**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| THE DISTRICT OF COLUMBIA, *et al.*<br><br>*Plaintiffs,*<br><br>v.<br><br>DONALD J. TRUMP, in his official capacity as President of the United States,<br><br>*Defendant*. | Case No. 8:17-cv-1596-PJM |

**REPLY IN SUPPORT OF DEFENDANT'S MOTION TO STAY PROCEEDINGS**

For the reasons the government explained in its opening brief, this Court should stay further proceedings pending potential Supreme Court review. The Fourth Circuit previously granted a stay of proceedings, and the equities remain the stay as they were when that stay was issued. The divided opinions of the en banc court demonstrate that there is a reasonable probability that the Supreme Court will both review and reverse this extraordinary suit asserting an implied cause of action in equity to enforce the Emoluments Clauses against the President of the United States. Plaintiffs' opposition fails to demonstrate otherwise, and indeed largely ignores the necessary premise of the Fourth Circuit's order initially granting the stay, as well as the arguments presented in the government's motion for a stay of proceedings in this Court.

## ARGUMENT

### I. PLAINTIFFS' ARGUMENTS THAT THE EQUITIES MILITATE AGAINST A STAY ARE DIRECTLY CONTRARY TO THE FOURTH CIRCUIT'S ORDER GRANTING A STAY.

Plaintiffs contend that the President will not suffer any hardship that would warrant extending the stay. *See* Pls.' Br. in Opp'n to the President's Mot. to Stay Proceedings at 3, 12-16,

ECF No. 173 ("Pls.' Opp'n"). But Plaintiffs never acknowledge that, in initially granting a stay, the Fourth Circuit necessarily concluded otherwise. Nothing in the Fourth Circuit's en banc decision provides any basis to question that conclusion. To the contrary, the en banc Fourth Circuit emphasized that the President is entitled to "special solicitude" when seeking relief from the appellate courts. *In re Trump*, 958 F.3d 274, 282 (9th Cir. 2020) (en banc). If that special solicitude means anything at all, it means that the President should not be subjected to continued litigation and discovery in this Court without first being afforded the opportunity to seek Supreme Court review in a case that closely divided the en banc Fourth Circuit.

In any event, Plaintiffs' particular arguments against hardship to the President are meritless. Although Plaintiffs' opposition brief emphasizes that they seek discovery primarily targeted against third-party businesses, *see* Pls.' Opp'n at 12, they wholly ignore that *all* of their discovery requests seek to delve into the President's personal finances on account of the office he holds. This harm even more clearly warrants a stay now than previously, because it is the exact harm that the Supreme Court recognized in staying subpoenas to third-party accountants for the President's financial records. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019).

Relatedly, Plaintiffs do not meaningfully engage with the capacious and constitutionally fraught discovery that they have already sought against five federal agencies. According to Plaintiffs, the Supreme Court's decision in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004), has no bearing here, because the discovery sought in that case included "requests for communications among the Vice President and senior officials about advice to the President on energy policy," while the discovery sought here raises no similar "constitutional or other protected interests." Pls.' Opp'n 14-15. In addition to the fact that their discovery necessarily impinges on the President's constitutionally protected interests—namely he

should not be subjected to discovery into his personal finances by virtue of his holding the Office of the Presidency, Plaintiffs disregard that they have already demanded, for example, "all *Communications with the President* or White House Concerning the location of the headquarters of the Federal Bureau of Investigation." Subpoena to GSA, Attach. A, Req. No. 10 (Dec. 6, 2018) (emphasis added). Plaintiffs have no theory for why their attempt to obtain such presidential communications is any less constitutionally troublesome than the request for vice presidential communications that *Cheney* found to implicate "the Executive's interests in maintaining its autonomy and safeguarding its communications' confidentiality." 542 U.S. at 370.

In an attempt to avoid this obvious constitutional obstacle, Plaintiffs now conveniently note for the first time in a footnote that they will not pursue their request to the GSA for communications regarding the location of the FBI headquarters, or their related request for "Any Document or Communication Concerning the potential future use(s) of the space that would be left vacant by the relocation of the headquarters of the [FBI]," *see* Subpoena to GSA, Attach. A, Req. No. 11 (Dec. 6, 2018), ECF No. 170-1, presumably because they concede those requests are foreclosed by *Cheney*. *See* Pls.' Opp'n at 15 n.5. Plaintiffs' belated concession—which is limited to a small subset of the information they seek from the government related to the President's personal finances and does not prevent Plaintiffs from making similar, equally problematic requests in the future—serves only to underscore that this Court will very likely be called upon to adjudicate difficult and constitutionally charged discovery disputes between the parties if this case is allowed to proceed before the Supreme Court considers the government's forthcoming petition for a writ of certiorari. What is more, it would trigger the precise type of harm that led the Fourth Circuit previously to issue a stay of district court proceedings.

Conversely, Plaintiffs argue that they are suffering injury now that militates against a stay. *See* Pls.' Opp'n at 3, 18. But Plaintiffs are doubly wrong. First, the only five judges of the Fourth Circuit to consider the question concluded that plaintiffs have no cognizable injury at all because their alleged financial injuries as competitors are purely speculative. *See In re Trump*, 958 F.3d at 326-28 (Niemeyer, J., dissenting). And second, Plaintiffs cannot plausibly contend that their case will reach final judgment before the Supreme Court decides whether to grant certiorari. It would plainly be inappropriate to allow discovery to proceed if the Supreme Court grants review, and so all Plaintiffs seek to gain by opposing a stay is a few months of discovery into the President's personal finances. That discovery for its own sake cannot redress any injury, or serve any other legitimate purpose, and so does not weigh against a stay.

## II. PLAINTIFFS' ARGUMENTS THAT THE SUPREME COURT IS UNLIKELY TO REVIEW AND REVERSE ESSENTIALLY IGNORE THE PRESIDENT'S ARGUMENTS IN THE STAY MOTION.

Plaintiffs' merits arguments fare no better. At the threshold, Plaintiffs are incorrect to claim that the Fourth Circuit never addressed the questions that the President proposes to present to the Supreme Court. *See* Pls.' Opp'n at 2. The Fourth Circuit squarely ruled that the President is not entitled to mandamus relief as to either this Court's denial of the government's motion to dismiss or its decision not to certify that denial for interlocutory appeal. *See In re Trump*, 958 F.3d at 282-89. These are the questions that the government intends to ask the Supreme Court to review, and those questions are worthy of certiorari. In addition, while the en banc majority did not squarely resolve the propriety of this Court's underlying orders outside of the mandamus posture, the Fourth Circuit's discussion of those orders further bolsters the case for Supreme Court review. Both of these points were developed in the government's motion and are elaborated on below.

**A.** As to the Fourth Circuit's failure to compel dismissal of this case, Plaintiffs simply assert that the government's arguments are "at most debatable, not conclusive." Pls.' Opp'n at 5. But Plaintiffs never respond *at all* to the government's specific arguments about why the President is indisputably not amenable to suit challenging his judgments concerning compliance with the Emoluments Clauses, and why this is clearly not an appropriate circumstance to recognize an implied cause of action when Plaintiffs seek to enforce those Clauses rather than preemptively assert a defense. *See* Def.'s Mot. to Stay Proceedings at 5-9, ECF No. 170 ("Def.'s Stay Mot.").[1]

Plaintiffs also argue that the government did not show in its stay application that appeal from a final judgment is not an adequate means of relief. *See* Pls.' Opp'n at 7-8. But that is because the en banc Fourth Court conspicuously did not rely the adequacy of the remedy, and for good reason. As the government explained in its mandamus briefing, *see In re Trump*, No. 18-2486, Pet. for Writ of Mandamus at 29-30 (4th Cir. Dec. 17, 2018); *In re Trump*, No. 18-2486, Reply Br. for Petitioner at 25 (4th Cir. Feb. 21, 2019), the Fourth Circuit has already held that an appeal after final judgment is not an adequate remedy when continuing with district court litigation would usurp an administrative agency's jurisdiction. *In re Sewell*, 690 F.2d 403, 406-07 (4th Cir. 1982). It follows *a fortiori* that an appeal after final judgment is not an adequate remedy when pending litigation usurps both the President's autonomy, *see Cheney*, 542 U.S. at 381, and the

[1] In a footnote, Plaintiffs do attempt to distinguish *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (plurality op.), suggesting that constitutional claims can be maintained against the President. *See* Pls.' Opp'n at 6 n.2. That is incorrect. *Franklin* relied on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), both of which reviewed the constitutionality of presidential action in a suit against *a subordinate executive official*. *See Youngstown*; 343 U.S. at 583; *Panama Refining*, 293 U.S. at 432-43. Neither of those cases, nor *Franklin*, therefore remotely supports the proposition that the President himself can be enjoined to comply with the Constitution. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties").

Fourth Circuit's jurisdiction to decide whether to hear an interlocutory appeal, *see* Def.'s Stay Mot. at 11-13; p. 6, *infra*.

Plaintiffs respond that there is no "[p]residential privilege of immunity from judicial process under all circumstances." Pls.' Opp'n at 8 (quoting *Clinton v. Jones*, 520 U.S. 681, 704 (1997)). But Plaintiffs' citation to *Jones* is inapposite for two key reasons. First, *Jones* involved a suit against the President "for his purely private acts," not for actions taken in his "public character." 520 U.S. at 696. Here, by contrast, Plaintiffs have brought an official-capacity suit against the President that is based on the fact that he holds the office of the Presidency. And second, *Jones* rejected only a claim of blanket immunity from suit, and emphasized that the "high respect that is owed to the office of the chief executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding." *Id.* at 707. As *Cheney* explained, that principle extends to the decision whether to grant immediate appellate relief rather than awaiting discovery and final judgment. 542 U.S. at 385.

**B.** As to the Fourth Circuit's decision not to compel certification of interlocutory appeal under 28 U.S.C. § 1292(b), Plaintiffs argue that there is no circuit split and that the issue therefore does not warrant the Supreme Court's review. *See* Pls.' Opp'n at 9-11. But Plaintiffs continue to distinguish *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982), on the ground that the Eleventh Circuit granted mandamus and ordered certification *before* the district court explained its reasoning, rather than *after*. *See* Pls.' Opp'n at 10-11. Plaintiffs do not respond to the government's showing that, if anything, that timing difference makes the conflict with the Eleventh Circuit much starker. *See* Def.'s Stay Mot. at 12. The Eleventh Circuit did not even permit the district court the opportunity to exercise its discretion before deciding that it was clear and indisputable that certification was required. Here, therefore, it was all the more appropriate for the

Fourth Circuit to mandate certification, because this Court had the chance to explain why certification was not warranted, but still abused its discretion, as five Judges of this Court recognized without any disagreement expressed by the majority. *In re Trump*, 958 F.3d at 322 (Niemeyer, J., dissenting).

Plaintiffs also all but ignore the D.C. Circuit's decision in *In re Trump*, 781 F. App'x 1 (D.C. Cir. 2019), which effectively compelled the district court to certify its orders under section 1292(b) without formally invoking mandamus, by holding that the district court had clearly abused its discretion and then remanding for that court to "reconsider" its decision in light of that admonition. Plaintiffs cannot realistically deny that the Eleventh Circuit's grant of mandamus, the D.C. Circuit's middle-ground approach, and the Fourth Circuit's refusal to grant mandamus together demonstrate a division among the circuits on this issue. The Supreme Court is likely to address this split by granting the government's forthcoming petition.

Finally, on the merits, Plaintiffs do not attempt to explain why this Court's decision not to certify its orders was a reasonable exercise of discretion. Instead, they simply repeat their argument that, even if the denial of certification was a clear and indisputable abuse of discretion, the President still must litigate the case, undergo discovery, and await final judgment before he can obtain relief from the appellate courts. *See* Pls.' Opp'n at 11-12. But, for the reasons already discussed, *see* pp. 2-3, *supra*, such a course of action plainly would not provide the President an *adequate* means of relief besides mandamus. Indeed, as *Cheney* specifically instructed, "[s]pecial considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals" in circumstances such as this. 542 U.S. at 391.

## CONCLUSION

For the foregoing reasons, Defendants respectfully ask that the Court stay proceedings pending the resolution of the government's forthcoming petition for a writ of certiorari and any further proceedings in the Supreme Court.

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Respectfully submitted,

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