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)

REPLY IN SUPPORT OF MOTION TO DISMISS THE APPEAL

President Trump in his individual capacity asks this Court for the extraordinary—and unprecedented—relief of pursuing an appeal of claims that not only were never decided below, but that plaintiffs have exercised their unfettered right to voluntarily dismiss. Because bedrock Article III principles bar that request, the individual-capacity appeal should be dismissed as moot.

I. PLAINTIFFS' VOLUNTARY DISMISSAL EXTINGUISHED THEIR CLAIMS AGAINST THE PRESIDENT IN HIS INDIVIDUAL CAPACITY AND MOOTED THIS APPEAL.

Numerous appellate decisions—including this Court's decision in *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544, 546 (4th Cir. 1993)—

recognize that a Rule 41(a)(1)(A)(i) notice "is effective at the moment the notice is filed with the clerk," *id.* at 546, that "no judicial approval is required," *id.*, and that it "obviat[es] the need for the district court to exercise its jurisdiction," *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999). The President's opposition fails to grapple with, or even to cite, any of these cases.

Instead, the President asserts that plaintiffs' notice of voluntary dismissal was defective because his notice of appeal stripped the district court of jurisdiction. That argument fails, however, because even if notices of appeal typically have that effect,[1] a Rule 41(a)(1) dismissal *does not implicate* the district court's jurisdiction. *See* Mot. at 3-5. Moreover, even if a notice of appeal "strip[ped] the district court of jurisdiction *to rule* on any matters involved in the appeal," *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (emphasis added),[2] it would not—as the President claims—"bar[] dismissal under Rule 41(a)(1)," Opp'n at 12. The President provides no authority for the proposition that depriving the district court of power to "rule on"

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[1] As a general matter, "the filing of a notice of appeal is an event of jurisdictional significance." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). But that principle is inapplicable where the President has sought to appeal the *absence* of a district court ruling. In these circumstances, *see* Mot. at 10-13, the President's notice of appeal is defective and does not confer jurisdiction on this Court. *See Griggs*, 459 U.S. at 58 (citing *Ruby v. Sec'y of U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1011 (1967) (a notice of appeal from an unappealable order does not divest the district court of jurisdiction)).

[2] *Cf. Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (observing that subject matter jurisdiction "represents 'the extent to which a court can *rule on* the conduct of persons or the status of things'" (citation omitted) (emphasis added)).

aspects of the case involved in the appeal has any bearing on the effectiveness of a notice of voluntary dismissal under Rule 41(a)(1)(A)(i), which not only does not require, but in fact precludes, an adjudication by the district court. *See In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d 161, 165 (3d Cir. 2008) ("A timely notice of voluntary dismissal invites no response from the district court and permits no interference by it." (citing *Marex*, 2 F.3d at 547-48)); *see also, e.g.*, *Yesh Music v. Lakewood Church*, 727 F.3d 356, 360, 362 (5th Cir. 2013) (noting that a voluntary dismissal "require[s] no judicial action or approval" and that it "terminates, closes, and ends [the plaintiff's] cause of action").[3]

Rather than acknowledge these established principles, the President relies on dicta from cases having nothing to do with Rule 41. *See* Opp'n at 12. Those cases are not to the contrary, because they involve actions taken by parties that invoke or rely on the court's jurisdiction. *Compare id*. (citing case addressing the issuance of subpoenas for the proposition that the "[t]he lack of jurisdiction voids the effect of

[3] The President's discussion of *Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass'n, Inc.*, 895 F.2d 711 (11th Cir. 1990), incorrectly characterizes the dismissal in that case as if it were effected under Rule 41(a)(1). There, the district court "entered an order of dismissal" after final judgment and while an appeal was pending "pursuant to a stipulation of settlement which at the time of the purported dismissal had been neither consummated by the parties nor filed with the court." *Id*. at 712, 713. The district court's affirmative undertaking to dismiss the case, in the absence of a stipulation from the parties, constituted an exercise of jurisdiction—the issuance of an order—which differs qualitatively from the self-executing Rule 41(a)(1)(A)(i) notice of voluntary dismissal.

any action . . . even [by] the parties"), *with United States v. Tenn. Walking Horse Breeders' & Exhibitors' Ass'n*, 727 F. App'x 119, 124 (6th Cir. 2018) (discussing "the addition of a provision [to Rule 45] that allowed attorneys to sign subpoenas *on behalf of the court*" and acknowledging "*the authority of the court* embodied in those attorney-issued subpoenas" (emphases added)).

The President's reliance on the jurisdiction-stripping effect of a valid notice of appeal also wrongly treats a district court's jurisdiction as a zero-sum proposition. For example, it is firmly established that the district court can exercise jurisdiction over matters in aid of an appeal. *See, e.g., Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991). The jurisdictional effects of a voluntary dismissal are likewise subject to certain exceptions. *See, e.g., In re Matthews*, 395 F.3d 477, 481 (4th Cir. 2005) ("[A] district court retains jurisdiction to resolve collateral issues after an action is dismissed." (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990)). And in certain circumstances, a court may exercise ancillary jurisdiction to "enable [it] to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (citing cases). Those examples, though not directly applicable under these circumstances, belie the President's suggestion that plaintiffs' notice of voluntary dismissal was necessarily ineffective simply because the district court may have been stripped of the

jurisdiction to "rule on any matters involved in the appeal." *Doe*, 749 F.3d at 258.

The President's reliance on Federal Rule of Appellate Procedure 42 is equally misplaced. Rule 42 relates to the voluntary dismissal of *appeals*. Plaintiffs did not seek to voluntarily dismiss the President's appeal; they instead dismissed their claims against the President in his individual capacity, and subsequently moved in this Court for dismissal of the appeal under Federal Rule of Appellate Procedure Rule 27 and Fourth Circuit Local Rule 27(f)(2). These steps are entirely harmonious with Rule 42, which does not even address motions to dismiss brought by an appellee.

Finally, the President urges this Court to ignore the weight of authority and hold that Rule 41(a) permits only the dismissal of the entire action and not the dismissal of all claims against a single defendant. While he asserts that his is the "better view," Opp'n at 14, it is decidedly the minority one. The federal appellate courts strongly favor permitting the dismissal of all claims against a party under Rule 41(a).[4] *See* Mot. at 5-7. Prohibiting voluntary dismissal of a single defendant would

[4] Although the President cites a Sixth Circuit case, *AmSouth Bank v. Dale*, 386 F.3d 763, 778 (6th Cir. 2004), that circuit cannot be accurately described as endorsing the President's view of Rule 41. First, the court merely noted in dicta that "dismissal of a party, rather than of an entire action, is more proper pursuant to Rule 21" than Rule 41—not that using Rule 41(a) for that purpose is improper. *Id.* Second, a contemporaneous case cited by *AmSouth* explains that Sixth Circuit case law on Rule 41 is "unclear." *Letherer v. Alger Grp., L.L.C.*, 328 F.3d 262, 266 (6th Cir. 2003), *overruled on other grounds by Blackburn v. Oaktree Capital Mgmt.*,

have no conceivable benefit, and it would undermine judicial economy, both with respect to a trial court's interest in narrowing disputes to the extent possible before trial, and as to the interests of typical defendants, who tend to welcome dismissal from a lawsuit that continues to proceed against other defendants.

II. PLAINTIFFS' ALTERNATIVE SUGGESTION OF A REMAND IS APPROPRIATE.

The President asserts that "[t]here is no basis for a remand." Opp'n at 17. That is the right answer offered for the wrong reason. A remand *is* unwarranted—because the notice of voluntary dismissal itself extinguishes the claim. *See Marex*, 2 F.3d at 547 n.2 ("[The notice] itself closes the file. . . . This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." (quoting *Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963))). If, however, this Court believes that any additional action is necessary for plaintiffs' voluntary dismissal to take effect, it should remand to the district court for that purpose. *See, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (noting that "the conditions and circumstances of the particular case" dictate whether remand is appropriate in the context of a case that has become moot on appeal (citation omitted)); *In re Bath & Kitchen Fixtures*, 535 F.3d at 165 & n.7 (explaining that no order of the district court is needed to effectuate a voluntary dismissal, and

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LLC, 511 F.3d 633 (6th Cir. 2008) (acknowledging conflicting panel decisions and noting that "[t]he Sixth Circuit's interpretation of Rule 41 is unclear").

noting that "[w]hen the notice is filed, the Clerk makes an appropriate entry on the docket noting the termination of the action").

Similarly, if this Court believes that there is something left of the case against the President in his individual capacity despite plaintiffs' Rule 41(a)(1) notice, it should remand for the district court to consider the President's motion to dismiss in the first instance. The President's reasoning to the contrary transparently privileges expedience over principles of appellate jurisdiction. *See* Opp'n at 17-18. While the President contends that an appellate court will address immunity defenses "when the district court failed to do so," Opp'n at 17, the cases he cites for that proposition involve instances in which the district court affirmatively addressed and rejected an immunity defense. *See Nero v. Mosby*, 890 F.3d 106, 117 (4th Cir. 2018) (district court held hearing and issued opinion denying various immunity defenses raised in motion to dismiss); *Jenkins v. Medford*, 119 F.3d 1156, 1158 (4th Cir. 1997) (en banc) (district court denied motion to dismiss asserting qualified-immunity defense). Here, as the President himself acknowledges, the district court repeatedly indicated that it would address the President's motion. *See* Opp'n at 6 (citing D.C. Doc. 111, D.C. Doc. 123 at 1 n.2 & 51). It is only because the President filed this faulty appeal that the district court was deprived of that opportunity. This Court should not condone such an end-run around basic principles of federal procedure.

CONCLUSION

This Court should dismiss this appeal as moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply complies with the requirements of Federal Rules of Appellate Procedure 27 and 32. The reply contains 1,822 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The reply 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 January 22, 2019, I electronically filed the foregoing document 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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