

No. 18-2488

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DISTRICT OF COLUMBIA; STATE OF MARYLAND,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States of America,
in his official capacity and his individual capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
Case No. 8:17-cv-01596
Judge Peter J. Messitte

**MOTION TO CONSOLIDATE
WITH NO. 18-2486**

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Defendant-Appellant President Donald J. Trump, in his individual capacity, requests that this appeal be consolidated with *In re Donald J. Trump*, 18-2486. Both this appeal and the mandamus petition sought by Defendant-Appellant President Donald J. Trump, in his official capacity, arise from the same case in the District of Maryland and address overlapping issues. A panel of this Court already has devoted significant time to this case (in No. 18-2486) in evaluating, and ultimately granting, the motion to stay further proceedings in the district court. Hence, consolidation will promote judicial economy and ensure an efficient disposition of these appellate proceedings. Counsel for Defendant-Appellant President Donald J. Trump, in his official capacity, consents to this motion on the condition that it not result in consolidated briefing by the President in his official and individual capacities. Counsel for Plaintiffs-Appellees District of Columbia and the State of Maryland oppose.

BACKGROUND

The District of Columbia and the State of Maryland initially filed this action against the President in his official capacity only, alleging violations of the Foreign and Domestic Emoluments Clauses. The Department of Justice, which serves as counsel to the President, in his official capacity, moved to dismiss the case. DOJ's motion argued, among other things, that Plaintiffs lacked standing and failed to state a claim under the Emoluments Clauses. After the first of two hearings on that motion, the Plaintiffs sought leave to amend the complaint to add as a defendant the President, in his individual capacity, noting that the decision was "prompted by the Court's questioning

at oral argument.” (Doc. 90-1, at 2). The district court granted the motion on March 12, 2018; the Plaintiffs filed the amended complaint (which made no other changes) later that same day. (Docs. 94, 95).

The President, in his individual capacity, sought dismissal on May 1, 2018. In that motion, the President joined some of DOJ’s arguments, including those pertaining to standing and the merits of the Emoluments Clauses claims. That motion also raised additional grounds for dismissal, including the President’s immunity from suit. (Doc. 112, at 24-27). Although the district court granted the request from the President, in his individual capacity, to expedite briefing on the motion, it denied his request to participate at the scheduled hearing on DOJ’s motion to dismiss.

On July 25, 2018, the district court denied DOJ’s motion to dismiss the official-capacity claims. (Doc. 123). But it did not rule on the motion to dismiss the individual-capacity claims, stating only that it would “address the individual capacity claims and the arguments to dismiss them in a separate Opinion.” *Id.* at 1 n.2; *see also id.* at 51. The district court failed to issue that separate opinion in the months that followed, despite requests to resolve the motion “at its earliest possible convenience[.]” (Doc. 125, at 5). On December 3, the district court entered an order opening discovery (Doc. 145), initiating pretrial proceedings and thereby effectively denying the President’s individual-capacity immunity claim. *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc); *Nero v. Mosby*, 890 F.3d 106, 125 (4th Cir. 2018). The President, in his individual capacity, filed a notice of appeal on December 14, 2018 (Doc. 147), and separately

sought a stay of discovery pending appeal in the district court as required by Federal Rule of Appellate Procedure 8(a). (Doc. 148).

Three days later, DOJ filed a petition for writ of mandamus in this Court and a motion to stay district court proceedings pending a decision on that petition. *See In re Donald J. Trump*, 18-2486. That same day, the district court ordered the parties to brief whether it “can dismiss without prejudice the claims against President Trump in his individual capacity, and if so, whether it should do so.” (Doc. 150). On December 19, 2018, the Plaintiffs filed a notice of voluntary dismissal of the President, in his individual capacity, without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). (Doc. 154). The next day, this Court granted DOJ’s stay motion, issued a briefing order, and scheduled argument. On December 21, 2018, the President, in his individual capacity, notified the district court that its stay motion was now moot and that the Rule 41(a)(1)(A)(i) voluntary dismissal was jurisdictionally defective and otherwise improper. (Doc. 158).

DISCUSSION

I. This Case Should Be Consolidated With No. 18-2486.

The Court should consolidate this case with DOJ’s mandamus petition, Docket No. 18-2486. This Court’s rules permit requests to consolidate cases on appeal. *See* Fed. R. App. P. 3(b)(2); L.R. 12(b). Consolidation is warranted. Both appeals arise from the same proceeding (indeed, the same amended complaint). The arguments on appeal also will involve overlapping issues. In addition to his immunity defense, the President, in

his individual capacity, will raise at least two issues this Court has already instructed DOJ and the Plaintiffs to brief: whether the Plaintiffs have standing and whether the Emoluments Clauses provide them with a cause of action, *See Williams v. Hansen*, 326 F.3d 569, 574 n.4 (4th Cir. 2003) (explaining that issues beyond immunity itself may be raised on appeal in this circumstance). Further, a panel of this Court already has devoted significant attention to the factual and legal issues underlying this case (in No. 18-2486) in evaluating, and ultimately granting, DOJ's motion to stay further proceedings in the district court. Judicial economy therefore strongly counsels in favor of consolidating these related appeals.

The Plaintiffs' Rule 41(a)(1)(A)(i) dismissal notice should not deter the Court from consolidating these appeals. As more thoroughly explained in the district-court filing, that notice was defective. First, the attempted dismissal is void because the district court was divested of jurisdiction upon the filing of this appeal. *See Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) ("Generally, a timely filed notice of appeal transfers jurisdiction of a case to the court of appeals and strips a district court of jurisdiction to rule on any matters involved in the appeal"); *Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990) (holding that a "district court is without jurisdiction to exercise the authority to dismiss the case" after an appeal was filed.) At this juncture, voluntary dismissal can only be accomplished pursuant to Federal Rule of Appellate Procedure 42, which does not permit an appellee to unilaterally dismiss an appeal.

Second, even if the district court retained jurisdiction, the Plaintiffs' notice was improper case because Rule 41(a)(1)(A)(i) permits only the dismissal of the entire *action*, not an individual party. *See Skinner v. First Am. Bank of Va.*, 64 F.3d 659, at *2 (4th Cir. 1995) (unpublished) (“Because Rule 41 provides for the dismissal of *actions*, rather than *claims*, Rule 15 is technically the proper vehicle to accomplish a partial dismissal.”); *Boone v. CSX Transportation, Inc.*, No. 17-cv-668, 2018 WL 1308914, at *2 (E.D. Va. Mar. 13, 2018) (collecting cases). The President, in his individual capacity, is prepared to fully brief this issue should the Court request it.

II. Proposed Briefing Schedule

The President, in his individual capacity, requests permission to file a separate brief should the Court consolidate these appeals. *See* LR. 28(a) (permitting separate briefing in a consolidated appeal “upon good cause shown”). There is good cause. The President, in his individual capacity, does not seek separate briefing on any issue DOJ will be raising. But there are issues (including absolute immunity itself), that are not within the ambit of DOJ's mandamus petition. DOJ thus has conditioned its consent to consolidation on the ability of the parties to file separate briefs. Finally, to facilitate consolidation, the President, in his individual capacity, consents to the same briefing schedule that will apply to No. 18-2846.

CONCLUSION

For these reasons, Defendant-Appellant moves to consolidate this appeal with No. 18-2486.

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December 28, 2018

*Attorneys for Defendant in his individual
capacity*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Fed. R. App. P. 27 and 32. The motion is prepared in 14-point Garamond font, a proportionally spaced typeface; it is double-spaced; and it does not exceed 5,200 words.

/s/ William S. Consovoy

William S. Consovoy

*Attorney for Defendant-Appellant in his
individual capacity*

CERTIFICATE OF SERVICE

I certify that on December 28, 2018, I electronically filed this document with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit using the CM/ECF system, which will send notification of the filing to all counsel.

/s/ William S. Consovoy

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