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 U.S. District Court for the District of Maryland
Case No. 8:17-cv-1596-PJM (Hon. Peter J. Messitte)

MOTION TO DISMISS THE APPEAL

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The Court should dismiss this appeal, filed by Donald J. Trump in his individual capacity, for either of two reasons. First, the appeal is moot because the District of Columbia and Maryland have voluntarily dismissed President Trump in his individual capacity through a self-executing notice of voluntary dismissal filed in the district court pursuant to Fed. R. Civ. P. Rule 41(a)(1)(A)(i). Dkt. 154. The dismissal affected by that notice eliminated from the case all claims against the President in his individual capacity, thereby rendering moot both his individual-capacity motion to dismiss and his interlocutory appeal from the alleged "effective denial" of that motion. Second, even if the individual-capacity case and this appeal were not moot, dismissal of the appeal would be required because the district court has not ruled on the President's motion to dismiss in his individual capacity, and there is thus no pertinent order from which an appeal may be taken. The appeal should be dismissed now without further proceedings.

Counsel for Defendant-Appellant President Donald J. Trump, in his individual capacity, opposes this motion. In light of the lapse of appropriations, counsel for President Trump in his official capacity takes no position on the motion.

BACKGROUND

This case began on June 12, 2017, when the District of Columbia and Maryland filed a complaint alleging claims against President Trump in his official capacity for violating the Foreign and Domestic Emoluments Clauses. Dkt. 1.

President Trump in his official capacity moved to dismiss those claims. Dkt. 21. While that motion was pending, on March 12, 2018, the district court granted plaintiffs leave to file an amended complaint that added claims against President Trump in his individual capacity. Dkts. 94, 95. On May 1, 2018, the President moved in his individual capacity to dismiss those claims pursuant to Rules 12(b)(1) and 12(b)(6). Dkt. 112.

In orders on March 28 and July 25, the district court denied the motion to dismiss the official-capacity claims. Dkts. 101 (standing and justiciability), 123 (claim for relief). In issuing the latter order, the district court stated that it would "address the individual capacity claims and the arguments to dismiss them in a separate Opinion." Dkt. 123 at 1 n.2; *see also id.* at 51 (same). On December 3, the district court issued a scheduling order with respect to the President "in his official capacity as President of the United States of America," which authorized commencement of discovery solely into the official-capacity claims. Dkt. 145.

On December 14, 2018, even though his individual-capacity motion to dismiss remained pending, and even though the district court had expressed its intention to rule on it, President Trump in his individual capacity filed a notice of appeal from what he termed the "effective denial" of his motion and sought a stay pending appeal. Dkt. 147, 148. On December 17, the district court directed the parties to address whether it "can dismiss without prejudice the claims against

President Trump in his individual capacity, and if so, whether it should do so." Dkt. 150. On December 19, plaintiffs voluntarily dismissed their claims against President Trump in his individual capacity without prejudice pursuant to Rule 41(a)(1)(A)(i).

Meanwhile, President Trump, in his official capacity, sought mandamus and a stay in this Court. *See* Pet. for Writ of Mandamus, *In re Donald J. Trump*, No. 18-2486 (Dec. 17, 2018). On December 20, the Court set a schedule for briefing and argument on the official-capacity mandamus petition and stayed further proceedings in the district court. No. 18-2486, Dkt 9. On December 26, at the request of the Department of Justice due to a lapse in its appropriations, the Court stayed that schedule pending further order by the Court. *Id.* at Dkt. 12.

ARGUMENT

I. THIS APPEAL IS MOOT BECAUSE THE PLAINTIFFS HAVE VOLUNTARILY DISMISSED THEIR INDIVIDUAL-CAPACITY CLAIMS AGAINST THE PRESIDENT.

A. The Rule 41(a) Dismissal Extinguished the Claims Against President Trump in His Individual Capacity.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (citation omitted). Here, plaintiffs' notice of voluntary dismissal under Rule 41 extinguished the individual-capacity claims, as well as the President's legally cognizable interest in the disposition of his motion to dismiss those claims.

Rule 41 provides that "the plaintiff may dismiss an action *without a court order* by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i) (emphasis added). As this Court has emphasized, voluntary dismissal under Rule 41(a) "is available as a matter of unconditional right and is self-executing, i.e., it is effective at the moment the notice is filed with the clerk and no judicial approval is required." *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544, 546 (4th Cir. 1993) (citation omitted); *see also Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) ("Voluntary dismissal, moreover, normally may precede any analysis of subject matter jurisdiction because it is self-executing and moots all pending motions, obviating the need for the district court to exercise its jurisdiction.").

The consequences of a Rule 41(a) dismissal are thus straightforward:

> [The filing of the notice] itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone.

Marex Titanic, 2 F.3d at 546 n.2 (quoting *Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963)); *accord Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993) (similar); *see also In re Matthews*, 395 F.3d 477, 480 (4th Cir. 2005) (explaining

that a Rule 41(a) notice "carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim."). "[A]fter an action is voluntarily dismissed, the court lacks authority to conduct further proceedings on the merits." *Matthews*, 395 F.3d at 480; *see also Duke Energy Trading & Mktg., LLC v. Davis*, 267 F.3d 1042, 1049 (9th Cir. 2001) ("Once the notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them.").

Accordingly, in this case, dismissal was "automatic and immediate" upon the exercise of plaintiffs' "unfettered" right to file a notice of voluntary dismissal. *In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d 161, 165 (3d Cir. 2008). The claims against President Trump in his individual capacity have been extinguished, and the appeal arising from those claims is moot.

B. President Trump's Arguments to the Contrary Lack Merit.

Despite having sought dismissal in the district court, President Trump in his individual capacity nevertheless maintains that, through quirks of civil procedure, he remains a party in the litigation and the appeal is not moot. He is mistaken.

First, he argues that the Rule 41(a) notice was improper "because Rule 41(a)(1)(A)(i) permits only the dismissal of the entire action, not an individual party." Mot. to Consolidate at 5. That proposition is contradicted by the current

precedent of every federal appellate court to have addressed the question except one, and even there panels have disagreed.[1] *See Pedrina*, 987 F.2d at 609-10 ("We agree with the First, Third, Fifth, and Eighth circuits that Rule 41(a)(1) allows a plaintiff to dismiss without a court order any defendant," including "fewer than all of the named defendants"); *accord Cabrera v. Municipality of Bayamon*, 622 F.2d 4, 6 (1st Cir. 1980); *Plains Growers By & Through Florists' Mut. Ins. Co. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 254–55 (5th Cir. 1973); *Johnston v. Cartwright*, 355 F.2d 32, 39 (8th Cir. 1966) (Blackmun, J.); *Young v. Wilky Carrier Corp.*, 150

[1] The one outlier appears to be the Seventh Circuit. In *Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015), the court held that Rule 41 permits voluntary dismissal of an "entire case," but not less than all defendants. However, *Taylor* acknowledges that prior Seventh Circuit case law on the subject was "not always clear." *Id.* at 857 n.6 (citing, *e.g.*, *Baker v. Am.'s Mortg. Serv., Inc.*, 58 F.3d 321, 324 n.2 (7th Cir. 1995) (assuming without deciding that Rule 41 permits partial dismissal)); *see also Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, 143 (7th Cir. 1978) (affirming voluntary dismissal of less than all defendants as "proper").

The Second and Sixth Circuits are sometimes mentioned as having disallowed voluntary dismissal of fewer than all defendants, *see Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953); *Philip Carey Mfg. Co. v. Taylor*, 286 F.2d 782 (6th Cir. 1961), but that is not the current law of those circuits. "The Second Circuit subsequently characterized [*Harvey Aluminum*'s] ruling as dictum and noted that it was against the weight of authority." 8 *Moore's Fed. Practice* 3d § 41.21[3][a] at 41-35 and n.14 (citing *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985), *modified*, 813 F.2d 535 (1987)). Although the Sixth Circuit in *Philip Carey* "implied, in dictum, that [voluntary] dismissal of individual defendants was improper," the court "tacitly approved of a partial dismissal in a later case." *Id.* at 41-35 and n.17 (citing *Banque de Depots v. Nat'l Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974)).

F.2d 764, 764 (3d Cir. 1945); *see also Shaw v. Stroud*, 13 F.3d 791, 797 n.10 (4th Cir. 1994) (noting that unlike defendants before the Court on appeal, "two other supervisors originally named as defendants . . . have been voluntarily dismissed by plaintiffs and are no longer involved in this action"); *Waiters v. Cross*, 2010 WL 5019415 (D.S.C. 2010) (granting Rule 41(a) motion for some defendants but not others), *aff'd*, 430 F. App'x 244 (4th Cir. 2011). Leading treatises on civil procedure agree that "the sounder view and the weight of judicial authority" permit voluntary dismissal of fewer than all defendants. 9 Wright & Miller, *Federal Practice and Procedure*, Civil 3d § 2362 at 410 (2008); *see also* 8 *Moore's Federal Practice* 3d § 41.21[3][a] at 41-34 to 41-35.1 (2013) ("A voluntary dismissal may be taken against fewer than all defendants, as long as all claims are dismissed as against each one affected[.]").

Second, President Trump contends that the Rule 41 notice "is void" because it was filed after he filed a notice of appeal from the district court's non-action on his motion to dismiss and thus the district court lacked jurisdiction to entertain the dismissal. Mot. to Consolidate at 4. But the question of the district court's jurisdiction is beside the point because, as discussed above, a "self-executing" Rule 41(a)(1) notice is "effective at the moment the notice is filed" and terminates the relevant claims *without* any need for "judicial approval," *Marex*, 2 F.3d at 546, thereby "obviating the need for the district court to exercise its jurisdiction," *Univ.*

of S. Ala., 168 F.3d at 409. Because the district court did not need to do anything upon receipt of a Rule 41(a)(1) notice, it is of no moment that the district court lacks jurisdiction to take steps other than those in aid of the appeal. There are simply no steps to take.

This principle is demonstrated by *McFarland v. Collins*, 8 F.3d 256, 257 (5th Cir. 1993). There, McFarland filed a habeas petition and then subsequently appealed the district court's denial of a stay of execution and failure to appoint counsel. *See id.* While the appeal was pending, "in an effort to avoid future abuse of writ problems, [McFarland] noticed the dismissal of his petition for writ of habeas corpus in the district court" under Rule 41(a). *Id.* (footnote omitted). Even though he had filed his Rule 41(a) notice after filing a notice of appeal, the Fifth Circuit held that "the dismissal of the habeas renders moot the issues raised in this appeal" and thus dismissed the appeal and lifted its own stay of execution. *Id.*; *see also id.* ("Petitioner is no longer seeking habeas relief. Any decision now by this Court . . . would be purely advisory. The dismissal of the habeas rendered the question moot.").

Here, just as in *McFarland*, the filing of a Rule 41(a)(1) notice immediately mooted plaintiffs' claims against President Trump in his individual capacity, regardless of the fact that an appeal had purportedly been taken. 8 F.3d at 257; *see also, e.g.*, *Neidich v. Salas*, 783 F.3d 1215 (11th Cir. 2015) (dismissing bankruptcy

appeal as moot where debtor had voluntarily dismissed bankruptcy petition while the appeal was pending); *In re Davenport*, 40 F.3d 298, 298-99 (9th Cir. 1994) (same); *Young v. Draper*, 691 F. App'x 736, 736 (4th Cir. 2017) (dismissing appeal where plaintiff voluntarily dismissed claims in district court while appeal was pending); *Mireskandari v. Associated Newspapers, Ltd.*, 665 F. App'x 570, 571 (9th Cir. 2016) (same); *Cheesboro v. Bloom*, 23 F. App'x 111, 112 (4th Cir. 2001) (same); *Mason, By & Through Mason v. Institutional Review Bd. for Human Research, Med. Univ. of S.C.*, 953 F.2d 638, 638 (4th Cir. 1992) (table opinion) (same).

The sole case cited by President Trump on this point is not to the contrary. *Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 895 F.2d 711, 712 (11th Cir. 1990), concerned a situation where the parties had litigated to a final judgment and thereafter, while the case was on appeal, asked the district court to dismiss pursuant to a settlement. The Eleventh Circuit did not object because of anything to do with Rule 41(a)(1), nor could it, as the case had moved well beyond Rule 41(a)(1)'s "point of no return." *Marex*, 2 F.3d at 546. Instead, the Eleventh Circuit faulted the parties and the district court for failing to adhere to the approach counseled by *United States v. Munsingwear*, 340 U.S. 36 (1950), under which "[t]he established practice of the appellate courts in dealing with a civil case from a court in the federal system which has become moot pending appeal is to vacate the

judgment below and to remand with instructions to dismiss" rather than have the district court act alone. *Showtime*, 895 F.2d at 713.

Here, unlike in *Showtime*, plaintiffs' voluntary dismissal occurred through Rule 41(a)(1)'s self-executing procedure and did not require anything more—from any court. And, because there is no order from which President Trump in his individual capacity is appealing, there is also no need to vacate anything on the docket below.

For these reasons, plaintiffs' Rule 41(a)(1) notice in the district court instantly mooted this appeal. Of course, if this Court has any doubt, it could remand the matter to the district court for the notice to take effect. *See, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) ("When a civil case from a court in the federal system . . . has become moot while on its way here, this Court's established practice is to reverse or vacate the judgment below and remand with a direction to dismiss." (internal quotation marks omitted)). But in no event should this Court retain jurisdiction over individual-capacity claims that are now dismissed.

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE THERE IS NO DECISION BELOW AND THUS NO BASIS FOR APPELLATE JURISDICTION.

An independently sufficient ground for dismissing this appeal is the absence of any order from which an appeal may be taken. Although orders denying absolute immunity can, in some circumstances, be appealed immediately under the collateral order doctrine, *see Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982), this appeal

involves no order denying absolute immunity. Indeed, there is no order concerning President Trump in his individual capacity at all, other than the district court's indication that it planned to issue an opinion on the matter. Dkt. 123 at 1 n.2, 51. In the absence of such an adverse order, there is nothing from which President Trump in his individual capacity could appeal or over which this Court could exercise appellate jurisdiction.

President Trump, in his individual capacity, maintains that the district court's failure to decide his motion within seven months of its filing constitutes a functional denial giving rise to appellate jurisdiction. Dkt. 148 at 3. But the cases he cites for that proposition provide no support. *Id.* (citing *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc), and *Nero v. Mosby*, 890 F.3d 106, 124 (4th Cir. 2018)). In *Jenkins*, the district court explicitly "*refused* to rule on the question of qualified immunity" at the motion-to-dismiss stage because the defendant "had not yet filed an answer," and the court indicated that it would rule after an answer was filed. 119 F.3d at 1159 (emphasis added). That "refusal to consider the question subjected [the defendant] to further pretrial procedures, and so effectively denied him qualified immunity." *Id.* Similarly, in *Nero*, the district court *denied* a motion to dismiss without considering an absolute immunity defense presented in the motion and was therefore held to have denied that defense by implication. *See* 890 F.3d at 125.

Here, unlike in *Jenkins* and *Nero*, the district court has repeatedly stated that it intends to rule on the President's absolute immunity defense at the first available opportunity—namely, when it resolves the President's motion to dismiss the individual-capacity claims. *See* Dkt. 123 at 1 n.2; *id.* at 51. Just days before the plaintiffs voluntarily dismissed the individual-capacity claims, the district court requested additional briefing on a specific question regarding the proper disposition of the claims. *See* Dkt. 150. It therefore cannot be said that the district court has "effectively deni[ed]" the President's individual-capacity immunity defense. Mot to Consolidate at 2; *see Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003) (dismissing appeal because district court's order indicated that the court intended to hear further arguments on immunity defense and was therefore not an appealable final order); *see also* Wright & Miller, 15A *Federal Practice & Procedure* Jurisdiction § 3914.10 (2d ed. 1991) ("[A]ppeal cannot be taken before the district court has deferred beyond reasonable limits a determination of a qualified immunity defense. In most circumstances, there is no jurisdiction if the court has yet to rule on the immunity issue or has ruled only on other issues.").

The President's reliance on the December 3 discovery order, Dkt. 145, does not dictate a different result. Mot. to Consolidate at 2. As the President no doubt understands, the scheduling order addressed only discovery regarding the *official-capacity* claims, which unlike the individual-capacity claims, have moved beyond

the motion-to-dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) (disposition of motion to dismiss determines whether or not plaintiff is "entitled to discovery"). What is more, plaintiffs did not serve any discovery on the President in either his official or individual capacity, so he can hardly be burdened. The December 3 order thus did not involve the President, in his individual capacity, in pre-trial procedures in a manner that denied immunity—effectively or otherwise.[2]

Finally, even if the Court were to conclude that (1) President Trump's individual-capacity absolute-immunity defense had been effectively denied, and (2) the individual-capacity claims were not mooted by plaintiffs' voluntarily dismissal, the appropriate course would be to remand for the district court to address any questions pertaining to the effect of the Rule 41(a)(1) notice of voluntary dismissal, and, if necessary, to rule on the President's assertion of immunity. *See, e.g.*, *Brown v. City of Oneonta*, 106 F.3d 1125, 1133-34 (2d Cir. 1997); *Craft v. Wipf*, 810 F.2d 170, 173 (8th Cir. 1987); *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986). The district court is intimately familiar with the case and may well have invested judicial resources in considering whether to dismiss the individual-capacity claims. Assuming those claims are not moot (which, as explained above, they are), the

[2] In any event, this Court has stayed further trial-court proceedings, including discovery. So long as that stay order remains in place, the President has no basis whatever for arguing that he has been "effectively denied" immunity by virtue of forced participation in pre-trial procedures or discovery.

district court should issue a decision and the aggrieved party may seek review from this Court. Pretermitting that process now is unwarranted.

CONCLUSION

The Court should dismiss this appeal. If the Court does not dismiss the appeal, it should remand the matter to the district court for entry of the Rule 41(a) voluntary dismissal or disposition of President Trump's individual-capacity motion to dismiss.

Respectfully submitted,

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January 4, 2019

CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Federal Rules of Appellate Procedure 27 and 32. The motion contains 3,470 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The motion 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 4, 2019, I electronically filed the foregoing motion 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
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