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

OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL

Patrick Strawbridge
CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

William S. Consovoy
Thomas R. McCarthy
Bryan K. Weir
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com
tom@consovoymccarthy.com
bryan@consovoymccarthy.com

Counsel for Defendant-Appellant in his individual capacity

INTRODUCTION

Appellees District of Columbia and State of Maryland sued the President of the United States, in his individual capacity, claiming he violated the Emoluments Clauses. The President moved to dismiss those claims, arguing, *inter alia*, that he had absolute immunity. Despite the President's many requests, the district court opened discovery without deciding the immunity issue in direct contravention of controlling law. Because this subjected the President to pretrial proceedings and effectively denied his immunity claim, the President appealed.

Appellees' motion to dismiss this appeal should be denied. First, the argument that there is no appellate jurisdiction because the district court never explicitly refused to rule on immunity is meritless. Motion to Dismiss ("Mot.") 10-13. Appellees concede (at 10-11) that when the "refusal to consider the [immunity] question" subjects the official to "pretrial procedures," it "effectively denied him … immunity" and triggers a right to appeal. *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc); *Nero v. Mosby*, 890 F.3d 106, 125 (4th Cir. 2018) (same). The issue, accordingly, is not whether the district court announced that it was refusing to rule on immunity. Indeed, that would render hollow the entitlement to an early disposition of immunity by allowing district courts to just ignore immunity claims until discovery is complete. What matters is whether the district court "effectively denied" immunity by initiating pretrial proceedings before ruling. That is what happened here.

Appellees' second argument—that the appeal is moot because they filed a notice of voluntary dismissal in the district court—is equally meritless. Mot. 3-10. That dismissal was filed *after* the President appealed. Once the President filed his notice of appeal, "it divested the district court of its jurisdiction over the case[.]" *United States v. Christy,* 3 F.3d 765, 767 (4th Cir. 1993). Appellees' attempted voluntary dismissal of their individual-capacity claims against the President under Federal Rule of Civil Procedure 41(a)(1)(A)(1) thus was defective. At this juncture, dismissal is governed by Federal Rule of Appellate Procedure 42, which does *not* allow an appellee to unilaterally dismiss an appeal. Appellees' arguments ignore founding-era jurisdictional principles, the text of the federal rules, and precedent interpreting both. Accepting this argument, moreover, would be untenable: a plaintiff-appellee could unilaterally dismiss the case at any time during the appeal—even in the middle of argument or as an opinion is announced—and deprive the appellate court of jurisdiction by mooting the case. The rules do not permit such gamesmanship.

But even if Appellees could theoretically moot this appeal via voluntary dismissal under Rule 41(a)(1)(A)(1), they did not properly do so here because they did not dismiss the "action" as the rule requires. Appellees concede that this question has divided the federal courts, and that this Court has not ruled on the question. Mot. 5-7. The Court should interpret Rule 41(a)(1)(A)(1), in accordance with its text and structure, to require a plaintiff to dismiss the entire "action"—not individual parties. Other rules control partial dismissals of claims or parties, and neither allows the plaintiff to act unilaterally.

See, e.g., Fed. R. Civ. P. 15 (generally requiring "the court's leave" to amend a pleading); Fed. R. Civ. P. 21 (allowing courts to, "on just terms, add or drop a party"). Rule 41(a)(1)(A)(1) allows plaintiffs to unilaterally terminate their entire case—not to unilaterally amend their pleading or drop a party.

Nor should this Court heed Appellees' last-ditch, half-hearted proposal for a remand. The issues presented in this appeal—including jurisdiction, immunity, and even the meaning of Rule 41(a)(1)—are all purely legal, and thus suitable for decision in the first instance by this Court. *See Perry v. Bartlett*, 231 F.3d 155, 160 (4th Cir. 2000) (Where "a question is purely a legal one, a remand is unnecessary and this court will reach the ... question."). Remand would also not avoid the need for this Court's action, as there is little doubt that all of these legal issues would be brought back to this Court by the losing party for consideration *de novo*. Remand would thus only further delay the President's entitlement to an early determination as to his immunity.[1]

Indeed, affording the President a timely decision is especially important. The Appellees added individual-capacity claims against the President in professed "good faith" in order "to facilitate full review of their claims, both in this Court and in any future appeals." D.C. Doc. 90-1, at 2. In response, the President was obliged to secure separate outside counsel, who expeditiously sought to have the case dismissed. Yet Appellees *never* encouraged the district court to hear those claims. And when this appeal

[1] This is especially so in light of the Court's order on January 10 setting this case for argument in March and deferring any ruling on the motion to dismiss pending that argument.

threatened Appellees' ability to pursue intrusive discovery, they suddenly lost interest in "facilitat[ing] full review" in an "appeal." Rather, Appellees strategically sought dismissal *without prejudice*—keenly aware that, if successful, they could attempt to bring the President in his individual capacity back later. That would result in the very prejudice that the interlocutory appeal and mandatory stay are designed to prevent: the procession of discovery without allowing his "counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to [his] position." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). The Court should deny the motion to dismiss and end this gamesmanship.

DISCUSSION

I. This Court Has Appellate Jurisdiction.

Unlike a "mere defense to liability," an assertion of "immunity from suit … is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526. The "basic thrust" of immunity is "to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (2009). It is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526.

Because immunity "seeks to protect government officials from the burdens of trial and preparing for trial," the Supreme Court has "repeatedly ... stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324, 330 (4th Cir. 2009). It

follows that "if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Defendants thus have a right to immediately appeal an adverse immunity decision. *Mitchell*, 472 U.S. at 526-27. The same goes when "the district court's refusal to consider the question subject[s] [a defendant] to further pretrial procedures." *Jenkins*, 119 F.3d at 1159; *Nero*, 890 F.3d at 125 ("[W]e have held that a district court's refusal to rule on an immunity-from-suit defense decided the immunity question for purposes of the collateral order doctrine."); *Everson v. Leis*, 556 F.3d 484, 493 (6th Cir. 2009); *Smith v. Reagan*, 841 F.2d 28, 31 (2d Cir. 1988).

Appellees do not—and could not—dispute these settled principles. They instead try to distinguish this case because the district court did not "explicitly" refuse to rule on the President's immunity claim. Mot. 11-12. That argument defies logic: a *sub silentio* refusal is still a refusal. And in this case, once discovery was opened, the district court's failure to act subjected the President to "further pretrial procedures," *Jenkins*, 119 F.3d at 1159, including the "disruptive discovery" that immunity is intended to shield him from, *Iqbal*, 556 U.S. at 685. Appellees do not even try to explain why a court can deny the President his legal right to an early decision on immunity—and, in turn, appellate review—simply by neglecting to rule.

Appellees claim that the district court "intends to rule on the President's absolute immunity defense at the first available opportunity." Mot. 12. But the record clearly demonstrates otherwise:

- The Appellees moved to amend their Complaint in March 2018 to add as a defendant the President, in his individual capacity, in response to a suggestion from the district court. D.C. Doc. 90-1, at 2. The motion was granted on March 12. D.C. Docs. 94, 95.

- The President, in his individual capacity, sought to expedite briefing so his motion to dismiss could be argued at a scheduled hearing in June on DOJ's motion to dismiss the official-capacity claims. D.C. Doc. 110. The Court granted the motion to expedite but denied the request to participate at the hearing, stating it would "entertain oral argument on the President's Motion to Dismiss in his individual capacity ... at a later time." D.C. Doc. 111.

- Briefing on the President's motion to dismiss, which included briefing on his assertion of absolute immunity, was completed by May 25, 2018. *See* D.C. Doc. 118.

- The district court denied DOJ's motion to dismiss the official-capacity claims on July 25, 2018. D.C. Doc. 123. But it did not rule on the motion to dismiss the individual-capacity claims, stating again 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.

- On August 15, 2018, the parties filed a Status Report in which the President, in his individual capacity, asked the Court to resolve the motion "at its earliest possible convenience[.]" D.C. Doc. 125, at 5.

- On December 3, with fact discovery about to commence, the President again asked for a status conference for his motion to dismiss, explaining how the President's immunity has already been impaired by pretrial proceedings. D.C. Doc. 143. Later that day, the district court entered an order opening discovery. D.C. Doc. 145.

- In response to that order, Appellees propounded almost forty subpoenas to third parties and commenced discovery in earnest. The subpoenas demanded production of documents by the first week of January, 2019.

- By December 14, the district court had still neither ruled on the President's motion to dismiss (which was filed eight months earlier) nor scheduled a conference to discuss its status. As a result, the President filed a notice of appeal. D.C. Doc. 147.

- On December 17, in response to the President's notice of appeal and stay request, the district court ordered the parties to brief "whether the Court can dismiss without prejudice the claims against President Trump in his individual capacity, and if so, whether it should do so." D.C. Doc. 150.

This timeline refutes Appellees' suggestion that the court was somehow on the verge of adjudicating the President's absolute-immunity claim when the notice of appeal was filed. It proves the opposite. The court had every opportunity to rule on the claim before opening discovery and, in response to the President's appeal and stay request, indicated an interest in dismissing the President—*without prejudice*—instead of doing so. As even the Appellees' own authority recognizes, an appeal is proper when "the district court has deferred beyond reasonable limits." Wright & Miller, 15A *Federal Practice & Procedure* § 3914.10 (2d ed. 1991). That was the case here.[2]

It is no answer that discovery was specific to "the *official-capacity* claims." Mot. 12. Any discovery—whether directed at the President, in his individual capacity, or not—will "require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed." *Iqbal*, 556 U.S. at 685. That is

[2] The President's prompt assertion of immunity distinguishes this case from the only case upon which Appellees rely: *Way v. County of Ventura*, 348 F.3d 808 (9th Cir. 2003). In *Way*, the defendants had moved for summary judgment only on the merits of the constitutional claims; after rejecting that argument, the district court invited the defendants to brief the applicability of qualified immunity because, at that time, the Supreme Court required courts to decide the merits before reaching immunity. *Id.* at 810 (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). Before even briefing immunity, though, the defendants appealed. The Ninth Circuit correctly held that the ruling was not yet final and appealable because, under *Saucier*, the district court was only "midway through the qualified immunity analysis" and had not yet rendered "a complete, final ruling on the issue." *Id.* Here, however, the district court is not midway through anything. *Wray* in no way conflicts with this Court's longstanding recognition that a defendant can immediately appeal a court's refusal to decide immunity. *Jenkins*, 119 F.3d at 1159; *Nero*, 890 F.3d at 125.

especially true here because the substance of the individual-capacity claims are identical to the official-capacity claims. D.C. Doc. 90-1, at 3. Once discovery began, counsel was obligated "to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to [the President's] position." *Iqbal*, 556 U.S. at 685. That is effective denial of immunity.

II. The Appeal Divested The District Court Of Jurisdiction.

A. Appellees cannot voluntarily dismiss this action in the district court while the case is on appeal.

It is "generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *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."); *Levin v. Alms and Associates, Inc.*, 634 F.3d 260, 263 (4th Cir. 2011) (quoting *Griggs*, 459 U.S. at 58); *Christy,* 3 F.3d at 767-68.

When the district court lost jurisdiction, it terminated the ability to effectuate dismissal in that court. "After the appeal is docketed, dismissal may be effected only in the court of appeals." *United States v. Hitchmon,* 602 F.2d 689, 692 (5th Cir. 1979),

superseded by statute on other grounds; *Sagone v. Florence Cnty Detention Ctr.*, 57 F.3d 1067, at *1 (4th Cir. 1995) (unpublished) (once "the appeal [was] docketed in this Court," the district court "lacked jurisdiction to dismiss the appeal."); *United States v. Ramey*, 559 F. Supp. 60, 68 (D. Tenn. 1981) ("no action may be taken by this District Court" on request to dismiss case that was docketed in the Court of Appeals).

The Eleventh Circuit has specifically rejected the Appellees' argument that voluntary dismissal under Rule 41(a)(1) "instantly moot[s] this appeal." Mot. 10. In *Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass'n, Inc.*, 895 F.2d 711 (11th Cir. 1990), a party argued that the court was "compelled to dismiss the appeal" because of the "district court's [Rule 41(a)(1)] dismissal," *id.* at 713. Citing *Griggs*, and the need to "avoid[]the confusion which would result from the simultaneous assertion of jurisdiction by two courts over the same matter," the Court squarely held that "the district court in this case was without jurisdiction to dismiss this case and that its attempt to do so had no force or effect." *Id.*

The federal rules codify these bedrock jurisdictional principles. The Federal Rules of Appellate Procedure permit a district court to grant dismissal "[*b*]*efore* an appeal has been docketed by the circuit clerk." Fed. R. App. P. 42(a) (emphasis added). And unlike Federal Rule of Civil Procedure 41(a)(1)(A)(i), which in some instances allows a plaintiff to unilaterally dismiss an "action," *see infra* at 13-16, the Federal Rules of Appellate Procedure provide that voluntary dismissal requires the appellant's consent. *See* Fed. R. App. P. 42(a) (allowing voluntary dismissal by "stipulation signed by all

parties or on the appellant's motion"); Fed. R. App. P. 42(b) (allowing dismissal of a docketed appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due."). Appellees do not even mention Rule 42—let alone grapple with the conflict between it and their position.

In fact, Appellees' position would nullify the applicable rules and upend settled procedural principles. After all, if Appellees can automatically terminate this appeal by voluntary dismissal in the district court now, what would prevent an appellee from filing a Rule 41(a)(1) dismissal after the appellate briefing closed? Or after oral argument? Or *during* argument? Or as an opinion is being announced? The controlling case law and the federal rules prohibit such gambits because, if they did not, strategic maneuvers like this would inevitably result in an attempt by the district and appellate court "to assert jurisdiction over a case simultaneously"—precisely what *Griggs* and its progeny forbid. 459 U.S. at 58.[3]

B. Appellees misconstrue precedent and foundational principles of jurisdiction.

The cases upon which Appellees rely, Mot. 7-9, do not support their novel position. To begin, (and unlike *Showtime*) none of them actually address or decide the key question: whether an attempted Rule 41(a)(1) dismissal automatically compels the

[3] There are "limited exceptions" to the rule prohibiting district courts from exercising jurisdiction during an appeal, *Doe*, 749 F.3d at 258, including "jurisdiction over issues not under consideration in the appeal," *In re South African Apartheid Litig.*, 02-mdl-1499, 2009 WL 5183832, at *1 (S.D.N.Y. July 7, 2009). But those exceptions do not apply to "cases 'respecting a right not to be tried,'" which includes appeals over the denial of immunity. *Id.*

termination of a pending appeal. Indeed, it is possible the respective courts did not even consider the jurisdictional implications of the dismissal. Regardless, Appellees (and this Court) cannot assume that they did. Rulings where jurisdiction may have been "assumed without discussion by the court ... have no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) (collecting cases).

The cases Appellees cite are inapt for other reasons. Several of them—including their primary case—involve attempted dismissals by the *appellant*—a scenario that is consistent with FRAP 42(a). *See McFarland v. Collins*, 8 F.3d 256, 257 (5th Cir. 1993); *Young v. Draper*, 691 F. App'x 736, 736 (4th Cir. 2017); *Cheesboro v. Bloom*, 23 F. App'x 111, 112 (4th Cir. 2001). Others involve dismissals in which the appellants appear to have accepted the validity of the dismissal and, in turn, conceded that no effective relief could be obtained on appeal. *See Mireskandari v. Associated Newspapers, Ltd.,* 665 F. App'x 570, 571 & n.6 (9th Cir. 2016); *Mason, ex rel. Mason v. Institutional Review Bd. for Human Research, Med. Univ. of S.C.*, 953 F.2d 638, at *1 & n. 1 (4th Cir. 1992) (unpublished). That is not true here. And Appellees' remaining cases arose from dismissals of bankruptcy petitions, which are governed by the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure. Moreover, "[t]he general rule that a properly filed notice of appeal deprives the trial court of jurisdiction to proceed further except by leave of the appellate court does not apply in bankruptcy proceedings." *In re Hollowell*, 95 F.3d 42, at *3 (4th Cir. 1996) (unpublished) (quoting *In re Christian & Porter Aluminum Co.,* 584 F.2d 326, 334 (9th Cir. 1978)).

The fact that a *proper* Rule 41(a)(1)(A)(i) motion is ordinarily "self-executing," Mot. 4-5, 7-8, does not help Appellees. To begin, a party's unilateral filing cannot undo the divestment of a district court's jurisdiction. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co.*, 523 U.S. at 94; *see also Webster v. Reid*, 52 U.S. 437, 451 (1850) ("[W]herever a court acts without jurisdiction, its decrees, judgments, and proceedings are absolute nullities"); *United States v. Hartwell*, 448 F.3d 707, 714 n.1 (4th Cir. 2006) (same). The lack of jurisdiction voids the effect of any action—whether by the district judge, the court clerk, or even the parties. *See, e.g., Armco, Inc. v. Penrod-Stauffer Bldg. Systems, Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984) (voiding a default judgment entered by clerk where "the district court was without jurisdiction of the defendant"); *In re Verifone, Inc.*, No. 18-cv-80087, 2018 WL 3532761, at *4 (N.D. Cal. 2018) (a federal court without jurisdiction even "lacks authority" to issue "deposition subpoenas or other process."). If lack of jurisdiction nullifies the entry of default by a clerk or issuance of subpoenas by a party, it likewise bars dismissal under Rule 41(a)(1) whether "there ... are no steps to take" to effectuate dismissal. *But see In re Bath and Kitchen Fixtures Antitrust Litigation*, 535 F.3d 161, 164 & n.3 (3d Cir. 2008) (Rule 41(a)(1)(A)(i) dismissal effectuated through a docket entry).

Moreover, a Rule 41(a)(1) notice of dismissal is not invariably "automatic" or "immediately" effective. Mot. 4-5, 7-8. Courts necessarily retain and exercise the power to ensure any notice meets the rule's basic requirements—for example, that it was filed before an answer or motion for summary judgment. *Robinson v. Robinson,* No. 13-cv-

5275, 2015 WL 224629, at *1-*2 (D.N.J. Jan. 15, 2015); *see also, e.g.*, *Elat v. Ngoubene*, 993 F. Supp. 2d 497, 519 (D. Md. 2014); *Garber v. Chicago Mercantile Exchange*, 570 F.3d 1361, 1364 (7th Cir. 2009). Such review would be improper if the mere act of filing the notice alone irreversibly terminated the court's jurisdiction over that action. Yet, without such review, the plaintiff could voluntarily dismiss their case under Rule 41(a), for example, on the eve of trial without any repercussions. That cannot be right.

III. The Dismissal Does Not In Any Event Satisfy The Requirements Of Rule 41(a)(1)(A)(i).

Even if there is no jurisdictional barrier, Appellees' Rule 41(a) notice is defective. Appellees purported to dismiss without prejudice only part of their case, *i.e.*, "the claims brought against Defendant Donald J. Trump in his individual capacity," preserved their other claims, and stated that the partial dismissal was intended "to allow the claims against President Trump in his official capacity to move forward expeditiously." D.C. Doc. 154. But Rule 41(a) "does not speak of dismissing one claim in a suit; it speaks of dismissing 'an action'—which is to say, the whole case." *Berthold Types Ltd. v. Adobe Sys. Inc.*, 242 F.3d 772, 777 (7th Cir. 2001).

Indeed, numerous courts, including the Fourth Circuit, have opined that "Rule 41(a) should be limited to dismissal of an entire action." *Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015); *accord 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) ("Plaintiff seeks to dismiss less than his entire action. Thus, plaintiff's motion to withdraw notwithstanding, his notice of dismissal under Rule 41(a)(1)(i) and motion to dismiss under Rule 41(a)(2) are not supported by the law."). These decisions are correct. Rule 41(b) distinguishes between "actions" and "claims," which is "a strong indication that [the drafters] intended there to be a distinction between the two provisions." *Taylor,* 787 F.3d at 857 n.7.

To be sure, there is division over whether Rule 41(a)(1) permits the dismissal of all claims against a party. Mot. 5-7. And the Fourth Circuit has not definitively weighed in—leading to some conflict. *Compare, e.g., Fagnant v. K-Mart Corp.*, No. 11-cv-302, 2013 WL 6901907, at *2 (D.S.C. Dec. 31, 2013) (permitting dismissal of some defendants), *with Volvo Trademark Holding Aktiebolaget v. AIS Const. Equipment Corp.*, 162 F. Supp. 2d 465, 472 (W.D.N.C. 2001) (voluntary dismissal of fewer than all defendants ineffective). The better view is that "a Rule 41 dismissal of a party rather than an action is ineffectual as a matter of law." *Id.* at 472; *Hilliard v. RHA Howell Care Centers, Inc.*, No. 09-cv-110, 2009 WL 2177008, at *1 (W.D.N.C. July 21, 2009); *AmSouth Bank v. Dale*, 386 F.3d 763, 778 (6th Cir. 2004) ("[D]ismissal of a party, rather than of an entire action, is more proper pursuant to Rule 21.").[4]

[4] *Dale* refutes Appellees' assertion that their view is "current law" in the Sixth Circuit; it is far more recent than the 1974 case they cite as having "tacitly approved" party dismissals. Mot. 6 n.1.

As these cases explain, the structure of the federal rules confirms that Rule 41(a) does not permit dismissal of less than the entire case. "The proper mechanism for a plaintiff to withdraw some, but not all, claims is to file a motion to amend pursuant to Fed. R. Civ. P. 15." *Elat*, 993 F. Supp. 2d at 519. Indeed, that was how the Appellees added the individual-capacity claims in the first place. D.C. Doc. 90. And Rule 21 provides for motions to "add or drop a party." Given these provisions, there is no basis for reading Rule 41(a) to provide an alternative (and potentially unfettered) avenue for accomplishing the same result. This Court instead should apply the "plain text" of the Federal Rules "so far as possible to give independent effect to all their provisions." *Patel v. Patel*, 283 F. Supp. 3d 512, 516 (E.D. Va. 2017).

The reasons underlying Rule 41(a)(1)'s restrictions also weigh heavily against rewarding Appellees' gambit. The rule "was designed to limit a plaintiff's ability to dismiss an action." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990). Before its enactment, plaintiffs could dismiss their case at any point before entry of judgment. *Id.* With that concern in mind, Rule 41(a)(1) "allow[s] a plaintiff to dismiss an action without the permission of the adverse party or the court only during the brief period before the defendant had made a significant commitment of time and money." *Id.*; Wright & Miller, 9 *Federal Practice & Procedure* § 2363 (3d ed. 2018) ("The rule limits the right of dismissal at the behest of the plaintiff to the early stages of the proceedings, thus curbing the abuses of this right that commonly had occurred under state procedures.").

Appellees' attempt to deploy Rule 41(a)(1) is akin to the kinds of abuses it is designed to stop. The Appellees added the President, in his individual capacity, earlier this year, forcing him to obtain (and pay for) separate outside counsel and file a motion to dismiss (which he filed on an expedited basis). That motion sat unresolved for months, even as the court adjudicated other motions, the President in his official capacity filed an answer, the parties (including the President's outside counsel) met and conferred regarding the scheduling and the scope of discovery, and the parties (including the President's outside counsel) negotiated a protective order and ESI protocol. In December, when discovery commenced, Appellees immediately served expansive party discovery and dozens of intrusive third-party subpoenas.

Yet when the President appealed the effective denial of his claim for immunity, Appellees suddenly disclaimed their desire to "facilitate full review of their claims" in an "appeal." Rather, because the President's exercise of his appellate rights required a stay of discovery, Appellees attempted to dismiss him without prejudice—knowing that this would allow them to try to bring him back later. Appellees' gamesmanship leaves the President facing the very prejudice that the interlocutory appeal and mandatory stay are supposed to prevent: commencement of discovery without allowing his "counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to [his] position." *Iqbal*, 556 U.S. at 685.

IV. There Is No Basis For A Remand.

In passing, Appellees suggest that the Court could remand either to determine the validity of their Rule 41(a)(1) notice, or to allow the district court to decide the immunity issue. Mot. 13-14. Neither of these halfhearted arguments has merit. There is no basis for a remand.

With respect to the Rule 41(a)(1) notice, the question of appellate versus district court jurisdiction is one for this Court to decide in the first instance. And to the extent the Court even needs to reach the circuit split regarding the use of Rule 41(a)(1) to effect the dismissal of some defendants, that question is purely legal and can be decided on the current record. Where "a question is purely a legal one, a remand is unnecessary and this court will reach the ... question." *Perry*, 231 F.3d at 160; *see also e.g.*, *HCMF Corp. v. Allen*, 238 F.3d 273, 277 n.2 (4th Cir. 2001). Nor will remand avoid the need for appellate review altogether; the non-prevailing party would not doubt appeal any disposition of the Rule 41(a)(1) notice and this Court would then have to address the issue *de novo* anyway. A remand thus would waste judicial and party resources, not conserve them.

The President's immunity defense (and any other issues that may be raised in the course of deciding this appeal) also are purely legal. It is common for this Court to address immunity in the first instance when the district court has failed to do so. *Jenkins*, 119 F.3d at 1159; *Nero*, 890 F.3d at 125. Appellees' cases arise in circuits with different practices and/or in cases that raise qualified immunity. *See Eng v. Coughlin,* 858 F.2d 889,

895 (2d Cir. 1988) ("It is our practice in this Circuit when a district court fails to address the qualified immunity defense to remand for such a ruling."); *Ferguson v. Short,* 840 F.3d 508, 511 (8th Cir. 2016); *Texas v. Caremark, Inc.*, 584 F.3d 655, 660 (5th Cir. 2009). Absolute immunity does not raise thorny factual questions that (in the view of some) may be better addressed by the district court in the first instance. *C.f. Craft v. Wipf*, 810 F.2d 170, 172 (8th Cir. 1987).

Nor is there merit to Appellees' tepid suggestion that the district court "may well have invested judicial resources in considering whether to dismiss the individual-capacity claims." Mot. 13. The district court never even scheduled argument on the President's motion during the eight months it was pending, and it never acknowledged the President's requests for a status conference. And the only indication of the district court's consideration came *after* this appeal and the President's stay motion, at which point it asked the parties whether it "can" and "should" "dismiss without prejudice the claims against President Trump in his individual capacity." D.C. Doc. 150. This Court, in contrast, will have invested significant time and resources to prepare for argument on the merits of this case and the related appeal. The President is entitled to timely resolution of his absolute immunity claim—not further delay.

CONCLUSION

For these reasons, Defendant-Appellant requests that Appellees' Motion to Dismiss be denied.

Patrick Strawbridge
CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

William S. Consovoy
Thomas R. McCarthy
Bryan K. Weir
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com
tom@consovoymcarthy.com
bryan@consovoymccarthy.com

January 14, 2019

Attorneys for Defendant in his individual capacity

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition complies with the requirements of Fed. R. App. P. 27 and 32. The opposition was prepared in 14-point Garamond font, a proportionally spaced typeface; it is double-spaced; and it contains 5,103 words.

/s/ William S. Consovoy
William S. Consovoy

Attorney for Defendant-Appellant in his individual capacity

CERTIFICATE OF SERVICE

I certify that on January 14, 2019, 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
William S. Consovoy

Attorney for Defendant in his individual capacity