No. 22A283

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, APPLICANT

v.

UNITED STATES OF AMERICA

RESPONSE IN OPPOSITION TO THE
APPLICATION TO VACATE IN PART THE PARTIAL STAY
ISSUED BY THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption to this case. See Sup. Ct. R. 24.1(b).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Trump v. United States, No. 22-cv-81294 (Sept. 5, 2022) (order granting preliminary injunction and providing that a special master shall be appointed)

United States v. Sealed Search Warrant, No. 22-mj-8332 (Aug. 5, 2022) (issuing search warrant)

United States Court of Appeals (11th Cir.):

Trump v. United States, No. 22-13005 (Sept. 21, 2022) (granting partial stay)

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The Solicitor General respectfully files this response in opposition to the application for a partial vacatur of the Eleventh Circuit's order partially staying the September 5, 2022 order of the United States District Court for the Southern District of Florida.

This application concerns an unprecedented order by the district court restricting the Executive Branch's use of its own highly classified records in an ongoing criminal investigation and directing the dissemination of those records outside the Executive Branch for a special-master review. In August 2022, the government obtained a warrant to search the residence of applicant, former President Donald J. Trump, based on a judicial finding of probable cause to believe that the search would reveal evidence of crimes, including wrongful retention of documents and information relating to the national defense as well as obstruction of justice. Among

other evidence, the search recovered roughly 100 records bearing classification markings, including markings reflecting the highest levels of classification and extremely restricted distribution.

Two weeks later, applicant filed this civil action seeking the appointment of a special master to review the seized materials for claims of privilege or return of property and an injunction barring the government from continuing to use those materials during that review process. District courts have no general equitable authority to superintend federal criminal investigations; instead, challenges to the government's use of the evidence recovered in a search are ordinarily resolved through criminal motions practice if and when charges are filed. Here, however, the district court granted the extraordinary relief applicant sought, ordering that a "special master shall be APPOINTED to review the seized property" and enjoining further review or use of any seized materials "for criminal investigative purposes" pending the special-master process, which will last months. Appl. for Partial Vacatur App. (App.) B at 23.[1]

Although the government believes the district court fundamentally erred in appointing a special master and granting injunctive relief at all -- and is appealing the court's September 5

[1] The appendix to the application is divided into seven lettered sections but not consecutively paginated. This response cites the appendix using the relevant section designation and the internal pagination of the documents contained in that section.

order in its entirety on an expedited basis -- the government sought only a partial stay of the portions of that order that caused the most serious and immediate harm to the United States and the public by "enjoin[ing] the government's use of the classified documents and requir[ing] the government to submit the classified documents to the special master for review." App. A at 29. The court of appeals granted that modest relief, holding that "the United States is substantially likely to succeed in showing that the district court abused its discretion in exercising jurisdiction over [applicant's] motion as it concerns the classified documents" and that all of the equitable factors favored a partial stay. Id. at 22; see id. at 15-29.

In this Court, applicant does not challenge the stay insofar as it reinstates the government's authority to use the documents bearing classification markings in its ongoing criminal investigation. Applicant instead seeks to partially vacate the stay to the extent it precludes dissemination and review of those documents in the special-master proceedings. Applicant is not entitled to that relief for multiple independent reasons.

Most notably, applicant has not even attempted to explain how he is irreparably injured by the court of appeals' partial stay, which simply prevents disclosure of the documents bearing classification markings in the special-master review during the pendency of the government's expedited appeal. Applicant's inability to

demonstrate irreparable injury is itself sufficient reason to deny the extraordinary relief he seeks in this Court. Indeed, applicant does not challenge the court of appeals' determinations that applicant will suffer no meaningful harm from the limited stay, App. A at 27-28; that the government would have been irreparably injured absent a stay, id. at 23-27; and that the public interest favors a stay, id. at 28-29. As the court explained, "allowing the special master and [applicant's] counsel to examine the classified records" would irreparably injure the government because "for reasons 'too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.'" Id. at 27 (quoting Department of the Navy v. Egan, 484 U.S. 518, 529 (1988)).

In addition, applicant has not shown that the court of appeals erred -- much less "clearly and demonstrably erred" -- in issuing a partial stay. Planned Parenthood v. Abbott, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay) (citation and internal quotation marks omitted). The district court appointed the special master to review claims of privilege and for the return of personal property, see App. B at 23, but applicant has no plausible claim of privilege in or ownership of government records bearing classification markings. As the court of appeals recognized, applicant thus has no basis to demand

special-master review of those records. App. A at 18-19. Applicant does not acknowledge, much less attempt to rebut, the court's careful analysis of those issues.

Instead, applicant principally asserts (Appl. 9-29) that although the court of appeals had jurisdiction to stay the district court's injunction, it lacked jurisdiction to stay the special master's review. That is wrong for three independent reasons. First, the court of appeals correctly held that it had pendent jurisdiction to address the special master's review because the injunction -- which precluded the government's use of the documents "pending resolution of the special master's review," App. B at 23 -- is "inextricably intertwined" with that review, App. A at 15 n.3 (citation omitted). Second, 28 U.S.C. 1292(a)(1) grants appellate jurisdiction to review "[i]nterlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions" (emphasis added). Appellate jurisdiction thus lies over the entire order granting an injunction, as this Court has held in interpreting other statutes granting jurisdiction to review particular types of "orders." See, e.g., BP p.l.c. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1537-1538 (2021). Here, the district court's September 5 order not only granted an injunction, but also provided that a "special master shall be APPOINTED to review the seized property," including the records bearing classification markings. App. B at 23. Third, a

directive compelling the Executive Branch to disclose information that is classified or otherwise implicates national security is itself immediately appealable as a collateral order. Cf. Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 113 n.4 (2009).

The court of appeals thus correctly held that it had appellate jurisdiction to review and stay the portion of the September 5 order that requires the government to turn over the documents bearing classification markings for special-master review. And even if there were some doubt on that score, applicant certainly cannot establish the clear error required to justify the relief he seeks -- particularly because he does not acknowledge, much less attempt to rebut, the court of appeals' conclusion that the district court's order was a serious and unwarranted intrusion on the Executive Branch's authority to control the use and distribution of extraordinarily sensitive government records. The application should be denied.

STATEMENT

A. Statutory And Factual Background

1. Applicant's term of office ended in January 2021. Over the next year, the National Archives and Records Administration (NARA) endeavored to recover what appeared to be missing records subject to the Presidential Records Act of 1978 (PRA), Pub. L. No. 95-591, 92 Stat. 2523 (44 U.S.C. 2201 et seq.). App. A at 3-4; App. D at A44. The PRA provides that the United States retains

"complete ownership, possession, and control of Presidential records," 44 U.S.C. 2202, which the law defines to include all records "created or received by the President" or his staff "in the course of conducting activities which relate to or have an effect upon" the President's official duties, 44 U.S.C. 2201(2). The PRA specifies that when a President leaves office, NARA "shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. 2203(g)(1).

In response to repeated requests from NARA, applicant ultimately provided NARA with 15 boxes of records in January 2022. App. D at A44 (May 10, 2022 letter from NARA to applicant's counsel). NARA discovered that the boxes contained "items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials." Ibid.; see App. A at 3. Material is marked as Top Secret if its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security. Exec. Order No. 13,526, § 1.2(1), 75 Fed. Reg. 707, 707 (Jan. 5, 2010). Sensitive Compartmented Information and Special Access Program material are subject to additional restrictions. Special Access Programs, for example, may be created only by cabinet-level officials or their deputies and must be based on "a specific finding" that "the vulnerability of, or threat to,

specific information is exceptional." § 4.3(a)(1), 75 Fed. Reg. at 722.

NARA referred the matter to the Department of Justice (DOJ), noting that highly classified records appeared to have been improperly transported and stored. App. D at A63-A64 (affidavit in support of search warrant). DOJ then sought access to the 15 boxes under the PRA's procedures governing presidential records in NARA's custody. Id. at A44-A45; see 44 U.S.C. 2205(2)(B). After receiving notification of that request, applicant neither attempted to pursue any claim of privilege in court, see 44 U.S.C. 2204(e), nor suggested that any documents bearing classification markings had been declassified. App. A at 4; App. D at A45.

2. The FBI developed evidence that additional boxes remaining at applicant's residence at the Mar-a-Lago Club in Palm Beach, Florida, were also likely to contain classified information. On May 11, 2022, applicant's counsel was served with a subpoena issued by a grand jury in the District of Columbia for "[a]ny and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings." App. D at A48 (subpoena).

In response, applicant's counsel and his custodian of records produced an envelope containing approximately three dozen documents bearing classification markings. App. D at A76-A77. Applicant did not assert any claim of privilege and did not suggest

that any of those documents had been declassified. App. A at 5. To the contrary, the envelope had been wrapped in tape in a manner "consistent with an effort to handle the documents as if they were still classified." App. D at A78. Some of the documents in the envelope bore classification markings at the highest levels, including additional compartmentalization. Id. at A77.

Applicant's counsel represented that those records had been retrieved from a storage room at Mar-a-Lago, where boxes removed from the White House had been placed, and that no responsive records were located anywhere else at Mar-a-Lago. App. D at A76-A77. Applicant's custodian provided a sworn certification in writing "on behalf of the Office of Donald J. Trump" that a "diligent search was conducted of the boxes that were moved from the White House to Florida" and that "[a]ny and all responsive documents accompany this certification." Id. at A50. The certification further stated that "[n]o copy, written notation, or reproduction of any kind was retained as to any responsive document." Ibid.

3. The FBI uncovered evidence that the response to the grand jury subpoena was incomplete, that additional classified documents likely remained at Mar-a-Lago, and that efforts had likely been undertaken to obstruct the investigation. The government applied to a magistrate judge for a search warrant, citing 18 U.S.C. 793 (willful retention of national defense information), 18 U.S.C. 2071 (concealment or removal of government records), and 18 U.S.C.

1519 (obstruction). App. D at A54. The magistrate judge found probable cause that evidence of those crimes would be found at Mar-a-Lago and authorized the government to seize, among other things, "[a]ny physical documents with classification markings, along with any containers/boxes * * * in which such documents are located." Id. at A98; see id. at A96-A98 (warrant and attachments). The magistrate judge also approved the government's proposed filter protocols for handling any materials potentially subject to personal attorney-client privilege. Id. at A87-A88.

The government executed the warrant on August 8, 2022. The search recovered more than 11,000 documents from the storage room and applicant's private office, roughly 100 of which bore classification markings, with some indicating the highest levels of classification and extremely restricted distribution. App. B at 4 & n.4; see App. D at A51 (photograph); App. G (inventory). In some instances, even FBI counterintelligence personnel required additional clearances to review the seized documents. D. Ct. Doc. 48, at 12-13 (Aug. 30, 2022).

B. Proceedings Below

1. Two weeks after the search, applicant filed a pleading styled as a "Motion for Judicial Oversight and Additional Relief" asking the district court to appoint a special master to adjudicate potential claims of executive and attorney-client privilege, to enjoin the government from further review and use of the seized

documents, and to order the government to return certain property under Federal Rule of Criminal Procedure 41(g). See D. Ct. Doc. 1, at 1-21 (Aug. 22, 2022).

On September 5, 2022, the district court granted applicant's motion in part, directing that a "special master shall be APPOINTED to review the seized property, manage assertions of privilege and make recommendations thereon, and evaluate claims for return of property," with the "exact details and mechanics of this review process [to] be decided expeditiously following receipt of the parties' proposals." App. B at 23. "[P]ending resolution of the special master's review," the court enjoined the government from "further review and use" of the seized materials "for criminal investigative purposes," but stated that the government may continue to review and use those materials "for purposes of intelligence classification and national security assessments." Id. at 23-24. The court explained that the injunction was issued "in natural conjunction with th[e] appointment [of the special master], and consistent with the value and sequence of special master procedures." Id. at 1.

The district court denied the government's subsequent motion for a partial stay of the September 5 order as it applied to the records bearing classification markings. App. D at A4-A13. The court declined to address the government's argument that special-master review is unnecessary and unwarranted with respect to that

discrete set of records because they are government records not subject to any plausible claim for return or assertion of privilege. Instead, the court referred generally to "factual and legal disputes as to precisely which materials constitute personal property and/or privileged materials." Id. At A7. And the court reiterated that the injunction preventing the government from using the seized records for investigative purposes was necessary "to uphold the value of the special master review." Id. At A32.

2. The court of appeals granted a stay of the order "to the extent it enjoins the government's use of the classified documents and requires the government to submit the classified documents to the special master for review." App. A at 29. The court observed that it had appellate jurisdiction to review the injunction under 28 U.S.C. 1292(a)(1), App. A at 15, and rejected applicant's contention that it lacked jurisdiction over the special-master portion of the district court's order, id. At 15 n.3. The court of appeals noted that the injunction expressly applied "'pending completion of the special master's review'" and "'in natural conjunction with the appointment of the special master.'" Ibid. (brackets and citation omitted). And the court explained that "pendent jurisdiction" would allow it to review even "an otherwise nonappealable order" where, as here, "it is inextricably intertwined with an appealable decision." Ibid.

The court of appeals then held that the government had satisfied the traditional standard for a stay set forth in Nken v. Holder, 556 U.S. 418 (2009). App. A at 15-16. The court concluded that the government "is substantially likely to succeed in showing that the district court abused its discretion in exercising jurisdiction over [applicant's] motion as it concerns the classified documents." Id. at 22; see id. at 16-22. Among other things, the court of appeals emphasized the district court's conclusion that the government did not engage in the sort of "callous disregard" for constitutional rights that circuit precedent makes an "indispensable" prerequisite for an exercise of equitable jurisdiction in this context. Id. at 17 (citation omitted). Applicant did not dispute that conclusion -- indeed, his filings in the court of appeals did not even allege that the search violated the Fourth Amendment.

The court of appeals also found that the government would suffer irreparable injury absent a stay. Crediting an affidavit from a senior FBI official, the court concluded that "an injunction delaying (or perhaps preventing) the United States's criminal investigation from using classified materials risks imposing real and significant harm on the United States and the public," including risks to national security. App. A at 26-27. The court also concluded that "allowing the special master and [applicant's] counsel to examine the classified records" would needlessly jeop-

ardize "the long-recognized 'compelling interest in protecting the secrecy of information important to our national security.'" Id. at 27 (citation and ellipsis omitted). The court further held that applicant had not shown that he would suffer substantial injury from a "limited" stay applicable only to the records bearing classification markings and that the public interest favored a partial stay pending appeal. Id. at 28-29.

3. Meanwhile, before the district court denied a stay, it had issued a September 15, 2022 order (App. C at 1-8) appointing Judge Raymond J. Dearie as the special master and providing the promised "details and mechanics of th[e] review process," App. B at 23. After the court of appeals entered the stay, the district court sua sponte modified the September 15 order by deleting the portions of that order addressing review of the records bearing classification markings. D. Ct. Doc. 104, at 1 (Sept. 22, 2022).

4. After the court of appeals granted the stay, it also granted the government's motion to expedite the appeal, which applicant had opposed. Briefing is set to be complete by November 17, 2022. 10/5/22 C.A. Order. Meanwhile, the government's investigation is ongoing, as is a national security review and assessment being coordinated by the Office of the Director of National Intelligence, see App. D at A40-A42.

ARGUMENT

Applicant seeks to vacate the partial stay entered by the court of appeals to the extent it precludes review of the documents bearing classification markings in the special-master proceedings. The application should be denied. "A stay granted by a court of appeals is entitled to great deference from this Court." Garcia-Mir v. Smith, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). Vacatur of such a stay is appropriate only when (1) the case "very likely would be reviewed [by this Court] upon final disposition in the court of appeals"; (2) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and (3) applicant's rights "may be seriously and irreparably injured by the stay." Western Airlines, Inc. v. International Brotherhood of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (citation omitted); see Valentine v. Collier, 140 S. Ct. 1598, 1598 (2020) (Sotomayor, J., respecting the denial of application to vacate stay); Planned Parenthood v. Abbott, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay). None of those requirements is satisfied here.

I. THIS COURT WOULD NOT LIKELY GRANT REVIEW IF THE COURT OF APPEALS REVERSED THE DISTRICT COURT'S ORDER

Applicant makes little effort to show that this Court would likely grant review if the court of appeals reversed the district court's order enjoining the government from using the documents

bearing classification markings pending a special master's review. Cf. Appl. 9-10. Indeed, the application does not even address the court of appeals' reasoning supporting its conclusion that the government is substantially likely to succeed on the merits. Instead, applicant focuses almost entirely on the assertion that the court lacked jurisdiction to stay the special master's review. But the jurisdictional question presented here arises from the unusual -- indeed, unprecedented -- order entered by the district court, and is therefore unlikely to recur. And applicant does not contend that a decision by the court of appeals exercising jurisdiction and reversing that order would conflict with any decision of another court of appeals or otherwise satisfy this Court's traditional certiorari standards.[2]

II. APPLICANT HAS NOT SHOWN THAT THE COURT OF APPEALS CLEARLY AND DEMONSTRABLY ERRED IN GRANTING A STAY

A. The Court Of Appeals Did Not Clearly And Demonstrably Err In Exercising Appellate Jurisdiction

Applicant recognizes (Appl. 3 n.3) that the court of appeals

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[2] The analysis would be different if the court of appeals were to affirm the district court's unprecedented order. Enjoining the government, pre-indictment, from using classified records recovered under a lawful search warrant pending a special master's review is an extraordinary intrusion raising significant national-security concerns. Cf. Department of the Navy v. Egan, 484 U.S. 518, 520 (1988) (explaining that the Court granted certiorari "because of the importance of the issue in its relation to national security concerns"). That is especially so because those records are the very subject of the investigation concerning wrongful retention of documents and information relating to the national defense, as well as obstruction of justice. See App. D at A57-A86.

had jurisdiction to review the portion of the district court's September 5 order enjoining the government's use of the documents bearing classification markings, and he does not challenge that portion of the stay. Instead, he argues (Appl. 9-29) only that the court of appeals lacked jurisdiction to stay the September 5 order "to the extent it * * * requires the government to submit the classified documents to the special master for review." App. A at 29.[3] That argument lacks merit for three independent reasons: (1) the court had pendent jurisdiction to address the special-master review that formed the predicate for the injunction; (2) the court had jurisdiction to review the entire September 5 order under 28 U.S.C. 1292(a)(1); and (3) the court had jurisdiction under the collateral-order doctrine to review the directive to disclose classified documents in the special-master proceedings.

1. The court of appeals had pendent jurisdiction

The court of appeals correctly recognized (App. A at 15 n.3) that it had pendent jurisdiction to address the special-master

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[3] Applicant is wrong to suggest (Appl. 13-15 & n.9) that because the district court appointed Judge Dearie and specified the details and mechanics of his review in its September 15 order, the court of appeals effectively stayed that later order too. The court of appeals expressly disclaimed having done so, see App. A at 15 n.3, and its order stays only the "district court order" (singular), id. at 29. The district court itself apparently did not understand the court of appeals to have stayed any portion of the September 15 order because after the stay was entered, the district court sua sponte modified that order to conform to the stay of the September 5 order. See D. Ct. Doc. 104.

review to which the injunction was expressly tied. Pendent appellate jurisdiction permits review of an otherwise non-appealable issue if it is "'inextricably intertwined with' or 'necessary to ensure meaningful review of'" an immediately appealable ruling. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531 (2021) (citation omitted). For example, in Clinton v. Jones, 520 U.S. 681 (1997), this Court held that because the appellate court had jurisdiction to review the district court's denial of a motion to dismiss on presidential immunity grounds, it had pendent jurisdiction to review the district court's ruling staying trial. Id. at 707 n.41. Likewise, in Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Court affirmed appellate jurisdiction to review the denial of a motion to dismiss for failure to state a claim pendent to the denial of qualified immunity. Id. at 673 (citing other cases).

The injunction here is an immediately appealable ruling under 28 U.S.C. 1292(a)(1), as applicant acknowledges. Appl. 3 n.3. But the injunction expressly applies only "pending resolution of the special master's review." App. B at 23. The district court itself explained that it issued the injunction "in natural conjunction with th[e] appointment [of the special master], and consistent with the value and sequence of special master procedures." Id. at 1. And the court reiterated that it viewed the injunction as necessary "to uphold the value of the special master review." App. D at A32. The special-master review is thus inextricably

intertwined with the injunction because it was the very predicate for the injunction. See Jones, 520 U.S. at 707 n.41.

Applicant asserts that the two are not inextricably intertwined because resolution of the propriety of the injunction "does not 'necessarily resolve' the Special Master issue." Appl. 25; see Appl. 24-25. But that conflates "inextricably intertwined" with the disjunctive "necessary to ensure meaningful review" path to pendent jurisdiction. Whole Woman's Health, 142 S. Ct. at 531 (citation omitted). And in any event, the assertion is incorrect. In staying the injunction, the court of appeals concluded that the district court likely abused its discretion in even entertaining applicant's motion as to the records bearing classification markings -- a conclusion that necessarily dictates that the special-master review of those records is improper. App. A at 16-22. The government has also argued that the injunction is unwarranted precisely because the special-master review process is unnecessary with respect to the documents bearing classification markings, over which applicant has no plausible claim of privilege or for return. App. D at 12-17. Again, that argument necessarily resolves not just the validity of the injunction, but also the propriety of the special-master review to which the injunction is expressly tied.

Applicant also contends (Appl. 21-22 & n.12) that pendent appellate jurisdiction is available only in cases where the ap-

pealable order is the denial of an immunity defense. But this Court has never articulated such a limitation. See Whole Woman's Health, 142 S. Ct. at 531; Iqbal, 556 U.S. at 673; Jones, 520 at 707 n.41.[4] Nor is there any sound basis to limit pendent jurisdiction to cases involving immunity defenses. Denials of immunity are immediately appealable under the collateral-order doctrine on the theory that "the central benefits" of immunity -- avoiding the costs and inconveniences of trial -- otherwise "would be forfeited" as a practical matter. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 143-144 (1993). If pendent jurisdiction is available under a doctrine grounded in those practical considerations, a fortiori it should be available when, as in Section 1292(a)(1), Congress has specifically authorized an appeal by statute.

2. The court of appeals had jurisdiction under 28 U.S.C. 1292(a)(1) over the entire September 5 order

Even setting aside pendent jurisdiction, Section 1292(a) provides that "the courts of appeals shall have jurisdiction of ap-

[4] Indeed, this Court has acknowledged that appellate courts reviewing interlocutory injunctive orders may properly review issues beyond just the injunction. E.g., Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940) (on appeal from grant of preliminary injunction, court of appeals had jurisdiction to review orders denying motions to dismiss); see Munaf v. Geren, 553 U.S. 674, 691 (2008) ("[A] reviewing court has the power on appeal from an interlocutory order 'to examine the merits of the case and upon deciding them in favor of the defendant to dismiss the bill.'") (citation and ellipsis omitted).

peals from[] * * * [i]nterlocutory orders of the district courts * * * granting * * * injunctions." 28 U.S.C. 1292(a)(1) (emphasis added). It is thus the entire order that is appealable under Section 1292(a)(1). This Court made exactly that point in construing the parallel language of Section 1292(b): "As the text of § 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court." Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996). And the Court recently employed the same interpretation of "order" to conclude that a court of appeals has jurisdiction to review all grounds for removal addressed in a remand order, not just the federal-officer ground providing the basis for appellate review under 28 U.S.C. 1447(d). BP p.l.c. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1537-1538 (2021). Here, the district court granted an injunction in its September 5 order. App. B at 23. It follows that the court of appeals had jurisdiction to review the entire order -- including the portion directing that a "special master shall be APPOINTED to review the seized property." Ibid.[5]

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[5] Contrary to applicant's suggestion (Appl. 13-14), that portion of the order was not merely precatory. Although the district court had not yet identified the special master or supplied the "exact details and mechanics of th[e] review process," App. C at 23, the September 5 order itself made plain that the government would have to submit the seized documents for special-master review, see id. at 14-19, 23. Indeed, as noted above, that review is the very predicate for the injunction.

Applicant contends (Appl. 19) that Yamaha and BP are inapposite because Section 1292(b) supposedly serves "a wholly different purpose" than Section 1292(a). But what matters is the statutory text, not its perceived purpose. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2496-2497 (2022). The plain text of Section 1292(a)(1) confers jurisdiction to review "orders * * * granting * * * injunctions," 28 U.S.C. 1292(a)(1) -- just as the text of Section 1292(b) confers jurisdiction to review certain "order[s]" that "involve[] a controlling question of law," 28 U.S.C. 1292(b), and just as the text of Section 1447(d) confers jurisdiction to review certain "order[s] remanding a case," 28 U.S.C. 1447(d). Applicant's observation (Appl. 19-20) that a court of appeals has discretion to reject an appeal under Section 1292(b), but not Section 1292(a), is a non sequitur; courts of appeals have no discretion to refuse appeals under Section 1447(d) either, but that does not undermine the textual point above. See BP, 141 S. Ct. at 1538.

Finally, applicant errs in invoking (Appl. 18-19) Abney v. United States, 431 U.S. 651 (1977). Abney held that the denial of a motion to dismiss an indictment on double-jeopardy grounds is immediately appealable under "the so-called 'collateral order' exception to the final-judgment rule," id. at 657; see id. at 657-662, but that "other claims contained in the motion to dismiss" are not necessarily immediately appealable, such as a challenge to

the sufficiency of the indictment, id. at 663. But Abney's holding ultimately rested on the text of Section 1291: as the Court explained, 28 U.S.C. 1291 provides appellate jurisdiction over a "final decision," and a ruling rejecting a double-jeopardy claim qualifies as a "final decision" under the test set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), but a ruling rejecting a sufficiency claim does not. Abney, 431 U.S. at 658. That reasoning is inapplicable to Section 1292(a), which provides appellate jurisdiction over "orders," not just particular decisions within those orders. If anything, Abney's focus on statutory text underscores the inaptness of applicant's purposive and policy-based arguments (Appl. 19-21).

3. The directive to divulge classified documents is reviewable as a collateral order

A third independent basis for appellate jurisdiction is that the special-master directive is itself a collateral order, at least as applied to the records bearing classification markings. See Al Odah v. United States, 559 F.3d 539, 542-544 (D.C. Cir. 2009) (per curiam); cf. Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 113 n.4 (2009) (leaving the question open). An interlocutory ruling is immediately appealable as a collateral order if it is "conclusive," "resolve[s] important questions separate from the merits," and is "effectively unreviewable on appeal from the final judgment in the underlying action." Mohawk Industries, 558 U.S. at 106 (citation omitted).

The district court's order compelling the disclosure of documents bearing classification markings in the special-master proceedings during the pendency of an ongoing investigation satisfies those criteria: it conclusively determines the government's obligation to disclose those sensitive materials; compelled disclosure outside the Executive Branch is an important issue separate from the merits of the underlying dispute; and disclosure, once made, is irreversible. Applicant agrees as to the first point, but argues (Appl. 29) that appointment of the special master presents "no particularly important issue." That mistakes the relevant inquiry, which is whether the disclosure of classified records -- not the appointment of a special master more broadly -- is important and separate from the merits. Likewise, that "the Special Master Order is reviewable on appeal" (ibid.) is nonresponsive to the point that appellate review of a ruling compelling the disclosure of classified documents will likely be futile once disclosure has occurred.

The D.C. Circuit held exactly that in Al Odah, finding appellate jurisdiction to review an order compelling disclosure of classified records. 559 F.3d at 543-544. Applicant attempts to distinguish Al Odah (Appl. 28) on the ground that the classified documents there were to be disclosed to the habeas petitioners' counsel. But applicant likewise has insisted that the documents bearing classification markings be disclosed to his counsel under

the district court's order. See D. Ct. Doc. 83, at 4-5 (Sept. 9, 2022); D. Ct. Doc. 97, at 3 (Sept. 19, 2022); see also App. C at 4. And in any event, even disclosure only to the special master would be important and effectively unreviewable on appeal, especially in light of "the long-recognized 'compelling interest in protecting the secrecy of information important to our national security.'" App. A at 27 (citation and ellipsis omitted). As this Court has emphasized, courts should be cautious before "insisting upon an examination" of records whose disclosure would jeopardize national security "even by the judge alone, in chambers." United States v. Reynolds, 345 U.S. 1, 10 (1953).

* * * * *

Even if all three of the independent grounds for appellate jurisdiction set forth above might ultimately be found unavailing, applicant still would not be entitled to partial vacatur of the stay because the court of appeals did not clearly and demonstrably err in determining that it had jurisdiction. This Court has expressly left open the question whether an order compelling disclosure of classified government records is immediately appealable as a collateral order, Mohawk Industries, 558 U.S. at 113 n.4; by definition, that means that the exercise of appellate jurisdiction in this case is not "clearly wrong," Planned Parenthood, 571 U.S. at 1062 (Scalia, J., concurring in denial of application to vacate

stay).[6] Likewise, because this Court has not had the opportunity to apply the logic of Yamaha and BP to the parallel language in Section 1292(a) or to address pendent jurisdiction in circumstances like these, the exercise of appellate jurisdiction here cannot be said to be "clearly wrong." Ibid. Indeed, the most that applicant could possibly establish about appellate jurisdiction in this case is that it presents a "'difficult'" question, which "cuts against vacatur, since the difficulty of a question is inversely proportional to the likelihood that a given answer will be clearly erroneous." Id. at 1061-1062 (citation omitted).

B. The Court Of Appeals Did Not Clearly And Demonstrably Err In Determining That The Government Was Likely To Succeed On The Merits

The court of appeals held that the government was likely to succeed on the merits because the district court abused its discretion in entertaining applicant's motion in the first place, especially with respect to the records bearing classification markings. App. A at 16-22. Applicant does not directly challenge that holding or address the court of appeals' analysis, including its conclusion that he has not alleged -- much less shown -- a

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[6] Mohawk Industries also recognized that mandamus may be an alternative path to appellate review in similar circumstances. See 558 U.S. at 111 & n.3. The government specifically preserved that alternative in the court below, see App. F at 8 n.2, thus providing yet another reason why the court of appeals did not clearly and demonstrably err in precluding the special master's review of the documents at issue here, cf. Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984).

violation of his constitutional rights. Id. at 17. Applicant instead contends that appointment of a special master was warranted because this case supposedly involves a "document storage dispute governed by the PRA" requiring "oversight," Appl. 30-31; see Appl. 29-32, and because applicant had the authority to declassify classified records during his tenure in office, Appl. 33-36. Those contentions are wrong and irrelevant.

Applicant's reliance on the PRA is misguided because he did not comply with his PRA obligation to deposit the records at issue with NARA in the first place. As a result, the Archivist does not have custody of those records, and the PRA's procedures do not apply to them. Cf. 44 U.S.C. 2202, 2203(g)(1). Even were that not so, any dispute over access to presidential records under the PRA must be resolved in the District of Columbia, not the Southern District of Florida. 44 U.S.C. 2204(e). If applicant truly believes that this suit is "governed by the PRA," Appl. 30, he has filed it in the wrong court -- which would be yet another reason the government is likely to succeed on the merits here.

As for applicant's former authority to declassify documents: Despite asserting that classification status "is at the core of the dispute" in this case, Appl. 35, applicant has never represented in any of his multiple legal filings in multiple courts that he in fact declassified any documents -- much less supported such a representation with competent evidence. Indeed, the court

of appeals observed that "before the special master, [applicant] resisted providing any evidence that he had declassified any of these documents" and that "the record contains no evidence that any of these records were declassified." App. A at 19. And in any event, any such declassification would be irrelevant to the special master's review for claims of privilege and for the return of property. App. B at 23. As the government has explained (App. D at 12-17), the classification markings establish on the face of the documents that they are not applicant's personal property, and the documents likewise cannot contain information subject to a personal attorney-client privilege since they are necessarily governmental records, see Exec. Order No. 13,526, § 1.2(1), 75 Fed. Reg. at 707.[7] Thus, as the court of appeals emphasized, applicant's "declassification argument" is a "red herring" because "de-

[7] In the district court, applicant suggested that some of the seized records might be subject to executive privilege. E.g., D. Ct. Doc. 1, at 19; D. Ct. Doc. 58, at 7-11 (Aug. 31, 2022). But applicant all but abandoned that argument in the court of appeals, and the application does not even mention it. With good reason: Applicant has identified no authority for the suggestion that he could invoke executive privilege to prevent review of Executive Branch records by "the very Executive Branch in whose name the privilege is invoked," Nixon v. Administrator of General Services, 433 U.S. 425, 447-448 (1977). And in any event, any such invocation would necessarily yield to the government's "demonstrated, specific need for evidence" in its criminal investigation concerning the wrongful retention of those very documents and obstruction of its efforts to recover them. United States v. Nixon, 418 U.S. 683, 713 (1974). See App. D at 12-17.

classifying an official document would not change its content or render it personal." App. A at 19.

C. The Court Of Appeals Did Not Clearly And Demonstrably Err In Its Application Of The Remaining Stay Factors

Finally, applicant does not contend that the court of appeals clearly and demonstrably erred in applying any of the other equitable factors constituting the "accepted standards" for a stay pending appeal. Planned Parenthood, 571 U.S. at 1061 (Scalia, J., concurring in denial of application to vacate stay) (citation omitted). Those factors include "whether the [government] would have been irreparably injured absent a stay"; "whether issuance of a stay would substantially injure other parties"; and "where the public interest lay." Ibid. (citing Nken v. Holder, 556 U.S. 418 (2009)). The court applied that standard and found that all of the factors favored a partial stay. App. A at 23-29.

As relevant here, the court of appeals explained that the government would be irreparably injured by having to disclose the classified records, some of which reflect the highest levels of classification and extraordinarily restricted distribution, to the special master and applicant's counsel in light of "the long-recognized 'compelling interest in protecting the secrecy of information important to our national security.'" App. A at 27 (citation and ellipsis omitted). The court found the public interest favored a stay for largely the same reasons. Id. at 28-29. The court also observed that applicant had not explained how

he would be harmed by "the limited scope of the stay" with respect to the documents bearing classification markings. Id. at 28. None of those findings is clearly wrong -- and applicant does not contend otherwise.

III. APPLICANT WILL NOT SUFFER IRREPARABLE INJURY FROM THE STAY

The challenged portion of the court of appeals' partial stay simply prevents dissemination of the documents bearing classification markings in the special-master review while the government's appeal proceeds. That limited relief imposes no harm -- much less irreparable injury -- on applicant. Applicant does not seriously argue otherwise. Indeed, applicant devotes only two conclusory sentences to irreparable injury: He asserts that it is "unnecessary" for him to make a showing of irreparable injury because the government is not likely to succeed on appeal, Appl. 29, and that "[i]rreparable injury could most certainly occur if the Government were permitted to improperly use the documents seized," Appl. 35.

The first assertion cannot be reconciled with the very standard applicant cites (Appl. 3), which requires a showing of irreparable injury in addition to a likelihood of success on the merits. See Western Airlines, 480 U.S. at 1305 (O'Connor, J., in chambers). Indeed, vacating a court of appeals' stay absent a showing of an irreparable injury would be inconsistent with both the "great deference" owed to the lower court's decision, Garcia-Mir, 469 U.S.

at 1313 (Rehnquist, J., in chambers), and general principles governing the granting of extraordinary equitable relief, see Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008).

Applicant's second assertion -- that he "could" be irreparably injured if the government "improperly use[s]" the documents, Appl. 35 -- is irrelevant because his application disclaims any request for vacatur of the portion of the court of appeals' stay concerning the government's use of the seized documents bearing classification markings. See Appl. 3 n.3, 9 n.6. Instead, applicant seeks vacatur only to the extent that the stay precludes the special master from reviewing those documents. Applicant has not asserted, much less demonstrated, any irreparable injury that would result from that portion of the court's stay.

Indeed, because applicant has no plausible claims of ownership of or privilege in the documents bearing classification markings, see App. D at 12-17; App. F at 2-6, he will suffer no harm at all from a temporary stay of the special master's review of those materials while the government's appeal proceeds. And applicant further undermined any claim that he is suffering irreparable injury from the stay by opposing the government's motion to expedite the underlying appeal and urging that oral argument be deferred until "January 2023 or later." Appl. C.A. Opp. to Mot. to Expedite 2 (Oct. 3, 2022). Applicant's failure to establish any risk of irreparable injury provides yet another independently

sufficient reason to deny his request to disturb the modest partial stay entered by the court of appeals.

CONCLUSION

The application should be denied.

Respectfully submitted.

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