No. 20-330

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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As the petition explained, the decision below allowed private parties to seek to enforce the Emoluments Clauses against President Trump in his official capacity under an implied cause of action based on a boundless theory of competitor standing. Respondents contend that certiorari should be denied in light of the election results. But setting aside the mootness issue that respondents anticipate, they lack any persuasive argument that the decision below would not have warranted this Court's review, and it plainly would have. Thus, if Congress accepts the votes of the Electoral College, the Court should hold the petition until it becomes moot after the inauguration, and then grant certiorari and vacate under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), as the decision below should not be allowed to stand without this Court's review.

A. Absent Mootness Considerations, The Decision Below Would Have Warranted This Court's Review

Setting aside the mootness issue anticipated by respondents, the decision below plainly would have merited both this Court's review and reversal.

1. As a threshold matter, the panel's decision to allow respondents to bring a novel lawsuit under the Emoluments Clauses seeking injunctive relief against the President would have justified further review based solely on the serious separation-of-powers concerns at stake. Pet. 22-23, 27-28. Respondents do not dispute that they ask the Judiciary "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997); see Br. in Opp. 2-3. Nor do they deny that they urge federal courts to take that weighty step by creating an implied cause of action not expressly authorized by Congress. Pet. 12, 27. And they acknowledge that they sought "injunctive relief" against the President in his official capacity, and never disavow that they would have pursued "'intrusive discovery'" as well. Br. in Opp. 4, 7, 16 (citation omitted).

Instead, respondents contend that these separation-of-powers concerns will "no longer" exist in the near future, Br. in Opp. 16, but that has no bearing on whether the petition would otherwise have been worthy of this Court's review. Respondents further observe that the decision below did not definitively resolve whether they could "obtain relief against the President." *Id.* at 15 (emphasis omitted). But this Court likely would have addressed that threshold defect in this suit, consistent with its recognition that "the high respect that is owed to the office of the Chief Executive is a matter that

should inform the conduct of the entire proceeding," *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 385 (2004) (brackets, citation, and ellipsis omitted).

2. That further review would have been warranted is underscored by the fact that the court of appeals allowed this extraordinary lawsuit to proceed by adopting an expansive theory of competitor standing at odds with the decisions of this Court and other circuits. Pet. 12-18, 23-27. Respondents do not even mention *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85 (2013), much less attempt to reconcile the decision below with this Court's rejection of "a boundless theory of standing" under which "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful." *Id.* at 99; see Pet. 15-16. They also fail to reconcile the Article III analysis below with this Court's precedents on traceability, or to address the fact that "even if the President's personal gains * * * were removed from the calculus," "[f]oreign diplomats and state officials might, quite lawfully, still choose the Trump establishment over plaintiffs' establishments to attempt to curry favor with the President." Pet. App. 168a (Walker, J., statement in opposition to the denial of rehearing en banc); see Pet. 16-18. And their observation that the courts of appeals uniformly require "'a sufficient likelihood' of injury" to establish competitor standing, Br. in Opp. 13 (citation omitted), in no way obviates the circuit split—recognized by several of the dissenting judges below—over what likelihood of injury is in fact sufficient. See Pet. 24-26; Pet. App. 125a-127a (Menashi, J., dissenting from the denial of rehearing en banc); *id.* at 170a (Walker, J., statement in opposition to the denial of rehearing en banc).

Indeed, confronted with the holding of a Fourth Circuit panel that the plaintiffs in a parallel suit lacked competitor standing, respondents merely observe that the decision was vacated by the en banc Fourth Circuit. Br. in Opp. 14. But no member of the Fourth Circuit called that aspect of the panel's decision into question, and five judges adhered to it and specifically rejected the Second Circuit's contrary analysis here. Pet. 26-27; see *In re Trump*, 958 F.3d 274, 327 (4th Cir. 2020) (en banc) (Niemeyer, J., dissenting), petition for cert. pending, No. 20-331 (filed Sept. 9, 2020).

B. The Appropriate Response To The Mootness That Respondents Anticipate Would Be To Vacate The Decision Below Under *Munsingwear*

Given that the decision below would have warranted further review apart from any anticipated mootness, if Congress accepts the votes of the Electoral College, see 3 U.S.C. 15, this Court should hold the petition until it becomes moot after the inauguration, and then grant and vacate the decision below under *Munsingwear*. As respondents recognize, Br. in Opp. 9, and this Court recently confirmed, vacatur under *Munsingwear* is available if a case becomes "moot before certiorari" when the decision below would have been worthy of further review absent mootness. *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam); see *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (explaining that vacatur under *Munsingwear* is appropriate when the court of appeals' decision was independently "appropriate for review"). Respondents offer two reasons for why this Court should not employ that equitable remedy, but neither withstands scrutiny.

First, while respondents correctly observe that any mootness would not be "attributable" to them, Br. in Opp. 10, they ignore that it would not be attributable to the President either. Rather, any mootness here would result from the election outcome. Such "vagaries of circumstance" warrant vacatur, because neither the Office of the President nor anyone else should continue to be governed by a precedential decision that likely would not have survived this Court's review but for "mootness by happenstance." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 & n.3 (1994).

Second, relying on the fact that this case is scheduled for the Court's consideration at a conference shortly before the inauguration occurs, respondents contend that the case will not then be moot and so the Court should simply deny review. Br. in Opp. 9-10 & n.1. But that happenstance of timing is no basis for leaving an erroneous decision on the books that this Court has not had a meaningful opportunity to review. Although the government acted expeditiously to preserve this Court's opportunity to resolve the case during this Term, see *id.* at 10 n.1, that is no reason to deny certiorari now solely because, as a result, the mootness that respondents anticipate has not yet occurred. Rather, the Court could simply wait several days and then grant certiorari and vacate the decision below under *Munsingwear* if the anticipated mootness materializes.

Respectfully submitted.

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