

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.

**DISTRICT OF COLUMBIA AND MARYLAND’S OPPOSITION TO
MOTION TO CONSOLIDATE**

The Court should deny the motion to consolidate filed by Donald J. Trump, in his individual capacity, because it lacks jurisdiction over the above-captioned appeal. In order to consolidate two appeals under Federal Rule of Appellate Procedure 3(b), “each of the matters . . . must be within the jurisdiction of the court.” *United States v. Wash.*, 573 F.2d 1121, 1123 (9th Cir. 1978). An appellate court will not “inject [an] issue into” another case “by the device of ordering consolidation when the appeal in question contains a fatal jurisdictional defect.” *Id*; *see, e.g., In re Steiger*, 221 F. App’x 279 (4th Cir. 2007) (declining to consolidate appeal with one that had been dismissed); *United States v. Smiley*, 60 F. App’x 990, 991 (4th

Cir. 2003) (dismissing appeal and declining to consolidate it with another appeal); *Campitelli v. Osborne*, 54 F. App'x 180 (4th Cir. 2003) (declining to consolidate appeals because one was an impermissible interlocutory appeal). As explained in plaintiffs' motion to dismiss the appeal, filed simultaneously with this opposition, the appeal with respect to President Trump in his individual capacity suffers from not one but two "fatal jurisdictional defect[s]." 573 F.2d at 1123.

First, President Trump, in his individual capacity, is no longer involved in this action. On December 19, 2018, the District of Columbia and Maryland filed a voluntary, self-executing dismissal of their action against President Trump in his individual capacity pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). *See Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544, 546 (4th Cir. 1993). That dismissal rendered moot both his individual-capacity motion to dismiss in the district court and his interlocutory appeal from its alleged "effective denial." Dkt. 147; *see* Mot. to Dismiss (Jan. 4, 2019) at 1. Second, even before it became moot, the appeal was improper because the district court had not yet ruled on the issue of absolute immunity, nor had it taken any action that denied President Trump, in his individual capacity, the protections of any applicable immunity. *See* Mot. to Dismiss at 10-13. For either reason, President Trump's individual-capacity appeal should be dismissed, and the motion to consolidate should be denied as moot.

CONCLUSION

The motion to consolidate should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

KARL A. RACINE
Attorney General for the District of Columbia

STEVEN M. SULLIVAN
Solicitor General

NATALIE O. LUDAWAY
Chief Deputy Attorney General

LEAH J. TULIN
Assistant Attorney General

LOREN L. ALIKHAN
Solicitor General

200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
T: (410) 576-6427 | F: (410) 576-7036
ssullivan@oag.state.md.us

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

NORMAN EISEN
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
lbeckerman@citizensforethics.org

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

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

January 4, 2019

CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 370 words, excluding the parts of the opposition exempted by Rule 32(a)(7)(B)(iii). This opposition complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Leah J. Tulin

Leah Tulin

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2019, 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 Tulin