental Petroleum*, 541 F.2d 1335, 1338 (9th Cir. 1976) (describing "mandamus to direct the district judge to exercise his discretion to certify the question" as inappropriate); *In re Mar. Serv. Corp.*, 515 F.2d 91, 92-93 (1st Cir. 1975) (noting "little difficulty in denying the [mandamus] petition as wholly inappropriate" given Section 1292(b)'s text); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 n.4 (8th Cir. 1975) ("This court is without jurisdiction to review an exercise of the district court's discretion in refusing [a Section 1292(b)] certification."); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756 n.1 (3d Cir. 1973) ("[T]he use of mandamus [to] forc[e] the district court to make a certification under 28 U.S.C. § 1292(b) does not seem appropriate.").[3]

"[W]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Daiflon, Inc.*, 449 U.S. at 36.

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[3] Commentators agree. *See* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3929 ("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.").

That is especially so with certification decisions, where discretion is statutorily lodged with district court judges in order to guard access to interlocutory-review procedures and avoid wasting appellate resources. *See, e.g.*, *In re Ford Motor Co.*, 344 F.3d at 654 ("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."). Were this Court to hold otherwise, it would, in practical terms, open the floodgates to mandamus review of all certification rulings in this Court.

Tacitly acknowledging the absence of case law supporting his position, the President instead relies almost exclusively on a case that did not even involve a district court's Section 1292(b) certification decision, *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982).[4] In that case, the district court had granted a temporary restraining order while ignoring a threshold jurisdictional defense the government had tried to assert. *Id.* at 428-29, 431. Alarmed by the district court's apparent unwillingness to even consider whether it had jurisdiction over the case, the Eleventh Circuit invoked its supervisory power under the All Writs Act, 28 U.S.C. § 1651(a), to order the district court to "conduct forthwith only such hearing

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[4] Indeed, although *Fernandez-Roque* was decided nearly four decades ago, it has *never* been cited for the proposition that an appellate court can order a Section 1292(b) certification where the district court has declined to certify.

as is necessary to a determination of whether subject matter jurisdiction exists," and to certify its ruling to facilitate review. *Id.*

Thus, in *Fernandez-Roque*, the district court had never ruled on the government's arguments, nor had it ruled on—or even been presented with—a request for certification under Section 1292(b). Here, in contrast, the district court issued two thoughtful and detailed opinions addressing the President's motion to dismiss, and then issued another detailed opinion denying Section 1292(b) certification and setting forth its reasons for doing so. *Fernandez-Roque* thus does nothing to support the President's claim that he is likely to obtain mandamus relief.

2. Even Assuming That The District Court's Decision Were Subject To Mandamus Review, The President Could Not Demonstrate A Likelihood Of Success On The Merits.

Even if this Court were to engage in unprecedented mandamus review of the district court's Section 1292(b) order, the President still could not show a likelihood of success on his petition. That is true for two separate and independently sufficient reasons. First, the petition does not present an "appropriate" circumstance for mandamus relief given the final-judgment rule. *See Cheney*, 542 U.S. 381 (explaining that even where the other requirements for mandamus are met, a court may decline to grant such extraordinary relief where mandamus is not "appropriate under the circumstances"). "[T]he mere possibility that an erroneous ruling at the trial level may result in additional litigation is not sufficient to set aside the finality

requirement imposed by Congress." *State of Utah By & Through Utah State Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1494 (10th Cir. 1994).

Next, the President has failed to demonstrate a "clear and indisputable" right to Section 1292(b) certification. Section 1292(b) is wholly discretionary: it uses mandatory language ("shall") only to refer to what must happen *after* a district judge is "of the opinion" that certification is warranted. As explained above, that is part of the reason why Section 1292(b) certifications have never been treated as reviewable on mandamus. But even if this Court were to break with that consensus, the subjective, judgment-oriented nature of Section 1292(b)'s standard demands far more than "a mere abuse of discretion." *Ralston*, 726 F.2d at 1005 ("[W]hile writs of mandamus to review discretionary decisions of district judges are not proscribed, they should 'hardly ever' issue.").

Here, there is no basis for concluding that the district court's order was so utterly devoid of logic, or so unconscionably wrong, that it constituted not only an abuse of discretion but also an abuse of judicial power warranting mandamus. The district court correctly identified each of the three Section 1292(b) factors: (1) a "controlling question of law" (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." It also described, in detail, the law governing these standards and the parties' positions. Finally, it applied the

Section 1292(b) factors to each of the four questions on which the President sought interlocutory review. This was a model analysis.

Indeed, aside from a generalized complaint that the district court could have been more thorough despite its 31-page opinion, the President's criticism of the district court's reasoning amounts to nothing more than continued disagreement with the court's Rule 12(b)(1) and 12(b)(6) decisions. But none of his criticisms have merit. First, he suggests that the district court improperly required a "pre-existing judicial disagreement." Pet. 23. But courts regularly assign great weight to the absence of judicial disagreement in Section 1292(b) orders, and the district court simply considered it as one of many factors bearing on its judgment.

Next, the President faults the court for denying certification "principally because it disagreed with the government's legal arguments on the merits." Br. 24. But that is not so. The court identified several reasons for denying certification, including avoiding piecemeal appeals and the fact that the President would still have lost the motion to dismiss under his own proposed definition of "Emolument."

Finally, the President asserts that the district court should have offered more detailed rejoinders to some of his arguments. But this call for even more extended analysis of the discretionary 1292(b) certification decision simply illustrates how the President cannot show that he is "clear[ly] and indisputabl[y]" right on the merits.

B. The President Is Not Entitled To Mandamus Relief Dismissing The Entire Lawsuit.

As a fallback, the President argues—in just two pages—that he is entitled to a writ of mandamus dismissing this entire suit. Pet. 28-30. For purposes of the stay motion, the question is whether he has shown a likelihood that he will prevail on that theory of mandamus. He has not.

1. The President Has Adequate Means To Obtain Relief.

The President is not entitled to mandamus because he can obtain full and adequate relief by taking an appeal if final judgment is entered against him. *See Cheney*, 542 U.S. at 380-81 ("[T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." (citation omitted)). In an effort to show otherwise, the President relies on a decades-old concurring opinion by Justice Scalia (joined by no other Justice), arguing that presidents should enjoy "immunity from judicial process." *See* Pet. at 29 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 826 (1992) (Scalia, J., concurring in part and in the judgment)). But the Supreme Court has "long held" that federal courts "ha[ve] the authority to determine whether [the President] has acted within the law." *Clinton v. Jones*, 520 U.S. at 703. Many lower courts have followed suit. *See generally* Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997) (citing cases). In those instances where courts have found it "improper" to issue relief against the President, they have done so for a reason

wholly inapplicable here: because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates." *Al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004). Here, due to the nature of the claim, there is no subordinate who bears responsibility for the President's unlawful receipt of emoluments; the constitutional provisions that give rise to the suit apply directly to the President.

It is "settled law" that federal courts are not precluded from "exercis[ing] jurisdiction over the President." *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982) (listing examples); *see* Dist. Ct. ECF No. 46, at 57 (citing cases). The President is therefore unlikely to succeed in claiming immunity from judicial process, and he cannot demonstrate a likelihood of success on his claim of entitlement to a writ of mandamus dismissing the entire case.

2. The President Lacks A Clear And Indisputable Right To Relief.

The President has also failed to demonstrate a substantial likelihood of success in obtaining a writ of mandamus for a second, independent reason: he cannot show a "clear and indisputable" right to relief. *Ralston*, 726 F.2d at 1004. As the district court explained in thorough, well-reasoned opinions, *see* Dist. Ct. ECF Nos. 101, 123, the plaintiffs have a cause of action and have properly stated a claim for relief.

First, the President argues that the District and Maryland have no cause of action because the Constitution does not provide one. But equitable actions have

"long been recognized as the proper means" to prevent public officials "from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). "The 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 Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see* Dist. Ct. ECF No. 46, at 51 (citing cases). Although the President claims (at 18) that the availability of such relief is limited to cases "where a party seeks preemptively to assert a defense," Pet. 18, he cites no case in support of such a proposition. Nor could he: The Supreme Court has repeatedly allowed plaintiffs to bring equitable actions even though they were not subject to potential enforcement actions, and courts in equity traditionally did the same. *See id.* at 51-52 & nn.32-33 (citing cases).

Nor is the President correct that plaintiffs' claims fall outside the Emoluments Clauses' zone of interests. Pet. 18-21. The Supreme Court has long allowed plaintiffs to seek equitable relief where they sought only to prevent the violation of a structural provision of the Constitution and had Article III standing to do so. *See, e.g. Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396 (2003); *see also* Dist. Ct. ECF No. 46, at 52-53 (citing cases).

This case is well within that line of authority. The Emoluments Clauses are structural provisions that define how federal officeholders may (and may not)

interact with foreign and domestic governments. Plaintiffs allege that President Trump is using his office to enrich himself by accepting financial benefits from these governments at his properties and that they have been harmed by these activities. Accordingly, plaintiffs' interests in preventing his unlawful profiteering at the expense of their quasi-sovereign, *parens patriae*, and proprietary interests evoke the very *core* of these provisions. Plaintiffs thus readily satisfy the zone-of-interests requirement, especially because it "is not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Next, the President contends that the district court's interpretation of "emolument," and its interpretation of the Emoluments Clauses generally, is so egregiously mistaken that his entitlement to relief is clear and indisputable. If anything, it is the President's cramped approach—which was fashioned from whole cloth in this litigation—that lacks any basis in the original public meaning of "emolument," the surrounding constitutional language, and the Clauses' obvious anti-corruption purpose.

As the district court explained in its well-reasoned opinion, the President's self-serving interpretation fails every mode of constitutional interpretation. It contradicts the "broad and expansive" text of the Clauses, and fails to grapple with the parallel ban on foreign "presents." Dist. Ct. ECF No. 123, at 15-22. It ignores the original public meaning of "emolument," which was defined in every Founding-

era dictionary to mean "profit" or "gain." *Id.* at 22-30; *see also* ECF No. 58-1 (Legal Historians Br.). It is at odds with two centuries of history, the Clauses' purposes, and a robust body of precedent from the Office of Legal Counsel and the Comptroller General. ECF No. 123, at 31-46; *see also* ECF No. 50 (Former Ethics Officers' Br.). If accepted, the President's novel reading would gut a rule aimed at "every kind of influence by foreign governments," 24 Op. Att'y Gen. 116–17 (1902), thereby allowing those very governments to send massive payments to the President in his "private" capacity, or launder them through his businesses. *See* ECF No. 68 (Nat'l Sec. Officials Br.). Under any theory of constitutional interpretation, the President's reading of the Clauses and its consequences are untenable.

The President's objections notwithstanding, a review of the district court's opinion and the briefing below confirms that each of the arguments he raises here was carefully considered and rejected. *See* ECF No. 123, at 15-46; *see also* ECF No. 46, at 29-50. That is sufficient to deny relief. Ultimately, the President cannot show that his position is clearly and indisputably correct, and thus he cannot demonstrate that he is likely to succeed in his petition for mandamus.

III. A STAY WOULD SUBSTANTIALLY INJURE PLAINTIFFS AND IS NOT IN THE PUBLIC INTEREST.

Granting the President's request for a stay would cause substantial harm to the District and Maryland, as well as the public at large. If plaintiffs are correct that the President is accepting constitutionally prohibited emoluments, they—and their

residents—suffer ongoing and immediate harm and are entitled to a swift remedy. The injuries alleged in the plaintiffs' complaint are ongoing, and the relief sought is only prospective. Postponing all proceedings, including third-party discovery, would unduly delay the conclusion of this case and the resolution of this pressing public issue.

CONCLUSION

The Court should deny the petitioner's request for a stay.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,838 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Leah J. Tulin
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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, I electronically filed the foregoing response 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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