

No.

In the Supreme Court of the United States

IN RE DONALD J. TRUMP

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

PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
*Acting Solicitor General
Counsel of Record*
JEFFREY BOSSERT CLARK
*Acting Assistant Attorney
General*
HASHIM M. MOOPAN
*Counselor to the Solicitor
General*
MORGAN L. RATNER
BRINTON LUCAS
*Assistants to the Solicitor
General*
MARK R. FREEMAN
MICHAEL S. RAAB
DANIEL WINIK
Attorneys
*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTIONS PRESENTED

The Foreign Emoluments Clause provides that no person holding an “Office of Profit or Trust” under the United States “shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. Const. Art. I, § 9, Cl. 8. The Domestic Emoluments Clause provides that, apart from the President’s compensation for the period for which he is elected, he “shall not receive within that Period any other Emolument from the United States, or any of them.” U.S. Const. Art. II, § 1, Cl. 7. In this case, the District of Columbia and the State of Maryland sued President Donald J. Trump, in his official capacity, asserting an implied cause of action to enforce the Emoluments Clauses. The district court denied a motion to dismiss and refused to certify an interlocutory appeal under 28 U.S.C. 1292(b). A panel of the court of appeals granted the President’s petition for a writ of mandamus, but the en banc court of appeals, by a 9-6 vote, held that mandamus was not available here. The questions presented are:

1. Whether a writ of mandamus is appropriate because, contrary to the holding of the court of appeals, the district court’s denial of the President’s motion to dismiss was clear and indisputable legal error.

2. Whether a writ of mandamus is appropriate, contrary to the holding of the court of appeals, where the district court’s refusal to grant the President’s motion to certify an interlocutory appeal was a clear abuse of discretion under 28 U.S.C. 1292(b).

PARTIES TO THE PROCEEDING

Petitioner Donald J. Trump, in his official capacity as President of the United States, was defendant in the district court and petitioner in the court of appeals. Donald J. Trump, in his individual capacity, was also defendant in the district court; although he was not a party to this mandamus petition in the court of appeals, he was appellant in a separate appeal.

Respondents, the District of Columbia and the State of Maryland, were plaintiffs in the district court and respondents to this mandamus petition in the court of appeals (and appellees in the separate appeal).

RELATED PROCEEDINGS

United States District Court (D. Md.):

The District of Columbia & the State of Maryland v. Donald J. Trump, No. 17-cv-1596 (Mar. 28, 2018)
(denying in part motion to dismiss)

The District of Columbia & the State of Maryland v. Donald J. Trump, No. 17-cv-1596 (July 25, 2018)
(denying in part motion to dismiss)

The District of Columbia & the State of Maryland v. Donald J. Trump, No. 17-cv-1596 (Nov. 2, 2018)
(denying interlocutory certification)

United States Court of Appeals (4th Cir.):

In re Donald J. Trump, No. 18-2486 (July 10, 2019)
(panel decision)

In re Donald J. Trump, No. 18-2486 (May 14, 2020)
(decision on rehearing en banc)

III

District of Columbia; State of Maryland v. Donald J. Trump, No. 18-2488 (July 10, 2019) (panel decision)

District of Columbia; State of Maryland v. Donald J. Trump, No. 18-2488 (decision on rehearing en banc)

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The Acting Solicitor General, on behalf of President Donald J. Trump, in his official capacity, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-111a) is reported at 958 F.3d 274. The opinion of the court of appeals panel (App., *infra*, 112a-149a) is reported at 928 F.3d 360. The opinion of the district court denying a motion to certify an interlocutory appeal (App., *infra*, 152a-181a) is reported at 344 F. Supp. 3d 828. The opinions of the district court denying a motion to dismiss (App., *infra*, 184a-249a, 252a-307a) are reported at 315 F. Supp. 3d 875 and 291 F. Supp. 3d 725.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 14, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) or, in the alternative, 28 U.S.C. 1651.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The Foreign Emoluments Clause (U.S. Const. Art. I, § 9, Cl. 8) provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

The Domestic Emoluments Clause (U.S. Const. Art. II, § 1, Cl. 7) provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

28 U.S.C. 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That appli-

cation for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT

The Constitution's Foreign and Domestic Emoluments Clauses are structural provisions that prophylactically protect the Nation as a whole against the corruption of official action. Yet respondents, the State of Maryland and the District of Columbia, have alleged attenuated and speculative economic harms as their basis to sue the President for asserted violations of the Emoluments Clauses and to seek discovery into the President's personal finances and the communications and activities of various Executive Branch agencies. See App., *infra*, 2a-3a; D. Ct. Doc. 132, at 4 (Sept. 14, 2018).

The district court denied the President's motion to dismiss, App., *infra*, 184a-249a, 252a-307a, and refused to certify the orders for interlocutory appeal under 28 U.S.C. 1292(b), App., *infra*, 152a-181a. The President petitioned the court of appeals for a writ of mandamus directing the district court either to dismiss respondents' complaint outright or at least to certify an interlocutory appeal under Section 1292(b). *Id.* at 116a. A panel of the court of appeals granted mandamus, directed that the orders be certified for interlocutory appeal to the panel, and then held that respondents lack Article III standing. *Id.* at 112a-149a. The en banc court of appeals, however, vacated the panel decision and denied the President's mandamus petition. *Id.* at 1a-111a.

1. In 2017, respondents brought suit directly under the Constitution against the President of the United States, in his official capacity, for alleged violations of the Foreign and Domestic Emoluments Clauses. D. Ct.

Doc. 1 (June 12, 2017). As relevant here, respondents allege that, since taking office, the President has maintained an ownership interest, through the Trump Organization, in the Trump International Hotel in Washington, D.C. App., *infra*, 255a. Respondents further allege that officials of a number of foreign and state governments have patronized the Hotel, and that “the President’s receipt of benefits from these sources violates both the Foreign and Domestic Emoluments Clauses.” *Id.* at 258a. Respondents assert that they have suffered injuries to a proprietary interest in their own properties that compete with the Hotel; a *parens patriae* interest in protecting businesses within their jurisdictions that compete with the Hotel; and a quasi-sovereign interest in ensuring that all other jurisdictions are equally barred from providing regulatory benefits to the President’s businesses. *Id.* at 259a-261a. They seek a declaration that the President has violated the Emoluments Clauses and an injunction preventing the President from receiving prohibited Emoluments in the future. *Id.* at 253a; see D. Ct. Doc. 95, at 45-46 (Mar. 12, 2018).¹

2. The President in his official capacity moved to dismiss respondents’ complaint for lack of jurisdiction and for failure to state a claim on which relief could be

¹ After litigation commenced, respondents, at the district court’s urging, amended their complaint to include claims against the President in his individual capacity, and then, again at the district court’s urging, attempted to voluntarily dismiss those claims. See D. Ct. Doc. 90-1, at 2 (Feb. 23, 2018); D. Ct. Doc. 95-1; D. Ct. Doc. 150 (Dec. 17, 2018); D. Ct. Doc. 154 (Dec. 19, 2018). Those claims are the subject of separate proceedings handled by the President’s personal lawyers, see *District of Columbia v. Trump*, 959 F.3d 126 (4th Cir. 2020) (en banc), and are not directly at issue here.

granted. D. Ct. Doc. 21 (Sept. 29, 2017). The district court bifurcated its motion-to-dismiss decisions.

In March 2018, the district court held that there was jurisdiction and a cause of action to bring this suit. App., *infra*, 252a-307a. It concluded that respondents had sufficiently alleged Article III injuries to at least some of their asserted proprietary, *parens patriae*, and quasi-sovereign interests, and that those injuries were fairly traceable to the asserted violation of the Emoluments Clauses. *Id.* at 269a-291a. The court also concluded that the injuries were redressable, as the court “s[aw] no barrier to its authority to grant either injunctive or declaratory relief” against the President. *Id.* at 296a. Finally, the court concluded that respondents fell within a zone of interests protected by the Emoluments Clauses because those Clauses “were and are meant to protect all Americans.” *Id.* at 301a. The court thus “s[aw] no problem in invoking its equitable jurisdiction here.” *Id.* at 302a.

In July 2018, the district court held that the complaint adequately pleaded a claim upon which relief could be granted. App., *infra*, 184a-249a. The court concluded that the term “emolument” means “any ‘profit,’ ‘gain,’ or ‘advantage,’” a definition that encompassed the President’s alleged acceptance of certain benefits from his business interests. *Id.* at 186a.

3. The President promptly moved to certify an interlocutory appeal of both orders denying the motion to dismiss. D. Ct. Doc. 127 (Aug. 17, 2018). In November 2018, the district court denied certification. App., *infra*, 152a-181a. Although the court acknowledged that respondents’ suit was “novel[,”]” *id.* at 165a, it concluded that no substantial legal grounds exist for disagreeing with its refusal to dismiss, see *id.* at 163a-165a, 168a-

175a. The court also asserted that the “delay[]” occasioned by an interlocutory appeal to the Fourth Circuit and a possible request for review in this Court “cannot be countenanced.” *Id.* at 166a. In addition, the court denied the government’s request for a stay pending appeal, opining that discovery into the President’s finances “would seem unlikely to impose any meaningful burden on the President.” *Id.* at 179a.

4. The district court entered a discovery schedule contemplating six months of fact discovery, D. Ct. Doc. 145 (Dec. 3, 2018), but the court of appeals subsequently stayed district-court proceedings pending resolution of the government’s mandamus petition, C.A. Doc. 9 (Dec. 20, 2018). Before the stay, though, respondents had propounded 38 third-party subpoenas. To date, respondents have served subpoenas on five federal agencies—the General Services Administration and the Departments of Agriculture, Commerce, Defense, and the Treasury—that demanded information about money expended by those agencies and their employees at the Trump Hotel, agency policies regarding patronage of the Hotel, the leasing of the Old Post Office Building in which the Hotel is located, and other government communications and decisions. See, *e.g.*, Notice of Subpoena to General Servs. Admin., Attach. A, at 8 (Dec. 4, 2018) (demanding “all Communications with the President or White House Concerning the location of the headquarters of the Federal Bureau of Investigation”).

In addition, respondents’ pre-discovery statement made clear that they might seek what they characterized as “limited” discovery from the President in his official capacity. D. Ct. Doc. 132, at 4. The contemplated discovery included attempts to obtain the President’s

“communications with foreign, state, and domestic government officials.” *Ibid.* Moreover, while respondents asserted that they “plan[ned] to pursue” that discovery first from third parties, even such third-party discovery would concern the President’s financial interests and would be on account of his office. *Ibid.*

5. The President filed a petition for a writ of mandamus in the court of appeals, seeking either dismissal of respondents’ complaint or certification for appeal of the district court’s motion-to-dismiss denials. C.A. Doc. 2-1 (Dec. 17, 2018). A panel of the court of appeals granted mandamus. App., *infra*, 112a-149a.

The panel explained that this suit is “extraordinary” in several ways: It “is brought directly under the Constitution without a statutory cause of action”; “seeks an injunction directly against a sitting President”; involves the first attempt “ever” to enforce the Emoluments Clauses in court; raises “novel and difficult constitutional questions, for which there is no precedent”; involves plaintiffs who “have manifested substantial difficulty articulating how they are harmed by the President’s alleged receipts of emoluments”; and seeks “intrusion into the duties and affairs of a sitting President.” App., *infra*, 124a-125a. Indeed, the panel added, “not only is this suit extraordinary, it also has national significance and is of special consequence.” *Id.* at 125a.

Given those circumstances, the panel concluded that “this is a paradigmatic case for certification under § 1292(b).” App., *infra*, 132a. The panel acknowledged that “disturbing an exercise of the broad discretion conferred on district courts to determine whether to certify orders for interlocutory appeal should be rare and occur only when a clear abuse of discretion is demonstrated.” *Ibid.* (emphasis omitted). But it determined that this

case met that stringent standard, as the district court had “erred so clearly in applying the § 1292(b) criteria.” *Ibid.* The panel accordingly granted a writ of mandamus that directed the district court to certify its orders, and rather than remanding to “pointlessly go through the motions of certifying,” the panel took jurisdiction under Section 1292(b). *Id.* at 133a.

The panel then concluded that the case should be dismissed because respondents lack Article III standing. App., *infra*, 137a-148a. It explained that respondents’ theory of “proprietary” injury—that foreign or state “government customers are patronizing the Hotel” rather than respondents’ businesses “because the Hotel distributes profits or dividends to the President”—was purely speculative. *Id.* at 140a (emphasis omitted). And the panel reasoned that respondents’ “theory of *parens patriae* standing” likewise failed because it “hinge[d] on the same attenuated chain of inferences as does their theory of proprietary harm.” *Id.* at 144a. Finally, the panel rejected respondents’ theory of “injury to their quasi-sovereign interests,” which “amount[ed] to little more than a general interest in having the law followed.” *Id.* at 145a.

6. The en banc court of appeals granted rehearing, vacated the panel decision, and, in a 9-6 decision, denied the President’s mandamus petition. App., *infra*, 1a-111a.

a. The en banc majority first rejected the request for mandamus directing the district court to certify its decisions for interlocutory appeal under Section 1292(b). App., *infra*, 7a-14a. Although the majority suggested that it might grant such relief if the failure to certify were based on “caprice” or “manifest bad faith,” *id.* at 13a, it reasoned that a district court’s “clear abuse of

discretion’” in applying the proper legal standard could not establish the “‘clear and indisputable’ right to relief necessary to obtain a writ of mandamus,” *id.* at 10a (citation omitted). Therefore, because the district court had issued “a detailed written opinion that applied the correct legal standards” and “was not arbitrary or based on passion or prejudice,” the majority concluded that mandamus directing the district court to certify its orders for interlocutory appeal was unavailable. *Id.* at 13a-14a. In so holding, though, the majority did not dispute the President’s claim that the orders reflected a clear abuse of discretion. See *id.* at 10a-14a.

The majority also rejected the request for mandamus directing the district court to dismiss respondents’ complaint. App., *infra*, 14a-17a. The majority acknowledged that respondents “press novel legal claims” and “seek to extend established precedent to a novel context,” but decided that the President’s arguments for dismissal were still “debatable” and fell short of the clear-and-indisputable standard to correct legal errors via mandamus. *Id.* at 14a-15a.²

b. Judge Wilkinson, joined by Judges Niemeyer, Agee, Richardson, Quattlebaum, and Rushing, dissented. App., *infra*, 26a-64a. Judge Wilkinson would have granted mandamus based on the conclusion that “[i]t is clear and indisputable that this action should never be in federal court.” *Id.* at 26a. He explained that respondents sued without any constitutional or statutory provision specifically authorizing a cause of action

² Judge Wynn, joined by Judges Keenan, Floyd, and Thacker, concurred to express the view that the majority was attempting to apply the law and was not motivated by partisan views. App., *infra*, 22a-25a.

and without any traditional basis in general equity jurisdiction. *Id.* at 31a-39a. He further explained that, “as redress for their purported injuries,” respondents sought the “extraordinary” remedy of “an injunction issued directly against the President of the United States”—permanent relief that “the federal courts have never sustained.” *Id.* at 39a, 44a; see *id.* at 39a-51a. Finally, he would have found that the Emoluments Clauses are not “amenable to judicial enforcement” absent congressional authorization because “[t]hey are all structural prohibitions designed to ensure that federal officials avoid the appearance of or opportunity for conflicts of interest.” *Id.* at 52a, 54a; see *id.* at 52a-59a.

c. Judge Niemeyer, joined by Judges Wilkinson, Agee, Quattlebaum, and Rushing, also dissented. App., *infra*, 65a-111a. Judge Niemeyer would have granted mandamus relief with respect to the district court’s failure to certify its orders for interlocutory appeal. *Id.* at 76a-92a. He explained that, in “this most marginal of lawsuits”—involving “paradigmatic orders for certification under § 1292(b)” —the failure to certify represented “either a judicial usurpation of power or a clear abuse of judicial discretion.” *Id.* at 66a-67a, 77a. And once the district court was compelled to certify its orders, Judge Niemeyer would have exercised jurisdiction and concluded that respondents’ suit, which faced “numerous” threshold hurdles, *id.* at 94a, should have been dismissed for lack of Article III standing, *id.* at 97a-110a. He observed that, “as our court is unwilling to step in to [dismiss the action], I can only hope and expect that the Supreme Court will do so under its well-established jurisprudence.” *Id.* at 67a-68a.

7. On July 9, 2020, the en banc court of appeals, with only one judge dissenting, granted the President's motion for a stay of district-court proceedings pending this Court's consideration of a petition for a writ of certiorari and any further proceedings in this Court. C.A. Doc. 111.

8. In addition to this case, two other suits have been brought against the President alleging violations of the Emoluments Clauses. Each of those is now separately before this Court.

First, in *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam), petition for cert. pending, No. 20-5 (filed July 6, 2020), individual Members of Congress sued to enforce the Foreign Emoluments Clause. *Id.* at 16. On interlocutory review under Section 1292(b), the court of appeals held that the legislators lack Article III standing. *Id.* at 18-20. The legislators have filed a petition for a writ of certiorari, and the President's brief in opposition is being filed contemporaneously with this petition.

Second, in *CREW v. Trump*, 953 F.3d 178 (2d Cir. 2019), various plaintiffs in the hospitality industry sued under both Emoluments Clauses, relying on a theory of competitive harm similar to the one asserted here. *Id.* at 184-186. A divided panel of the court of appeals held that the plaintiffs had pleaded Article III standing, and remanded for the district court to decide several other remaining issues raised in the President's motion to dismiss. *Id.* at 189, 203. The en banc Second Circuit denied rehearing, over multiple dissents, *CREW v. Trump*, No. 18-474, 2020 WL 4745067 (Aug. 17, 2020), and the President is contemporaneously filing a petition for a writ of certiorari in that case.

REASONS FOR GRANTING THE PETITION

Respondents seek official-capacity relief against the President of the United States that has never been permitted by this Court. They do so to enforce constitutional provisions that have never previously been invoked in any court. And they assert an implied cause of action pursuant to the equity jurisdiction of Article III courts that has never previously been recognized by any court. The district court fundamentally erred in permitting this unprecedented and extraordinary suit to proceed. And in light of the clear, foundational flaws with this suit, the court of appeals equally erred in asserting that it was powerless to provide any relief to the President at this stage of the litigation. The en banc majority concluded that a writ of mandamus was unavailable because (1) any legal errors by the district court in declining to dismiss the suit were insufficiently clear to support mandamus, and (2) even a clear abuse of discretion by the district court in refusing to certify an interlocutory appeal under 28 U.S.C. 1292(b) would not be a basis for mandamus. As the en banc dissents forcefully contended, both conclusions are incorrect and each warrants this Court's review.

First, mandamus is appropriate to compel the dismissal of respondents' complaint. Although this novel suit suffers from a host of threshold defects, two are particularly clear: Respondents cannot seek redress in an Article III court because they lack an implied cause of action in equity to directly enforce the structural, prophylactic requirements of the Emoluments Clauses, and at the very least, they cannot bring such a suit against the President in his official capacity. The court of appeals' denial of mandamus in these circumstances

contravenes this Court's precedents, including its instructions that equitable suits seeking "relief that has never been available before" must be authorized by Congress, *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999), and that federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). This Court's review is especially critical because the fact that the President in his official capacity and various federal agencies will otherwise be subjected to intrusive discovery "remove[s] this case from the category of ordinary discovery [disputes]" and creates serious "separation-of-powers concerns." *Cheney v. United States Dist. Court*, 542 U.S. 367, 381, 383 (2004).

Second, and alternatively, mandamus is appropriate to compel the district court to certify its motion-to-dismiss orders under Section 1292(b). Not a single judge on the en banc court of appeals disputed the obvious: This suit presents novel questions as to which there is, at a minimum, "substantial ground for difference of opinion," and that the resolution of those questions "may materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b). Yet the court of appeals concluded that it was powerless to correct even a district court's "clear abuse of discretion" in refusing certification under Section 1292(b), so long as the district court did not act out of "caprice" or "manifest bad faith." App., *infra*, 10a, 13a (citation omitted). That conclusion conflicts with this Court's articulation of the mandamus standard in *Cheney*, which reaffirmed long-standing precedent that mandamus is appropriate to correct either a "judicial 'usurpation of power' or a 'clear abuse of discretion.'" 542 U.S. at 380 (citation

omitted). The court of appeals' decision also conflicts with decisions of several other courts of appeals, which have adopted varying approaches to mandamus petitions in this context. The President would not have been completely denied relief in three other circuits—indeed, he received relief in the D.C. Circuit in a parallel suit brought by individual Members of Congress to enforce the Foreign Emoluments Clause. This Court should be the final word on whether this unprecedented suit against the President may proceed without appellate review of whether it is even judicially cognizable.

A. Mandamus Is Appropriate To Correct The District Court's Clear And Indisputable Legal Errors In Declining To Dismiss Respondents' Suit

The district court committed clear and indisputable legal errors in declining to dismiss this extraordinary suit. Accordingly, this Court should grant certiorari to reverse the court of appeals' denial of mandamus. Alternatively, the Court may wish to construe this petition as a petition for a writ of mandamus and then directly grant mandamus compelling the district court to dismiss respondents' suit.

1. As this Court has observed, the traditional use of mandamus has been “to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.” *Cheney*, 542 U.S. at 380 (brackets and citation omitted). Mandamus is thus justified to correct errors “amounting to a judicial ‘usurpation of power’” or a “clear abuse of discretion.” *Ibid.* (citation omitted). A court may grant mandamus upon a showing that (1) the petitioner’s “right to issuance of the writ is ‘clear and indisputable’”; (2) “no other adequate means [exist] to attain the relief he desires”; and (3) “the writ is appropriate under the circumstances.” *Hollingsworth*

v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney*, 542 U.S. at 380-381) (brackets in original). Those requirements for mandamus relief are met in this case. The court of appeals did not dispute that the second and third requirements were satisfied, and it erred in holding that the first was not.

a. In failing to dismiss this suit, the district court “clear[ly] and indisputabl[y]” erred. *Perry*, 558 U.S. at 190 (citation omitted).

Under Article III, “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States.” U.S. Const. Art. III, § 2. Respondents’ attempt to invoke the jurisdiction of federal courts to directly enforce the Emoluments Clauses against the President is not a proper Article III case in equity. The Emoluments Clauses are prophylactic measures that protect the Nation as a whole against the exercise or appearance of influence by foreign or domestic governments on actions by covered federal officers. See, e.g., 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 465-466 (2d ed. 1891) (statement of Virginia Governor Randolph explaining that the Foreign Emoluments Clause is “provided to prevent corruption”); *id.* at 486 (similar for Domestic Emoluments Clause). Respondents, of course, cannot assert a generalized grievance, shared by all members of the public, in having the President comply with prophylactic provisions of the Constitution adopted for the benefit of the Nation. See *United States v. Richardson*, 418 U.S. 166, 176-178 (1974); accord *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

Nor have respondents articulated any concrete and particularized injury that they have suffered. Even assuming there is an implied cause of action directly under the Constitution to enforce the Emoluments Clauses in some circumstances, respondents do not assert any actual corrupted action—let alone that any such action has injured them. Instead, respondents’ purported injury is primarily an attenuated and speculative economic harm: that they and their constituents are disadvantaged in competing for business from foreign and state governmental customers who may choose to patronize businesses in which the President has a financial interest in order to curry favor with him. That effort to manufacture a suit to enforce the Clauses against the President suffers from myriad fundamental flaws, but two of them are especially clear and indisputable for purposes of mandamus.

i. As a threshold matter, there is no basis in law or equity to seek relief from an Article III court to enforce the Emoluments Clauses. Neither the Constitution nor any statute expressly confers any personal rights pursuant to the Clauses, much less a right to sue for alleged violation of the Clauses. See App., *infra*, 38a (Wilkinson, J., dissenting) (“[T]he text of the Clauses does not contain *any* rights-conferring language.”); *id.* at 66a (Niemeyer, J., dissenting) (“[T]he Emoluments Clauses, * * * by their terms, bestow no rights and provide no remedies.”). And this Court has cautioned that the creation of an implied cause of action in equity is available only in “some circumstances” that present “a proper case.” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327 (2015) (citation omitted). As the Court explained in *Grupo Mexicano*, a proper case is one seeking the type of relief “traditionally accorded

by courts of equity,” and any “departure from past practice” must come from “Congress.” 527 U.S. at 319, 322; see *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (inferring a cause of action that extends beyond “traditional equitable powers” is a “significant step under separation-of-powers principles” because it intrudes upon the powers of “Congress, [which] has a substantial responsibility to determine” whether a suit should lie against individual officers and employees).

Implied equitable suits against government officers have typically involved claims that “permit potential defendants in legal actions to raise in equity a defense available at law.” *Michigan Corr. Org. v. Michigan Dep’t of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014); see, e.g., *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Such suits ordinarily do not pose separation-of-powers concerns because they merely shift the timing and posture of litigating a legal issue that Congress has already authorized to be adjudicated in federal court. Here, by contrast, the district court created an equitable cause of action even though respondents “are not subject to or threatened with any enforcement proceeding” and the parties’ dispute otherwise would never be in federal court *at all*. See *Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting).

Implied equitable suits have also occasionally challenged direct governmental infringement of the plaintiff’s own property or liberty interests. For example, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the plaintiff sought an injunction against a postmaster, alleging statutory and constitutional violations stemming from the postmaster’s refusal to deliver the plaintiff’s mail. *Id.* at 110-111. Here,

by contrast, respondents do not allege that the President is directly and illegally restricting their businesses, but merely that a business in which the President has a financial interest is diverting customers from them as a result. That type of asserted competitive harm, standing alone and without legislative authorization to sue, has not historically served as a basis for the exercise of courts' equity jurisdiction, much less directly under the Constitution. See App., *infra*, 33a-37a (Wilkinson, J., dissenting).

The district court asserted that it nevertheless could create a cause of action because this Court permitted a party to “bring claims to enjoin unconstitutional actions by federal officials” in *Bond v. United States*, 564 U.S. 211 (2011), and *Free Enterprise Fund*, *supra*. See App., *infra*, 302a. But neither suit is apposite. *Bond* involved a constitutional claim that was raised as a *defense* to a federal prosecution and that contended Congress lacked the enumerated power to prohibit the private party's *own conduct*. 564 U.S. at 214. And *Free Enterprise Fund* was consistent with the traditional practice of invoking equity to assert a preemptive defense, as the Court allowed a suit raising separation-of-powers defects with a federal agency that had threatened a “formal investigation” of one of the plaintiffs' businesses. 561 U.S. at 487.

The en banc majority did not identify a single case in which a court has created a cause of action against a government official for a plaintiff who is subject neither to any enforcement action nor to any direct regulation of his own property or liberty interests, let alone under constitutional provisions like the Emoluments Clauses. See App., *infra*, 14a-15a. Instead, the majority stated

only that this Court’s precedents are “not obviously limited in th[at] way.” *Id.* at 15a. But that reverses the proper inquiry: “To accord a type of relief that has never been available before” exceeds the constraints of “traditional equitable relief,” and authorization for such “a wrenching departure from past practice” must be left to “Congress.” *Grupo Mexicano*, 527 U.S. at 322. Because respondents have failed to identify any even arguable foothold in the traditional equitable practice of Article III courts, they are clearly and indisputably not entitled to bring this suit.³

ii. At a minimum, the President is not subject to suit in his official capacity. As this Court has explained, imposing such relief against him would violate the fundamental principle, rooted in the separation of powers, that federal courts have “no jurisdiction of a bill to enjoin the President in the performance of his official duties.” *Mississippi*, 71 U.S. (4 Wall.) at 501; see *Franklin v. Massachusetts*, 505 U.S. 788, 802-803 (1992) (opinion of O’Connor, J.). The D.C. Circuit accordingly has concluded that “[a] court—whether via injunctive or declaratory relief—does not sit in judgment of a President’s executive decisions.” *Newdow v. Roberts*, 603 F.3d 1002, 1012 (2010), cert. denied, 563 U.S. 1001 (2011); see *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part and concurring in the judgment) (finding it “clear” that “no court has authority to direct the President to take an official act”).

³ Respondents likewise cannot invoke the Declaratory Judgment Act, 28 U.S.C. 2201. They are not “interested part[ies]” seeking a declaration of *their* “rights and other legal relations,” 28 U.S.C. 2201(a), and the Act “enlarged the range of remedies available in the federal courts but did not extend their jurisdiction,” *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

The district court failed to grapple with those separation-of-powers constraints. In the court’s view, either declaratory relief or “an appropriate injunction of some sort could be fashioned.” App., *infra*, 295a. But the court did not specify what sort of relief against the President in his official capacity would be consistent with the principles set forth above. See *id.* at 294a-295a. And insofar as the court was suggesting that a remedy involving divestment of the President’s private businesses would not implicate the President’s official duties under *Mississippi*, that suggestion is mistaken. This suit was brought against the President in his official capacity, and divestment could be a remedy only if the Emoluments Clauses required it because of the President’s official duties. See *id.* at 43a (Wilkinson, J., dissenting) (explaining that “an obligation (*i.e.*, a duty) that derives from one’s government position (*i.e.*, office)” is, by definition, an “official duty”).

The en banc majority briefly suggested (App., *infra*, 19a-21a) that an injunction against the President might be appropriate here because the Emoluments Clauses are “restraints” on the President and because compliance is the type of “ministerial duty” that *Mississippi* suggested the President might permissibly be ordered to satisfy. 71 U.S. (4 Wall.) at 498. Neither suggestion offers a viable basis for distinguishing *Mississippi*.

A comparable “restraints” argument was advanced in *Mississippi* itself, where the plaintiff State asked for “the President [to] be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional.” 71 U.S. (4 Wall.) at 498. This Court rejected the argument, concluding that “[a]n attempt on the part of the judicial department of the government

to enforce the performance” of “the duty of the President in the exercise of the power to see that the laws are faithfully executed” would be “an absurd and excessive extravagance.” *Id.* at 499.

Nor does this case implicate the possibility left open in *Mississippi* that a President may be “required to perform a mere ministerial duty.” 71 U.S. (4 Wall.) at 498. A ministerial duty is one in “which nothing is left to discretion.” *Ibid.* Here, by contrast, determining compliance with the Foreign Emoluments Clause requires ample “exercise of judgment.” *Id.* at 499. It is immaterial that, as the en banc majority noted (App., *infra*, 20a), violating the Clauses would be prohibited. In *Mississippi*, President Johnson likewise was prohibited from enforcing the statutes at issue if they were unconstitutional. 71 U.S. (4 Wall.) at 498. What matters is that the President must exercise judgment in determining whether his financial interests are compatible with the continued exercise of his office under the Emoluments Clauses, and thus his “performance of [that] official dut[y]” is not ministerial under *Mississippi*. *Id.* at 501.

At the very least, there is sufficient constitutional doubt here that courts clearly should not recognize a novel suit and remedy against the President in the absence of clear authorization by Congress. See *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 466 (1989) (“Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government.”); cf. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (giving “great weight” to the fact that a dispute involving the President “represent[ed] a significant departure from historical practice”) (citation

omitted). Indeed, this Court has held that it requires “an express statement by Congress” before a generally available cause of action—even an express statutory cause of action—may be applied to the President, “[o]ut of respect for the separation of powers and the unique constitutional position of the President.” *Franklin*, 505 U.S. at 800-801. That requirement of an express statement alone clearly and indisputably forecloses subjecting the President to suit here.

b. Because the district court’s orders declining to dismiss this suit are clearly and indisputably incorrect, the President is entitled to a writ of mandamus if he has “no other adequate means to attain the relief” and mandamus relief is “appropriate under the circumstances.” *Perry*, 558 U.S. at 190 (alteration and citation omitted). As noted, even the en banc majority did not dispute that these additional mandamus requirements are satisfied, and for good reason. Although an appeal from final judgment is ordinarily an adequate means of relief from the erroneous failure to dismiss a complaint, see *Cheney*, 542 U.S. at 380-381, that plainly is not true in these unique circumstances. There are stark separation-of-powers concerns presented by allowing a suit to proceed and discovery to commence in a case against the President in his official capacity that targets his private financial affairs because of the office he holds.

This Court has repeatedly held that “[t]he high respect that is owed to the office of the Chief Executive * * * is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.” *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)) (brackets in original). Where the underlying suit is clearly and indisputably nonjusticiable (and also meritless), it is not “adequate”

to expose the President to continuation of the suit as well as unwarranted and distracting discovery; it is accordingly “appropriate” to provide mandamus relief to eliminate that “threat[] [to] the separation of powers.” *Id.* at 380-381 (citation omitted).

The district court disregarded the constitutional implications of proceeding with this litigation. In refusing to certify an interlocutory appeal, the court reasoned that because “most of what [respondents] seek is discovery from third parties,” discovery “would seem unlikely to impose any meaningful burden on the President.” App., *infra*, 179a. The court indicated that it could “limit the extent to which the President might be obliged to respond” to “minimize an unusual impact.” *Ibid.* But the fact that this suit is brought against the President in his official capacity “remove[s] this case from the category of ordinary discovery [disputes] where interlocutory appellate review is unavailable, through mandamus or otherwise.” *Cheney*, 542 U.S. at 381.

Those separation-of-powers concerns apply with particular force here. If respondents seek discovery against the President directly, that would inevitably “distract” the President “from the energetic performance of [his] constitutional duties.” *Cheney*, 542 U.S. at 382. Even respondents’ plan to target third parties to discover the President’s personal financial information would be similarly problematic. See *Mazars*, 140 S. Ct. at 2035 (explaining that “separation of powers concerns are no less palpable” where subpoenas for the President’s personal information are “issued to third parties”). Moreover, the separation-of-powers concerns of the Executive Branch are heightened here because respondents’ subpoenas commenced a broad-ranging inquiry into any supposed effects of alleged

Emoluments on official actions of the President's administration, including through third-party subpoenas to five federal agencies. See pp. 6-7, *supra*.

2. The first question presented warrants this Court's review. As discussed, the court of appeals' failure to grant mandamus—after the district court indisputably erred in refusing to dismiss a suit by Maryland and the District of Columbia against the President to enforce the Emoluments Clauses—is in significant tension with this Court's precedents. See pp. 15-22, *supra*. Moreover, the court of appeals' decision is exceptionally important in light of its implications for the separation of powers. This Court has admonished that “separation-of-powers considerations should inform * * * evaluation of a mandamus petition involving the President.” *Cheney*, 542 U.S. at 382; see *id.* at 381 (recognizing that the mandamus “prerequisites” are “not insuperable” where ongoing district-court proceedings “threaten the separation of powers”). Such separation-of-powers considerations should similarly inform this Court's decision to review the denial of mandamus. See, e.g., *Mazars*, 140 S. Ct. at 2031 (noting that dispute over congressional subpoena of President's personal records was “the first of its kind to reach this Court”). And at the very least, the court of appeals' decision in this novel, official-capacity suit against the President warrants this Court's review in light of “[t]he high respect that is owed to the office of the Chief Executive,” which “should inform the conduct of the entire proceeding.” *Cheney*, 542 U.S. at 385 (citation omitted; brackets in original); see App., *infra*, 67a-68a (Niemeyer, J. dissenting) (expressing his “hope and

expect[ation] that the Supreme Court will” “step in” to dismiss this “remarkable” suit).⁴

B. Alternatively, Mandamus Is Appropriate To Correct The District Court’s Clear Abuse Of Discretion In Refusing To Certify Its Orders For Interlocutory Appeal

As the en banc dissenters concluded—and the majority did not contest—“the district court’s orders are paradigmatic orders for certification under [28 U.S.C.] 1292(b) and * * * the district court clearly abused its discretion * * * in refusing to certify them.” App., *infra*, 77a (Niemeyer, J., dissenting). The en banc majority erred in concluding that even a clear abuse of discretion in applying the Section 1292(b) factors is insulated from mandamus so long as it does not reflect “caprice” or “bad faith.” *Id.* at 13a; see *id.* at 11a-13a. This Court should correct that error by granting certiorari, or alternatively by directly granting mandamus after construing this petition to seek such relief, so that the President at the very least can pursue a direct appeal in the court of appeals.

1. A writ of mandamus is available to correct a district court’s clear abuse of discretion in applying 28 U.S.C. 1292(b). Under Section 1292(b), a district

⁴ The President is contemporaneously filing a petition for a writ of certiorari in *CREW v. Trump*, 953 F.3d 178 (2d Cir. 2019), which presents the question whether plaintiffs alleging competitive injuries similar to respondents’ can sue the President to enforce the Emoluments Clauses. This Court’s review is warranted in both cases. See Pet. at 29-30, *CREW*, *supra* (filed Sept. 9, 2020). By contrast, the Court should deny the pending petition in *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam), No. 20-5 (filed July 6, 2020), in which the court of appeals correctly held that a Foreign Emoluments Clause suit by Members of Congress must be dismissed on legislative-standing grounds inapplicable here. See Br. in Opp. at 7-24, *Blumenthal*, *supra* (No. 20-5).

court “shall” certify an order whenever the court is “of the opinion” that “such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *Ibid.* To be sure, the decision whether to grant certification under Section 1292(b) is discretionary. See *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 47 (1995). But “[d]iscretion is not whim,” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (citation omitted; brackets in original); it thus can be “clear[ly] abuse[d],” and that, in turn, “will justify the invocation of” mandamus, *Cheney*, 542 U.S. at 380 (citation omitted).

This is the rare case where the district court’s refusal to certify an order warrants mandamus relief, given that the legal standard for certification was indisputably met and that the court’s contrary reasoning disregarded important separation-of-powers concerns.

a. It is clear that an “immediate appeal” from the district court’s motion-to-dismiss orders would “materially advance the ultimate termination of the litigation,” because resolution in the President’s favor of any of the “controlling question[s] of law” raised would require threshold dismissal of this suit. 28 U.S.C. 1292(b). It is likewise clear that there are “substantial ground[s] for difference of opinion” on the district court’s denial of each of the grounds in the motion to dismiss. *Ibid.*

First, whether an Article III court may adjudicate an implied equitable suit to enforce the Emoluments Clauses against the President is, at a minimum, subject to substantial grounds for disagreement. Indeed, the district court’s allowance of such a suit is clearly and indisputably wrong. See pp. 15-22, *supra*.

Second, as the en banc majority acknowledged, it is at least “a debatable question” whether the district court properly held that respondents in particular have legally and judicially cognizable interests supporting a suit to enforce the Emoluments Clauses. App., *infra*, 15a. Even assuming that an individualized right to enforce the Clauses could ever be judicially recognized without an express cause of action enacted by Congress, respondents’ asserted interests do not “fall within the zone of interests to be protected or regulated by the * * * constitutional guarantee in question.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (citation and internal quotation marks omitted). Because the Emoluments Clauses were “designed to prevent official corruption,” reasonable judges have already disagreed with the en banc majority and respondents that those Clauses also “create a new legal interest for parties to be protected from lawful competition.” App., *infra*, 38a (Wilkinson, J., dissenting); accord *CREW v. Trump*, No. 18-474, 2020 WL 4745067, at *9-*10 (2d Cir. Aug. 17, 2020) (Menashi, J., dissenting from denial of rehearing en banc).

The cognizability of respondents’ asserted competitive injuries is particularly debatable because, even on their own terms, they fail to satisfy the bare-minimum requirements of Article III standing. This Court has rejected “a boundless theory of standing” in which “a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). And once again, reasonable judges have already disagreed as to the viability of respondents’ in-

herently speculative theory that: (1) certain governmental customers patronize the President's businesses because of his financial interests (rather than the businesses' other qualities, including their general association with the President); (2) those customers would otherwise patronize the limited venues in which respondents have a commercial interest (rather than any of countless other venues); and (3) respondents may disregard or discount any countervailing effect from other governmental customers who may be inclined to avoid the President's business because of his financial interests. Compare *CREW v. Trump*, 953 F.3d 178, 189-200 (2d Cir. 2019), with *id.* at 205-216 (Walker, J., dissenting); *CREW*, 2020 WL 4745067, at *3-*7 (Menashi, J., dissenting from denial of rehearing en banc); and App., *infra*, 99a-105a (Niemeyer, J., dissenting).

Third, there are substantial grounds for disagreement over the district court's unprecedented merits conclusion about the scope of the Emoluments Clauses. The Clauses are properly interpreted to prohibit only compensation accepted from a foreign or domestic government for services rendered by a covered officer in either an official capacity or employment-type relationship. As we have explained, that interpretation is supported by contemporaneous dictionaries; by textual comparisons both within the Clauses themselves and with the Incompatibility Clause, U.S. Const. Art. I, § 6, Cl. 2; and by consistent Executive practice from the Founding era to modern times. See D. Ct. Doc. 21-1, at 30-54. But the district court rejected that well-supported interpretation and instead construed the term broadly to mean "any 'profit,' 'gain,' or 'advantage,'" a definition that encompassed the President's alleged acceptance of certain benefits from

his financial interest in a corporation whose hotel may be patronized by foreign or domestic governmental officials. App., *infra*, 186a. That construction renders parts of the constitutional text superfluous and would lead to ahistorical and absurd results. See *id.* at 45a-47a (Wilkinson, J., dissenting).

Given the several important legal questions that are, at a minimum, subject to reasonable dispute, the Section 1292(b) factors are plainly satisfied in this case. As the court of appeals panel explained, it was a clear abuse of discretion for the district court not to grant certification under Section 1292(b) in these “extraordinary” circumstances. App., *infra*, 125a. That was particularly true since allowing discovery to move forward in an official-capacity suit against the President—including subpoenas already served on five federal agencies—would have “national significance” and “special consequence” because it “could result in an unnecessary intrusion into the duties and affairs of a sitting President.” *Ibid.*

b. The en banc majority nevertheless determined that, in the context of a Section 1292(b) certification, it was powerless to grant mandamus to correct even a clear abuse of discretion. See App., *infra*, 7a-14a. The majority neither adopted the district court’s certification analysis nor even concluded that the analysis was reasonably defensible. And it acknowledged the possibility that “in an appropriate case a writ of mandamus may issue to order a district court to certify an interlocutory appeal under § 1292(b).” *Id.* at 13a. But the majority concluded that it could grant mandamus to compel certification only if a district court’s denial had been “based on nothing more than caprice” or made “in manifest bad faith”—not if the district court had committed

an unquestionable abuse of discretion in applying the Section 1292(b) criteria. *Ibid.* Put differently, so long as a clearly erroneous refusal to certify an interlocutory appeal was, at bottom, “a judicial act,” the court of appeals held that it could do nothing to protect its own appellate jurisdiction. *Id.* at 14a (citation omitted).

The en banc majority’s analysis conflicts with this Court’s articulation of the mandamus standard. *Cheney* reaffirmed that, although limited to “exceptional circumstances,” mandamus is appropriate to correct either a “judicial ‘usurpation of power’ or a clear abuse of discretion.” 542 U.S. at 380 (emphasis added; citation omitted); accord *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953). *Cheney* thus refutes the odd notion that mandamus relief is available against discretionary decisions only if the court acted out of caprice or bad faith, but not if it clearly abused its discretion after articulating the correct legal standard—let alone where the district court’s error usurped the power of the appellate court to consider an interlocutory appeal. Indeed, imposing a mandamus standard that requires litigants to assert, and appellate courts to find, bad faith or irrationality on the part of district courts would be detrimental to the judiciary, especially given that objectively egregious legal rulings will readily lend themselves to charges of subjective bad faith. See, e.g., Pet. App. 80a-84a (Niemeyer, J., dissenting) (concluding that the district court, in addition to clearly abusing its discretion in refusing to certify, had “usurp[ed] * * * judicial power”).

2. The second question presented particularly warrants this Court’s review because the courts of appeals are divided.

a. Several courts of appeals have stated that mandamus is unavailable for the denial of certification under Section 1292(b). See *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) (per curiam); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 n.4 (8th Cir. 1975), cert. denied, 424 U.S. 950 (1976); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972). Though even those courts have assumed that appellate review would remain available to correct “serious[] abus[es]” of the district court’s authority, including through a petition for mandamus of the underlying legal question. *Ford Motor*, 344 F.3d at 654; see *Green*, 541 F.2d at 1338; *Leasco*, 468 F.2d at 1344.

The court of appeals here adopted a slightly narrower approach. As discussed, it left open the possibility that mandamus would be available for capricious or bad-faith denials of Section 1292(b) certification, but held that mandamus relief was unavailable even for a clear abuse of discretion under the properly articulated Section 1292(b) standard. See p. 30, *supra*.

b. By contrast, the Eleventh Circuit has held that mandamus is available to direct certification under Section 1292(b). In *Fernandez-Roque v. Smith*, 671 F.2d 426 (1982), the court granted mandamus and directed the district court both to rule on a threshold jurisdictional issue and then to certify its order for interlocutory appeal under Section 1292(b). *Id.* at 431-432. The court deemed the case to “present[] the truly ‘rare’ situation in which it is appropriate for [an appellate] court to require certification of a controlling issue of national significance.” *Id.* at 431.

Other courts of appeals have adopted a different approach to reach the same result. Rather than granting

mandamus outright, they have concluded that the district court clearly abused its discretion in denying certification and then have remanded for reconsideration, which inevitably has led the district court to certify an appeal. For example, in *In re McLelland Engineers, Inc.*, 742 F.2d 837 (1984), the Fifth Circuit disposed of a mandamus petition by proclaiming that the district court’s “refusal to certify in the circumstances presented constitutes an abuse of discretion,” and then vacating the district court’s order and remanding with the expectation that the district court would “promptly proceed to certify in view of this conclusion.” *Id.* at 837-838; cf. Order, *United States v. United States Dist. Court*, No. 18A65 (July 30, 2018) (denying stay application as “premature” but observing that “the justiciability of [the plaintiffs’] claims presents substantial grounds for difference of opinion” that the district court should “take * * * into account”); *Juliana v. United States*, No. 15-1517, 2018 WL 6303774 (D. Or. Nov. 21, 2018) (reconsidering prior order and certifying for interlocutory appeal).

Indeed, the D.C. Circuit adopted this disapprove-and-remand approach in a parallel Emoluments suit brought against the President by Members of Congress. See *In re Trump*, 781 Fed. Appx. 1 (2019) (per curiam). The court declined to formally decide whether it “ha[d] jurisdiction to issue a writ of mandamus to order a district court to certify an issue for interlocutory appeal.” *Id.* at 2. Instead, it expressed its “view that [the relevant] orders squarely meet the criteria for certification,” concluded that the district court thus had “abused its discretion” in denying certification, and “remand[ed] the matter to the district court for immediate

reconsideration of the motion to certify.” *Ibid.* Unsurprisingly, the district court on remand certified its orders for interlocutory appeal. See *Blumenthal v. Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020) (per curiam), petition for cert. pending, No. 20-5 (filed July 6, 2020).

c. Accordingly, in the circumstances here, the President would have obtained mandamus relief in the Eleventh Circuit directing certification, and he would have obtained the substantive equivalent in the Fifth and D.C. Circuits, through disapproval of the district court’s denial of certification and remand for reconsideration. The conflict among the courts of appeals on this question merits the Court’s review, particularly because the Fourth Circuit’s disavowal of power to provide relief also conflicts with this Court’s decision in *Cheney*. This Court should be the final word on whether, at a minimum, the President is entitled to an interlocutory appeal on the viability of respondents’ complaint, before litigation proceeds and intrusive discovery commences.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court could construe this petition as a petition for a writ of mandamus and direct the district court either to dismiss the suit outright or at least to certify an interlocutory appeal.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
*Acting Assistant Attorney
General*
HASHIM M. MOOPAN
*Counselor to the Solicitor
General*
MORGAN L. RATNER
BRINTON LUCAS
*Assistants to the Solicitor
General*
MARK R. FREEMAN
MICHAEL S. RAAB
DANIEL WINIK
Attorneys

SEPTEMBER 2020

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-2486

**IN RE: DONALD J. TRUMP, PRESIDENT OF THE UNITED
STATES OF AMERICA, IN HIS OFFICIAL CAPACITY AND
IN HIS INDIVIDUAL CAPACITY, PETITIONER**

**PROFESSOR CLARK D. CUNNINGHAM;
PROFESSOR JESSE EGBERT, AMICI CURIAE**

**SCHOLAR SETH BARRETT TILLMAN; JUDICIAL
EDUCATION PROJECT, AMICI SUPPORTING PETITIONER**

**FORMER NATIONAL SECURITY OFFICIALS;
COMMONWEALTH OF VIRGINIA; THE NISKANEN
CENTER; REPUBLICAN WOMEN FOR PROGRESS;
CHERI JACOBUS; TOM COLEMAN; EMIL H. FRANKEL;
JOEL SEARBY; ADMINISTRATIVE LAW,
CONSTITUTIONAL LAW, AND FEDERAL COURTS
SCHOLARS; CERTAIN LEGAL HISTORIANS,
AMICI SUPPORTING RESPONDENTS**

Argued: Dec. 12, 2019

Decided: May 14, 2020

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, Senior District Judge.
(8:17-cv-01596-PJM)

ON REHEARING EN BANC

(1a)

Before GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

DIANA GRIBBON MOTZ, Circuit Judge:

President Donald J. Trump, in his official capacity, petitions this court for a writ of mandamus directing the district court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or, in the alternative, ordering the district court to dismiss the complaint against him. The President maintains that the district court committed multiple errors that we should correct; however, this case is not on appeal. We recognize that the President is no ordinary petitioner, and we accord him great deference as the head of the Executive branch. But Congress and the Supreme Court have severely limited our ability to grant the extraordinary relief the President seeks. Because the President has not established a right to a writ of mandamus, we deny his petition.

I.

The District of Columbia and the State of Maryland (“Respondents”) filed this action in the District of Maryland against the President in his official capacity.¹ They allege that the President is violating the Foreign and Domestic Emoluments Clauses of the U.S. Constitution by accepting prohibited “emoluments” from foreign and

¹ Respondents later amended their complaint to add the President in his individual capacity. The President noted an interlocutory appeal in that case, No. 18-2488, which we address in a companion opinion, also issued today. References to the President in this opinion refer to the President in his official capacity.

domestic governments. The Foreign Emoluments Clause provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8. The Domestic Emoluments Clause provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Id. art. II, § 1, cl. 7.

The President moved to dismiss the complaint. After considering the parties' extensive oral arguments and lengthy briefs, the district court issued two thorough opinions. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018); *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018). The court granted the President's motion to dismiss with respect to the operations of the Trump Organization outside the District of Columbia, concluding that Respondents lacked standing to pursue those claims. *Trump*, 291 F. Supp. 3d at 732. This narrowed the case to the President's alleged violations relating to the Trump International Hotel in Washington, D.C. The district court denied the motion with respect to that hotel.

The President moved for certification to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), seeking appellate review of four questions: (1) the correct interpretation of the term “emolument”; (2) whether Respondents had an equitable cause of action to bring the suit; (3) whether Respondents had Article III standing; and (4) whether any court has the ability to issue equitable relief against the President in these circumstances. The district court declined to certify an interlocutory appeal, explaining its decision in another written opinion. There, the court recognized the proper standard for certification under § 1292(b) and elaborated why, in its opinion, resolution of the questions presented by the President did not satisfy the statutory prerequisites. *See District of Columbia v. Trump*, 344 F. Supp. 3d 828, 844 (D. Md. 2018).

In response, the President petitioned this court for a writ of mandamus, invoking the All Writs Act, 28 U.S.C. § 1651(a), and Federal Rule of Appellate Procedure 21. He asks us either to direct the district court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or to order the district court to dismiss the complaint with prejudice. A panel of this court granted the President’s petition for a writ of mandamus and, purportedly exercising jurisdiction pursuant to § 1292(b), found Respondents lacked standing and so “reverse[d] the district court’s orders” and “remand[ed] with instructions to dismiss the complaint with prejudice.” *In re Trump*, 928 F.3d 360, 364 (4th Cir. 2019). We subsequently agreed to hear the case en banc, vacating the panel opinion. *In re Trump*, 780 F. App’x 36 (4th Cir. 2019).

II.

A writ of mandamus is not a means to prevent “hardship occasioned by appeal being delayed until after final judgment.” *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (internal quotation marks omitted). Rather, it is a “drastic” remedy that is appropriate “only in extraordinary situations,” such as where a court has exceeded the “lawful exercise of its prescribed jurisdiction” or refused “to exercise its authority when it is its duty to do so.” *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976) (internal quotation marks omitted). As the Supreme Court has explained, issuance of the writ without adherence to these strictures would erode the final judgment rule, a congressional command since the Judiciary Act of 1789. *Id.* at 403; accord *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980).

Accordingly, a petitioner seeking mandamus relief bears the burden of demonstrating that he has satisfied three requirements. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). First, the petitioner must establish that there are no other adequate means of obtaining the relief sought. This criterion is “designed to ensure that the writ will not be used as a substitute for the regular appeals process.” *Id.* at 380-81. If there is an available “alternative, less extreme, path to [relief,] issuance of the writ is inappropriate.” *Kerr*, 426 U.S. at 396.

Second, the petitioner must prove that his “right to issuance of the writ is clear and indisputable.” *Cheney*, 542 U.S. at 381 (internal quotation marks omitted). This criterion similarly ensures that the writ of mandamus is not “made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed

is ministerial and the obligation to act peremptory and plainly defined. The law must not only authorize the demanded action but require it; the duty must be clear and indisputable.” *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931).

Third, even if the petitioner satisfies the first two criteria, “the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney*, 542 U.S. at 381. Thus, the decision to issue a writ of mandamus “is in large part a matter of discretion with the court to which the petition is addressed.” *Kerr*, 426 U.S. at 403.

Given the demanding criteria a petitioner must meet to obtain a writ of mandamus, appellate courts rarely grant mandamus relief, and even more rarely find it appropriate to issue a writ of mandamus to correct acts within the discretion of the district court. *See, e.g., In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984) (“[W]hile writs of mandamus to review discretionary decisions of district judges are not proscribed, they should ‘hardly ever’ issue.” (quoting *Allied Chem.*, 449 U.S. at 36)).

Of course, when the petitioner is the President, “the Court of Appeals must also ask, as part of this [mandamus] inquiry, whether the District Court’s actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties.” *Cheney*, 542 U.S. at 390. The special solicitude for a President seeking a writ of mandamus “give[s] recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.” *Id.* at 382.

The President advances two courses that he maintains provide him entitlement to the extraordinary relief he seeks. We address each in turn and then consider the contention that, in any event, *Cheney* requires us to grant such relief.

III.

First and principally, the President contends that this court should issue a writ of mandamus ordering the district court to certify its orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That statute provides a vehicle for appeal of an interlocutory order where the district court and the court of appeals have agreed that such an appeal is appropriate.

Section 1292(b) mandates that a litigant who wishes to take such an interlocutory appeal first seek certification from the district court, and, only after the district court agrees, obtain permission from the court of appeals:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be *of the opinion* that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action *may* thereupon, *in its discretion*, permit an appeal to be taken from such order. . . .

28 U.S.C. § 1292(b) (emphases added). Thus, the plain language of the statute establishes that Congress vested

the district court and the court of appeals each with discretion in making its respective decision.

The legislative history of § 1292(b) confirms Congress's clear intent to require both the district court and the court of appeals to agree to allow an interlocutory appeal and to provide both courts with discretion in deciding whether to do so. *See, e.g.*, S. Rep. No. 2434, 85th Cong., 2d Sess. 3 (1958) (“[T]he bill is cast in such a way that the appeal is discretionary rather than a matter of right. It is discretionary in the first instance with the district judge. . . . ”); H.R. Rep. No. 1667, 85th Cong., 2d Sess. 3 (1958) (“The right of appeal given by the amendatory statute is limited both by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics, and by the resting of final discretion in the matter in the Court of Appeals. . . . ”).² Relying on this language and history, courts have understood the matter of certification to be vested first

² Only in 1958, after years of extensive deliberation, multiple proposals, and “considerable study” by the Judicial Conference of the United States, S. Rep. No. 85-2434 at 2, did Congress enact § 1292(b). *See* Pub. L. 85-919, 72 Stat. 1770 (1958). One proposal would have permitted an interlocutory appeal upon direct application to the courts of appeals when “necessary or desirable to avoid substantial injustice.” Judicial Conference of the United States, Report of the Proceedings of a Special Session 203 (Mar. 20-21, 1952), *quoted in* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 610 (1975). The Judicial Conference rejected that proposal, concluding that it would too liberally permit interlocutory appeals. *See Appeals from Interlocutory Orders and Confinement in Jail-Type Institutions: Hearings on H.R. 6238 and H.R. 7260 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong., 2d Sess. 9 (1958).

in the discretion of the district court. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 46 (1995) (“Congress . . . chose to confer on district courts first line discretion to allow interlocutory appeals.”). The Supreme Court has long recognized that Congress carefully chose this bifurcated process to preserve the integrity of the final judgment rule. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978), *superseded by rule on other grounds as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017).

It is hardly surprising that appellate courts, generally reluctant to issue a writ of mandamus to correct a decision within the discretion of the lower court, have been particularly wary of usurping the discretion Congress specifically vested in the district courts under § 1292(b). *See, e.g., In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003) (collecting cases); *Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 697-98 (9th Cir. 1977); *In re Mar. Serv. Corp.*, 515 F.2d 91, 92-93 (1st Cir. 1975); *see also In re Trump*, 781 F. App’x 1, 2 (D.C. Cir. 2019). *But cf. Fernandez-Roque v. Smith*, 671 F.2d 426, 431-32 (11th Cir. 1982). Appellate courts’ aversion to issuing a writ of mandamus to direct certification is for good reason. It is always difficult to establish a “clear and indisputable” right to a decision that lies within a court’s discretion, but it is particularly problematic when doing so circumvents the specific process Congress has prescribed for seeking interlocutory review.

The President concedes that a “district court has broad discretion in considering” whether the § 1292(b) certification criteria have been met. Pet. at 11; *see also*

id. at 2 (“wide discretion”), *id.* at 12 (“significant discretion”). Nonetheless, he maintains that in this case the district court’s asserted legal errors amounted to a “clear abuse of discretion” requiring us to issue a writ of mandamus directing the district court to certify an interlocutory appeal. *Id.* at 11. At oral argument, the President’s counsel suggested that this asserted “clear abuse of discretion” provides a substitute for the “clear and indisputable” right to relief necessary to obtain a writ of mandamus. Oral Arg. at 6:07-6:15, 8:32-8:53. Thus, the President’s argument that we must issue a writ of mandamus ordering the district court to certify an appeal rests entirely on his contention that the magnitude of the district court’s asserted error transforms the mandamus requirement that a petitioner establish a “clear and indisputable” right to relief into a requirement that the petitioner show a legal error amounting to a “clear abuse of discretion.” The second dissent echoes this argument, maintaining that the district court’s refusal to certify was assertedly not “guided by sound legal principles” and for this reason amounted to a “clear abuse of discretion.” Second dissent at 83 (internal quotation marks omitted); *see also id.* (suggesting that the district court’s opinion was “unmoored from the governing legal principles”).

But the contention that a naked error of law amounts to an abuse of discretion entitling a petitioner to mandamus relief has been repeatedly rejected by the Supreme Court. More than fifty years ago, after noting it was “unnecessary to reach” the question of whether the district court had erred, the Court counseled appellate courts to be wary of issuing writs of mandamus:

Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as “abuse of discretion” and ‘want of power’ into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.

Will v. United States, 389 U.S. 90, 95, 98 n.6 (1967).

The Supreme Court has never wavered from the view that, while “a simple showing of error may suffice to obtain a reversal on direct appeal,” it does not permit an appellate court to issue a writ of mandamus. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978); *accord Bankers Life*, 346 U.S. at 382.³ To hold otherwise “would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.” *Allied Chem.*, 449 U.S. at 35 (internal quotation marks omitted). Thus, the allegation of legal error in the district court’s thorough certification analysis—an issue on which we do not

³ Nor, contrary to the President’s suggestion, does *Cheney* set forth a new, more lenient “clear abuse of discretion” standard for obtaining mandamus relief. In *Cheney*, the Court noted that a petitioner seeking a writ of mandamus must demonstrate “exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.” 542 U.S. at 380 (internal quotation marks and citations omitted). And immediately following this statement, the *Cheney* Court explicitly declared that the long-established “three conditions *must be satisfied* before [a writ of mandamus] may issue,” *id.* (emphasis added), including “the burden of showing that [his] right to issuance of the writ is clear and indisputable,” *id.* at 381 (internal quotation marks omitted). The Court thus made clear that it did *not* establish a new standard or relax the three conditions necessary for a writ of mandamus to issue.

pass—provides no basis for us to compel certification under § 1292(b).

The second dissent seeks to bolster its legal error/abuse of discretion argument by claiming that the district court not only erred, but also improperly “attemp[ed] to insulate itself from appellate review.” Second dissent at 76. The dissent admits that “each individual decision of the district court in this case purportedly fell within its jurisdictional purview.” *Id.* at 77. But the dissent nonetheless maintains that, “viewed holistically,” the district court’s decisions “evinced a purposeful intent by the court to insulate its rulings from appellate review.” *Id.* But, no matter how “holistically” the district court’s opinions are viewed, actual evidence of the court’s “purposeful intent” to “insulate” its rulings from appellate review is nowhere to be found.⁴ Rather, the record reflects that the district court adjudicated the motion before it in accordance with the dic-

⁴ The weakness of the dissent’s “insulation” argument is manifest in its heavy reliance on artful quotation of *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21 (1943). See second dissent at 75, 77, 79, 80, 87. The *Roche* Court did not use “thwart[ing] appellate review” to describe a district court following a prescribed statutory procedure. The only example the Court gave of conduct “thwart[ing]” review was a district court that avoids ruling at all on the challenged issue, a scenario not present here. *Roche*, 319 U.S. at 26. Moreover, the Court reiterated its consistent view, one the dissent would have us ignore, that “[w]here the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals. . . .” *Id.* at 30. The dissent’s partial quotations hence distort *Roche*’s holding beyond recognition.

tates of § 1292(b). The dissent does not deny this. Instead, relying solely on its unsubstantiated viewpoint, the dissent simply assumes that all courts must believe that the certification criteria were satisfied. The dissent’s “insulation” argument thus boils down to disagreement as to whether the § 1292(b) criteria have been met. Mere disagreement with the district court, the body that Congress vested with the initial discretion to make that determination, does not constitute evidence that the decision was based on “whim” or that the district court usurped judicial power.

We do not foreclose the possibility that in an appropriate case a writ of mandamus may issue to order a district court to certify an interlocutory appeal under § 1292(b). If the district court ignored a request for certification, denied such a request based on nothing more than caprice, or made its decision in manifest bad faith, issuing the writ might well be appropriate. *See Ex parte Secombe*, 60 U.S. (19 How.) 9, 13-15 (1856) (explaining that a writ of mandamus is not appropriate to correct an erroneous decision within the jurisdiction of the lower court unless the exercise of discretion is used in an “arbitrary and despotic” way or the court issues a decision “from passion, prejudice, or personal hostility”); *see also Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 376-77 (1868) (instructing that a writ of mandamus should not issue to control a decision within the judicial discretion of the lower court unless the challenged act exceeds the court’s jurisdiction or the court, motivated by “caprice, prejudice, or passion,” exercises its discretion “with manifest injustice”). But here the district court promptly recognized and ruled on the request for certification in a detailed written opinion that applied

the correct legal standards. The court’s action was not arbitrary or based on passion or prejudice; to the contrary, it “was in its nature a judicial act.” *Ex parte Secombe*, 60 U.S. at 15. Notably, notwithstanding the President’s vigorous assertion that the court erred in its legal analysis, he does not contend that the district court denied certification for nonlegal reasons or in bad faith.

Accordingly, the President has not shown that he is entitled to a writ of mandamus compelling the district court to certify its orders for interlocutory review under § 1292(b).⁵

IV.

We turn to the President’s secondary argument. *See* Pet. at 28-30. The President maintains that, even if we “conclude that the district court’s certification discretion under § 1292(b) was sufficiently broad that a writ of mandamus directing certification is unwarranted,” we “nevertheless should grant mandamus directing the district court to dismiss [Respondents’] complaint.” *Id.* at 28. To obtain this relief, the President must establish that it is not merely *likely*, but “clear and indisputable,” that the *entire action* cannot lie. He has not done so.

We recognize that Respondents press novel legal claims. But reasonable jurists can disagree in good faith on the merits of these claims. For example, the President contends that the absence of congressional authorization forecloses the availability of judicial review, relying on *Grupo Mexicano de Desarrollo, S.A. v. Alliance*

⁵ The President has not offered any independent argument that he meets the other two criteria for mandamus relief. *See* Pet. at 11.

Bond Fund, Inc., 527 U.S. 308 (1999). Respondents counter that courts routinely recognize causes of action to enjoin conduct that violates the Constitution. See, e.g., *Bond v. United States*, 564 U.S. 211 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). The President responds that such equitable causes of action are available only as preemptive defenses to enforcement actions. Although that argument is plausible, the cited cases are not obviously limited in this way, and so the President does not have a clear and indisputable right to dismissal of the complaint on this ground. *Accord In re Trump*, 781 F. App'x 1, 2 (D.C. Cir. 2019) (“The question of whether the Foreign Emoluments Clause or other authority gives rise to a cause of action against the President is unsettled. . . . ” (citation omitted)).

The President’s assertion that the Respondents lack any cognizable injury also presents a debatable question. Respondents do seek to extend established precedent to a novel context. But their argument rests on legal principles that the Supreme Court has expressly endorsed. See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (competitor standing); *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (states enjoy equal sovereignty in union); *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007) (states are entitled to special solicitude in the standing analysis); cf., e.g., *Am. Legion v. Am. Humanist Ass’n* 139 S. Ct. 2067 (2019) (offended observer standing); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (same).

The President’s insistence that “emoluments” indisputably include only “profit arising from office or em-

ploy” (that is, payment for services rendered in performance of a formal job), while possible, is certainly not indisputable. Respondents assert that emoluments include “all profits and other benefits [accepted from a foreign or domestic government] that [the President] accepts through the businesses he owns.” Before this litigation commenced, no court had ruled on this question, but Respondents point us to several Executive Branch and Comptroller General legal opinions that have arguably interpreted the term consistently with their definition, not the President’s. *See* Resp. Br. at 5-6. And multiple amici have submitted briefs in this and the companion case, No. 18-2488, urging still different understandings of the term emolument. *See, e.g.*, Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert on Behalf of Neither Party, *In re Trump* (No. 18-2486), 2019 WL 366218; Brief for Amici Curiae Certain Legal Historians in Support of Plaintiffs-Appellees and in Opposition to Petition for Writ of Mandamus, *In re Trump* (No. 18-2486), 2019 WL 654726. Finally, within the Executive Branch, officials have acknowledged there is considerable debate about this issue. *See* Office of Inspector Gen., U.S. Gen. Servs. Admin., *Evaluation of GSA’s Management and Administration of the Old Post Office Building Lease 5* (2019) (finding that lawyers from the General Services Administration “all agreed early on that [the President’s lease of the D.C. Hotel] was a possible violation of the Constitution’s Emoluments Clauses”). Given this history, we can hardly conclude that the President’s preferred definition of this obscure word is clearly and indisputably the correct one.

In sum, while precedent offers guidance, it does not dictate a particular outcome on the facts alleged in the President’s petition.⁶ When assessing whether to issue a writ of mandamus, a court does not balance the respective merits of the parties’ arguments but instead determines whether the petitioner has established a clear and indisputable right to the writ.⁷ The President, the petitioner in this case, has not done so.

V.

Finally, we turn to the contention that separation of powers concerns require us to issue a writ of mandamus.

A.

The President, relying on *Cheney*, argues that we must issue a writ of mandamus because this suit, like

⁶ The first dissent rejects this holding, proclaiming at length that of course the President is entitled to the extraordinary relief he seeks, and that our contrary view is improperly motivated. The dissent portrays us as “partisan warriors” acting with an “absence of restraint . . . incompatible with the dictates of the law.” First dissent at 29-30. But we remain confident that our narrow holding, reached with careful attention to the standard of review, is the essence of restraint. Readers may compare our measured approach with the dramatics of the dissent and draw their own conclusions.

⁷ That the respondents’ claims may eventually be found non-cognizable does not mean that rejection of them is clearly and indisputably foreordained. *Cf. In re United States*, 884 F.3d 830, 836-37 (9th Cir. 2018) (denying a mandamus petition that contended that novel claims for climate change-related harms asserted directly under the Constitution were noncognizable, would result in intrusive discovery, and violated separation of powers, and that respondents lacked standing).

that in *Cheney*, subjects the Executive Branch to “intrusive discovery.” Pet. 29.

This is a puzzling argument given that, unlike the Vice President and the other petitioners in *Cheney*, the President has *not* petitioned for relief as to any discovery order. In any event, *Cheney* offers no assistance to the President here. The challenged discovery in that case required production of communications among Executive Branch officers appointed by the President to advise him on the nation’s energy policy. No one disputed that these communications were undertaken pursuant to the President’s power to solicit advice and recommendations from his subordinates; the case concerned whether the discovery orders would impair the functioning of the Executive Branch. In contrast, the discovery here—business records as to hotel stays and restaurant expenses, sought from private third parties and low-level government employees—implicates no Executive power. The President has not explained, nor do we see, how requests pertaining to spending at a private restaurant and hotel threaten any Executive Branch prerogative.⁸

Perhaps recognizing the difficulty with his *Cheney*-based discovery argument, the President briefly asserts that the separation of powers discussion in *Cheney* supports his claim that he is entitled to a writ of mandamus to immunize him “from judicial process.” Pet. at 29 (internal quotation marks omitted). That contention is

⁸ Of course, the President can always seek relief from intrusive or overbroad discovery orders from the district court and, failing that, through a petition for a writ of mandamus, just as the Vice President did in *Cheney*.

meritless. Indeed, *Cheney* approvingly cited *Clinton v. Jones*, in which the Supreme Court rejected precisely this argument. *Cheney*, 542 U.S. at 388 (citing *Clinton v. Jones*, 520 U.S. 681, 705 (1997)).

B.

The dissenters embroider on the separation of powers argument, maintaining that no court can order the President to comply with the Emoluments Clauses. According to the dissenters, these clauses vest the President with a discretionary duty and, pursuant to *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), the judiciary cannot direct or otherwise interfere with the performance of this duty.

The argument that the President's emoluments-related actions are judicially unreviewable rests on two premises, both of which collapse under scrutiny. The first is that every requirement or obligation that the Constitution imposes on the President provides him with an official executive duty. That is simply not so. For example, the Constitution requires that the President attain the age of 35 and be a natural-born citizen. U.S. Const. art. II, § 1, cl. 5. Those constitutional dictates, like the Emoluments Clauses, do not vest the President with any duty to execute the law. They are, rather, *restraints* on the President. Indeed, as the dissenters acknowledge, the Founders themselves recognized that the Foreign Emoluments Clause constitutes a restraint. See second dissent at 89 (quoting 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465 (Jonathan Elliot ed., 2d ed. 1836) (“The [Foreign Emoluments Clause] *restrains* any person in office from accepting of any present or

emolument, title or office, from any foreign prince or state.” (emphasis added))).

Such restraints are positive law, and of course the President must comply with the law. The duty to do so, however, is not a uniquely official executive duty of the President, for in the United States, every person—even the President—has a duty to obey the law. The duty to obey these particular laws—the Constitution’s Emoluments Clauses—flows from the President’s status as head of the Executive Branch, but this duty to obey neither constitutes an official executive prerogative nor impedes any official executive function.

Moreover, even if obeying the law were somehow an official executive duty, such a duty would not be “discretionary,” but rather a “ministerial” act within the meaning of *Johnson*. The dissents disagree, arguing that this duty is not only an official executive duty, but also one that encompasses the discretionary function of determining the meaning of “emolument.” See first dissent at 42-44; second dissent at 91; second dissent in No. 18-2488. That argument rests on another faulty premise—that defining the term “emolument” is an executive function. Although the Constitution entrusts the President with the enormous responsibility of faithfully executing the law, see U.S. Const. art. II, § 3, cl. 5, the notion that the President is vested with unreviewable power to both execute and interpret the law is foreign to our system of government. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Framers, concerned about the corrosive effect of power and animated by fears of unduly blending government powers, dispersed the authority to enforce the law and the authority to interpret it. To hold otherwise would

mean that the President alone has the ultimate authority to interpret what the Constitution means. Allowing the President to be the final arbiter of both the interpretation and enforcement of the law—as the dissents would—would gravely offend separation of powers. Rather than sanction an “assault by the judicial branch against the powers of the executive,” first dissent at 27, our holding affirms the separation of powers principles dictated by the Constitution and endorsed by centuries of foundational jurisprudence.

VI.

The procedural posture in which this case comes to us—a petition for a writ of mandamus—is not window dressing. A petitioner must establish a clear and indisputable right to the relief sought for a writ of mandamus to issue, and the President has not done so. Accordingly, the petition is

DENIED.

WYNN, Circuit Judge, with whom Judges KEENAN, FLOYD, and THACKER join, concurring:

Without a doubt, a lawsuit brought by the State of Maryland and the District of Columbia against the President of the United States catches attention outside the walls of the courthouse. How then should the Court avoid the appearance of partiality when there are eyes upon it? By applying the law and abstaining from grandiose screeds about partisan motives. Or, put another way—*by doing its job*. And that is exactly what the excellent majority opinion does.

But to the contrary, our dissenting colleague insinuates that “something other than law [is] afoot” here. First dissent at 60 (Wilkinson, J.). He makes much of the fact that “[n]o federal court has ever allowed a party to sue the President under the Domestic [and Foreign] Emoluments Clause[s].” *Id.* But all of us, majority and dissent alike, recognize that this is a novel case.

Novelty, of course, is not new to our courts. As a matter of fact, novel issues occur frequently. Judges everywhere call them “issues of first impression”—issues that require courts to engage in decision-making with seriousness and fairness. When faced with difficult and challenging questions, it may be tempting to invoke politics to justify declaring that we “have not the slightest idea” what to do. *Id.* at 28. But we must resist.

That is particularly true in this matter because even the best efforts to editorialize this case as a political fray must acknowledge that the State of Maryland and the

District of Columbia present a simple, non-political question: Should mandamus* issue to override the district court's discretion not to certify an interlocutory appeal? The answer is equally simple: No.

To evade that simple answer, the second dissenting opinion resorts to a baseless (and novel) assertion that the district court's "several decisions, when viewed holistically" amount to judicial usurpation. Second dissent at 77 (Niemeyer, J.); first dissent at 26 n.1 (Wilkinson, J.) (noting agreement with second dissenting opinion).

Editorial writers, political speechwriters, and others are free, of course, to make a career out of accusing judges who make decisions that they dislike of bias and bad faith. But the public's confidence and trust in the integrity of the judiciary suffer greatly when judges who disagree with their colleagues' view of the law accuse those colleagues of abandoning their constitutional oath of office. *See* second dissent at 63 (concluding the district court "purposefully endeavored" to ensnare the President in litigation and the majority now contrives to "protect[]" the district court).

And yet our dissenting colleague also grieves the "loss of that distinct and noble character of non-partisanship and self-restraint, which our forebears on the bench worked mightily to build and which our judicial generation has no right to disassemble." First dissent at 29. If this case represents that loss, it is because the dissenting opinions, in a disappointing display of judicial

* The writ of mandamus, a drastic remedy, is traditionally employed to compel ministerial duties—i.e., duties that involve no exercise of judgment and leave nothing to discretion. *See id.* at 43.

immodesty, have made this case into something it is not. The dissenting opinions abandon notions of judicial temperament and restraint by commandeering this case as a vehicle to question the good faith of judges and litigants that are constituent members of our Union.

Not content with disparaging the judges in the majority as political hacks, our dissenting colleague also bemoans at length this Court's refusal to resolve many questions not before it: whether the Emoluments Clauses provide a basis for relief, what type of relief might address the asserted injuries, and whether one type of relief—an injunction against the President—is appropriate in our constitutional system despite being unknown to the subjects of King George III. *Id.* at 28, 37, 39. But looking solely to the law, the reason for not addressing those questions is simple: “A litigated case is not a symposium . . . , and whatever views we may have on these issues must be left for another day.” *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659 (4th Cir. 2019) (Wilkinson, J.).

That reason fully explains why the majority opinion only addresses the legal issue actually before our Court—whether a party has demonstrated entitlement to a writ of mandamus. The majority opinion's painstaking adherence to settled law in the staid domain of procedure exemplifies a conservative and traditional approach of deciding those issues which need to be resolved, rather than opining on speculative issues that may never come before us. Doing otherwise would amount to unfettered judicial activism.

To put it plainly: Judges strive to do right under the Constitution. Still, our dissenting colleague fears the “partisan fevers [that] grip the national government”

and urges this Court to “operate as a non-partisan counterweight and discourage suits whose inevitable denouement will make us part of the political scrum.” First dissent at 29. But deciding which suits we should “discourage” because they may have political implications is itself a political choice. And of course, even deciding what constitutes the “political scrum” is a choice rooted in policy concerns, the perception of which lies in the eye of the beholder. What our dissenting colleague is really saying is that judges should forecast the outcome of a lawsuit and “discourage suits [having an] [anticipated] denouement [that] will [associate them with a political view they dislike].”

Such a naked policy choice belongs to the Executive or Legislative Branches of Government and has no place in the Judicial Branch. Instead, ours is a distinct and noble tradition of guarding citizens’ constitutional rights when the political branches fail—a tradition “which our forebears on the bench worked mightily to build.” *Id.* We have a duty to do our level best to do equal right to the parties who appear before us. *See* Statement from Roberts, C.J., to the Associated Press (Nov. 21, 2018).

When all is said and done, the majority opinion here represents a dedicated group of judges doing just that.

WILKINSON, Circuit Judge, with whom Judges NIEMEYER, AGEE, RICHARDSON, QUATTLEBAUM, and RUSHING join, dissenting:

I respectfully dissent from the denial of mandamus relief in this case. I would return it to the district court with directions to dismiss it forthwith. I make but one point—that the federal judiciary, no less than the President, is subject to the law. And here the federal judiciary has sorely overstepped its proper bounds.¹

My friends in the majority chide this dissent for its “dramatics.” Maj. Op. 17 n.6. Instead, they give this case the ho-hum treatment as though it were no different from our ordinary fare. I intend no diminution of the ordinary case to note that this case is extraordinary. The majority is using a wholly novel and nakedly political cause of action to pave the path for a litigative assault upon this and future Presidents and for an ascendant judicial supervisory role over Presidential action.

It is clear and indisputable that this action should never be in federal court. The legal foundations for this lawsuit are non-existent. It is a fanciful construct that invites the courts to create rights and duties from thin air. It allows an action to proceed that seeks to enjoin the President directly for official actions while in

¹ While I limit my comments to the official capacity suit, I note my agreement with Judge Niemeyer’s fine dissenting opinions as to both actions and, in particular, the propriety of a writ of mandamus, the trial court’s refusal to issue a § 1292(b) certification order, and on the absence of standing here, which I view as yet another ruling on the complete absence of redressability as to the relief that plaintiffs seek. In other words, as we are not allowed to grant the remedy plaintiffs seek, they are not allowed to ask for it.

office. It opens the door to litigation as a tool of harassment of a coordinate branch with notions of competitor standing so wide and injury-in-fact so loose that litigants can virtually haul the Presidency into court at their pleasure.

Do I fear for an enfeebled Executive? No I do not. But the metastatic spread of litigation, which this case represents, would divert the energies of any institution from what should be its primary focus of good governance.

Consider the insouciant spirit that guides this litigation. It's all make-it-up-as-we-go-along. We are proceeding under constitutional emoluments provisions that confer no right, provide no remedy, and lack all guidance in precedent and history. In so proceeding, the majority ascribes to the courts a lawmaking function that has been committed to the legislative branch.

We move forward to who knows where by leaving Congress, our most democratic branch, on the back stoop in the cold. One would have thought that an assault by the judicial branch against the powers of the executive would at least take place with some democratic imprimatur, with some cognizance of the legislative branch. But our solitary status leaves us undeterred.

We look in vain for evidence of Congress' whereabouts. There are no congressional subpoenas in this case. There is no congressionally created cause of action. There is no word from Congress on what an emolument might be or even the framework in which it should be assessed. There is no recognition given to the powers of Congress to include emoluments abuse in articles

of impeachment or to require disclosure by statute of whatever emoluments are thought to be.

Years ago, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Robert Jackson warned of unilateral executive action taken without thought of sanction or approbation by the other branches of the government. How much more perilous must it be for the judiciary to embark upon its solitary trek without the slightest semblance of democratic input or backing.

And that is not all. Not only is no right conferred upon these plaintiffs in the Bill of Rights or elsewhere; the nature of any remedy is nowhere set forth. Not knowing what an emolument even is, we can hardly fashion a remedy to what by pure guesswork we are supposed to enjoin. If it is the Trump Hotel that gives offense, are we to order its closure for the duration of the President's term? Or are we to command divestiture of any presidential interest, beneficial or otherwise, notwithstanding the fact that divestment is traditionally disfavored in equity? Are we to place this single asset in some sort of not-so-blind trust? Are we to enjoin foreign dignitaries from patronizing the Hotel? Are we to bring in some third party to manage the Hotel's ongoing operations? I have not the slightest idea. Nor am I comforted in the slightest by the majority's assertion that this all lies somewhere down some road.

It is said that no man or woman is above the law, and with that proposition I wholeheartedly agree. But has the President operated above the law by operating, directly or indirectly, an asset acquired well before his Presidency? And if the judiciary is to decide, again without any congressional or democratic input, that the President's arrangements for the operation of the Hotel

in a commercial market are somehow above the law, what businessperson will enter public service? The judiciary through its lack of clarity and its novel ambush will succeed in making public service inhospitable to those with lawfully acquired means whose business backgrounds form part of that mix of experiences upon which our Republic relies for its good health and governance. We are widening the chasm between the public and private sectors in our country, adding another schism to those that regrettably already exist.

Finally, in opening the door to suing a President who has visited not the slightest concrete harm on any plaintiff in this action, we invite the judiciary to assemble along partisan lines in suits that seek to enlist judges as partisan warriors in contradiction to the rule of law that is and should be our first devotion. When partisan fevers grip the national government, the judiciary must operate as a non-partisan counterweight and discourage suits whose inevitable denouement will make us part of the political scum.

It may be that at this time the judicial branch, with its aspirations to be above the fray, is our country's best remaining hope for maintaining public trust. Shall we sacrifice that hope in the service of a lawsuit, which asks us to exercise no traditional judicial power, such as was present in the enforcement of a criminal trial subpoena, see *United States v. Nixon*, 418 U.S. 683 (1974), or such as is present when the power of the government is brought against the rights of citizens that the Constitution has plainly conferred, see *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010)? Exercising the extrajudicial powers invited by this lawsuit assumes as well an extrajudicial risk, the chief of which is the loss of that

distinct and noble character of non-partisanship and self-restraint, which our forebears on the bench worked mightily to build and which our judicial generation has no right to disassemble.

It is well for some suits to transcend the moment. I hold no brief for the particular conduct of this or any President. I fear only for the future of the courts, where the absence of restraint is so evidently incompatible with the dictates of the law. This is not an occasion for business as usual. We are reaching the point of solving political differences increasingly through litigation rather than through legislation and elections. This is a profoundly anti-democratic development pressed in a suit whose wrongfulness and transparently political character will diminish the respect to which courts are entitled when they carry out the essential functions that our cherished Constitution has assigned them.

I.

I have thus far confined my comments to the contemporary indefensibility of plaintiffs' request. But it matters not whether a contemporary or historical lens is applied to this suit because the perspectives of past and present blend seamlessly together and require a single conclusion: that the plaintiffs are venturing into virgin territory as anathema to the Founders as it is in the present day.

There are many problems with what the majority has set in motion. The most fundamental is the fact we lack any authority to let this suit go forward. No federal court can provide a remedy in this case. And because a remedy is unavailable at the end of the road, we are forbidden from starting the journey.

A.

Plaintiffs here seek equitable relief. But the allegations set forth in their complaint do not bring this action within the carefully circumscribed equity jurisdiction of the federal courts. Indeed, history, tradition, and precedent all underscore they lie outside it.

The equity jurisdiction of the federal courts is strictly limited to the “authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)); see also *Fletcher v. Morey*, 9 F. Cas. 266, 271 (C.C.D. Mass. 1843) (Story, J.). Such suits in equity comprise only those “cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.” 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 33 (1836); see also *Missouri v. Jenkins*, 515 U.S. 70, 130 (1995) (Thomas, J., concurring).

In other words, to fall within the equitable jurisdiction of the federal courts, a litigant must demonstrate *both* that he has suffered an injury to some legally protected interest *and* that he cannot obtain adequate redress for that injury at law. See *Atlas Life Ins. Co.*, 306 U.S. at 569-70. Plaintiffs cannot clear this threshold inquiry because they fail to satisfy the first prong. That is, their case falls outside of our equitable jurisdiction because they have not alleged “a wrong which di-

rectly results in the violation of a *legal right*.” *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (emphasis added).

Two sources of law can create legal rights the violation of which may be cognizable in equity. First, the federal courts will enforce the set of rights traditionally protected by courts of equity in 1789. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (noting that a litigant may ordinarily “challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts”). Second, positive law, such as a federal statute or the Constitution, can create new legal rights that will be enforced by the federal courts in accordance with “the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” *Grupo Mexicano*, 527 U.S. at 318 (internal quotation marks omitted). Thus, to maintain a cause of action in equity, plaintiffs here must allege injury to either a traditional equitable right or a clear interest created and protected by written law.

Given that, it is important to recall exactly what the Maryland and D.C. plaintiffs are complaining of in this case. The crux of their argument is that, as a result of President Trump’s alleged unlawful acceptance of emoluments, guests that otherwise would have patronized their business establishments (and those of their residents) have instead patronized President Trump’s Hotel. Importantly, plaintiffs *do not* accuse the Hotel—their alleged competitor—of any wrongdoing or unlawful conduct. Rather, they assert only that the Hotel is

an *incidental* beneficiary of the President’s actions, which have increased traffic to their competitor and thereby created an “unfair economic playing field.” Plaintiffs’ Resp. Br. 27. The plaintiffs are at heart claiming what is called a “competitive injury”—lost profits due to increased competition.

The problem for plaintiffs is that their purported injury does not infringe any rights enforceable in equity. Generally speaking, freestanding “competitive injuries” do not constitute legal wrongs traditionally redressable by the courts. And plaintiffs have not identified any written law protecting their interest in being free from lawful competition by the Hotel. So while plaintiffs may have a grievance, they do not have a *legal injury* that falls within our equitable jurisdiction. I consider each of these points in turn.

- 1.

Put simply, plaintiffs do not assert that President Trump’s actions have infringed any traditional legal right. Remember, to maintain a cause of action in the federal courts based solely on rights traditionally protected in equity, plaintiffs must premise their claim on the type of legal injury that could have been brought before the English Court of Chancery in 1789. *Grupo Mexicano*, 527 U.S. at 318-19; Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. Rev. 217, 233 (2018). After all, if plaintiffs could call on the federal equity power to vindicate *any* interest, no matter how foreign to English practice at the Founding, the fixed limits on our equitable jurisdiction would quickly become illusory. See *Missouri*, 515 U.S. at 130 (Thomas, J., concurring) (noting that the Framers insisted that only “the defined nature of the English and colonial equity system

—with its specified claims and remedies—would continue to exist under the federal judiciary”).

At the time of the Founding, however, it was firmly established under English law that the loss of business incident to lawful competition was not a legally cognizable injury. As Blackstone explained, it was not unlawful “to set up any trade . . . in neighborhood or rivalry with another,” and “if the new [business] occasion a damage to the old one, it is *damnum absque injuria*,” *i.e.*, damage without injury. 3 W. Blackstone, *Commentaries on the Laws of England* 219 (1768) (hereinafter “Blackstone”). This proposition is supported by a line of precedents stretching back to Henry IV. See, *e.g.*, *Hamlyn v. More*, Y.B. 11 Hen. 4, fo. 47, Hil., pl. 21 (1410) (Eng.) (Hankford, J.) (“[I]f I have a mill and my neighbor sets up another mill, so that the profit from my mill is reduced, I shall have no action against him.”); *Keeble v. Hickeringhall*, 91 Eng. Rep. 659 (Q.B. 1707) (same).

The courts of this country have unsurprisingly applied the same rule. Faithful to the bounds of the judicial power, federal courts have consistently refused to grant equitable relief to plaintiffs complaining only of competitive harm. See, *e.g.*, *New Orleans, M. & T.R. Co. v. Ellerman*, 105 U.S. 166, 173-74 (1881) (holding that lawful competition “does not abridge or impair any [legal or equitable] right”); see also Louis L. Jaffe, *Judicial Control of Administrative Action* 509 (1965) (“[O]ur common law does not protect a person from competition . . . on the contrary free trade has become its guiding rule.”).

Critically, this principle applies even where, as here, plaintiffs allege that they face increased competition due

to *government action* that benefits their competitor. As Justice Black put it, “neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights.” *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940). Such was the holding in *Alabama Power*, where several power companies sought to enjoin the execution of allegedly unconstitutional loan agreements between the federal government and competing municipal power companies. 302 U.S. at 473-75. The Supreme Court responded that plaintiffs had no right to equitable relief because even if their “business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.” *Id.* at 480.

In short, so long as the actions of the competing entity itself are lawful, a plaintiff suffers no injury cognizable in equity. See *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-39 (1939). Thus, even if President Trump’s actions have incidentally cost plaintiffs business, it amounts to nothing more than *damnum absque injuria* so long as the Hotel itself is operating lawfully. And without legal injury, plaintiffs cannot avail themselves of our equitable jurisdiction.

In response, plaintiffs assert that “[c]ourts have long recognized that a plaintiff has a legally cognizable interest in challenging unlawful conduct that undermines his ability to participate in a competitive market on equal terms.” Resp. Br. 46. Doubtless. But those decisions were premised on *written* law creating and protecting such interests—not on traditional equitable rights. Indeed, such cases are largely outgrowths of the adminis-

trative state, which “brought legislation creating countless new interests that had not been protected at common law.” John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 1008 (2002). In other words, this body of law—where comprehensive regulatory schemes define competitive injuries with particularity and where would-be plaintiffs benefit from the “generous” statutory judicial review provisions of the Administrative Procedure Act, *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987)—does not stand for the proposition that lawful competition alone can cause legally cognizable injury. Rather these cases speak to the entirely separate point that where written federal law creates a new legal right to be free of competition in a given context or permits it only on certain terms, a court sitting in equity may enjoin government action that is violative of that right.

To see this proposition in action, consider *The Chicago Junction Case*, 264 U.S. 258 (1924). There, plaintiffs asked the court to invalidate an order of the Interstate Commerce Commission that had authorized a competing company to acquire a terminal road. *Id.* at 260-62. The Supreme Court held that plaintiffs suffered a legally cognizable injury, but “not the incident of more effective competition.” *Id.* at 267. Instead, the ICC order had violated the plaintiffs’ right to “equality of treatment,” which was created and protected by the Interstate Commerce Act. *Id.* The Court later clarified that, “*but for* [the] express statutory provision creating a different rule,” plaintiffs in *Chicago Junction* would not have alleged any legal injury. *Alabama Power*, 302 U.S. at 483-84 (emphasis added).

In sum, plaintiffs do not allege harm to any right traditionally vindicated by courts of equity. And the strict bounds of our equity jurisdiction under Article III render the federal courts powerless to unilaterally create and protect such a right.

2.

In light of the foregoing, if this case is to proceed, plaintiffs must identify some right created by positive law that has been invaded by President Trump's actions. As previously noted, absent a clear analogue from traditional equity practice, a plaintiff may base a claim of legal injury on the invasion of "an interest created by the Constitution or a statute." *McGrath*, 341 U.S. at 152 (Frankfurter, J., concurring); see also *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977) (recognizing that Congress can create new substantive rights "unknown to the common law"). And where a "statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a federal court." *Henrietta Mills v. Rutherford Cty.*, 281 U.S. 121, 127 (1930). "But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially." *McGrath*, 341 U.S. at 152 (Frankfurter, J., concurring).

Everyone agrees there is no statutory provision at issue. So the plaintiffs here cannot go the way of the plaintiffs in *Chicago Junction* or related cases. Rather, they must find their legal interest, if at all, in the Constitution itself. But this search is in vain.

The Supreme Court has repeatedly cautioned that “a major departure from the long tradition of equity practice should not be lightly implied.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). Neither the plaintiffs nor the majority have offered even the thinnest rationale for why the Emoluments Clauses would justify such a departure. They have pointed to nothing in the history of the drafting or ratification of the Clauses to remotely suggest that the Founders intended to create a new legal interest for parties to be protected from lawful competition—an interest wholly unknown to traditional equity practice. Further, the text of the Clauses does not contain *any* rights-conferring language, let alone something resembling the sort of comprehensive regulatory scheme that typically gives rise to competitive injury suits. And the government action complained of here is not “agency” action subject to the “generous” review provisions of the APA. See *Clarke*, 479 U.S. at 400 n.16. Rather, we are faced with two discrete structural provisions of the Constitution designed to prevent official corruption—provisions, as I will discuss below, that are not and never have been judicially enforceable in their own right. In short, there is not a colorable argument that the Emoluments Clauses, on their own, create a legal interest that would allow the plaintiffs to avail themselves of our equitable jurisdiction.

For these reasons, the plaintiffs have essentially failed to state a claim upon which relief can be granted, because their particular “competitive injury” does not contain a *legal* injury cognizable in equity. That should end this case. Regrettably, my colleagues in the majority, content with kicking the can down the road and

untroubled by such parochial concerns as the scope of our Article III powers, decide to let this futile action proceed.

B.

The above is only the first of two fatal defects with the plaintiffs' claim. The federal equity power is further constrained by the structure of the Constitution. See 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 294 (A. L. Bancroft & Co. 1881). This means, at a minimum, that the federal equity power cannot extend beyond what the separation of powers will allow. See *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 104-07 (1945).

But as redress for their purported injuries, plaintiffs ask for something extraordinary: an injunction issued directly against the President of the United States. To date, I am not aware of a single case where a federal appellate court has allowed a claim premised on this mode of relief to move forward. Until now. In reaching this unprecedented outcome, the majority has laid aside the inspired design of our constitutional order in exchange for the ephemeral rush of a judicial power unbound. I would instead keep to the longstanding rule impelled by the history and structure of the Constitution: federal courts cannot enjoin the President in connection with the performance of his official duties.

1.

The Supreme Court first articulated this limit on our equitable jurisdiction in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867). There, Mississippi sought an injunction to stop President Andrew Johnson from enforcing the Reconstruction Acts on the ground that the Acts

were unconstitutional. The Court rejected any notion that the federal judiciary had the power to issue such a remedy, squarely holding that the federal courts could not “enjoin the President in the performance of his official duties.” *Id.* at 501.

The *Mississippi* decision reflected what was already settled law at the time. For one, this kind of equitable remedy would have been unheard of at the English Court of Chancery in 1789. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 425 (2017) (“In English Equity before the Founding of the United States, there were no injunctions against the Crown.”). And, at the time, no federal court had ever sustained an injunction directly against the President. *Mississippi*, 71 U.S. at 500 (“It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.”).

Since *Mississippi*, the federal courts have continued this practice *without exception* and have not sustained a single injunction against the President in his official capacity. *Newdow v. Bush*, 355 F. Supp. 2d 265, 282 (D.D.C. 2005) (recognizing the absence of any example where “an injunction against the President [has been] issued and sustained by the federal courts”). Over the course of this nation’s entire existence, there has been an “unbroken historical tradition . . . implicit in the separation of powers’ that a President may not be ordered by the Judiciary to perform particular Executive acts.” *Clinton v. Jones*, 520 U.S. 681, 719 (1997) (Breyer, J., concurring) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part and concurring in the judgment)); see also *Newdow v.*

Roberts, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him”).

Ordinarily, this sort of uniform historical record is supposed to count for something. The Supreme Court has repeatedly made clear that history has independent doctrinal significance in resolving separation of powers questions. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). In particular, when the scope of a given power is not readily apparent from the face of the Constitution—such as the contours of the “judicial power” vested in the federal courts by Article III—practice should illuminate meaning. See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

To that end, history is especially instructive when one branch of government claims a novel power against another—such as the judiciary asserting the authority to enjoin the chief executive—but cannot point to a single instance of having used it. In a system of government where ambition was made to counteract ambition, the Constitution does not keep hidden the consequential powers of the respective branches. So when one branch claims to stumble upon a previously unknown font of authority that would materially affect the separation of powers, chances are it is grasping for something beyond its constitutional bounds. See *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (“Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for [it].”). These principles ring loudly in this case. The dearth of a *single* example of such an injunction sustained directly against

the President, despite untold chances, speaks volumes about our authority to permit one.

Moreover, this unbroken historical practice makes perfect sense because *Mississippi*'s core holding is compelled by the structure of the Constitution. As the *Mississippi* Court recognized, "the President is the executive department." *Mississippi*, 71 U.S. at 500. He accordingly "occupies a unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), because the executive power of the entire government finds its summation in the President alone, U.S. Const., Art. II, § 1. For this reason, "as far as his powers are derived from the constitution, [the President] is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838).

A moment's reflection reveals why: the integrity of the separation of powers depends on no branch being able to commandeer another. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other."). On that score, because "the President is the executive department," *Mississippi*, 71 U.S. at 500, to control him, in any official capacity, is to control the executive branch itself. But the judiciary may not coopt the executive power any more than the executive can attempt to sit atop the judicial power. See *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). And the federal equity power must conform to the structure of the Constitution. As such, the federal courts may not use their powers in equity to force the President, as

chief executive, to perform his official duties in any particular manner.

2.

Mississippi settles this case. Compliance with the Emoluments Clauses is an official duty of the presidency—it is a legal requirement that applies to the President by virtue of the very fact he is President, binding on him only for the duration of his time in office. And under *Mississippi*, as confirmed by the history and structure of the Constitution, we lack the capacity to enjoin the President in the performance of such a duty.

Perhaps aware of the rather apparent obstacle *Mississippi* poses to their desired outcome, the plaintiffs try to sidestep the case entirely by emphasizing, rather curiously, that how a President structures his personal finances is not inherently an official executive action. Of course it is not. But that is also beside the point. *Mississippi* speaks of “official duties,” and whether something is an official *duty* turns on the nature of the obligation, not the means of complying with it. Only a lawyer would maintain that an obligation (*i.e.*, a duty) that derives from one’s government position (*i.e.*, office) is not an “official duty.” As I see it, compliance with the Emoluments Clauses is an official duty of the presidency because it flows directly from the Constitution as a requirement of the office, even if complying with that duty may involve colloquially private activities like setting up a trust.

Relatedly, compliance with the Emoluments Clauses is not a “ministerial duty.” True enough, in *Mississippi*, the Supreme Court left open whether the federal

courts could enjoin the President to perform a “ministerial duty.” 71 U.S. at 498-99. But the federal courts have never sustained an injunction on this basis. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (“We have, however, never attempted to exercise power to order the President to perform a ministerial duty.”). And, in any event, this narrow exception could only apply to “simple, definite” duties where “nothing is left to discretion.” *Mississippi*, 71 U.S. at 498.

In other words, once an official responsibility involves the “exercise of judgment,” it is a non-ministerial official duty. *Mississippi*, 71 U.S. at 499. That describes compliance with the Emoluments Clauses. As the facts of this case make plain, compliance in practice is not a “simple, definite” endeavor; rather, it involves seemingly innumerable judgment calls about how a President must organize his financial interests, sequester his real assets, or restructure his holdings. To put a finer point on it, compare these sorts of choices with what was required in the quintessential example of a ministerial duty: the delivery of the commission in *Marbury v. Madison*. There, Marbury’s commission had been signed and sealed, but not delivered. The Secretary of State was required by law to just hand over the parchment, a function that required *no* judgment and where *nothing* was left to discretion. Such a rote errand is different in kind from the sort of discretionary conduct at issue here.²

² The plaintiffs muddle this point by arguing that while the *manner* of compliance with the Emoluments Clauses could involve judgment, the decision of *whether* to comply is non-discretionary: in short, no emoluments means no emoluments. But this simplistic refrain proves too much. For one, the Supreme Court rejected this

For what it is worth, the district court’s interpretation of the Emoluments Clauses, left in place by the majority, gives away the farm on this point. In order to gerrymander a reading of the Clauses that is broad enough to cover *this* President but narrow enough to avoid all the others, the district court carved out an exception for so-called “de minimis” emoluments. But this move gives with one hand and takes with the other; specifically, it forecloses the position that compliance with the Emoluments Clauses can be characterized as a ministerial duty. Indeed, reasonable minds cannot differ that it takes at least *some* “exercise of judgment,” *Mississippi*, 71 U.S. at 499, to figure out if a given “emolument” (whatever that is) is sufficiently “de minimis” (whatever that is) such that it falls outside “the contemplation of the Clauses,” *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 899 (D. Md. 2018). And

exact sort of rationale in *Mississippi*, where the state tried to say that the President’s duties under the Take Care Clause were also mechanistic (that is, following the Constitution means following the Constitution). What’s more, plaintiffs’ interpretation of the Clauses would necessarily brand George Washington a repeat violator—a conclusion that ordinarily speaks more to flaws in a given constitutional interpretation than it does to the first President’s conduct. See *American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067, 2087-89 (2019). Washington likely purchased several plots of land from the federal government while President; continued to export crops overseas; and received, without consent of Congress, numerous diplomatic gifts from France. And he was by no means an aberration. See Douglas R. Hume, *Between “The Rock” and a Hard Case: Application of the Emoluments Clauses for a New Political Era*, 2018 Pepp. L. Rev. 68, 75-76 (noting analogous examples for Jefferson, Madison, and Monroe); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 Minn. L. Rev. 639, 657-58, 662-63 (2018) (same for Reagan and Obama).

once that point is granted, then *Mississippi* controls, placing enforcement of the Emoluments Clauses beyond our equitable jurisdiction.

Even the plaintiffs disclaim the district court’s “*de minimis*” exception to what constitutes an emolument. See Resp. Br. 6 (“The word ‘emolument’ as used in the Clauses, accordingly covers ‘any profits’ accepted from a foreign or domestic government. . . . That is true . . . even when the amount accepted was small.”). Instead, the plaintiffs have argued an emolument covers “any” profit, gain, or advantage the President might receive. Resp. Br. 30. Contending the emolument prohibition brooks no exceptions, the plaintiffs have consistently alleged it must be broadly construed to cover “anything of value,” Am. Compl. ¶¶ 24, 25, 26, 134.³ That is, until oral argument in this en banc appeal. There, when confronted with various examples of commercial investment returns that indisputably constitute something “of value,” the plaintiffs changed course and now say “any” profit, gain, or advantage is “not necessarily” an emolument—*de minimis* or otherwise—if others not subject to the Clauses might also receive such largesse. Oral Argument at 1:02:41-43, *In re Donald J. Trump* (No. 18-2486); *id.* at 1:03:18-22 (an emolument is “any particular type of advantage that is not available to

³ Plaintiffs similarly contend that an “emolument” constitutes such broad categories of benefits as: “something of value,” “improper incentives,” or “private enrichment,” Am. Compl. ¶ 6; “payments, benefits, and other valuable consideration”, *id.* ¶ 9; anything that may “boost[] th[e] patronage of [the President’s] enterprises,” *id.* ¶ 13; “payments, transactions granting special treatment, and transactions above marginal cost,” *id.* ¶ 25; as well as “monetary and non-monetary gifts or transactions, transactions granting special treatment, and transactions above marginal cost,” *id.* ¶¶ 134, 140.

everyone else”). All of which confirms that determining an emolument of necessity requires “exercise of judgment” as the definition seems to shift upon each exigency.

To repeat, the federal courts have *never* sustained an injunction against the President in connection with the performance of an official duty. But they have at times enjoined his subordinates when doing so would provide adequate relief in a given case. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is but one example in this long line of precedents. There, the Court sustained an injunction against the Secretary of Commerce, who was trying to enforce an executive order promulgated by President Harry Truman, rather than President Truman himself. Indeed, *Youngstown* stands not only for the separation of powers axiom that no one branch should charge alone on matters of national importance, as noted, but it also underscores the constitutional necessity of the judiciary separating the President, as chief executive, from his subordinate officers within the executive branch.

This distinction, in fact, makes all the difference. See Jaffe, *Judicial Control of Administrative Action* 363 (“[The President] is ‘the executive’ in the sense that his subordinates are not.”); see also *Myers v. United States*, 272 U.S. 52, 132-33 (1926). So much so for at least two reasons. First, more formally, when a federal court enjoins the conduct of a subordinate executive officer, it may frustrate the President’s will in a specific instance, but it does not seize the very reins of the executive branch by exercising control over “the executive department” itself. *Mississippi*, 71 U.S. at 500; see also *Chamber of Commerce of the United States v. Reich*, 74 F.3d

1322, 1331 n.4 (D.C. Cir. 1996). Second, more functionally, the President is “entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity,” *Fitzgerald*, 457 U.S. at 750, and how he decides to allocate his energies and attentions in an official capacity is itself owed constitutional protection. By contrast, when the judiciary enjoins subordinate executive officers, whose positions are often creatures of statute tasked with discrete and circumscribed roles, the level of intrusion into the executive branch’s fluid operation is far less severe.⁴

That said, the fact that there is no subordinate officer available to stand in for the President in *this* case is of little consequence. To be sure, the plaintiffs claim that if an injunction cannot run against the President directly in this matter, then no equitable relief is available at all for them.⁵ But that reality, whatever political salience it may or may not possess, has no bearing on the

⁴ Relatedly, the plaintiffs’ reliance on cases like *United States v. Nixon*, 418 U.S. 683 (1974), misses the mark. *Nixon* involved a prototypically traditional judicial action—the issuance of a subpoena in a criminal matter—and stands for the simple proposition that the President does not shed every aspect of his ordinary citizenship when he takes office. It is quite the leap, to say the least, to take the point that the President is not absolutely immune from *all* judicial process as near-dispositive support for the unprecedented idea that the judiciary can subject the President to the *kind of process* at issue here—an injunction directing him, in an official capacity, to perform an *official duty* of his office.

⁵ It is also not possible for any private parties, be it members of the President’s family or employees of the Trump Organization, to stand in for him in this case. For one, the plaintiffs have requested relief directly against the President, *i.e.*, that *he* divest *his* stake in the Hotel. More importantly, this is an official capacity action. As

legal question before us. This case, at heart, is about power—specifically, whether the federal courts can use the judicial power of the United States to compel the President to perform an official duty in a particular manner. And that question turns principally on the President’s unique status within our constitutional system, a position that does not vary depending on the availability or variety of subordinate executive officers potentially amenable to suit. In fact, to hold that the absence of such a subordinate officer changes the constitutional calculus is to countenance the notion that the judicial power must extend as far as needed to be effective; that the federal equity power must always stretch long enough to offer remedial force. While this promise of soon-to-come judicial superiority might be intoxicating today, it would be *horribilis* to the Founders, see, e.g., The Federalist No. 78, at 402 (Hamilton) (George W. Carey & James McClellan, eds., 2001) (hereinafter “The Federalist”) (“[T]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”), and it is a marked departure from the respect one branch of government owes another.

With inexplicable ease, the majority asserts that the mere existence of this lawsuit does not threaten separation of powers. I agree that this lawsuit does not merely threaten separation of powers. It violates them in a way, as explained above, that no federal court of appeals has ever done before. At bottom, plaintiffs are asking

such, the plaintiffs must allege a wrong that can be redressed by a court order against a *government actor* in his official capacity.

for a remedy not only foreign to traditional equity practice, but also in the teeth of our Constitution's structure. Why such a suit merits a single moment more in federal court, as the majority permits, is beyond me.

C.

The plaintiffs also seek a declaratory judgment “stating that [President Trump] has violated and will continue to violate the Foreign and Domestic Emoluments Clauses.” J.A. 182. We are similarly powerless to grant this mode of relief.

We have no more power to issue a declaratory judgment against the President regarding the performance of an official duty than we do an injunction. Much as the President's unique constitutional status bars the federal courts from *directing* his exercise of the “executive power,” the federal judiciary is prohibited from subjecting him to their *declaration* of how he should wield the same. *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment) (“It is incompatible with [the President's] constitutional position that he be compelled personally to defend his executive actions before a court.”); see also *Roberts*, 603 F.3d at 1013. Suits for declaratory relief also pose the same functional concerns that militate against injunctions; namely, the diminution of the President's attentions and energies with respect to his official duties. In short, the structure of the Constitution forecloses this form of relief for the plaintiffs here.

What is more, as noted *supra*, no federal court has the power to grant coercive relief against the President in this case. And without the ability to supply coercive

relief on the back end—that is, without the ability to ultimately provide an injunctive remedy—we are without the power to opine on the front end. See *Vaden v. Discover Bank*, 556 U.S. 49, 70 n.19 (2009) (noting that the Act “does not enlarge the jurisdiction of the federal courts; it is procedural only” (internal quotation marks omitted)); see also *Samuels v. Mackell*, 401 U.S. 66, 72 (1971); *Powell v. McCormack*, 395 U.S. 486, 499 (1969). As such, granting declaratory relief here would be a quintessential (and barred) example of providing an advisory opinion. See *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); see also *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937) (noting the Act’s application is limited to actual “controversies,” *i.e.*, those that are “appropriate for judicial determination” and “admit[] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be”). Put plainly, without the option of coercive relief later, declaratory relief is unavailable now.

* * *

Make no mistake about what has really happened here. By discarding centuries of settled practice and precedent that kept true to the genius of the Constitution and its separation of powers, the majority has only confirmed one of the Founders’ worst fears: that, while no man may be above the law, a group of judges, so emboldened, may consider themselves beyond it. See, *e.g.*, *The Federalist* No. 47, at 251-52 (Madison) (“[W]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the*

judge might behave with all the violence of *an oppressor*.”) (internal quotation marks omitted); The Federalist No. 78, at 407 (Hamilton) (observing that the loss of judicial legitimacy corrodes the rule of law, “sap[ping] the foundations of public and private confidence, and . . . introduc[ing] in its stead universal distrust and distress”).

II.

A.

Just how far the judiciary has set itself above the law becomes ever more clear. The Emoluments Clauses are prime examples of the sort of constitutional provisions that are not self-executing and that judges may not enforce on their own. The text, structure, and history of the Constitution make plain that it is Congress and the people, not the federal courts, that are best positioned to address a President’s alleged violations of the Clauses—whatever they may be said to mean. But in the majority’s concluding ode to judicial supremacy, no mention of Congress is even to be found.

To begin with, the very fact that a clause is included in the Constitution does not automatically render it amenable to judicial enforcement. The Supreme Court has held that there are numerous structural provisions embedded in the Constitution that are beyond the immediate ambit of our jurisdiction. In fact, the Court has said as much with respect to *every* constitutional provision that resembles the Emoluments Clauses.

Consider, for starters, the cases of *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), and *Ex Parte Levitt*, 302 U.S. 633 (1937), which concerned

the Incompatibility and Ineligibility Clauses, respectively. The Incompatibility Clause provides that “no Person holding any Office under the United States, shall be a Member of either House [of Congress] during his Continuance in Office,” U.S. Const. Art. 1, § 6, cl. 2, while the Ineligibility Clause says that “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time,” *id.* In *Schlesinger*, opponents of the Vietnam War challenged the eligibility of certain members of Congress to simultaneously hold positions in the armed forces reserve. 418 U.S. at 210-11. They argued that unless those breaches of the Incompatibility Clause were remedied, they would “suffer[] injury because Members of Congress holding a Reserve position in the Executive Branch were . . . subject to the possibility of undue influence by the Executive Branch.” *Id.* at 212. In *Ex Parte Levitt*, plaintiffs alleged that Hugo Black was appointed to the Supreme Court in violation of the Ineligibility Clause because he was named to a vacancy whose “Emoluments” (there, a pension plan) had increased and also arose while he was in the Senate. 302 U.S. at 633-34.

The Supreme Court rejected both claims. It held that plaintiffs’ purported injury in *Schlesinger* was no more than a “generalized interest” in ensuring that elected officials comply with the terms of the Constitution. 418 U.S. at 227. Though the Court acknowledged that “[a]ll citizens” share “an interest in the independence of each branch of Government,” which is protected by the Incompatibility Clause, it ultimately concluded

that “[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.” *Id.* The same held true in *Levitt*, where the Court maintained that the plaintiffs’ interest in the Ineligibility Clause was “merely a general interest common to all members of the public,” and thus non-justiciable. 302 U.S. at 634; see also *United States v. Richardson*, 418 U.S. 166, 176-80 (1974) (holding the same for the Receipts Clause).

Perhaps most relevant to the instant case is Chief Justice Marshall’s discussion of the Title of Nobility Clause in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). That provision, contained in the same clause of Article I, Section 9 that includes the Foreign Emoluments Clause, states that “[n]o Title of Nobility shall be granted by the United States.” In concluding that this provision would likely not be judicially enforceable, Chief Justice Marshall flatly stated that Article III “does not extend the judicial power to every violation of the constitution which may possibly take place.” *Id.* at 405.

It takes no great imagination to see that the provisions at issue in the foregoing cases are all of a part with the Emoluments Clauses. They are all structural prohibitions designed to ensure that federal officials avoid the appearance of or opportunity for conflicts of interest. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 358-62 (2009) (characterizing the Foreign Emoluments, Ineligibility, Incompatibility, and Receipts Clauses as having the same animating purpose and being directed at “fears of corruption”).

By their terms, these Clauses do not create any individual rights or protect against any direct harms. And, as one leading scholar has recognized, the Emoluments Clauses also have “no means of enforcement within” them, Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 N.W. U. L. Rev. Colloquy 30, 38 (2012), much like the other structural anti-corruption provisions the Supreme Court has found not to be judicially enforceable.

In fact, everything we know about the structure and design of the Constitution would make it seem that the Emoluments Clauses are *especially* inapposite for free-standing judicial resolution. Only the President must comply with both Clauses. But in numerous and diverse contexts, the Supreme Court has displayed extreme reluctance, based on the structure of the Constitution, to permit suits against the President. See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867). It is, at the very least, inconsistent with these opinions to suddenly discover that all along the Constitution has contained, in the Emoluments Clauses of all places, a ready-made equitable cause of action directly against the President in his official capacity. See *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment) (noting that “[i]f official-action suits against the President had been contemplated, surely they would have been placed within [the Supreme] Court’s original jurisdiction”); see also *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015).

This is not to say that the Clauses are purely precatory. Far from it. As Edmund Randolph observed at

the Virginia Ratifying Convention, by operation of the Clauses, the President “is restrained from receiving any present or emolument whatever,” to the point that Randolph concluded that “[i]t is impossible to guard better against corruption.” 3 Debates on the Federal Constitution 486 (J. Elliot 2d ed. 1836) (hereinafter Elliot’s Debates). But if plaintiffs, it is said, cannot run to judges to enforce the Clauses, how then could those Clauses ever guard against corruption? The answer is a simple one, common in our constitutional scheme: the interests recognized and protected by the Clauses are to be vindicated in either the courts of Congress or the courts of public opinion.

To begin with Congress, it is clear that the legislative branch has ample tools at its disposal to remedy a perceived violation of the Emoluments Clauses. For one, the Foreign Emoluments Clause itself provides a mechanism by which Congress can approve, or disapprove, the President’s receipt of emoluments from foreign powers. The provision itself forbids the President from receiving any foreign emolument without “the Consent of the Congress.” U.S. Const. Art. 1, § 9, cl. 8. Congressional oversight pursuant to the Clause is thus “not a minor check”; rather, it “leads to a radical transparency and interrogation that could chill quiet transfers of wealth for affection.” Teachout, *Gifts, Offices, and Corruption*, 107 N.W. U. L. Rev. Colloquy at 36.

Congress may also impeach a President for his non-compliance with the Clauses. As Alexander Hamilton observed, the proper subjects for impeachment “are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.” The Federalist No. 65, at 338

(Hamilton). It is hard to think of a more apt description of an Emoluments Clause violation. The Framers said as much. Randolph recognized that if the President is “discovered” to have received forbidden emoluments, “he may be impeached.” 3 Elliot’s Debates 486; see also 1 Annals of Cong. 661 (1789) (remarks of Rep. Stone) (identifying impeachment as Domestic Emoluments Clause remedy).

Further, Congress could pass a statute mandating disclosure of the President’s financial records, which would better enable the people to cast an informed ballot at the next election. See *Federal Election Comm’n v. Akins*, 524 U.S. 11, 24-25 (1998) (recognizing that as to disclosure informational injury can satisfy standing); see also L. Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”). While the relationship between the legislative and executive is itself often hotly contested territory, the legislature is in a far better position to enumerate a definition of an “emolument,” distinguish between valid and invalid receipts thereof, and develop a remedial or oversight scheme that could lay a proper legal groundwork for some judicial involvement. But in its haste to let this case go forward, the majority gives short shrift to these superior enforcement means—mechanisms that Congress has not shied away from using in the past. See, *e.g.*, Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2012).

Moreover, while Congress should be the leading branch of government to enforce the Emoluments Clauses, it is not the only check on the Executive. On

the contrary, “that the Constitution does not afford a judicial remedy does not . . . impair [plaintiffs’] right to assert [their] views in the political forum or at the polls.” *Richardson*, 418 U.S. at 179. As Chief Justice Marshall observed in *Marbury v. Madison*, the Constitution imposes certain duties on the President, in the performance of which “he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.” 5 U.S. (1 Cranch.) 137, 166 (1803). Compliance with the Clauses is such a duty. If Congress fails to impeach the President, he is ultimately accountable to the electorate, and can be “displaced at the end of four years.” 3 Elliot’s Debates 486 (Edmund Randolph).

Even if we had the power to let this case go forward, prudence and any sense of judicial modesty should stop us from doing so. When faced with such an unprecedented case based on such tenuous constitutional grounds, we would do well to heed the ancient admonition against wanton abuse of judicial authority: “O, it is excellent / To have a giant’s strength; but it is tyrannous / To use it like a giant.” W. Shakespeare, *Measure for Measure*, act 2, sc. 2, lines 107-09. Not incidentally, the Great Bard was referring to a judge. The Emoluments Clauses—like the Incompatibility, Ineligibility, and Title of Nobility Clauses—are exemplars of constitutional provisions that are not self-executing, and are instead best left to the political branches and the electorate. All told, it is never good for judges to go beyond their authority, but it is an unforced error of exceptional hubris to grab *this measure* of unrestrained power all for ourselves.

Plaintiffs imply however that by dismissing this suit we would allow the President to be above the law. To

the contrary, applying long-recognized principles of law to litigants raises no one above it. It is the majority's failure to apply them that lifts the courts alone above the law. It is not too much to ask that the judiciary think introspectively and survey the damage that the esteemed guardians of law inflict when they proceed to disregard it.

By not dismissing this case promptly, we have set in motion—without guidance from Congress, precedent, or tradition—a dangerous project involving the Emoluments Clauses. In so doing, we have returned to the worst era of equity, where judges were “at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case.” 3 Blackstone 441.

B.

No one of course takes corruption in public life lightly. But that does not begin to answer the question about whether the corrective for such will ultimately be as bad or worse than the disease, and further, whether corruption can be used, or rather misused, as a pretext for the augmentation of judicial authority. Why this most complex and politically-sensitive matter should be given to the institution least suited for resolving it is quite beyond me. This presents serious problems, the least of which is that crafting from whole cloth an enforcement scheme for the Emoluments Clauses seems well beyond our competency.

Without the slightest courtesy of notice, which the legislative process would afford, we shall deign to inform the President what separates an acceptable from an unacceptable “emolument.” Of course, *this* President must

be on the hook for having a passive financial stake in hotels administered by third parties that foreign and domestic sovereigns patronize in a commercial market. Change the fact pattern one iota, though, and what is an acceptable emolument is anyone's guess.

Relatedly, we are not so much as amateur legislators, and I am entirely at a loss as to how we could fashion an injunction that would provide an effective and administrable remedy in this case. And I am not alone; in fact, the *plaintiffs* repeatedly avoided telling the panel in this case what their ideal injunction would require of the President. *In re Trump*, 928 F.3d 360, 376-77 (4th Cir. 2019). At oral argument in this en banc appeal, they finally floated the idea of an injunction that would require the President to *completely* divest his passive majority-stake in the Hotel. Oral Argument at 1:07:15, *In re Donald J. Trump* (No. 18-2486). But what this broad-stroke proposal has in candor it lacks in plausibility. Divestment is traditionally quite disfavored at equity, namely because it often destroys the underlying business and also forces the owner, operating under court pressure, to sell-off at a discount or in a fire sale. See *Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870, 873 (N.Y. 1970). This hardly counts as a realistic option, and the majority has not even attempted to suggest a sensible alternative. These are all details to be filled in later after the case drags the presidency through the fishing expedition of discovery and the usual slew of insinuation. But as I see it, the lack of an intuitive judicially-manageable remedy on the back end cautions against placing the judiciary, working entirely on its own, at the heart of an enforcement scheme in the first place.

Further, *even if* we could develop a coherent sense of rights and remedies under the Emoluments Clauses, problems still abound. For example, with respect to the Foreign Emoluments Clause, it is quite hard to conceive of a potential judgment that would not at least partially infringe on the President's foreign affairs responsibilities. The Supreme Court has termed the President "the sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and "[w]ith respect to foreign affairs . . . the [Supreme] Court has recognized the President's independent authority and need to be free from interference," *Hamdi v. Rumsfeld*, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting). How to square even the most modest conception of the President's authority in foreign affairs with a scheme that would have judges or their special masters oversee the propriety of every diplomatic gift or hotel tab remains a daunting task.

The only people I can think of who will fare better under this whole obscure regime are the lawyers who will dutifully assist those persons from the private sector who still dare to enter the public one. The majority's approach is an albatross for any businessperson, or any citizen for that matter, looking to be part of public service. Could a President stay in a pension plan that holds shares of Saudi Aramco? Could he send a child to a foreign university on a scholarship? Could he accept any tax credit on a property he owns abroad? Is the only sure way to comply with the Clauses to stuff one's pre-acquired assets in a mason jar and bury it in the backyard? The majority's decision will be one that launches a thousand questions. And while there might

eventually be answers to them, I am positive that they will not come from the bench. I am also confident that the mere prospect of open-ended liability under the Emoluments Clauses will deter businesspeople, successful or not, from entering politics—an added toll at the gates of the political arena that this branch has no prerogative to impose.

All this said, there is a more fundamental problem still to what the majority has inaugurated. For the majority, the consuming indeterminacy that permeates this incipient Emoluments Clause jurisprudence is a *feature* of the system, not a bug. Indeed, from now on, every President will face an immediate and indeterminate specter of constitutional culpability under the Emoluments Clauses, the prospect of being hauled before a federal judge by a private or state litigant on the ground there has been some indirect disadvantage flowing from the receipt of some illicit “emolument.” But nobody knows what any of this means. Without history, tradition, judicial precedent, or democratic input as our guide, these suits will inevitably turn on the unbound whim of the judiciary. In other words, the federal courts, for purposes of the Emoluments Clauses, will be transformed into Oracles, to be beseeched by presidents and private litigants alike to learn whether an improper “emolument” has taken place. What a windfall for judicial supremacy. And, to boot, I do not think it far-fetched to predict that, in these rank exercises of policy-making, federal judges will somehow line up on “party lines.”

Can we not see the political cloak we are asked to don? No federal court has ever allowed a party to sue the President under the Domestic Emoluments Clause.

Until this President. No federal court has ever permitted the same with respect to the Foreign Emoluments Clause. Until this President. No federal court has used its powers in equity to remedy a standalone competitive harm, unsupported by positive law. Until this President. And no federal court has ever entertained the prospect of an injunction against a President in connection with the performance of his official duties. Until this President. Following this barrage of doctrinal firsts, would it not be fair for our fellow Americans to suspect that something other than law was afoot?

The plaintiffs here are attempting nothing less than to enjoin the President of the United States for official actions taken while in office. They are seeking to harness the coercive machinery of legal process to drag the President through what are coming to seem more and more like interminable proceedings. To all of which the court responds: carry on! The willingness of the majority to indulge this lawsuit is a missed opportunity to transcend the political moment. Far beyond the context of today's political configuration, the majority's grasp for judicial power at the expense of the elected branches of our government will stand as precedent that the judiciary can direct the actions of the Presidency to an extent inconceivable heretofore.

I respect of course the office of the presidency. But I revere, like each and every one of my fine colleagues on this court, the role of courts in making real the rule of law. But courts can best promote the rule of law by not setting themselves so self-evidently above it. The majority has jeopardized a great deal today. The trust the public holds in courts depends on our staying out of

the political fray. As the one branch of government removed from the democratic process, the federal courts occupy a special position within our constitutional order. Namely, because we cannot be checked at the ballot box, and because we cherish our impartiality, we must scrupulously check the human tendency to excess in the exercise of power. To deserve our autonomy, we must, in the words of Justice Frankfurter, keep to a “duty of restraint, [a] humility of function.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 534 (1947). The majority, by prolonging and perpetuating an ad hoc and untethered Emoluments Clause claim, has failed many times over to keep to this command. In this most rancorous of times, we should burnish the ideal that we can be respected stewards of those powers with which we have, in an extraordinary exhibition of the Founders’ and our fellow citizens’ faith, been entrusted.

NIEMEYER, Circuit Judge, with whom Judges WILKINSON, AGEE, QUATTLEBAUM, and RUSHING join, dissenting:

The purpose for this unique action against the President of the United States is not revealed in any of the numerous filings by the District of Columbia and the State of Maryland, and the relief they seek—the President’s divestiture of his interest in the Trump International Hotel in Washington, D.C. to prevent his receiving income from the Hotel—redresses no harm that has been caused to or threatened against them. Whether the Hotel’s profits go to the President himself or instead to his family can make no conceivable difference to customers of the Hotel or to the District or Maryland. Had the plaintiffs actually suffered any discernable harm from the President’s receipt of income from the Hotel, one might have expected that they would have described and complained of their harm before filing suit. But they never did so.

This question of purpose becomes yet more puzzling when taking into account that the District and Maryland’s claims for relief are lodged in the Emoluments Clauses of the Constitution, which, by their terms, do not provide a cause of action or judicial remedy to anyone. Indeed, no court has ever enforced those Clauses against a President, despite the fact that prior Presidents have owned property while in office, producing income that could be attributed in part to domestic or foreign governments and officials. The District and Maryland’s expansive interpretation of the Clauses would lead to the conclusion that no President could, for example, own municipal bonds in his investment portfolio or attend an embassy dinner funded by a foreign country.

At its core, this action does not present a case or controversy for which courts can provide redress. Rather, it appears simply to seek to use the courts to assert pressure against a political figure, placing unjustified stress on the separation of powers. Such pursuit of political aims should instead be resolved through the political process.

Yet, despite the unique nature of this action, the district court, through a series of fragmented rulings, has sought to avoid appellate scrutiny of its orders denying the President's motions to dismiss. And given the procedural history in this case, I can only conclude that the district court has purposefully endeavored to ensure that the President will continue to be subjected to this unprecedented litigation. The majority now protects this course, ruling that the President must, while in office, defend himself from this most marginal of lawsuits.

It is marginal in several respects. *First*, the plaintiffs bring their claims directly under the Constitution—without a statutory cause of action—seeking to enforce the Emoluments Clauses, which, by their terms, bestow no rights and provide no remedies. *Second*, the suit seeks an injunction directly against a sitting President, the Nation's chief executive officer. *Third*, up until the series of suits brought recently against this President under the Emoluments Clauses, no court in our Nation's history has ever entertained a claim to enforce them. *Fourth*, this and similar suits recently filed against the President under the Emoluments Clauses raise novel and difficult constitutional questions, for which there is no precedent. *Fifth*, the District and Maryland have failed to adequately articulate either how they are

harmed by the President's alleged receipt of emoluments or how any harm so conceived could be redressed in court. In light of all this, allowing such a suit to go forward in the district court without resolution of controlling issues by a court of appeals will result in an unnecessary intrusion into the duties and affairs of a sitting President. Indeed, the dire and far-reaching consequences of permitting a court to create and define a new right under a structural clause of the Constitution, as well articulated by Judge Wilkinson in his separate dissenting opinion, threaten to undermine the very structural foundation of the Constitution.

In circumstances far less remarkable and dramatic than those before us, the Supreme Court has authorized the issuance of a writ of mandamus to rectify either a judicial usurpation of power or a clear abuse of judicial discretion. As both are involved here, issuance of the writ is entirely appropriate. And when the action is scrutinized under the authority conferred by the writ, it becomes apparent *at the threshold* that the District and Maryland lack constitutional standing to bring the action.

Disregarding the compelling circumstances calling for mandamus relief, the majority opinion addresses the issues only with indisputable *general* propositions—glossing over the specific facts and procedural maneuvers of the district court—that do not take into account the particular circumstances. This approach hardly engages the issues presented.

As explained herein and in Judge Wilkinson's opinion, above, I submit that the District and Maryland's action must be dismissed. And as our court is unwilling to step in to do so, I can only hope and expect that the

Supreme Court will do so under its well-established jurisprudence.

I

The District of Columbia and the State of Maryland commenced this action against Donald J. Trump in his official capacity as President of the United States, alleging that his continued interest in the Trump Organization—specifically in hotels and related properties—results in his receiving “emoluments” from various government entities and officials, both foreign and domestic, and that such receipts violate the Foreign and Domestic Emoluments Clauses of the U.S. Constitution. They later amended their complaint to assert the same claims against the President in his individual capacity.

With regard to the Foreign Emoluments Clause, the complaint alleges that the President is benefiting and will continue to benefit from the business conducted by the Trump Organization with foreign governments and officials. Focusing on the Trump International Hotel in Washington, D.C., in which the President has approximately a 76% interest, the complaint alleges that the Hotel markets itself to the diplomatic community and that, as a result, foreign officials have hosted events and “spent thousands of dollars on rooms, catering, and parking” at the Hotel. In addition to benefits received from the Hotel, the complaint also alleges that the President has violated the Foreign Emoluments Clause by receiving income and benefits from foreign governments and officials through other sources, such as Trump Tower and Trump World Tower in New York City and the international distribution of the television show “The Apprentice” and its spinoffs.

With regard to the Domestic Emoluments Clause, the complaint again focuses predominantly on the Trump International Hotel and alleges that the Hotel, which leases the Old Post Office Building from the General Services Administration (“GSA”), a federal agency, received a benefit from the GSA after the President’s inauguration. While the Hotel’s lease agreement provided that “[n]o . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom,” the GSA amended the lease agreement and issued a letter stating that the Hotel “is in full compliance with [the Lease] and, accordingly, the Lease is valid and in full force and effect.” The complaint claims that this “forbearing from enforcing” the terms of the original lease agreement amounts to an “emolument” that violates the Domestic Emoluments Clause.

To support their standing to sue the President, the District and Maryland allege that they suffer “harm to their sovereign and/or quasi-sovereign interests,” as well as “proprietary and other financial harms,” because of the President’s constitutional violations. Regarding sovereign interests in particular, Maryland alleges that it has a “sovereign interest in enforcing the terms on which it agreed to enter the Union,” and the District and Maryland allege that each has an interest in enforcing its laws relating to property that the President or his business organizations own or might seek to acquire. More specifically, the complaint alleges that:

The [President’s] acceptance or receipt of presents and emoluments in violation of the Constitution presents the District and Maryland with an intolerable

dilemma: either (1) grant the [Trump] Organization's requests for concessions, exemptions, waivers, variances, and the like and suffer the consequences, potentially including lost revenue and compromised enforcement of environmental protection, zoning, and land use regulations, or (2) deny such requests and be placed at a disadvantage vis-à-vis states and other government entities that have granted or will agree to such concessions.

In addition, the complaint alleges that the District and Maryland have a *parens patriae* interest in protecting their citizens from economic injury caused by the "payment of presents and emoluments to the [President's businesses]," asserting that such payments "tilt[] the competitive playing field toward his businesses, causing competing companies and their employees to lose business, wages, and tips."

Finally, with respect to their proprietary interests, the District alleges that it has a financial interest in the Walter E. Washington Convention Center, the D.C. Armory, and the Carnegie Library, and that its interests in those properties have been and continue to be harmed by the President's receipt of emoluments through the Trump International Hotel because such receipt allegedly gives the Hotel an unlawful competitive advantage. Maryland alleges similarly that it has a financial interest in the Montgomery County Conference Center in Bethesda and that the Center is suffering and will continue to suffer economic harm due to the competitive disadvantage resulting from the President's violations of the Emoluments Clauses.

For relief, the District and Maryland seek a declaratory judgment that the President is violating the Emoluments Clauses and an injunction prohibiting future violations. In particular, the District and Maryland have represented that an order directing the President to divest himself of his relevant business interests would be the most appropriate remedy for the violations they allege.

The President, in his official capacity, filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending that the District and Maryland lack standing and that they failed to state a claim under the Emoluments Clauses. He also filed a separate motion to dismiss in his individual capacity, alleging that he is absolutely immune from suit. The district court treated the issues raised by the President's motions in piecemeal fashion.

By an opinion and order dated March 28, 2018, the district court rejected the President's challenge to the District and Maryland's standing insofar as their claims were made in connection with the Trump International Hotel and its appurtenances in Washington, D.C. *See District of Columbia v. Trump*, 291 F. Supp. 3d 725, 732-33 (D. Md. 2018). The court found that the District and Maryland had "stated cognizable injuries to their quasi-sovereign, proprietary, and *parens patriae* interests," *id.* at 738, and concluded that such injuries were directly traceable to the President's alleged violations of the Emoluments Clauses, *id.* at 748-50. But the court granted the President's motion to the extent that the District and Maryland's claims were based on the operations of the Trump Organization *outside* the District of Columbia. *Id.* at 757-58.

Particularly as to the District and Maryland's alleged sovereign/quasi-sovereign interests, the district court noted that Trump Organization hotels had obtained "substantial tax concessions" from the District and from the State of Mississippi; that the GSA had amended the Hotel's lease agreement; and that the Governor of Maine had stayed at the Hotel during an official visit to Washington in the spring of 2017, suggesting that the District and Maryland "may very well feel themselves obliged, i.e., coerced, to patronize the Hotel in order to help them obtain federal favors." *Trump*, 291 F. Supp. 3d at 741-42.

As for the District and Maryland's proprietary interests, the court concluded that Maryland had sufficiently alleged injury based on competitive harm to the Montgomery County Conference Center and that the District had sufficiently alleged injury based on competitive harm to the Washington Convention Center. *Trump*, 291 F. Supp. 3d at 744-45. The court stated that the District and Maryland had "alleged sufficient facts to show that the President's ownership interest in the Hotel has had and almost certainly will continue to have an unlawful effect on competition, allowing an inference of impending (if not already occurring) injury" to Maryland and the District's proprietary interests. *Id.* at 745.

And regarding the District and Maryland's *parens patriae* interests, the court concluded that both the District and Maryland "have sufficiently stated a concrete injury-in-fact to their *parens patriae* interests in protecting the economic welfare of their residents." *Trump*, 291 F. Supp. 3d at 748. Citing the large size of the hospitality industry within and bordering Washington,

D.C., the court reasoned that “a large number of Maryland and District of Columbia residents are being affected and will continue to be affected when foreign and state governments choose to stay, host events, or dine at the Hotel rather than at comparable Maryland or District of Columbia establishments, in whole or in substantial part simply because of the President’s association with it.” *Id.*

In this March 28, 2018 opinion and order, the district court deferred ruling on the remaining issues raised by the President’s motion filed in his official capacity. It also stated that it would “deal with the viability of the individual capacity claims [against the President] in a subsequent Opinion and Order,” thus declining to address the President’s assertion of absolute immunity. *Trump*, 291 F. Supp. 3d at 733 n.4.

On July 25, 2018, the district court issued another opinion and order, broadly defining the term emolument as “any profit, gain, or advantage” and holding that the various benefits alleged in the complaint to have been received by the President therefore qualified as “emoluments” under the Emoluments Clauses. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 894-95 (D. Md. 2018). In this opinion, the district court deferred ruling on the President’s motion to dismiss the claims against him in his individual capacity based on absolute immunity and instead directed the parties to submit a discovery plan. *Id.* at 907.

On August 15, 2018, and again on December 3, 2018, the President requested, in filings submitted to the district court, that the court resolve the individual capacity motion to dismiss and rule on his assertion of absolute

immunity at its earliest convenience, expressing concern that continued deferral would deny him the benefits of immunity, complicate discovery, and otherwise adversely affect him. Nonetheless, on December 3—the very day the President had for the second time requested a ruling on the individual capacity motion to dismiss—the district court entered a discovery schedule contemplating six months of full fact discovery against the President in his official capacity.

In short, the district court denied the President’s motion to dismiss the claims against him in his official capacity insofar as they pertained to the Trump International Hotel in Washington, D.C. And it repeatedly deferred ruling on the President’s individual capacity claim of absolute immunity, instead ordering full discovery to proceed against the President in his official capacity.

The President filed a motion requesting that the district court certify its March 28 and July 15 orders under 28 U.S.C. § 1292(b) to authorize an interlocutory appeal. In particular, the President identified four issues as controlling legal questions warranting certification: “(1) [what is] the correct interpretation of the Emoluments Clauses; (2) whether Plaintiffs have asserted interests addressed by the Clauses and have an equitable cause of action under those Clauses; (3) whether Plaintiffs have Article III standing to pursue their claims; and (4) whether [the district court] has jurisdiction to issue the requested declaratory and injunctive relief against the President.” But the court denied the motion to certify its orders for appeal, concluding that its orders did not satisfy the statute’s criteria for certification—i.e., that an order involve a controlling question of law as to which

there is a substantial ground for difference of opinion and that an immediate appeal from such order would materially advance the ultimate termination of the litigation. *District of Columbia v. Trump*, 344 F. Supp. 3d 828, 844 (D. Md. 2018). In so concluding, the court reiterated the reasoning of its earlier rulings. *See id.* at 835-43.

Following the district court's denial of his motion for § 1292(b) certification, the President, in his official capacity, filed a petition for a writ of mandamus in this court, seeking an order "directing the district court to certify its orders denying dismissal of [the] plaintiffs' complaint for immediate appellate review" or "directing the district court to dismiss [the] plaintiffs' complaint outright." He also requested a stay of the district court proceedings pending resolution of the petition.

By order dated December 20, 2018, we granted the President's request for a stay and scheduled the President's petition for oral argument, directing that the parties be prepared to argue "not only the procedural issues regarding the mandamus petition but also the underlying issues of (1) whether the two Emoluments Clauses provide plaintiffs with a cause of action to seek injunctive relief and (2) whether the plaintiffs have alleged legally cognizable injuries sufficient to support standing to obtain relief against the President."

The three-judge panel that heard the case unanimously granted the President's petition for a writ of mandamus, directed the district court to certify its orders for immediate appeal, treated its orders as certified, and asserted appellate jurisdiction under § 1292(b). The panel then ordered that the case be dismissed for lack of constitutional standing. *See In re Trump*, 928

F.3d 360 (4th Cir. 2019). By order dated October 15, 2019, a majority of this court's judges voted to grant rehearing en banc, *see* 780 F. App'x 36 (4th Cir. Oct. 15, 2019), and oral argument proceeded before the en banc court on December 12, 2019.

II

With his petition for a writ of mandamus, the President requests that we direct the district court to certify its orders of March 28 and July 25, 2018, for interlocutory appeal under 28 U.S.C. § 1292(b), or, in the alternative, that we direct the district court to dismiss the District and Maryland's complaint outright.

The District and Maryland assert that § 1292(b) certification decisions are committed to the discretion of the district court and thus not reviewable through the extraordinary writ of mandamus. They note that the party seeking the writ must establish a clear and indisputable right to its issuance, which they maintain a party cannot do with respect to a district court's exercise of discretion.

The majority opinion rejects the assertion that § 1292(b) certification decisions are not reviewable through mandamus, acknowledging that “[i]f the district court ignored a request for [§ 1292(b)] certification, denied such a request based on nothing more than caprice, or made its decision in manifest bad faith, issuing the writ [of mandamus] might well be appropriate.” *Ante* at 14. The majority concludes, however, that such a showing has not been made. In doing so, it fails to account for the relevant facts and proceedings.

In the circumstances of this case, I would grant the narrower of the President's requests, issuing the writ to

direct the district court to certify its orders for immediate appeal. The facts and procedural history demonstrate that the district court's orders are paradigmatic orders for certification under § 1292(b) and that the district court clearly abused its discretion and usurped appellate jurisdiction in refusing to certify them. As such, this is an entirely appropriate case for mandamus relief directing § 1292(b) certification. I therefore find it unnecessary to reach the President's broader alternative argument that mandamus is also warranted to dismiss the suit outright, although there is certainly support for our authority to do so. *See, e.g., In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 41 (2d Cir. 2014) (granting writ of mandamus based on a clearly erroneous finding of personal jurisdiction and directing the district court to dismiss all claims against a particular defendant); *In re Dale Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996) (granting the writ and directing the district court to remand the entire case back to state court for lack of federal jurisdiction and observing that “[a]lthough the availability of permissive interlocutory appeal under § 1292(b) should normally militate against granting the writ, it is plain that any attempt to obtain certification in this case would have been futile”).

While § 1292(b) indisputably confers broad discretion upon district courts, *see Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995), the statute does not provide that a district court's exercise of discretion is unfettered and unreviewable. And the Supreme Court has repeatedly recognized that mandamus is appropriate in “exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (cleaned

up); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (“The writ is appropriately issued . . . when there is usurpation of judicial power or a clear abuse of discretion” (cleaned up)); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (“The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power” (cleaned up)). This case presents exactly the exceptional circumstances contemplated by the Supreme Court. A holistic review of the district court’s decisions, including its refusal to certify its orders for appeal under § 1292(b), reveals both a clear abuse of discretion—indeed amounting to whim and caprice—and a judicial usurpation of power in this most unusual case against the President of the United States, thus establishing his entitlement to the extraordinary remedy of mandamus.

A. Writ of Mandamus

As one of the writs authorized by the All Writs Act, 28 U.S.C. § 1651(a), the writ of mandamus has traditionally been used “in aid of appellate jurisdiction . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.” *Cheney*, 542 U.S. at 380 (cleaned up). And although the writ is “not [to] be used as a substitute for the regular appeals process,” *id.* at 380-81, in limited circumstances, its use “extends to those cases which are within [a court’s] appellate jurisdiction although no appeal has been perfected,” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943). This is meant to ensure that “appellate jurisdiction [is not] defeated and the purpose of the statute

authorizing the writ [is not] thwarted by unauthorized action of the district court obstructing the appeal.” *Id.*

It is well established that the party seeking the writ of mandamus must demonstrate (1) that it has a “clear and indisputable” right to its issuance; (2) that there are “no other adequate means” to obtain the desired relief; and (3) that the writ is “appropriate under the circumstances.” *Cheney*, 542 U.S. at 380-81. And Supreme Court precedent indicates that these requirements are satisfied in the event of *either* a judicial usurpation of power *or* a clear abuse of discretion. *See id.* at 380; *Schlagenhauf*, 379 U.S. at 110; *Bankers Life*, 346 U.S. at 383. Indeed, cases where the Supreme Court has granted the writ are varied and include those in which

unwarranted judicial action threatened ‘to embarrass the executive arm of the government in conducting foreign relations,’ *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943), where [granting the writ] was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *State of Maryland v. Soper*, 270 U.S. 9 (1926), where [granting the writ] was necessary to confine a lower court to the terms of an appellate tribunal’s mandate, *United States v. United States Dist. Court*, 334 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by [the Supreme] Court, *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *see McCullough v. Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706, 707 (1927) (dictum).

Will v. United States, 389 U.S. 90, 95-96 (1967) (cleaned up). These cases reveal a particular sensitivity to matters that may jeopardize the proper allocation of power among the three branches of government and between the various levels of the federal courts—the very concerns implicated in the case before us. The weighty considerations presented here and the fact that all three criteria for mandamus are well met strongly counsel in favor of granting the writ to require certification under § 1292(b). See *Fernandez-Roque v. Smith*, 671 F.2d 426, 431-32 (11th Cir. 1982) (noting certain “separation of powers” issues at stake before directing the district court to both rule on a threshold jurisdictional issue *and* certify its order for interlocutory appeal under § 1292(b)).

To begin, the President has a clear and indisputable right to issuance of the writ for two independent reasons. The first reason is the district court’s manifestly clear abuse of discretion in refusing to certify its orders for immediate appellate review under § 1292(b). As described in greater detail in Part II.B below, the district court’s conclusion that the criteria for certification under § 1292(b) were not satisfied was simply divorced from law and reality. The second reason is the district court’s usurpation of judicial power in attempting to insulate itself from appellate review, which is apparent from the pattern of actions taken by the district court to avoid creating an immediately appealable order.

A “clear and indisputable right” to mandamus relief based on the “usurpation of judicial power” arises when a district court acts outside its jurisdiction—for example, when there is an “action or omission on its part [that] has thwarted or tends to thwart appellate review

of the ruling.” *Roche*, 319 U.S. at 26. In such an instance, the writ is appropriately issued “to remove obstacles to appeal” rather than as a mere substitute for appeal. *Cf. id.* (holding that mandamus was not warranted where a trial court, in striking pleas in abatement, acted within its jurisdiction and in no way thwarted appellate review of its ruling). Such circumstances exist in this case. Even though each individual decision of the district court in this case purportedly fell within its jurisdictional purview, its several decisions, when viewed holistically, evince a purposeful intent by the court to insulate its rulings from appellate review. And the usurpation only continued when the district court acted beyond any judicial authority on the merits, as demonstrated by Judge Wilkinson in his accompanying opinion.

One of the ways in which the district court created obstacles to appeal relates to its treatment of the President’s individual capacity claim of absolute immunity. Because the District and Maryland’s claims against the President in both his official and individual capacities appear in one complaint filed in one case, any immediately appealable order with respect to the President in either capacity would grant this court jurisdiction to conduct appellate review. Yet, the district court’s continued deferral of a ruling on the President’s claim of absolute immunity—which would, if rejected, result in an immediately appealable order—shielded its decisions from any appellate review. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (explaining that orders denying claims of absolute immunity are immediately appealable collateral orders). This repeated deferral was particularly brazen in light of Supreme Court precedent that

“immunity questions should be decided at the earliest possible stage of the litigation.” *Clinton v. Jones*, 520 U.S. 681, 686 (1997); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Also, by declining to certify its orders under § 1292(b) when certification was clearly appropriate and instead declaring that its orders were “final and unreviewable,” *Trump*, 344 F. Supp. 3d at 833, the district court also avoided appellate review of the unique issues that lie at the heart of this litigation.

Through its treatment of both absolute immunity and denial of § 1292(b) certification, the district court contrived to retain the litigation at the district court level and then ordered full fact discovery, despite the President’s objection and representations that proceeding while his absolute immunity claim remained unresolved would “complicate discovery” and “ultimately lead to an inefficient allocation of party and judicial resources.” These actions by the district court are all the more troubling against the backdrop of clear pronouncements from the Supreme Court that “[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.” *Clinton*, 520 U.S. at 707; *see also id.* at 709 (assuming that, in litigation involving the President, district courts would be faithful “to the tradition . . . of giving the utmost deference to Presidential responsibilities” (cleaned up)).

In endeavoring to prevent an appealable order from materializing in this case, the district court inappropriately aggrandized its own jurisdiction and thereby abused judicial power. This alone was sufficient to afford the President the “clear and indisputable” right to the requested mandamus relief, particularly as the Supreme Court has “not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of ‘jurisdiction.’” *Kerr v. U.S. Dist. Ct. for N. Dist. Cal.*, 426 U.S. 394, 402 (1976); see also *Mallard v. U.S. Dist. Ct. for S. Dist. Iowa*, 490 U.S. 296, 309 (1989) (reversing the denial of a writ of mandamus where “the District Court plainly acted beyond its ‘jurisdiction’ as [Supreme Court] decisions have interpreted that term”). Confining district courts within the lawful limits of their jurisdiction and preventing “unauthorized action[s] . . . obstructing the appeal” lie at the core of the historical purposes underlying the mandamus remedy. *Roche*, 319 U.S. at 25; 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice And Procedure* § 3932 (3d ed. 2019) (“The most common traditional statement is that the extraordinary writs are available to a court of appeals to prevent a district court from acting beyond its jurisdiction, *or to compel it to take action that it lacks power to withhold*” (emphasis added)).

The right to mandamus relief is even more clear and indisputable when a petition for a writ of mandamus contains “a substantial allegation of usurpation of power” with respect to “an issue of first impression.” *Schlagenhauf*, 379 U.S. at 111. Here, not only did the President’s petition for mandamus allege the district court’s

usurpation of power, it correctly observed that the district court orders relied on “unprecedented legal theories,” as more fully described in Judge Wilkinson’s opinion. Indeed, when the district court denied § 1292(b) certification, only one other federal court had ever considered the novel issues on which the President sought certification, and that court had come down the other way. See *Citizens for Responsibility & Ethics in Washington (“CREW”) v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

It is thus readily apparent that the President has established the first requirement for a writ of mandamus. And the second two criteria easily follow in these unique circumstances. For one, the President has established that there are “no other adequate means” for him to obtain the desired relief. This prerequisite to mandamus relief “ensure[s] that the writ will not be used as a substitute for the regular appeals process.” *Cheney*, 542 U.S. at 380-81. But the requirement is met where, as here, a district court has usurped judicial power to obstruct that very process. See *Roche*, 319 U.S. at 30-31. And while we ordinarily recognize that inconvenience to litigants in waiting until final judgment is not a sufficient basis for granting mandamus, that is no reason to refrain where there are “special circumstances which would justify the issuance of the writ.” *Id.* The special circumstances here arise from the novelty of the issues raised and from the varied concerns implicated when the President is a litigant. As Chief Justice Marshall has observed, courts are not “required to proceed against the president as against an ordinary individual.” *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

Finally, it follows from the above that the last requirement for mandamus is also satisfied, as granting the writ in this case is “appropriate under the circumstances.” When the district court insulated itself from appellate review through capricious application of the § 1292(b) criteria and unwarranted deferral of a ruling on absolute immunity, it left no other mechanism for prompt appellate review of the threshold legal issues raised by the District and Maryland’s complaint, which asserts unprecedented claims directly against a sitting President. *See Cheney*, 542 U.S. at 382 (recognizing the “paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties”).

B. Section 1292(b) Certification

Focusing in particular on the denial of § 1292(b) certification, I conclude that the district court clearly abused its discretion and that such abuse is another reason underscoring the President’s “clear and indisputable” right to mandamus relief. *See In re Trump*, 781 F. App’x 1 (D.C. Cir. July 19, 2019) (per curiam) (holding that a district court in similar circumstances abused its discretion in refusing § 1292(b) certification).

Section 1292(b) provides a limited exception to the general principle that the courts of appeals may review only final orders of the district courts. *See* 28 U.S.C. § 1291. Section 1292(b) states, in relevant part:

When a district judge . . . shall be of the opinion that such order involves [1] a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal

from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order.

Id. § 1292(b). The statute thus confers initial discretion on the district court to determine whether its order meets the three criteria for certification. But once the court concludes that those criteria have been satisfied, its duty to certify becomes mandatory—the district judge “*shall* so state in writing in such order”—and discretion is then vested in the court of appeals to determine whether to “permit an appeal to be taken from such order.” *Id.* (emphasis added).

The District and Maryland argue that this “dual gatekeeper system” forecloses an appellate court’s exercising its discretion when a district court has declined to certify an order for appeal. As a general proposition and for most cases, I agree. Disturbing an exercise of the discretion conferred on district courts to determine whether to certify orders for interlocutory appeal should be rare and occur only when a clear abuse of discretion is demonstrated or when that action usurps judicial power. This is so because § 1292(b), while mandating certification when the statutory criteria are met, nonetheless places broad discretion in the district courts to determine whether the criteria are satisfied. The statute confers discretion on courts of appeals as a separate and distinct aspect of its operation, providing that “[t]he Court of Appeals . . . may thereupon [after the district court’s certification], *in its discretion*, permit an appeal to be taken from such order.” 28 U.S.C.

§ 1292(b) (emphasis added). Section 1292(b) thus creates a two-step process in which the district court and the court of appeals exercise their discretion sequentially and independently.

But this does not mean that the district court's discretion in refusing to certify is unfettered and unreviewable, and the statute does not so provide. *See In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 837, 839 (5th Cir. 1984) (concluding that "the [district] court's refusal to certify [under § 1292(b)] in the circumstances constitute[d] an abuse of discretion," vacating the order denying § 1292(b) certification, and sending the case back with a "request that the district court certify its interlocutory order for appeal") *overruled on other grounds by In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987), *which was vacated by Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989) (mem.); *see also Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (recognizing that "[i]f a district court refuses certification . . . then a party may petition for a writ of mandamus" (cleaned up)); *Fernandez-Roque*, 671 F.2d at 431-32 (issuing a writ of mandamus directing the district court to rule on whether it had subject matter jurisdiction and then certify that ruling for interlocutory appeal under § 1292(b), concluding that the case "present[ed] the truly 'rare' situation in which it [was] appropriate for [the appellate court] to require certification of a controlling issue of national significance").

Such review, however, should be limited to circumstances where a district court's discretion is not "guided by sound legal principles" but by "whim," such that the

court of appeals can conclude that the district court’s actions amounted to a clear abuse of that discretion. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931-32 (2016) (cleaned up) (addressing generally the nature of “discretion”). Moreover, when a district court determines that the statutory criteria are present, it has a “*duty . . . to allow an immediate appeal to be taken.*” *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (emphasis added); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009). The district court cannot circumvent this duty by exercising its discretion to analyze the criteria in a manner unmoored from the governing legal principles, especially when its underlying order “involves a new legal question or is of special consequence,” *Mohawk*, 558 U.S. at 111.

Because it is readily apparent in this case that the district court’s underlying orders clearly met the three criteria for certification under § 1292(b), the court’s contrary determination was not “guided by sound legal principles” and thus amounted to a clear abuse of discretion. Indeed, its reasoning was completely divorced from governing law and factual reality.

First, the four issues on which the President sought certification—how to define “emoluments”; whether the District and Maryland have an implied equitable cause of action directly under the Emoluments Clauses; whether the District and Maryland have standing; and whether the district court could grant their requested relief against the President—amount to controlling questions of law. Certainly, each presents a “pure question of law, i.e., an abstract legal issue that the court of appeals can decide quickly and cleanly” without the need “to

delve beyond the surface of the record in order to determine the facts.” *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340-41 (4th Cir. 2017) (cleaned up). And these legal questions involve novel threshold matters that go to the heart of whether the case may proceed at all. They are thus “controlling.” See *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (noting that “controlling” in § 1292(b) “means serious to the conduct of the litigation, either practically or legally” (citation omitted)).

Second, there can be no dispute that there was substantial ground for difference of opinion with respect to the resolution of these controlling legal questions. As the President noted, the district court was “the first ever to permit a party to pursue relief under the Emoluments Clauses for alleged competitive injury—or for any injury for that matter,” and therefore the relevant questions are far from settled. The district court dismissed this novelty by reciting the general proposition that “numerous cases have found that a firm has constitutional standing to challenge a competitor’s entry into the market,” but it provided no authority applying that proposition to a direct claim under the Constitution, let alone a direct claim under the Emoluments Clauses. *Trump*, 344 F. Supp. 3d at 841 (cleaned up). In doing so, the court failed to engage the reality that, among other things, no previous court had enforced the Emoluments Clauses; that no decision had defined what “emoluments” are; that no prior decision had determined that a party can sue directly under the Emoluments Clauses when the constitutional provisions, by their terms, bestow no rights and specify no remedies; and that no case had held that a State has standing to sue the President

for alleged injury to its proprietary or sovereign interests from a violation of the Emoluments Clauses. One can hardly question that the case is replete with “new legal question[s]” of “special consequence.” *Mohawk*, 558 U.S. at 111.

Indeed, at the time of the district court’s decision denying § 1292(b) certification, the Southern District of New York was the only other court to have considered a cause of action under the Emoluments Clauses, and that court ruled differently than did the district court here. *See CREW*, 276 F. Supp. 3d at 188. Yet, the district court dismissed the incongruity between its reasoning and the reasoning in *CREW* out of hand, characterizing the New York court’s reasoning as “pure dicta” and asserting without further explanation that the “President’s reliance on the *CREW* decision reflects—at best—an instance of judges applying the law differently. It does not demonstrate, as is required for interlocutory appeal, that courts themselves disagree as to what the law is.” *Trump*, 344 F. Supp. 3d at 838-39 (cleaned up).

The New York district court’s decision in *CREW*, however, was not merely an instance of a court applying the same settled law to a different set of facts. There, as here, the plaintiffs were owners of establishments that catered to foreign and domestic government clientele and allegedly competed with the President’s establishments. The New York plaintiffs asserted a theory of harm under the Emoluments Clauses that is nearly identical to the theory asserted by the District and Maryland in this case, even referencing many of the same factual examples of foreign diplomats patronizing the President’s hotels. *See CREW*, 276 F. Supp. 3d at 182. It thus blinks reality to suggest that opinion in *CREW*—

which addressed the issue of competitor standing and the type of harms encompassed by the Emoluments Clauses on nearly identical facts—did not signify the existence of a substantial difference of opinion on these issues. Moreover, even though the district court’s opinion in *CREW* has since been vacated, the resulting Second Circuit decision and dissent likewise illustrate that there remain substantial grounds for difference of opinion on these controlling legal questions. See *CREW v. Trump*, 939 F.3d 131 (2d Cir. 2019).

Third and finally, there can be no doubt that prompt appellate resolution of these threshold questions could “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b); see also *McFarlin v. Consecro Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (“[T]he text of § 1292(b) requires that resolution of a ‘controlling question of law . . . may materially advance the ultimate termination of the litigation.’ This is not a difficult requirement to understand. It means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation” (citation omitted)). A determination on the threshold justiciability issues raised by the President’s request for § 1292(b) certification would either terminate the case outright or, at the very least, serve to focus the challenge, inform discovery, and thereby shorten the litigation.

Despite the clarity with which each § 1292(b) factor was met in this case, the district court nonetheless declined to certify its orders and declared that its decision to deny such certification was “final and *unreviewable*.” *Trump*, 344 F. Supp. 3d at 833 (emphasis added). While there are surely varied circumstances in which a

district court can justifiably be “of the opinion” that its order does not satisfy § 1292(b)’s certification criteria, this is not one of them. As the D.C. Circuit recently recognized in a similar case under the Emoluments Clauses, when a district court’s orders “squarely meet the criteria for certification under § 1292(b),” it is an abuse of discretion for a district court to refuse a request for certification. *In re Trump*, 781 F. App’x at 2.

In sum, a district court’s refusal to certify its orders for appellate review under § 1292(b) creates a “clear and indisputable” right to mandamus relief in circumstances where the denial amounts to a clear abuse of discretion or the usurpation of judicial power. In its effort to retain jurisdiction, the district court’s conduct in this case constituted both. As such, mandamus is appropriate “in aid of . . . jurisdiction” lest “the purpose of the statute authorizing the writ [be] thwarted by unauthorized action of the district court obstructing the appeal.” *Roche*, 319 U.S. at 25.

III

Alternatively, I conclude that we have appellate jurisdiction over at least the district court’s effective denial of the President’s motion to dismiss on the basis of absolute immunity, as demonstrated in my dissenting opinion filed today in *District of Columbia v. Trump*, No. 18-2488. And having appellate jurisdiction on that basis, I would remand this action to the district court to dismiss it on the ground that the District and Maryland lack constitutional standing to bring the action, as shown in Part V below.

IV

With respect to the President's motion to dismiss the official capacity claims, the President presented numerous arguments to the district court flowing from the complex question of "whether and when the President is subject to suit under the Emoluments Clauses." The Foreign Emoluments Clause provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8. And the Domestic Emoluments Clause provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

U.S. Const. art. II, § 1, cl. 7. Neither Clause expressly confers any rights on any person, nor does either Clause specify any remedy for a violation. Rather, they are structural provisions concerned with public corruption and undue influence. In particular, the Foreign Emoluments Clause is concerned with preventing U.S. officials from being corrupted or unduly influenced by gifts or titles from foreign governments. *See 2 The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., 1911) ("Mr. Pinkney urged the necessity of preserv-

ing foreign Ministers & other officers of the U.S. independent of external influence and moved to insert [the Foreign Emoluments Clause]”); 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 465 (Jonathan Elliot ed., 2d ed. 1836) (“The [Foreign Emoluments Clause] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state. . . . This restriction is provided to prevent corruption”). And the Domestic Emoluments Clause is concerned with ensuring presidential independence and preventing improper influence by the States. *See The Federalist No. 73*, at 378-79 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990) (“Neither the Union nor any of its members will be at liberty to give, nor will he be at liberty to receive any other emolument, than that which may have been determined by the first act. He can of course have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution”).

As the Clauses do not expressly confer any rights or provide any remedies, efforts to enforce them in courts were virtually nonexistent prior to President Trump’s inauguration in 2017. In that year, however, three separate complaints were filed against the President alleging Emoluments Clauses violations, including the complaint filed in this case. *See* Complaint, *CREW v. Trump*, No. 1:17-cv-458 (S.D.N.Y. Jan. 23, 2017); Complaint, *Blumenthal v. Trump*, No. 1:17-cv-1154 (D.D.C. June 14, 2017); Complaint, *District of Columbia v. Trump*, No. 8:17-cv-1596 (D. Md. June 12, 2017).

In view of the nature, purpose, and language of the Clauses, there are numerous issues that would have to

be resolved before allowing the case against the President to go forward. Because the District and Maryland have no express cause of action, statutory or otherwise, they rely on the district court's "inherent authority to grant equitable relief," citing the Supreme Court's recognition that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The President acknowledges this authority in the abstract but points to the Supreme Court's instruction that "[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (cleaned up). And he contends that the relief sought by the District and Maryland was not "traditionally accorded by courts of equity." *Id.* at 319. As the President notes, the typical case in which plaintiffs sue to enjoin unconstitutional conduct without a statutory cause of action involves the "anti-suit injunction," a traditional equitable cause of action that "permit[s] potential defendants in legal actions to raise in equity a defense available at law." *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Because the District and Maryland's suit falls outside the scope of this kind of case, the President contends that allowing the suit to proceed would in effect recognize an entirely new class of equitable action.

Beyond that threshold question lie issues relating to whether the District and Maryland have an interest sufficient to bring a suit under the Emoluments Clauses. Not only would they need to show that the alleged violation caused them harm, but they would also need to show that such harm fell within the zone of interests protected by the Clauses. See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); see also *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)). The President maintains that the interests asserted by the District and Maryland are “so marginally related to the Emoluments Clauses’ zone of interests” that they do not “remotely establish the type of private right needed” to make such a showing.

For relief, moreover, the District and Maryland seek an injunction against the President himself, a form of relief that the Supreme Court has termed “extraordinary” and has advised should “raise[] judicial eyebrows.” *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Indeed, as Judge Wilkinson notes, we generally lack the power to “sustain[] [an] injunction against the President in his official capacity.” *Ante* at 39; see also *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866) (making clear that “[a]n attempt on the part of the judicial department of the government to enforce the performance of” the President’s duty “to see that the laws are faithfully executed” “might be justly characterized, in the language of Chief Justice Marshal[l], as ‘an absurd and excessive extravagance’”); *Franklin*, 505 U.S. at 826-27 (Scalia, J., concurring in part and concurring in the judgment) (noting that the Court is without

authority to “require [the President] to exercise the ‘executive Power’ in a judicially prescribed fashion” or to “issue a declaratory judgment against the President” because “compell[ing] [him] personally to defend his executive actions before a court” would be “incompatible with his constitutional position”).

In addition, as Judge Wilkinson also explains, “The text, structure, and history of the Constitution make plain that it is Congress and the people, not the federal courts, that are best positioned to address a President’s alleged violation of the Clauses—whatever they may be said to mean.” *Ante* at 50.

While all of these issues and more presented by the President to the district court do indeed raise an array of substantial questions about the viability of this action, the threshold matter that we must decide is whether the District and Maryland have standing under Article III to pursue their claims, a question that goes to our judicial power. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-102 (1998).

V

The requirements for Article III standing are well established, and they apply in all cases regardless of the plaintiff or the particular theory of standing being asserted. As the Supreme Court has explained:

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the exe-

cution of that function, courts have no charter to review and revise legislative and executive action. This limitation is founded in concern about the proper—and properly limited—role of the courts in a democratic society.

The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction. He bears the burden of showing that he has standing for each type of relief sought. To seek injunctive relief, a plaintiff must show that he is under threat of suffering “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. This requirement assures that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) (cleaned up). And, of course, an “assumption that if [the plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (cleaned up); cf. *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“[T]he absence of” a proper “individual or class to litigate” supports the conclusion that “the subject matter is committed to . . . the political process”).

In denying the President’s motion to dismiss for lack of standing, the district court concluded that the District and Maryland sufficiently showed standing based on (1) the alleged harm to their proprietary interests in properties that were in competition with the Trump International Hotel in Washington, D.C.; (2) the alleged harm to their *parens patriae* interests on behalf of their residents’ competitive interests that were similarly harmed; and (3) the alleged harm to their quasi-sovereign interests in not facing pressure to grant the President’s businesses favorable treatment. The District and Maryland rely on these theories on appeal, and I address each in turn.

A

The district court held that the District and Maryland have standing based on harm to the District’s proprietary interest in the Washington Convention Center and Maryland’s proprietary interest in the Montgomery County Conference Center, reasoning that the President’s receipt of emoluments from the Trump International Hotel provides the Hotel with an illegal competitive advantage and thus diverts business away from these properties. *See Trump*, 291 F. Supp. 3d at 742-45. In so holding, the court accepted the District and Maryland’s invocation of the “competitive standing doctrine,” the “nub” of which is that “when a challenged . . . action authorizes allegedly illegal transactions that will almost surely cause [the plaintiff] to lose business, there is no need to wait for injury from specific transactions.” *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001) (cleaned up).

But even were the “competitive standing doctrine” to be accepted in this circuit, the doctrine is an *application*

of Article III standing principles, not a *relaxation* of them. See *DEK Energy*, 248 F.3d at 1195. Thus, we must still determine whether the standard requirements for Article III standing are satisfied. And this requires assessing whether the District and Maryland have sufficiently pleaded that President Trump’s conduct—i.e., his receipt of funds from foreign and state governments patronizing the Hotel—has caused harm to their proprietary interests and that enjoining that conduct would redress such harm. See *Summers*, 555 U.S. at 492-93. Upon conducting that assessment, I conclude that the District and Maryland’s complaint fails to make the necessary showing.

To begin, the District and Maryland’s theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends to the President*, rather than due to a more general interest in currying favor with the President or because of the Hotel’s branding or other characteristics. Such a conclusion, however, is not only economically illogical, but it also requires speculation into the subjective motives of independent actors who are not before the court, thus precluding a finding of causation. See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 413 (2013) (“[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment”); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (“[T]he injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court”); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.

26, 28, 42-43, 45-46 (1976) (holding that indigent plaintiffs, who alleged that a regulation allowing favorable tax treatment to certain hospitals that provided only limited services to indigent patients “encouraged” those hospitals to deny them service, lacked standing to challenge the regulation, reasoning that it was “purely speculative whether the denials of service specified in the complaint fairly [could] be traced” to the regulation or “instead result[ed] from decisions made by the hospitals without regard to the tax implications” and that it was “equally speculative” whether the plaintiffs’ desired injunction would result in them receiving service); *Linda R.S. v. Richard D.*, 410 U.S. 614, 615-19 (1973) (holding that a mother lacked standing to seek an injunction to force the prosecution of her child’s father for failing to pay child support, reasoning that because prosecution would result only in the father being jailed, it was overly “speculative” whether an injunction would result in future child support payments); *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (dismissing appeal for lack of Article III standing, reasoning that the plaintiff’s theory of standing “depend[ed] on the independent actions of third parties, [thus] distinguishing its case from the ‘garden variety competitor standing cases’ which require a court to simply acknowledge a chain of causation ‘firmly rooted in the basic law of economics’” (citation omitted)); *Am. Soc’y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 149-50 (D.C. Cir. 1977) (concluding that plaintiffs’ claim of competitive harm was “too speculative to support standing,” reasoning that customers “might for a variety of reasons continue to prefer” competitors even if the plaintiffs prevailed). Indeed, there is a distinct possibility—which was completely ignored by the District and Maryland, as well as

by the district court—that certain government officials might *avoid* patronizing the Hotel because of the President’s association with it. See *United Transp. Union v. ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989) (rejecting standing where it was “wholly speculative” whether the challenged conduct would “harm rather than help” the plaintiffs).

To be sure, the Second Circuit, in a split decision, did recently find that competitor standing existed in a parallel Emoluments Clauses case. See *CREW*, 939 F.3d at 142-48. But it was able to do so only by applying a generalized analysis of causation and traceability and attempting to distinguish the Supreme Court’s decision in *Simon v. Eastern Kentucky Welfare Rights Organization*. Specifically, rather than analyzing how the New York properties’ distribution of income to the President gives those properties a competitive advantage over their competitors, the Second Circuit simply reiterated the causation standard at a highly general level and stated that there was “a substantial likelihood that [the plaintiffs’] injury [was] the consequence of the challenged conduct.” 939 F.3d at 145. Taking language from the Supreme Court’s decision in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666 (1993), out of context, it concluded that plaintiffs need only allege injury “caused by a defendant’s unlawful conduct that skewed the market in another competitor’s favor, notwithstanding other possible, even likely, causes for the benefit going to the plaintiff’s competition.” *CREW*, 939 F.3d at 146. But what the Second Circuit failed to explain is how a President’s direct receipt of income from a hotel investment—as opposed to,

for example, his family members' receipt of that income—could have skewed the market in his favor. Moreover, the Second Circuit strained unsuccessfully, I submit, to distinguish *Simon*—a precedent that should have foreclosed a finding that standing had been sufficiently alleged. See *CREW*, 939 F.3d at 169 (Walker, J., dissenting) (citing *Simon* to conclude that the plaintiffs' complaint failed to rise above speculation).

The inevitable conclusion in this case remains that there is no logical economic causation between the Trump Hotel's distribution of income to the President and harm to the Hotel's competitors. Significantly, the plaintiffs have failed to explain why the Hotel's allegedly unlawful competitive advantage would not continue at its same strength if, as is likely if divestiture were required, the Hotel's income were instead distributed to a member of the Trump family. The President's personal receipt of income from the Hotel surely does not have a predictable effect on the decisions of third parties as to whether to patronize the Hotel nor a predictable effect of skewing the market in which the plaintiffs allegedly compete. Cf. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding that plaintiffs had Article III standing where their "theory of standing . . . rel[ied] . . . on the predictable effect of Government action on the decisions of third parties"). As such, any causal link between the President's receipt of proceeds from his establishments and government officials' decisions on whether to patronize those establishments remains "unadorned speculation." *Simon*, 426 U.S. at 44.

Relatedly, it is unlikely that the relief the District and Maryland seek—a court order directing the President to divest himself of his interest in the Hotel—

would cause government officials to cease spending money at the Hotel, which demonstrates a lack of redressability that independently bars a finding of standing. Even if government officials were patronizing the Hotel to curry the President's favor, there is no reason to conclude that they would stop doing so were the President to assign his interest in the Hotel to a family member. After all, the Hotel would still be publicly associated with the President and would still bear his name. Even after divestment, government officials could still well believe that continuing to patronize the Hotel would be an effective means of earning the President's favor. In short, the causal link between government officials' patronage of the Hotel and the Hotel's payment of profits or dividends to the President himself is simply too attenuated, and there is no indication that the District and Maryland's requested relief would redress their alleged injury.

At bottom, the District and Maryland are left to rest on the theory that so long as a plaintiff competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met. But such a "boundless theory of standing" has been expressly rejected by the Supreme Court:

Taken to its logical conclusion, the theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing. The cases [the plaintiff] cites for this remarkable proposition stand for no such

thing. In each of those cases, standing was based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor.

Already, LLC v. Nike, Inc., 568 U.S. 85, 99 (2013) (citing *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 666 and *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115 (1974)).

Accordingly, I would reject the District and Maryland's argument that they have Article III standing based on harm to their proprietary interests.

B

The district court also concluded that the District and Maryland have *parens patriae* standing to protect the economic interests of their citizens, accepting the argument that the District and Maryland's "residents are harmed by the President's alleged violations of both Emoluments Clauses because the competitive playing field is illegally tilted towards the President's Hotel." *Trump*, 291 F. Supp. 3d at 746. But, at bottom, the harm from which the District and Maryland are purportedly seeking to protect their citizens is exactly the same type of harm that they allege with respect to their own proprietary interests. Their theory of *parens patriae* standing thus hinges on the same attenuated chain of inferences as does their theory of proprietary harm, and it accordingly suffers from the same defects.

While the District and Maryland rely on *Massachusetts v. EPA*, 549 U.S. 497 (2007), it provides them little help. In concluding that Massachusetts had standing to challenge an EPA decision, the Supreme Court relied

on Massachusetts’s own “particularized injury in its capacity as a landowner” and its “well-founded desire to preserve its sovereign territory,” *id.* at 519, 522, as well as the procedural right and express cause of action provided by Congress, *id.* at 520. Neither factor is present here.

Thus, I would reject the District and Maryland’s assertion of Article III standing based on their *parens patriae* interests.

C

Finally, the district court concluded that the District and Maryland have standing based on injury to their quasi-sovereign interests, *see Trump*, 291 F. Supp. 3d at 740-42, thus accepting the District and Maryland’s argument that “their injury is the violation of their constitutionally protected interest in avoiding entirely pressure to compete with others for the President’s favor by giving him money or other valuable dispensations” and that it is the “opportunity for favoritism” that disrupts the balance of power in the federal system and injures the District and Maryland.

In essence, the interest alleged to have been harmed in this manner amounts to no more than a general interest in having the law followed. And the Supreme Court has “consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Lujan v. Defs. of Wildlife*, 504 U.S.

555, 573-74 (1992). Rather, to seek injunctive and declaratory relief, “a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized” and that “the threat [is] *actual and imminent, not conjectural or hypothetical.*” *Summers*, 555 U.S. at 493 (emphasis added); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586 (1972) (“It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack a personal stake in the outcome of the controversy” (cleaned up)); *Beck v. McDonald*, 848 F.3d 262, 270-76 (4th Cir. 2017). The District and Maryland’s assertion of injury to their quasi-sovereign interests fails to satisfy these requirements.

Indeed, this theory of standing is strikingly similar to the theory rejected in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). The plaintiffs in *Schlesinger* alleged that certain members of Congress were violating the Incompatibility Clause, which provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office,” U.S. Const. art. I, § 6, cl. 2. To support Article III standing, the plaintiffs claimed that they “suffered injury because Members of Congress holding a . . . position in the Executive Branch were . . . subject to the possibility of undue influence.” *Schlesinger*, 418 U.S. at 212. The Court, with reasoning that is strikingly applicable here, concluded that the plaintiffs lacked standing:

[I]t is nothing more than a matter of speculation whether the claimed nonobservance of that Clause

deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury. . . .

* * *

. . . [T]he District Court acknowledged that any injury resulting from the reservist status of Members of Congress was hypothetical, but stressed that the Incompatibility Clause was designed to prohibit such potential for injury. This rationale fails, however, to compensate for the respondents' failure to present a claim under that Clause which alleges concrete injury. The claims of respondents here . . . would require courts to deal with a difficult and sensitive issue of constitutional adjudication on the complaint of one who does not allege a personal stake in the outcome of the controversy. . . .

* * *

Furthermore, to have reached the conclusion that respondents' interests as citizens were meant to be protected by the Incompatibility Clause because the primary purpose of the Clause was to insure independence of each of the branches of the Federal Government, similarly involved an appraisal of the merits before the issue of standing was resolved. All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant

to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a ‘case or controversy’ appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Closely linked to the idea that generalized citizen interest is a sufficient basis for standing was the District Court’s observation that it was not irrelevant that if respondents could not obtain judicial review of petitioners’ action, ‘then as a practical matter no one can.’ Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.

Id. at 217, 224, 226-27 (cleaned up); *see also Richardson*, 418 U.S. at 168-71 (holding that the plaintiff lacked standing to sue to enforce the Accounts Clause, U.S. Const. art. I, § 9, cl. 7, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”); *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (holding that the plaintiff lacked standing to challenge Justice Black’s appointment under the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2, which provides that “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time”).

As in these cases, the District and Maryland’s interest in constitutional governance is no more than a generalized grievance, insufficient to amount to a case or controversy within the meaning of Article III. *See Valley Forge Christian Coll.*, 454 U.S. at 482-87; *see also Schlesinger*, 418 U.S. at 222 (“To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction’”).

VI

Accordingly, in the unique circumstances of this case, I would grant the President’s petition for a writ of mandamus and direct the district court to certify its orders of March 28 and July 25, 2018, for interlocutory appeal. Moreover, rather than remanding the case to the district court simply to have it go through the ministerial task of certifying its orders, I would take the district court’s orders as certified and grant permission to the President to appeal those orders, thus taking jurisdiction under § 1292(b). It is all but certain that the district court would certify its orders if we were to remand this case with instructions to do so, as confirmed by what recently occurred in one of the parallel emoluments cases. *See Blumenthal v. Trump*, No. 17-1154, 2019 WL 3948478, at *3 (D.D.C. Aug. 21, 2019) (certifying dismissal orders for immediate appeal under § 1292(b) upon a remand order from the D.C. Circuit stating that “the dismissal orders squarely met the criteria for certification” (cleaned up)).

Alternatively, as explained in my companion opinion in No. 18-2488, I would exercise appellate jurisdiction over the district court's effective denial of the President's claim of absolute immunity. *See Nixon*, 457 U.S. at 742 (noting that orders denying claims of absolute immunity are appealable collateral orders).

And on the issues raised, I would hold, as a threshold matter, that the District and Maryland lack Article III standing to pursue their claims against the President in either his official or individual capacity.

Therefore, I would reverse the district court's orders denying the President's motion to dismiss filed in his official capacity, and, consistent with my related opinion in No. 18-2488 addressing the President's motion to dismiss in his individual capacity, I would remand with instructions that the district court dismiss the District and Maryland's complaint in its entirety.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2486

IN RE DONALD J. TRUMP, PRESIDENT OF THE UNITED
STATES OF AMERICA, IN HIS INDIVIDUAL CAPACITY,
PETITIONER

PROFESSOR CLARK D. CUNNINGHAM;
PROFESSOR JESSE EGBERT, AMICI CURIAE,
SCHOLAR SETH BARRETT TILLMAN; JUDICIAL
EDUCATION PROJECT, AMICI SUPPORTING PETITIONER,
FORMER NATIONAL SECURITY OFFICIALS;
COMMONWEALTH OF VIRGINIA; THE NISKANEN
CENTER; REPUBLICAN WOMEN FOR PROGRESS;
CHERI JACOBUS; TOM COLEMAN; EMIL H. FRANKEL;
JOEL SEARBY; ADMINISTRATIVE LAW,
CONSTITUTIONAL LAW, AND FEDERAL COURTS
SCHOLARS; CERTAIN LEGAL HISTORIANS,
AMICI SUPPORTING RESPONDENTS

Argued: Mar. 19, 2019

Decided: July 10, 2019

On Petition for Writ of Mandamus from
the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, Senior District Judge.
(8:17-cv-01596-PJM)

Before NIEMEYER and QUATTLEBAUM, Circuit Judges,
and SHEDD, Senior Circuit Judge.

NIEMEYER, Circuit Judge:

The District of Columbia and the State of Maryland commenced this action against Donald J. Trump in his official capacity as President of the United States and in his individual capacity, alleging that he violated the Foreign and Domestic Emoluments Clauses of the U.S. Constitution. The Foreign Emoluments Clause provides that no officer of the United States shall “accept” any “present, Emolument, Office, or Title . . . from any King, Prince, or foreign State.” U.S. Const. art. I, § 9, cl. 8. And the Domestic Emoluments Clause provides that the President shall receive “Compensation” “for his Services” but not “any other Emolument” from the United States or any State. U.S. Const. art. II, § 1, cl. 7. The District and Maryland contend that the President’s “continued ownership interest in a global business empire” provides him with “millions of dollars in payments, benefits, and other valuable consideration from foreign governments and persons acting on their behalf, as well as federal agencies and state governments,” and that the President is therefore receiving “emoluments” that are prohibited by the Clauses.

In their complaint, the District and Maryland allege that the President’s ongoing constitutional violations harm their sovereign, quasi-sovereign, and proprietary interests, particularly (1) Maryland’s interest as a separate sovereign State in securing adherence to the terms on which it agreed to enter the Union; (2) the District and Maryland’s interests in not being pressured to grant, or being perceived as granting, “special treat-

ment to the [President] and his extensive affiliated enterprises”; (3) the District and Maryland’s interests in protecting the economic well-being of their residents, who, as competitors of the President, are injured by “decreased business, wages, and tips resulting from economic and commercial activity diverted” to the President’s businesses; (4) Maryland’s interest in avoiding a “reduction in tax revenue that flows from [the alleged] violations”; and (5) the District and Maryland’s interests as proprietors of businesses that compete with the President’s businesses. For relief, the District and Maryland seek a declaratory judgment that the President has violated the Emoluments Clauses and injunctive relief prohibiting future violations.

The President, in his official capacity, filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending, among other things, that the District and Maryland lack standing to bring their action; that they do not have equitable causes of action to enforce the Emoluments Clauses; and that he has not received “emoluments” as prohibited by the Clauses. The President also filed a separate motion to dismiss in his individual capacity under Rules 12(b)(1) and 12(b)(6), contending additionally that he has absolute immunity.

The district court treated the President’s motions piecemeal. First, by an opinion and order dated March 28, 2018, the court denied the President’s motion filed in his official capacity “insofar as it dispute[d] Plaintiffs’ standing to challenge the involvement of the President with respect to the Trump International Hotel in Washington, D.C. and its appurtenances and any and all operations of the Trump Organization with respect to the

same”; it granted the motion with respect to the “operations of the Trump Organization and the President’s involvement in the same outside the District of Columbia,” concluding that the District and Maryland lacked standing to pursue any claims premised on such operations; and it deferred ruling on the other questions raised by the motion. The court also deferred ruling on the motion filed by the President in his individual capacity. Then, by an opinion and order dated July 25, 2018, the court concluded that the District and Maryland’s complaint stated valid claims under the Emoluments Clauses and accordingly denied the President’s motion to dismiss filed in his official capacity insofar as the claims were made against him with respect to the Trump International Hotel and all its appurtenances in Washington, D.C. The court again deferred ruling on the President’s motion to dismiss filed in his individual capacity, which included the President’s assertion of absolute immunity. Also with the July 25 order, the court directed the parties to submit a joint recommendation with respect to the next steps to be taken in the litigation, including an outline of proposed discovery.

The President, contending that the district court’s rulings in both orders involved “controlling question[s] of law as to which there [was] substantial ground for a difference of opinion and that an immediate appeal from the order[s] [would] materially advance the ultimate termination of the litigation,” filed a motion with the district court requesting that the court certify its orders for appeal under 28 U.S.C. § 1292(b). By order dated November 2, 2018, the court denied the motion, concluding that “the President has failed to identify a controlling question of law decided by this court as to which there

is a substantial ground for difference of opinion justifying appellate review that would materially advance the ultimate termination of the case or even the material narrowing of issues.” This ruling left the action to proceed forward in the district court, including discovery against the President.

Seeking to avoid “intrusive discovery into [his] personal financial affairs and the official actions of his Administration,” the President in his official capacity then filed a petition for a writ of mandamus in this court seeking an order (1) directing the district court to certify its orders for appeal under § 1292(b), or (2) directing the court to dismiss the District and Maryland’s complaint outright. He also filed a motion for a stay of the district court proceedings. While acknowledging that “a district court normally has wide discretion to determine whether the criteria for certification under § 1292(b) are satisfied,” the President contends that mandamus “is a necessary safety valve in the extraordinary situation here, where a district court has insisted in retaining jurisdiction over what all reasonable jurists would recognize is a paradigmatic case for certification of [an] interlocutory appeal under § 1292(b).” The President also filed an appeal with respect to the court’s failure to address his assertion of absolute immunity on the claims made against him in his individual capacity, contending that by opening discovery against him, the court effectively denied him immunity.

By order dated December 20, 2018, we granted the President’s motion for a stay of the proceedings in the district court pending our rulings on his petition for a writ of mandamus and his appeal. We also determined

to consider separately the mandamus petition and the appeal, ordering oral arguments on them seriatim.

We now grant the President’s petition for a writ of mandamus and, exercising jurisdiction through operation of § 1292(b), reverse the district court’s orders, concluding that the District and Maryland lack standing under Article III. And in the separate appeal, No. 18-2488, that we also decide today, we likewise reverse due to the District and Maryland’s lack of standing. Based on the decisions in this appeal and in appeal No. 18-2488, we remand with instructions to dismiss the complaint with prejudice.

I

The District and Maryland’s complaint alleges that the President’s continued interest in the Trump Organization—specifically in hotels and related properties—results in him receiving “emoluments” from various government entities and officials, both foreign and domestic, and that such receipts violate the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.

With regard to the Foreign Emoluments Clause, the complaint alleges that the President is benefiting and will continue to benefit from the business conducted by the Trump Organization with foreign governments, instrumentalities, and officials. Focusing on the Trump International Hotel in Washington, D.C., in which the President has a 76% interest, the complaint alleges that the Hotel markets itself to the diplomatic community and that, as a result, (1) the Embassy of Kuwait held its National Day celebration at the Hotel on February 22, 2017, spending an estimated \$40,000 to \$60,000; (2) the Kingdom of Saudi Arabia “spent thousands of dollars on

rooms, catering, and parking” at the Hotel in January and February 2017; and (3) Georgia’s Ambassador and Permanent Representative to the United Nations stayed at the Hotel at the Georgian government’s expense. Beyond benefits received from the Hotel, the complaint also alleges that the President has violated the Foreign Emoluments Clause by receiving (1) income from various foreign states and foreign officials patronizing Trump Tower and Trump World Tower in New York City; (2) a favorable trademark decision from the Chinese government; (3) income from the international distribution of “The Apprentice” and its spinoffs; and (4) income from real estate projects in which the Trump Organization is engaged in the United Arab Emirates and Indonesia.

With regard to the Domestic Emoluments Clause, the complaint, again focusing on the Trump International Hotel, alleges that the Hotel, which leases the Old Post Office Building from the General Services Administration (“GSA”), a federal agency, received a benefit from the GSA in March 2017, after the President was inaugurated. While the Hotel’s lease agreement provided that “no . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom,” the GSA amended the lease agreement and issued a letter stating that the Hotel “is in full compliance with [the Lease] and, accordingly, the Lease is valid and in full force and effect.” The complaint claims that this “forbearing from enforcing” the terms of the original lease agreement amounted to an “emolument” in violation of the Domestic Emoluments Clause.

The complaint also alleges that the President, “through entities he owns,” is seeking a \$32 million historic-

preservation tax credit for the Hotel and that, if the National Park Service approves the credit, it “may constitute an emolument, in violation of the Domestic Emoluments Clause.”

Finally, the complaint alleges that the State Department and U.S. Embassies have promoted the Mar-a-Lago Club—a business owned by the President in Palm Beach, Florida—and that “federal, state, and local governments, or their instrumentalities have made and will continue to make payments for the use of the facilities owned or operated by [the President] for a variety of functions.”

To support their standing to sue the President, the District and Maryland allege that because of the President’s constitutional violations, they suffer “harm to their sovereign and/or quasi-sovereign interests,” as well as “proprietary and other financial harms.” Regarding sovereign interests in particular, Maryland alleges that it has a “sovereign interest in enforcing the terms on which it agreed to enter the Union,” and the District and Maryland allege that each has an interest in the enforcement of its laws relating to property that the President or his business organizations own or might seek to acquire.

With respect to the District and Maryland’s quasi-sovereign interests, the complaint alleges that:

The [President’s] acceptance or receipt of presents and emoluments in violation of the Constitution presents the District and Maryland with an intolerable dilemma: either (1) grant the [Trump] Organization’s requests for concessions, exemptions, waivers, vari-

ances, and the like and suffer the consequences, potentially including lost revenue and compromised enforcement of environmental protection, zoning, and land use regulations, or (2) deny such requests and be placed at a disadvantage vis-à-vis states and other government entities that have granted or will agree to such concessions.

In addition, the complaint alleges that the District and Maryland have a *parens patriae* interest in protecting their citizens from economic injury caused by the “payment of presents and emoluments to the [President’s businesses],” asserting that such payments “tilt[] the competitive playing field toward [his] businesses, causing competing companies and their employees to lose business, wages, and tips.”

The complaint also alleges that the President’s constitutional violations harm Maryland’s tax revenue, stating in particular that the Trump International Hotel will have an adverse effect on tax revenue from the National Harbor development in Prince George’s County.

Finally, with respect to their proprietary interests, the District alleges that it has a financial interest in the Walter E. Washington Convention Center, the D.C. Armory, and the Carnegie Library, and that its interests in those properties has been harmed by the President’s receipt of emoluments through the Trump International Hotel, which gives the Hotel an unlawful competitive advantage. Maryland alleges similarly that it has a financial interest in the Montgomery County Conference Center in Bethesda and that the Center will suffer economic harm due to the competitive disadvantage resulting from the President’s violations of the Emoluments Clauses.

For relief, the District and Maryland seek a declaratory judgment that the President is violating the Emoluments Clauses and an injunction prohibiting future violations.

The President, in his official capacity, filed a motion to dismiss the complaint under Rules 12(b)(1) and 12(b)(6), contending that the District and Maryland lack standing and that he has not violated the Emoluments Clauses. He also filed a separate motion to dismiss in his individual capacity, contending that he has absolute immunity. The district court treated the issues raised by the President's motions separately.

By an opinion and order dated March 28, 2018, the district court rejected the President's challenge to the District and Maryland's standing insofar as their claims were made in connection with the Trump International Hotel and its appurtenances in Washington, D.C. The court found that the District and Maryland had "stated cognizable injuries to their quasi-sovereign, proprietary, and *parens patriae* interests" and concluded that such injuries were directly traceable to the President's alleged violations of the Emoluments Clauses. But the court granted the President's motion to the extent that the District and Maryland's claims were based on the operations of the Trump Organization *outside* the District of Columbia.

Particularly as to the District and Maryland's alleged quasi-sovereign interests, the district court noted that Trump Organization hotels had obtained "substantial tax concessions" from the District and from the State of Mississippi; that the GSA had amended the Hotel's lease agreement; and that the Governor of Maine had stayed at the Hotel during an official visit to Washington in the

spring of 2017, suggesting that the District and Maryland “may very well feel themselves obliged, *i.e.*, coerced, to patronize the Hotel in order to help them obtain federal favors.”

As for the District and Maryland’s proprietary interests, the court concluded that Maryland had sufficiently alleged injury based on competitive harm to the Montgomery County Conference Center and that the District had sufficiently alleged injury based on competitive harm to the Washington Convention Center. The court stated that the District and Maryland had “alleged sufficient facts to show that the President’s ownership interest in the Hotel has had and almost certainly will continue to have an unlawful effect on competition, allowing an inference of impending (if not already occurring) injury” to Maryland and the District’s proprietary interests.

And regarding the District and Maryland’s *parens patriae* interests, the court concluded that both the District and Maryland “have sufficiently stated a concrete injury-in-fact to their *parens patriae* interest in protecting the economic welfare of their residents.” Citing the large size of the hospitality industry within and bordering Washington, D.C., the court reasoned that “a large number of Maryland and District of Columbia residents are being affected and will continue to be affected when foreign and state governments choose to stay, host events, or dine at the Hotel rather than at comparable Maryland or District of Columbia establishments, in whole or in substantial part simply because of the President’s association with it.”

In its March 28, 2018 opinion and order, the district court deferred ruling on the remaining issues raised by

the President's motion filed in his official capacity. It also deferred ruling on the President's separate motion filed in his individual capacity.

On July 25, 2018, the district court issued another opinion and order, holding that the term emolument means "any profit, gain, or advantage" and that the various benefits alleged in the complaint to have been received by the President therefore qualified as "emoluments" under the Emoluments Clauses. In this opinion, the district court again deferred ruling on the President's motion to dismiss the claims against him in his individual capacity, thus declining again to address the President's assertion of absolute immunity. Nonetheless, the court allowed the case to proceed with discovery.

In short, the district court denied the President's motion to dismiss the claims against him in his official capacity insofar as they pertained to the Trump International Hotel in Washington, D.C. And it deferred ruling on the President's motion to dismiss the claims against him in his individual capacity.

The President then filed a motion requesting that the district court certify its orders for appeal pursuant to 28 U.S.C. §1292(b). But the court denied the motion, concluding that its orders did not satisfy the statute's criteria that an order involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from such order would materially advance the ultimate termination of the litigation. In so concluding, the court reiterated the reasoning of its earlier rulings.

Following the district court's denial of his motion for § 1292(b) certification, the President, in his official capacity, filed a petition for a writ of mandamus in this court, seeking an order "directing the district court to certify its orders denying dismissal of [the] plaintiffs' complaint for immediate appellate review" or "directing the district court to dismiss [the] plaintiffs' complaint outright." He also requested a stay of the district court proceedings pending resolution of the petition.

By order dated December 20, 2018, we granted the President's request for a stay and scheduled the President's petition for oral argument, directing that the parties be prepared to argue "not only the procedural issues regarding the mandamus petition but also the underlying issues of (1) whether the two Emoluments Clauses provide plaintiffs with a cause of action to seek injunctive relief and (2) whether the plaintiffs have alleged legally cognizable injuries sufficient to support standing to obtain relief against the President." We conducted oral argument on March 19, 2019.

II

With his petition for a writ of mandamus, the President requests that we direct the district court to certify for interlocutory appeal under 28 U.S.C. § 1292(b) its orders of March 28 and July 25, 2018, which the court refused to do. That request is indeed an extraordinary one, as petitions for writs of mandamus are rarely given, and the district court's refusal to certify was an exercise of broad discretion. But, in the same vein, the District and Maryland's suit is also an extraordinary one.

First, the suit is brought directly under the Constitution without a statutory cause of action, seeking to enforce the Emoluments Clauses which, by their terms, give no rights and provide no remedies. Second, the suit seeks an injunction directly against a sitting President, the Nation's chief executive officer. Third, up until the series of suits recently brought against this President under the Emoluments Clauses, no court has ever entertained a claim to enforce them. Fourth, this and the similar suits now pending under the Emoluments Clauses raise novel and difficult constitutional questions, for which there is no precedent. Fifth, the District and Maryland have manifested substantial difficulty articulating how they are harmed by the President's alleged receipts of emoluments and the nature of the relief that could redress any harm so conceived. Sixth, to allow such a suit to go forward in the district court without a resolution of the controlling issues by a court of appeals could result in an unnecessary intrusion into the duties and affairs of a sitting President. Accordingly, not only is this suit extraordinary, it also has national significance and is of special consequence.

The criteria for granting petitions for writs of mandamus and § 1292(b) certifications are well established. A party seeking a writ of mandamus must demonstrate (1) that it has a "clear and indisputable" right; (2) that there are "no other adequate means" to vindicate that right; and (3) that the writ is "appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). Under these principles, it is understood that a writ of mandamus can properly issue to remedy a "clear abuse of discretion." *Id.* at 390 ("[U]nder principles of mandamus jurisdiction, the Court of

Appeals may exercise its power to issue the writ only upon a finding of ‘exceptional circumstances amounting to a judicial usurpation of power,’ or a ‘*clear abuse of discretion.*’ As this case implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court’s actions constituted an *unwarranted impairment* of another branch in the performance of its constitutional duties” (emphasis added) (citations omitted)).

To be sure, the discretion conferred on district courts by § 1292(b) is broad. See *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 47 (1995). The statute provides that a district court “shall” certify its order for interlocutory appeal when the court determines that its order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b); see also, e.g., *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011). The broad discretion given to district courts under § 1292(b) is reflected in the open-ended terms used to define the statutory criteria. When a district court determines that the statutory criteria are present, however, it has a “*duty . . . to allow an immediate appeal to be taken.*” *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (emphasis added); see also *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009). And when a district court’s discretion in applying the statutory criteria is not “guided by sound legal principles,” but by “whim,” a court of appeals may conclude that the court’s actions amounted to a clear abuse of discretion. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S.

Ct. 1923, 1931-32 (2016) (cleaned up) (addressing generally the nature of “discretion”).

In this case, although the district court recognized the Supreme Court’s instruction that “district courts should not hesitate to certify an interlocutory appeal” under § 1292(b) when a decision “involves *a new legal question or is of special consequence*,” *Mohawk*, 558 U.S. at 111 (emphasis added), as well as its “duty” to certify when the statutory criteria are met, *Ahrenholz*, 219 F.3d at 677, it refused to certify its orders for appeal. Rather, it simply reiterated its earlier reasoning, relying on its belief that it was unquestionably correct and therefore that there existed no substantial ground for difference of opinion.

Yet, as the President noted, the district court was “the first ever to permit a party to pursue relief under the Emoluments Clauses for alleged competitive injury—or for any injury for that matter.” The district court dismissed this novelty by reciting the general proposition that “numerous cases have found that a firm has constitutional standing to challenge a competitor’s entry into the market,” providing no citation that would make that proposition applicable to a direct claim under the Constitution, let alone a direct claim under the Emoluments Clauses. In doing so, the court failed to recognize, among other things, that no previous court had enforced the Emoluments Clauses; that no decision had defined what “emoluments” are; that no prior decision had determined that a party can sue directly under the Emoluments Clauses when the constitutional provisions provide no rights and specify no remedies; and that no case had held that a State has standing to sue the President for alleged injury to its proprietary or sovereign

interests from a violation of the Emoluments Clauses. One can hardly question that these are “new legal question[s]” of “special consequence.” *Mohawk*, 558 U.S. at 111.

And quite apart from the novelty of the issues presented, the President also pointed to *Citizens for Responsibility & Ethics in Washington (“CREW”) v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), to show a reasonable difference of opinion. But the district court dismissed the apparent disagreement between its reasoning and the reasoning in *CREW* out of hand, asserting without further explanation that the “President’s reliance on the *CREW* decision reflects—at best—an instance of judges applying the law differently. It does not demonstrate, as is required for interlocutory appeal, that courts themselves disagree as to what the law is.” (Cleaned up).

In *CREW*, the Southern District of New York concluded that plaintiffs representing the hospitality industry lacked standing to bring an Emoluments Clauses suit against President Trump and that the plaintiffs’ alleged injuries were not within the “zone of interests” of the Clauses. 276 F. Supp. 3d at 184-88. Like the District and Maryland, the plaintiffs in *CREW* alleged that President Trump’s violations of the Clauses granted him an unlawful competitive advantage in the hospitality industry and sought competitors’ standing on that ground. *See id.* at 180-83. In fact, they alleged *exactly* the same anecdotes as the District and Maryland allege here about foreign diplomats patronizing the President’s hotels, *see id.* at 182, and likewise pointed to the GSA’s amendment of the Trump International Hotel’s lease

agreement, claiming that it amounted to an impermissible emolument, *id.* at 182-83. The *CREW* court concluded that the plaintiffs had “failed to properly allege that [the President’s] actions *caused* [the plaintiffs’] competitive injury and that such an injury [was] *redressable*” by the court. It reasoned:

Even before Defendant took office, he had amassed wealth and fame and was competing against the Hospitality Plaintiffs in the restaurant and hotel business. It is only natural that interest in his properties has generally increased since he became President. As such, despite any alleged violation on Defendant’s part, the Hospitality Plaintiffs may face a tougher competitive market overall. Aside from Defendant’s public profile, there are a number of reasons why patrons may choose to visit Defendant’s hotels and restaurants including service, quality, location, price and other factors related to individual preference. Therefore, the connection between the Hospitality Plaintiffs’ alleged injury and Defendant’s actions is too tenuous to satisfy Article III’s causation requirement.

Moreover, the Hospitality Plaintiffs cannot establish that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Plaintiffs seek an injunction preventing Defendant from violating the Emoluments Clauses. They argue that such injunction would “stop the source of intensified competition and provide redress.” Even if it were determined that the Defendant personally accepting any income from the Trump Organization’s business with foreign and domestic governments was a violation of the Emoluments Clauses, it is entirely

speculative what effect, if any, an injunction would have on the competition Plaintiffs claim they face.

. . . Were Defendant not to personally accept any income from government business, this Court would have no power to lessen the competition inherent in any patron's choice of hotel or restaurant. . . . [T]he Emoluments Clauses prohibit Defendant from receiving gifts and emoluments. They do not prohibit Defendant's businesses from competing directly with the Hospitality Plaintiffs. Furthermore, notwithstanding an injunction from this Court, Congress could still consent and allow Defendant to continue to accept payments from foreign governments in competition with Plaintiffs.

Thus, while a court order enjoining Defendant may stop his alleged constitutional violations, it would not ultimately redress the Hospitality Plaintiffs' alleged competitive injuries.

Id. at 185-87 (cleaned up). In addition, the *CREW* court concluded that there was "simply no basis to conclude" that the plaintiffs' alleged competitive injuries fell "within the zone of interests that the Emoluments Clauses sought to protect," reasoning:

[T]here can be no doubt that the intended purpose of the Foreign Emoluments Clause was to prevent official corruption and foreign influence, while the Domestic Emoluments Clause was meant to ensure presidential independence. Therefore, the Hospitality Plaintiffs' theory that the Clauses protect them from increased competition in the market for government business must be rejected, especially when (1) the

Clauses offer no protection from increased competition in the market for non-government business and (2) with Congressional consent, the Constitution allows federal officials to accept foreign gifts and emoluments, regardless of its effect on competition. With Congress's consent, the Hospitality Plaintiffs could still face increased competition in the market for foreign government business but would have no cognizable claim to redress in court.

Id. at 188.

The *CREW* court's disagreement with the theory of competitor standing embraced by the district court is fundamental and obvious, and the district court's suggestion to the contrary blinks reality. "A substantial ground for difference of opinion exists *where reasonable jurists might disagree* on an issue's resolution." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (emphasis added). That is undeniably the case here.

Moreover, there can be no doubt that the questions the President sought to have certified under § 1292(b) were "controlling" and that their prompt appellate resolution could "materially advance the ultimate termination of the litigation." *See Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (noting that "controlling" in § 1292(b) "means serious to the conduct of the litigation, either practically or legally" (citation omitted)); *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) ("[T]he text of § 1292(b) requires that resolution of a 'controlling question of law . . . may materially advance the ultimate termination of the litigation.' This is not a difficult requirement to understand. It means that resolution of a controlling legal question

would serve to avoid a trial or otherwise substantially shorten the litigation” (citation omitted)).

At bottom, we agree with the President that this is a paradigmatic case for certification under § 1292(b) and that the district court’s reasons for not certifying its orders were not “guided by sound legal principles.” *Halo Elecs.*, 136 S. Ct. at 1231; *see also Mohawk*, 558 U.S. at 110-11. The court’s refusal to certify therefore amounted to a clear abuse of discretion.

Because there is no other mechanism for prompt appellate review of the threshold legal issues raised by the District and Maryland’s complaint, which asserts unprecedented claims directly against a sitting President, *see Cheney*, 542 U.S. at 382 (recognizing the “paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties”), and because the district court erred so clearly in applying the § 1292(b) criteria, we conclude that granting the President’s petition for mandamus is appropriate.

In reaching this conclusion, however, we are quick to note that disturbing an exercise of the broad discretion conferred on district courts to determine whether to certify orders for interlocutory appeal should be rare and occur *only* when a clear abuse of discretion is demonstrated. This is so because § 1292(b), while mandating certification when the statutory criteria are met, nonetheless places broad discretion for finding that the criteria are satisfied in the district courts. The statute confers discretion on courts of appeals as a separate and distinct responsibility for its operation, providing that “[t]he Court of Appeals . . . may thereupon [after

the district court's certification], *in its discretion*, permit an appeal to be taken from such order.” 28 U.S.C. § 1292(b) (emphasis added). The proper operation of § 1292(b) thus occurs only when *both* the district court *and* the court of appeals exercise their independently assigned discretion. But this does not mean that the district court's discretion in refusing to certify is unfettered and unreviewable, and the statute does not so provide. See *Fernandez-Roque v. Smith*, 671 F.2d 426, 431-32 (11th Cir. 1982) (issuing a writ of mandamus directing the district court to rule on whether it had subject-matter jurisdiction and then certify that ruling for interlocutory appeal under § 1292(b), concluding that the case “present[ed] the truly ‘rare’ situation in which it [was] appropriate for [the appellate court] to require certification of a controlling issue of national significance”); *In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 837, 839 (5th Cir. 1984) (concluding that “the [district] court's refusal to certify [under § 1292(b)] in the circumstances constitute[ed] an abuse of discretion,” vacating the order denying § 1292 certification, and sending the case back with a “request that the district court certify its interlocutory order for appeal”).

Accordingly, in the unique circumstances of this case, we grant the President's petition for a writ of mandamus directing the district court to certify its orders of March 28 and July 25 for interlocutory appeal. And, rather than remand the case to the district court simply to have it pointlessly go through the motions of certifying, we will take the district court's orders as certified and grant our permission to the President to appeal those orders, thus taking jurisdiction under § 1292(b).

III

Turning to the motion to dismiss the official-capacity claims against the President filed in the district court, the President presented numerous arguments to the district court flowing from the complex question of “whether and when the President is subject to suit under the Emoluments Clauses.” The Foreign Emoluments Clause provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8. And the Domestic Emoluments Clause provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

U.S. Const. art. II, § 1, cl. 7. Neither Clause expressly confers any rights on any person, nor does either Clause specify any remedy for a violation. They are structural provisions concerned with public corruption and undue influence. In particular, the Foreign Emoluments Clause is concerned with preventing U.S. officials from being corrupted or unduly influenced by gifts or titles from foreign governments. *See 2 The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., 1911) (“Mr. Pinkney urged the necessity of preserving

foreign Ministers & other officers of the U.S. independent of external influence and moved to insert [the Foreign Emoluments Clause]”); 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 465 (Jonathan Elliot ed., 2d ed. 1836) (“The [Foreign Emoluments Clause] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state. . . . This restriction is provided to prevent corruption”). And the Domestic Emoluments Clause is concerned with ensuring presidential independence and preventing the President from being improperly swayed by the States. See *The Federalist No. 73*, at 378-79 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990) (“Neither the Union nor any of its members will be at liberty to give, nor will he be at liberty to receive any other emolument, than that which may have been determined by the first act. He can of course have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution”).

As the Clauses do not expressly confer any rights or provide any remedies, efforts to enforce them in courts have been virtually nonexistent prior to President Trump’s inauguration in 2017. In 2017, however, three separate complaints were filed against the President alleging Emoluments Clauses violations, including the complaint filed in this case. See *Complaint, CREW*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458); *Complaint, Blumenthal v. Trump*, No. 1:17-cv-1154 (D.D.C. June 14, 2017); *Complaint, District of Columbia v. Trump*, No. 8:17-cv-1596 (D. Md. June 12, 2017).

In view of the nature, purpose, and language of the Clauses, there are numerous issues that would have to be resolved in allowing the case against the President to go forward. Because the District and Maryland have no express cause of action, statutory or otherwise, they rely on the district court's "inherent authority to grant equitable relief," citing the Supreme Court's recognition that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The President acknowledges this authority in the abstract but points to the Supreme Court's instruction that "[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction" and contends that the relief sought by the District and Maryland was not "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (cleaned up). As the President notes, the classic type of case in which plaintiffs sue to enjoin unconstitutional conduct without a statutory cause of action involves the "anti-suit injunction," a traditional equitable remedy that "permit[s] potential defendants in legal actions to raise in equity a defense available at law." *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Because the District and Maryland's suit falls outside the scope of this traditional type of case, the President contends that allowing the suit to proceed would in effect recognize an entirely new class of equitable action.

Beyond that threshold question lie issues relating to whether the District and Maryland have an interest sufficient to bring a suit under the Emoluments Clauses. Not only would they need to show that the alleged violation caused them harm, but they might also need to show that such harm fell within the zone of interests protected by the Clauses. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting). The President maintains that the interests asserted by the District and Maryland are “so marginally related to the Emoluments Clauses’ zone of interests” that they do not “remotely establish the type of private right needed” to make such a showing.

For relief, moreover, the District and Maryland seek an injunction against the President himself, a form of relief that the Supreme Court has termed “extraordinary” and has advised should “raise[] judicial eyebrows.” *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992).

But while these issues presented by the President to the district court do indeed raise an array of substantial questions about the viability of this action, the threshold matter to be decided is whether the District and Maryland have standing under Article III to pursue their claims, a question that goes to our judicial power.

IV

The requirements for Article III standing are well established, and they apply in all cases regardless of the plaintiff or the particular theory of standing being asserted. As the Supreme Court has explained:

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation is founded in concern about the proper—and properly limited—role of the courts in a democratic society.

The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction. He bears the burden of showing that he has standing for each type of relief sought. To seek injunctive relief, a plaintiff must show that he is under threat of suffering “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. This requirement assures that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) (cleaned up). And, of course, an “assumption that if [the plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.”

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489 (1982) (cleaned up); cf. *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“[T]he absence of” a proper “individual or class to litigate” supports the conclusion that “the subject matter is committed to . . . the political process”).

In denying the President’s motion to dismiss based on a lack of standing, the district court concluded that the District and Maryland sufficiently showed standing based on (1) the alleged harm to their proprietary interests in properties that were in competition with the Trump International Hotel in Washington, D.C.; (2) the alleged harm to their *parens patriae* interests on behalf of their residents’ competitive interests that were similarly harmed; and (3) the alleged harm to their other quasi-sovereign interests in not being pressured to grant the President’s businesses favorable treatment. The District and Maryland rely on these theories on appeal, and we address each in turn.

A

The district court held that the District and Maryland have standing based on harm to the District’s proprietary interest in the Washington Convention Center and Maryland’s proprietary interest in the Montgomery County Conference Center, reasoning that the President’s receipt of emoluments from the Trump International Hotel provides the Hotel with an illegal competitive advantage and thus diverts business away from these properties. In so holding, the court accepted the District and Maryland’s invocation of the “competitive standing doctrine,” the “nub” of which is that “when a

challenged [government] action authorizes allegedly illegal transactions that will *almost surely* cause [the plaintiff] to lose business, there is no need to wait for injury from specific transactions.” *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001) (citation omitted).

But even were the “competitive standing doctrine” to be accepted in this circuit, the doctrine is an *application* of Article III standing principles, not a relaxation of them. *See DEK Energy*, 248 F.3d at 1195. Thus, we must still determine whether the standard requirements for Article III standing are satisfied. And to do so, we assess whether the District and Maryland have demonstrated that President Trump’s allegedly illegal conduct—*i.e.*, his receipt of funds from foreign and state governments patronizing the Hotel—has *caused* harm to their proprietary interests and that enjoining that conduct would *redress* such harm. *See Summers*, 555 U.S. at 492-93. Upon conducting that assessment, we conclude that the District and Maryland’s complaint fails to make a sufficient showing.

To begin, the District and Maryland’s theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends to the President*, rather than due to any of the Hotel’s other characteristics. Such a conclusion, however, requires speculation into the subjective motives of independent actors who are not before the court, undermining a finding of causation. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 413 (2013) (“[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment”); *Bennett*

v. Spear, 520 U.S. 154, 167 (1997) (“[T]he injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court”); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28, 42-43, 45-46 (1976) (holding that indigent plaintiffs, who alleged that a regulation affording favorable tax treatment to certain hospitals that provided only limited services to indigent patients “encouraged” those hospitals to deny them service, lacked standing to challenge the regulation, reasoning that it was “purely speculative whether the denials of service specified in the complaint fairly [could] be traced” to the regulation or “instead result[ed] from decisions made by the hospitals without regard to the tax implications” and that it was “equally speculative” whether the plaintiffs’ desired injunction would result in them receiving service); *Linda R.S. v. Richard D.*, 410 U.S. 614, 615-19 (1973) (holding that a mother lacked standing to seek an injunction to force the prosecution of her child’s father for failing to pay child support, reasoning that because prosecution would result only in the father being jailed, it was overly “speculative” whether an injunction would result in future child support payments); *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (dismissing for lack of Article III standing, reasoning that the plaintiff’s theory of standing “depend[ed] on the independent actions of third parties, [thus] distinguishing its case from the ‘garden variety competitor standing cases’ which require a court to simply acknowledge a chain of causation ‘firmly rooted in the basic law of economics’” (citation omitted)); *Am. Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150 (D.C. Cir. 1977) (concluding that plaintiffs’ claim of

competitive harm was “too speculative to support standing,” reasoning that customers “might for a variety of reasons continue to prefer” competitors even if the plaintiffs prevailed).

Indeed, there is a distinct possibility—which was completely ignored by the District and Maryland, as well as by the district court—that certain government officials might *avoid* patronizing the Hotel because of the President’s association with it. *See United Transp. Union v. ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989) (rejecting standing where it was “wholly speculative” whether the challenged conduct would “harm rather than help” the plaintiffs). And, even if government officials were patronizing the Hotel to curry the President’s favor, there is no reason to conclude that they would cease doing so were the President enjoined from receiving income from the Hotel. After all, the Hotel would still be publicly associated with the President, would still bear his name, and would still financially benefit members of his family. In short, the link between government officials’ patronage of the Hotel and the Hotel’s payment of profits or dividends to the President himself is simply too attenuated.

Moreover, the likelihood that an injunction barring the President from receiving money from the Hotel would not cause government officials to cease patronizing the Hotel demonstrates a lack of redressability, independently barring a finding of standing. This deficiency was remarkably manifested at oral argument when counsel for the District and Maryland, upon being questioned, was repeatedly unable to articulate the terms of the injunction that the District and Maryland were seeking to redress the alleged violations. When

plaintiffs before a court are unable to specify the relief they seek, one must wonder why they came to the court for relief in the first place.

At bottom, the District and Maryland are left to rest on the theory that so long as a plaintiff competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met. But such a “boundless theory of standing” has been expressly rejected by the Supreme Court:

Taken to its logical conclusion, the theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing. The cases [the plaintiff] cites for this remarkable proposition stand for no such thing. In each of those cases, standing was based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff’s competitor.

Already, LLC v. Nike, Inc., 568 U.S. 85, 99 (2013) (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that a group of businesses had standing to challenge, on Equal Protection grounds, the City of Jacksonville’s ordinance granting preferential treatment to certain minority-owned businesses in the awarding of city contracts); and *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115 (1974) (holding that employers had standing to challenge, under the Labor Management Relations Act, New Jersey regulations that granted benefits to their striking employees)).

Accordingly, we reject the District and Maryland's argument that they have Article III standing based on harm to their proprietary interests.

B

The district court also concluded that the District and Maryland have *parens patriae* standing to protect the economic interests of their citizens, accepting the argument that the District and Maryland's "residents are harmed by the President's alleged violations of both Emoluments Clauses because the competitive playing field is illegally tilted towards the President's Hotel." But, at bottom, the harm from which the District and Maryland are purportedly seeking to protect their citizens is *exactly the same type of harm* that they allege has occurred to their own proprietary interests. Their theory of *parens patriae* standing thus hinges on the same attenuated chain of inferences as does their theory of proprietary harm, and it accordingly suffers from the same defects.

The District and Maryland's reliance on *Massachusetts v. EPA*, 549 U.S. 497 (2007), provides them little help. In holding that Massachusetts had standing to challenge an EPA decision, the Supreme Court relied on Massachusetts's own "particularized injury in its capacity as a landowner" and its "well-founded desire to preserve its sovereign territory," *id.* at 519, 522, as well as the procedural right and express cause of action provided to Massachusetts by Congress, *id.* at 520. Neither factor is present here.

Thus, we reject the District and Maryland's argument for Article III standing based on their *parens patriae* interests.

C

Finally, the district court concluded that the District and Maryland have standing based on injury to their quasi-sovereign interests, thus accepting the District and Maryland’s argument that “[t]heir injury is the violation of their constitutionally protected interest in avoiding entirely pressure to compete with others for the President’s favor by giving him money or other valuable dispensations” and that “it is the *opportunity* for favoritism that disrupts the balance of power in the federal system and injures the District and Maryland.”

This alleged harm amounts to little more than a general interest in having the law followed. And the Supreme Court has “consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992). Rather, to seek injunctive and declaratory relief, “a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is *concrete and particularized*” and that “the threat [is] *actual and imminent, not conjectural or hypothetical.*” *Summers*, 555 U.S. at 493 (emphasis added) (cleaned up); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586 (1972) (“It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack a personal stake in the outcome of the controversy” (cleaned up)); *Beck v. McDonald*, 848 F.3d 262, 271-76 (4th Cir. 2017). The

District and Maryland's assertion of quasi-sovereign injury fails to satisfy these requirements.

Indeed, this theory of standing is strikingly similar to the theory rejected in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). The plaintiffs in *Schlesinger* alleged that certain members of Congress were violating the Incompatibility Clause, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," U.S. Const. art. I, § 6, cl. 2. To support Article III standing, the plaintiffs claimed that they "suffered injury because Members of Congress holding a . . . position in the Executive Branch were . . . subject to the possibility of undue influence." *Id.* at 212. The Court, with reasoning that is readily applicable here, concluded that the plaintiffs lacked standing:

It is nothing more than a matter of speculation whether the claimed nonobservance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury. . . .

The District Court acknowledged that any injury resulting from the reservist status of Members of Congress was hypothetical, but stressed that the Incompatibility Clause was designed to prohibit such potential for injury. This rationale fails, however, to compensate for the respondents' failure to present a claim under that Clause which alleges concrete injury.

The claims of respondents here . . . would require courts to deal with a difficult and sensitive issue of constitutional adjudication on the complaint of one who does not allege a personal stake in the outcome of the controversy. . . .

Furthermore, to have reached the conclusion that respondents' interests as citizens were meant to be protected by the Incompatibility Clause because the primary purpose of the Clause was to insure independence of each of the branches of the Federal Government, similarly involved an appraisal of the merits before the issue of standing was resolved. All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a 'case or controversy' appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Closely linked to the idea that generalized citizen interest is a sufficient basis for standing was the District Court's observation that it was not irrelevant that if respondents could not obtain judicial review of petitioners' action, 'then as a practical matter no one can.' Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.

Id. at 217, 224, 226-27 (cleaned up); *see also Richardson*, 418 U.S. 166 (holding that plaintiff lacked standing to sue to enforce the Accounts Clause, U.S. Const. art. I, § 9, cl. 7, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”); *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (holding that plaintiff lacked standing to challenge Justice Black’s appointment under the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2, which provides that “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time”).

As in *Schlesinger*, the District and Maryland’s interest in constitutional governance is no more than a generalized grievance, insufficient to amount to a case or controversy within the meaning of Article III. *See Valley Forge Christian Coll.*, 454 U.S. at 482-87; *see also Schlesinger*, 418 U.S. at 222 (“To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing “government by injunction”).

* * *

The District and Maryland’s interest in enforcing the Emoluments Clauses is so attenuated and abstract that their prosecution of this case readily provokes the question of whether this action against the President is an

appropriate use of the courts, which were created to resolve real cases and controversies between the parties. In any event, for the reasons given, we grant the President's petition for a writ of mandamus and, taking jurisdiction under 28 U.S.C. § 1292(b), hold that the District and Maryland do not have Article III standing to pursue their claims against the President. Accordingly, we reverse the district court's orders denying the President's motion to dismiss filed in his official capacity, and, in light of our related decision in No. 18-2488, we remand with instructions that the court dismiss the District and Maryland's complaint with prejudice.

PETITION FOR WRIT OF MANDAMUS GRANTED;
REVERSED AND REMANDED
WITH INSTRUCTIONS

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 17-1596

THE DISTRICT OF COLUMBIA AND THE STATE OF
MARYLAND, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, DEFENDANT

Filed: Nov. 2, 2018

ORDER

Having considered Defendant Donald J. Trump's Motion for Leave to Appeal (Interlocutory), and for a Stay Pending Appeal (ECF No. 127) it is, for the reasons set forth in the accompanying Memorandum Opinion this 2nd day of November, 2018

ORDERED:

- 1) The President's Motion for Leave to Appeal and for a Stay Pending Appeal (ECF No. 127) is **DE-NIED**;
- 2) Plaintiffs **SHALL** submit within twenty (20) days a proposed Schedule of Discovery, consistent

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with the Schedule set out in the earlier Joint Report made to the Court pursuant to F.R.C.P. 26(f) (ECF No. 132).

_____/s/_____
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 17-1596

THE DISTRICT OF COLUMBIA AND THE STATE OF
MARYLAND, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, DEFENDANT

Filed: Nov. 2, 2018

MEMORANDUM OPINION

I. Procedural Background

In a previous Opinion, the Court held that the District of Columbia and the State of Maryland have standing to challenge, in his official capacity, President Donald J. Trump based on his alleged violations of the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.¹ The Court found that Plaintiffs had standing based on proprietary, quasi-sovereign, and *parens patriae* interests vis-a-vis the President's undisputed ownership interest in the Trump International Hotel in Washington.²

¹ See Opinion (March 28, 2018), ECF No. 101 (Standing Opinion).

² *Id.* at 12-29.

In a second Opinion, the Court considered the meaning of the term “emolument” as used in the Clauses. The Foreign Clause bans any person holding an office of profit or trust under the United States, (including, the Court found, the President) from accepting without Congressional approval “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.” U.S. Const. art. I, § 9, cl. 8. The Domestic Clause provides that “[t]he President shall . . . receive for his services, a compensation . . . and he shall not receive within that period any other emolument from the United States, or any of them.” U.S. Const. art. II, § 1, cl. 7. Based on those constitutional texts, as well as the virtually universal definition given the term “emolument” in dictionaries and literature contemporaneous to the enactment of the Clauses, the purpose of the Clauses, and ample historical evidence and executive branch precedent and practice, the Court determined that the word “emolument” refers to any “profit,” “gain” or “advantage” of a more than *de minimis* nature.³ Accordingly, the President’s ownership interest in the Trump International Hotel and his apparent receipt of benefits from at least some foreign and state governments, as well as from the Federal Government itself, suggest that he has received “emoluments” in violation of the Constitution, giving rise to plausible causes of action against him brought by parties with standing.

The President has filed a Motion for Leave to Appeal (Interlocutory) and for a Stay Pending Appeal the Court’s rulings, ECF No. 127, which Plaintiffs oppose.

³ See Opinion (July 25, 2018), ECF No. 123 (Emoluments Opinion).

As part of the relief he requests, the President asks the Court to stay any and all discovery pending his appeal, again over Plaintiffs' objection.

The Court has reviewed the President's Motion and, for the reasons that follow, will **DENY** it. His Motion for a Stay pending any appeal will also be **DENIED**.

II. Questions the President Seeks to Have Certified

Pursuant to 28 U.S.C. § 1292(b), the President has identified four (4) purportedly controlling questions of law decided by the Court in its previous two opinions that he believes are certifiable: (1) the correct interpretation of the term "emolument" in the Emoluments Clauses of the Constitution and the scope of those Clauses; (2) whether Plaintiffs have asserted interests addressed by those Clauses and have an equitable cause of action under them; (3) whether Plaintiffs have Article III standing to pursue their claims; and (4) whether the Court has jurisdiction to issue declaratory and injunctive relief against the President. Def's Mot. for Appeal at 1.

III. Statutory Standards

a. In general

28 U.S.C. § 1292(b) provides that when a district judge believes an order "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion [3] and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the Judge may certify it for interlocutory appeal, "[p]rovided, however, That application . . . shall not stay proceedings" unless ordered by the district judge or appellate court.

Although noting that the Fourth Circuit has cautioned that § 1292(b) should be used sparingly, the President argues that the “Supreme Court has explained that ‘district courts should not hesitate to certify an interlocutory appeal’ when a decision ‘involves a new legal question or is of special consequence.’” *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). Indeed, the Seventh Circuit, says the President, has “emphasize[d] the duty of the district court . . . to allow an immediate appeal to be taken when the statutory criteria are met.” *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 677 (7th Cir. 2000). For the purposes of § 1292(b), a “question of law” is “the meaning of a statutory or constitutional provision, regulation, or common law doctrine.” *Lynn v. Monarch Recovery Mgmt, Inc.*, 953 F. Supp. 2d 612, 623 (D. Md. 2013). Def’s Mot. for Appeal at 6-7 (Aug. 17, 2018), ECF No. 127.

Plaintiffs, for their part, cite the “general rule[]that ‘a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error . . . may be ventilated.’” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996), and that the “‘narrow’ exception” for interlocutory appeals under § 1292(b) “should stay that way and never be allowed to swallow the general rule, that a party is entitled to a single appeal.” *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). “[E]ven when the elements of section 1292(b) are satisfied,” say Plaintiffs, “the district court retains ‘unfettered discretion’ to deny certification.” *Garber v. Office of the Comm’r of Baseball*, 120 F. Supp. 3d 334, 337 (S.D.N.Y. 2014). Plaintiffs say further that, consistent with interlocutory ap-

peals remaining a narrow exception, “[c]ertification under section 1292(b) is improper if it is simply ‘to provide early review of difficult rulings in hard cases.’” Pls.’ Resp. in Opp’n at 2-3 (Sept. 17, 2018), ECF No. 133 (quoting *Butler v. DirectSAT USA, LLC*, 307 F.R.D. 445, 452 (D. Md. 2015)).

A district court’s decision not to certify an interlocutory appeal is final and unreviewable. This is said to be so because a case must be certified to be considered by the Fourth Circuit; lack of certification therefore ordinarily precludes appellate court jurisdiction. *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 137 (4th Cir. 1997) (explaining that the Fourth Circuit did not have subject matter jurisdiction where the district court declined to certify an interlocutory order for appeal). Failing to meet even one of the statutory requirements will defeat a litigant’s request for an interlocutory appeal. *See, e.g., Cooke-Bates v. Bayer Corp.*, 2010 WL 4789838, at *2 n.4 (E.D. Va. Nov. 16, 2010) (denying interlocutory appeal, and not deciding whether issues presented were controlling questions of law that may advance the termination of the litigation, because a nevertheless novel question was not particularly difficult and therefore did not present substantial grounds for disagreement); *Butler*, 307 F.R.D. at 452 (“Unless *all* of the statutory criteria are satisfied . . . ‘the district court may not and should not certify its order . . . under section 1292(b).’”) (internal citation omitted).

b. *Controlling Questions of Law*

The President argues that the Fourth Circuit has recognized that “it may be proper to conduct an interlocutory review of an order presenting ‘a pure question

of law,' i.e., 'an abstract legal issue that the court of appeals can decide quickly and cleanly.'" Def's Mot. for Appeal at 7 (quoting *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340 (4th Cir. 2017) (internal citation omitted)). Accordingly, the President cites cases to the effect that a question of law is "controlling" if its "resolution would be completely dispositive of the litigation, either as a legal or practical matter." *Butler*, 307 F.R.D. at 452 (internal quotation omitted). A ruling can also be controlling if it "control[s] many aspects of the proceedings in substantial respects, particularly the scope of the discovery. . . ." *In re Microsoft Corp. Antitrust Litigation*, 274 F. Supp. 2d 741, 742 (D. Md. 2003). In that event, the court noted that concerns bearing on the scope of discovery are particularly likely to be weighty when the case at hand, as occurred there, involves multi-district litigation where multiple competitor cases will be affected by the challenged order, as was the situation in *In re Microsoft*, *id.* at 742-43.

Plaintiffs characterize a "controlling question of law" as "an issue that would, decided differently, terminate or substantially alter the suit." Pls.' Resp. in Opp'n at 3. For instance, "controlling questions . . . determine whether there should be any future proceedings at all with respect to Plaintiffs' claims." *Moffett v. Comput. Scis. Corp.*, No. PJM 05-1547, 2010 WL 348701, at *2 (D. Md. Jan. 22, 2010). In his Reply, the President emphasizes that, although a question whose resolution may terminate the case is certainly one kind of controlling question, the standard for "controlling" questions "should be kept flexible," *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991), and should include questions

that control significant aspects of the proceedings, including discovery. Def’s Reply (Sept. 26, 2018), ECF No. 134 at 3 (quoting *In re Microsoft Corp.*, 274 F. Supp. 2d at 742). Finally, a “controlling question of law” has been said to include orders that “if erroneous, would be reversible error on final appeal.” *Lynn*, 953 F. Supp. at 623 (internal citation omitted).

c. *Substantial Ground for Difference of Opinion*

The second statutory requirement that must be present for a district court to certify an interlocutory appeal is that the relevant controlling question of law is one “as to which there is substantial ground for difference of opinion.” 28 U.S.C. § 1292(b).

The President argues that “[c]ourts have repeatedly recognized” that a “‘novel issue’ ‘on which fair-minded jurists might reach contradictory conclusions’ ‘may be certified for interlocutory appeal without first awaiting development of contradictory precedent.’” Def’s Mot. for Appeal at 10 (citing *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); see also *In re Trump*, 874 F.3d 948, 952 (6th Cir. 2017) (quoting the same). “When a matter of first impression also had other grounds for difference of opinion . . . , district courts in this circuit have certified the issue for interlocutory appeal.” *Goodman v. Archbishop Curley High Sch., Inc.*, 195 F. Supp. 3d 767, 774 (D. Md. 2016) (quoting *Kennedy v. Villa St. Catherine, Inc.*, No. PWG-09-3021 (WDQ), 2010 WL 9009364, at *2 (D. Md. June 16, 2010)). Moreover, the President points out, “[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case.” *Coal. For Equity & Excellence in Md. Higher Educ. v. Md.*

Higher Educ. Comm'n, No. CCB-06-2773, 2015 WL 4040425, at *6 (D. Md. June 29, 2015) (internal quotation omitted) (granting § 1292(b) certification in light of the “context of this extraordinarily important case”). The President believes that the present “case presents the extraordinary circumstance of allegations that a sitting President is violating the Constitution,” and is now poised to be subject to “civil discovery in his official capacity.” The President believes that this fact alone “counsels extreme restraint and warrants § 1292(b) certification.” Def’s Mot. for Appeal at 11.

Plaintiffs argue that there is only “substantial ground for difference of opinion” for § 1292(b) certification purposes when there is “substantial doubt that the district court’s order was correct.” *Goodman*, 195 F. Supp. 3d at 774 (internal citations omitted). They insist that a party’s “own disappointment or disagreement with the outcome of an order does not rise to the level of substantial doubt.” *See Lizarbe v. Rondon*, No. PJM 07-1809, 2009 WL 2487083, at *3 (D. Md. Aug. 12, 2009) (court found that where there was no contrary authority other than party’s own disagreement with controlling case law, there was no substantial ground for difference of opinion). In the same vein, “[a]n issue presents a substantial ground for difference of opinion if courts, as opposed to parties, disagree on a controlling legal issue.” *Goodman*, 195 F. Supp. 3d at 774 (internal quotation omitted); Pls.’ Resp. in Opp’n at 4.

Finally, the Court notes that the “mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.” *Lynn*, 953 F. Supp. 2d at 624 (quoting *In re Flor*, 79 F.3d 281, 284

(2d Cir.1996)). To be sure, however, questions of first impression have nevertheless been certified when they otherwise meet all statutory requirements for certification, novelty notwithstanding. *Id.* (quoting *Kennedy*, 2010 WL 9009364, at *2 (D. Md. June 16, 2010)).

d. *Likelihood of advancing the termination of the case*

The third and final statutory requirement for § 1292(b) certification purposes is that the controlling question of law as to which a substantial ground for difference of opinion exists is one where “an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

The President observes that the third and first statutory requirements for certification are interrelated. If an immediate appeal may materially advance the ultimate termination of the litigation, a question of law is necessarily “controlling” because it “could advance the litigation by ending it,” *Coal. For Equity & Excellence in Md. Higher Educ.*, 2015 WL 4040425, at *7, even if “other possible outcomes exist.” *Kennedy*, 2010 WL 9009364, at *4. The President further suggests that this third requirement is met where the appeal would “eliminate complex issues so as to simplify the trial, or []eliminate issues to make discovery easier and less costly.” *Lynn*, 953 F. Supp. 2d at 626 (internal quotation omitted). Def’s Mot. for Appeal at 7-8; *see* Pls.’ Resp. in Opp’n at 4.

The President submits that an interlocutory appeal of the four questions he raises is warranted because the resolution of any one of them in his favor would “either terminate this suit or at least substantially narrow the

scope of this litigation,” and because there is a “substantial ground for difference of opinion as to each” question. Def’s Mot. for Appeal at 1-2. He believes this is particularly true with regard to his “view that to qualify as an ‘Emolument,’ the benefit must be a ‘profit arising from an office or employ.’” *Id.* The Court considers the President’s arguments and Plaintiffs’ responses.

Plaintiffs submit that none of the questions the President seeks to certify is likely to advance the termination of or the reduction of significant aspects of the case. Most centrally, even were the Court of Appeals to accept the President’s cramped interpretation of the meaning of “emoluments,” i.e. that they are only prohibited if given for actions taken by the President as President—there is clear evidence that some foreign governments have explicitly stated that they are patronizing the Trump International Hotel precisely because the President, in effect, owns it. Accordingly, say Plaintiffs, discovery would proceed in the case even if the term “emoluments” is more narrowly defined.

e. *Court’s interpretation of the term “Emolument”*

First and foremost, the President believes that the correct interpretation of the term “emolument” in the Emoluments Clauses and the scope of those Clauses is a controlling question of law because, if decided in his favor, this suit would be terminated or, at the very least, substantially narrowed in scope. Plaintiffs not only believe the Court’s interpretation of the meaning of the term “emolument” is, by any analysis, correct; they argue that the issue is not even a controlling question of law. The Court agrees with Plaintiffs.

The President insists here, just as he did in his original brief, that his interpretation of what an “emolument” is—based on his reading of text, his review of contemporaneous definitions of the term, his understanding of the purpose of the Clauses, his take on historical evidence, and executive branch precedent and practice—is one as to which substantial grounds of disagreement exist, presumably in the sense that fair minded jurists might reasonably reach contradictory conclusions. The Court finds this a dubious proposition. Even now it remains unclear, as it did in connection with the President’s original motion to dismiss, exactly how he came to his view of the meaning of “emolument.” What he said in his Motion to Dismiss and repeats now is that the President would have to receive payments for his services *as President* for the payments to qualify as prohibited “emoluments;” in other words, over and above the salary he receives for his services as President, the Federal government, and foreign and state governments would have to make specific payments to him (or possibly provide non-monetary benefits) for Presidential acts before they would be constitutionally impermissible. *See, e.g.*, Def’s Mot. for Appeal at 14. By every reasonable metric, this appears to describe what is tantamount to a bribe, so above all else the President’s definition of the term “emolument” is exceedingly strained. To be sure, it may be a difference of opinion, (“emoluments . . . of any nature whatsoever”), but, in candor, as much as anything it appears to be little more than a lawyerly construct to establish a “difference of opinion,” but not necessarily one as to which fair minded jurists might reach contradictory conclusions. *See* Emoluments Opinion at 31.

Plaintiffs, moreover, stress that “the President offers no authority demonstrating the disagreement *among courts* that is generally necessary to show substantial doubt as to the correctness of this Court’s opinion.” Pls.’ Resp. in Opp’n at 11 (emphasis added) (citations omitted). They emphasize that the mere fact that the Court’s ruling deals with an issue of first impression does not guarantee certification for purposes of interlocutory appeal. Indeed, say Plaintiffs, “[d]istrict judges have not been bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression.” 16 Charles A. Wright, *Federal Practice and Procedure* § 3930 (3d ed. 2018). See also *Job v. Simply Wireless, Inc.*, No. 15-676, 2016 WL 8229037, at *2 (E.D. Va. Jan 19, 2016) (rejecting defendants’ argument that “an interlocutory appeal is warranted every time a district court interprets novel contractual language” as “plainly inconsistent with the strong policy favoring appeals only from final orders”); *In re Loy*, No. 07-51040-FJS, 2011 WL 2619253, at *9 (E.D. Va. 2011) (noting that the fact that a case involves “novel issues . . . is not conclusive that a substantial ground for difference of opinion exists”). Plaintiffs conclude that certification is particularly inapt in a situation where, as here, the “Court has unambiguously determined that *none* of the President’s definitional arguments withstand scrutiny.” Pls.’ Resp. in Opp’n at 13.

Additionally, the Court finds no substantial ground for difference of opinion *among courts* as to the meaning of “emolument” that meets the § 1292(b) standard. The Court’s own 52-page opinion on the subject, rather than “highlight[ing] the complexity of the interpretive task,” as the President suggests, Def’s Mot. for Appeal

at 11, provides an extensive explanation of how and why the vast weight of textual, definitional, and historical evidence and executive branch precedent and practice justify the broader reading of the term “emolument” given by the Court than what the President puts forth.

It is clear that the President, unhappy with the Court’s reasoning and conclusion, merely reargues that his interpretation of the Emoluments Clauses should apply instead of the one the Court gave. He challenges the Court’s interpretation of the text of the Clauses; the original definitions and public meaning of the term “emolument”; the purpose of the Emoluments Clauses; their historical context; and the consistent interpretation that the executive branch offices have given the term or related terms over the years. The Court sees no point in stating again why it concluded as it did as to each of these issues. Clearly the President believes that the Court made incorrect holdings; it is another matter altogether, however, for him to establish the requisite “substantial difference of opinion” over the Court’s rulings apart from that. He has not done so. Although the President cites to the decision of Judge Daniels in the *CREW* case as a court disagreeing over the purpose of the protection the Clauses offer, the fact is that Judge Daniels engaged in no analysis at all as to the meaning of the Emoluments Clauses. Rightly or wrongly, he dismissed the case on standing grounds. Any comment he may have made as to the meaning of the term were extraneous to the *ratio decidendi* of his decision. See *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. Dec. 21, 2017) (“the CREW case”).

The Court returns to the proposition that “a party’s own disagreement with a district court’s conclusion does not constitute ‘substantial ground[s] for difference of opinion.’” *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (internal quotation omitted). Furthermore, insofar as a question may arise for the first time, it has been held that while district courts may consider novelty as a determinative factor in certifying an order, they should do so only *where the other statutory requirements for certification are already met* and where the “matter of first impression also ha[s] other grounds for difference of opinion.” *Lynn*, 953 F. Supp. 2d at 624 (alteration in original) (quoting *Kennedy*, 2010 WL 9009364, at *2).

All this said, as the Court had occasion to point out in its earlier opinion, even accepting the President’s proposed definition of “emolument,” Plaintiffs have still plausibly stated a claim in this case. Emoluments Opinion at 19. For instance, insofar as foreign governments have expressly stated in the media that they are patronizing the President’s hotel precisely because he is the President, and insofar as foreign governments such as Kuwait and Saudi Arabia have demonstrably done so, their payments could still constitute an “emolument” foursquare within the President’s definition of the word, especially if, what appears likely, the payments to his hotel are being made with an expectation of favorable treatment by the President in matters of foreign policy. As a result, even if the appellate court were to disagree with this Court’s definition of “emolument” and embrace the President’s, Plaintiffs’ claims in this case would still remain viable under the definition of “emolument” the President himself appears to embrace.

Finally, there is genuine concern on the part of Plaintiffs, indeed the Court shares it, that if the President is permitted to appeal the Court's decisions in piecemeal fashion, ultimate resolution of the case could be delayed significantly, perhaps for years, since it is quite likely the President would seek to appeal an adverse decision from the Fourth Circuit to the U.S. Supreme Court. That, as a matter of justice, cannot be countenanced. There is no substantial disagreement over the meaning of the term "emolument" in the sense that reasonable jurists, much less courts, would disagree, nor would resolution of that question in favor of the President on appeal be likely to materially advance the ultimate termination of the proceedings or otherwise streamline the proceedings in any material respect. *See supra pp. 10-11.* The Court's ruling as to the meaning of "emolument" is not appropriate for certification.

- f. *Whether Plaintiffs have interests addressed by the Emoluments Clauses and have an equitable cause of action under them*

The second question the President identifies for interlocutory appeal is whether the Plaintiffs have asserted interests addressed by the Emoluments Clauses and have an equitable cause of action under them. He disagrees with the Court that the Emoluments Clauses "were intended to protect against competitive injuries to particular members of the public" or that the Court "may recognize an equitable cause of action by a private person to enforce" them. Def's Mot. for Appeal at 22. He begins, as of course he must, by arguing the question of Plaintiffs' standing is a controlling question of law as to which there is substantial disagreement, which is to say, one that fair minded jurists disagree over or as to

which diverse courts have opined. The Court has just rejected this argument.

But, further, Plaintiffs argue that their standing is not a controlling question of law because the Court found that they “have standing based on harms to their proprietary, *parens patriae*, and quasi-sovereign interests.” Pls.’ Resp. in Opp’n at 5. *See* Standing Opinion at 20, 25, 29. On the other hand, the President, in his motion seeking certification for leave to appeal, only discusses the Court’s ruling on the question of competitor standing. Again, therefore, Plaintiffs conclude, an appellate decision favorable to the President—i.e., were the Court to find that the Emoluments Clauses were not meant to protect competitors’ economic interests—would still leave Plaintiffs free to proceed in their capacities as *parens patriae* and quasi-sovereigns. Pls.’ Resp. in Opp’n at 6. The President has sought to salvage his argument in his Reply, suggesting that “by ‘economic interests,’ he was clearly referring to interests against ‘competitive injuries,’ . . . which would encompass both Plaintiffs’ proprietary and asserted *parens patriae* interests.” Def’s Reply at 10. The President’s reply gains him no ground.

As the Court explained in its Standing Opinion, the District of Columbia and the State of Maryland have standing as *parens patriae* in part because of the apparent competitive economic injuries sustained by their residents as a result of competitive advantages enjoyed by the Trump International Hotel. The Court also held that as *parens patriae* and by reason of the District and Maryland’s quasi-sovereign positions, they are acting appropriately to protect their state economies and governance interests. Standing Opinion at 15. That is,

on behalf of their citizens, Plaintiffs assert “public or governmental interests that concern the State as a whole.” Standing Opinion at 25 n.14, 26 (citing *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007)). Although the President goes on at length, arguing that contrary to the Court’s ruling, competitor standing does not apply in this case, *see* Def’s Mot. for Appeal 22-23; Def’s Reply at 12-13, the Court agrees with Plaintiffs that even an appellate ruling in favor of the President on this point would not preclude Plaintiffs from pursuing their claims as *parens patriae* and quasi-sovereigns. In other words, resolving the President’s question differently on appeal would not substantially narrow or terminate this litigation, and is not therefore a controlling question for the purposes of certification under § 1292(b). While this alone suffices to deny certification of this particular question, for the sake of completeness, the Court considers the President’s further arguments on this issue.

The President points to Judge Daniels’ decision in the *CREW* case as an instance of another court disagreeing over whether business competitors are within the Emoluments Clauses’ zones of interest. Def’s Mot. for Appeal at 22. To be sure, Judge Daniels did say that,

[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition. The prohibitions contained in these Clauses arose from the Framers’ concern with protecting the new government from corruption and undue influence.”

276 F. Supp. 3d at 187.

The quoted language from Judge Daniel’s decision, however, is pure dicta. After finding that plaintiffs there—a non-profit organization (CREW) and two private citizens—had failed to show injury-in-fact for standing purposes, Judge Daniels went on to opine that business competitor plaintiffs are not within the zone of interests of the Emoluments Clauses and thus could not invoke their protection. Even as dicta, it is not clear why entities or persons affected by undue influence or corruption on the part of their business competitor somehow lie outside the zone of interests of the Clauses. In a broad sense, all Americans fall within the zones of interest of the Clauses. Nothing in the Constitution precludes business competitors—a sub-class of Americans—from challenging the improper receipt of emoluments by a President who is purportedly engaging in a business directly in competition with those businesses; especially given the particular allegations in the present case—that the President’s business is specifically drawing business away from hotels, event spaces, and restaurants owned by the business competitors. Judge Daniel’s decision in the *CREW* case, in short, does not represent a substantial different of opinion among courts as to standing, limited as it is to the question of standing of particular non-governmental plaintiffs. The Court agrees with Plaintiffs that the “President’s reliance on the *CREW* decision reflects—at best—an instance of judges applying the law differently[. It] does not demonstrate, as is required for interlocutory appeal, that ‘courts themselves disagree as to what the law is.’ Pls.’ Resp. in Opp’n at 8 (quoting *In re Nichols*, No. TDC-14-0625, 2014 WL 4094340, at *3 (D. Md. Aug. 15, 2014)).

The more important point, in any event, is that by the President’s analysis, no one (save perhaps Congress in cases involving emoluments paid by foreign governments) could ever bring an action to challenge the President’s receipt of emoluments—even if there were no dispute as to what the term meant—because no one, including the American people at large, could show that they were in the zone of the interests contemplated by the Clauses. Yet it is noteworthy that since the briefing on the certification of the standing question was completed, another federal court has held that some 200 members of Congress have standing to sue the President for failure to notify Congress of his receipt of foreign “emoluments” pursuant to the Foreign Clause. *See Blumenthal v. Trump*, No. 17-1154, 2018 WL 4681001, at *4-5. (D.D.C. Sept. 28, 2018). There Judge Emmet Sullivan of the United States District Court for the District of Columbia found that, even in light of the separation-of-powers concerns recited in that case, standing was appropriate in part because “plaintiffs have no adequate legislative remedy and this dispute is capable of resolution through the judicial process.” *Id.* at *5. That is also the case here. The fact that another court has found standing in a cohort other than the full membership of Congress fortifies this Court’s analysis as well.⁴ The Governmental Plaintiffs in this case

⁴ While Congress can presumably legislate in the context of the Emoluments Clauses, *see* such initiatives as S. Con. Res. 8, 115th Cong. (2017) (among other things, declaring the President’s dealings through his companies with foreign governments to be potential violations of the emoluments clause); H.R.J. Res. 16, 115th Cong. (2017) (denying congressional consent for the President to accept any foreign emolument during his Presidency), in order to prevent the President from accepting unconstitutional emoluments, it is, as

lie fully within the zones of interests of the Emoluments Clauses. Standing Opinion at 42.

g. *Whether Plaintiffs have Article III standing to pursue their claims*

The third purportedly controlling question of law the President identifies is whether Plaintiffs have Article III standing to pursue their claims. The Court has just considered this question in connection with the previous question as to which the President seeks certification. The President challenges the Court's determination that the competitor standing doctrine yields the conclusion that Plaintiffs have suffered or will imminently suffer an injury-in-fact. But again Plaintiffs note that competitor standing is integral primarily to their proprietary claims, not those made in their *parens patriae* or quasi-sovereign capacities. For the same reasons that the Court rejects the President's claim that prudential standing considerations justify certification, *see supra* p. 17, the Court agrees with Plaintiffs that whether they have suffered injury-in-fact based on the competitor standing theory is not a controlling question. It is also worth considering the President's argument that there is "substantial ground for disagreement" on this point.

The President again points to *CREW v. Trump* as evidence that courts disagree over whether Plaintiffs have standing. Def's Mot. for Appeal at 23-24; Def's Reply at 13. He recites some of Judge Daniels' reasoning for

the *Blumenthal* decision has suggested, the President's duty to seek the consent of Congress first. *Blumenthal*, 2018 WL 4681001 at *4 (also discussing, for standing purposes, the relevance of legislative remedy in legislator standing analyses).

finding that the plaintiffs in that case did not have standing. He then argues that “reasonable minds could differ” over whether the doctrine of competitive standing establishes Plaintiffs’ injury-in-fact; the President submits that “the Fourth Circuit has never expressly endorsed the competitor standing doctrine” and that no court “has applied it in the context of a diffused market in which competition depends on a large number of variables, as is the case here.” Def’s Mot. for Appeal at 23-24. The President also notes that “[t]his Court is the first ever to permit a party to pursue relief under the Emoluments Clauses for alleged competitive injury—or for any injury for that matter. . . . ” Def’s Reply at 11.

Again, Plaintiffs respond that even if this Court’s ruling that competitive standing establishes an injury-in-fact for the Article III standing analysis were overturned, Plaintiffs would still be able to proceed based on their *parens patriae* and quasi-sovereign capacities. Under the latter theories, Plaintiffs share interests of “trying to protect a large segment of their commercial residents and hospitality industry employees from economic harm” and in “protect[ing] their position among . . . sister states.” Pls.’ Resp. in Opp’n at 5 (citing Standing Opinion at 15, 19, 29).

But Plaintiffs also point out that “even if the Fourth Circuit had not addressed the question [of competitor standing], it would be of no moment because . . . ‘the *Supreme Court* has recognized that plaintiffs with an economic interest have standing to sue to prevent a direct competitor from receiving an illegal market benefit leading to an unlawful increase in competition.’” Pls.’ Resp. in Opp’n at 6-7 (quoting Standing Opinion at

21). Plaintiffs conclude by pointing out that Judge Daniels' decision in *CREW v. Trump* was nothing more than a Judge applying essentially the same law to different facts, finding that "the private-party plaintiffs had not sufficiently alleged competitor standing against the President," but not showing disagreement about "what the law is." Pls.' Resp. in Opp'n at 7 (internal quotation omitted). In other words, Judge Daniels was not disagreeing with this Court over what is required to establish standing. He employed the same three-part test this Court did. He simply found, with respect to the plaintiffs before him, all non-governmental persons or entities, that no injury-in-fact had been shown. Here, with more broadly based governmental entity plaintiffs before it, this Court found that, in contrast, they had indeed established injury-in-fact.

Beyond that, the President's statement that the Fourth Circuit has not addressed the question of competitor standing is somewhat misleading. While it may not have specifically decided a case involving the theory, the Fourth Circuit has in fact noted that "numerous cases have found that a firm has constitutional standing to challenge a competitor's entry into the market." *Zeneca, Inc. v. Shalala*, 213 F.3d 161, 170 n.10 (4th Cir. 2000) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)). There is thus a strong indication that the Fourth Circuit would embrace the competitor standing theory if and when squarely called upon to decide. But this is not that case.

Since the first two statutory factors for certification have not been met on the question of Article III standing via the competitor standing doctrine, the Court declines to certify this issue for appeal.

h. *Whether the Court has jurisdiction to declare Declaratory and Injunctive relief against the President*

The fourth and final question the President identifies as certifiable is whether the Court has jurisdiction to issue declaratory and injunctive relief against him. He submits that if the Court's failure to grant his motions to dismiss on this point was erroneous, it would necessarily be reversible and dispositive on final appeal. Therefore, he says, this is a controlling issue of law. *See Butler*, 307 F.R.D. at 452. The Court considers first whether there is a substantial ground for a difference of opinion on this issue among courts.

The President argues that it is open to debate among courts whether equitable relief can be granted against a sitting president. Def's Mot. for Appeal at 24. He believes "Supreme Court precedent holds that equitable relief against a sitting President is 'extraordinary,' and that federal courts have 'no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" *Id.* (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866), *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (quoting same)). Thus the President says that the Court's conclusion that there is no "barrier to its authority to grant either injunctive or declaratory relief," *see* Standing Opinion at 36, is in "significant tension" with *Johnson* and other cited precedent. Def's Mot. for Appeal at 25.

Plaintiffs contend that the Court was correct in finding that "[p]recedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution." Standing

Opinion at 42. They point out that in the two cases the President cites where the courts did not issue injunctive relief against the President, both courts noted that it was more appropriate in each case to enjoin a subordinate executive official to block the protested action. *See* Pls.’ Resp. in Opp’n at 18. Here, where there is obviously no subordinate official against whom equitable relief would make sense—the suit has been filed against the President for actions benefitting him personally—the situation is significantly different. Moreover, instead of involving parties seeking to enjoin the President from enforcing an act of Congress, as was the case in *Johnson*⁵, the present suit “involves [the President’s] personal compliance with discrete constitutional prohibitions that foreclose any claim of Presidential authority.” *Id.* at 19.

In its Standing Opinion rejecting the President’s argument, the Court discussed this issue at length, and the issue needs no further elucidation here. *See* Standing Opinion at 42. The Court found there was ample authority suggesting that even the President—in his official capacity—can be the subject of equitable relief, especially given a situation such as the one at hand. While Plaintiffs may not have sought a preliminary injunction, that obviously would not diminish the force of their claim on the merits.

⁵ In *Johnson*, the State of Mississippi sought to enjoin the President from in any way carrying out the Reconstruction Acts, which the state alleged were unconstitutional. The Court took care to note that the single point it considered was whether the President could be enjoined from enforcing an allegedly unconstitutional law. 71 U.S. at 498.

i. *Extraordinary Circumstances Justifying Certification*

The President relies heavily on the proposition that the Court’s orders should be certified because they present extraordinary circumstances dealing with issues of first impression—that a sitting President, representing an equal branch of the government, is accused of violating the Constitution and faces the prospect of civil discovery, a burdensome and distracting enterprise. *See, e.g.*, Def’s Mot. for Appeal at 3, 6, 9, 25; Def’s Reply at 1, 4, 6-7. The Court, however, reminds that even if the circumstances were truly extraordinary—and the Court does not believe they are⁶—that would favor certification only if all the criteria required by § 1292(b) are otherwise met. Here, as the Court has found, they are not.

Yet again, the Court notes that certification for appeal is not appropriate “to provide early review of difficult rulings in hard cases.” *Butler*, 307 F.R.D. at 452 (internal quotation omitted). “[I]n a separation-of-powers case as in any other. . . . it is the role of the Judiciary to ‘say what the law is’ regarding the meaning of the Foreign Emoluments Clause and the President’s compliance with it.” *Blumenthal*, 2018 WL 4681001 at *17 (internal citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Pres-

⁶ *See supra* pp. 12, 14 (discussing why it does not suffice for certification that the Orders present some issues of first impression); Standing Opinion at 41-42 (discussing the availability of equitable action against a President).

ident has not satisfied the several criteria for certification of the issues that concern him.⁷ Accordingly, his Motion for Leave to Appeal (Interlocutory) (ECF No. 127) is **DENIED**.

IV. Stay Pending Appeal

Independently of the denial of the President's request to certify, the Court **DENIES** his Motion to Stay All Discovery Pending Appeal.

When courts determine the appropriateness of staying proceedings in a given case, three factors must be taken into account: 1) the interest in judicial economy; 2) the hardship to the moving party if the action is not stayed; and 3) the potential damage or prejudice to the non-moving party. *International Refugee Assistance Project v. Trump*, 323 F. Supp. 726, 731 (D. Md. 2018). The movant "bears the burden of establishing its need" for a stay and does not enjoy an automatic stay as a right. *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

⁷ The President may be correct that if an Order is certified for appeal and the Fourth Circuit agrees to review it, issues "would necessarily be presented *in toto* to the appellate court," Def's Reply at 12, and the Fourth Circuit could then evaluate issues that the President did not explicitly address in his brief. See *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 ("[A]ppellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court.") However, to warrant certification, the President must first demonstrate there is at least one controlling question of law as to which there is substantial ground for difference of opinion that could materially advance the termination of the litigation if decided differently. He has not done so here.

Congress expressly established the availability of an interlocutory appeal under Section 1292(b) on the condition that it “shall not stay proceedings in the district court” unless the district court exercises its jurisdiction to so order. *See* Pls.’ Resp. in Opp’n at 20. The presumption, then, is against a stay. *See* David G. Knibb, *Fed. Court of Appeals Manual* § 5:6 (6th ed. 2018). “[A] request to stay proceedings calls for an exercise of the district court’s judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court’s docket.” *Maryland Universal Elections, Inc.*, 729 F.3d 370, 375 (4th Cir. 2013) (internal quotation omitted).

The requested stay in this case would not serve judicial economy for the simple reason that the President’s success on appeal would neither terminate nor narrow the case nor would it foreclose discovery relevant to proving, to at least some extent, Plaintiffs’ claimed injuries. *See supra* p. 14-15, 17, 21 (discussing why appealing the Court’s decisions as to the meaning of “emolument” and prudential and competitive standing would not significantly narrow the scope of the case). Furthermore, if certified for appeal to the Fourth Circuit, it is highly likely that any decision—favorable or unfavorable to the President—would be appealed to the Supreme Court. All the issues raised by the President at present could just as cleanly be addressed on a final appeal. Judicial economy favors going forward with the case in this Court at this time.

As for hardship or inconvenience attending a stay, the most the President can say is that if he is required to respond to civil discovery, he would be ill-served.

But as Plaintiffs point out, most of what they seek is discovery from third parties, e.g., the Trump International Hotel, which would seem unlikely to impose any meaningful burden on the President individually. *See* Report of Rule 26(f) Planning Meeting (Sept. 14, 2018), ECF No. 132. And, of course, “mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough.” *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970) (internal quotation omitted). The President’s argument that he would be distracted would seem to apply to any litigant who has been sued. Yet Presidents have unquestionably responded to court orders, as in this case, and have also had extensive interactions with the court system. *See* Standing Opinion at 35-36; Pls.’ Resp. in Opp’n at 18-19.

Apart from Plaintiffs’ focus on discovery from third parties, there are numerous ways to limit the extent to which the President might be obliged to respond, e.g., he could do so by stipulation, by limited written discovery requests, or by other non-burdensome means. And of course, the Court is always available to limit given discovery to minimize an unusual impact.

It bears noting that the President himself appears to have had little reluctance to pursue personal litigation despite the supposed distractions it imposes upon his office. *See, e.g.*, Order, *Cohen v. United States*, No. 18-3161 (S.D.N.Y. Apr. 13, 2018) (granting the President’s motion to intervene in litigation); *see also, e.g.*, Michael D. Shear & Eileen Sullivan, *Trump and Giuliani Taunt Brennan About Filing a Lawsuit*, N.Y. Times, Aug. 20, 2018 (President inviting lawsuit against himself), <https://nyti.ms/2Mwj3De>; Letter from Charles

H. Harder to Steve Rubin & Michael Wolff (Jan. 4, 2018) (providing notice of potential legal action in connection with allegedly defamatory statements made in upcoming publication), goo.gl/hwVLTZ; Steve Holland & Doina Chiacu, *Trump targets book, threatens ex-ally Bannon with legal action*, Reuters (Jan. 3, 2018) (reporting on cease-and-desist letter sent to Stephen K. Bannon and stating that President Trump's attorney Charles Harder "told Reuters that 'legal action is imminent' against Bannon"), <https://reut.rs/2NhQCJG>; Sarah Fitzpatrick & Tracy Connor, *Trump tries to move Stormy Daniels lawsuit to federal court, claims she owes him \$20 million*, NBC News, March 16, 2018 (President's lawyer, with the consent of the President, files a notice of removal in lawsuit by Stephanie Clifford), <https://goo.gl/E5zo9N>.

Finally, Plaintiffs argue that a stay of all proceedings would cause substantial harm to them and the public, more particularly the residents of the State of Maryland and the District of Columbia, and that any inconvenience to the President does not outweigh the prejudice that delay would visit upon Plaintiffs and their constituents. Pls.' Resp. in Opp'n at 26-27. The inescapable fact remains that the President could, on the basis of piecemeal appeals, potentially delay resolution of a good part of this case for years. As the Supreme Court has pointed out, the President "errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997).

The Court is satisfied that no stay of the proceedings, for discovery purposes or otherwise, is warranted.

V. Conclusion

The President has failed to identify a controlling question of law decided by this Court as to which there is substantial ground for difference of opinion justifying appellate review that would materially advance the ultimate termination of the case or even the material narrowing of issues. Nor is a stay warranted, even if the Court were to certify one or more of the President's proposed issues. Judicial economy would not be served, no hardship or equitable justification would result if the case were to go forward, and any inconvenience to the President if the proceeding is not stayed would not outweigh the prejudice that a delay would inflict on Plaintiffs and their constituents.

The President's Motion for Leave to Appeal (Interlocutory) and for a Stay (ECF No. 127) is DENIED.

Within twenty (20) days, Plaintiffs shall submit a specific discovery schedule to the Court consistent with that set out in the statement they previously submitted pursuant to FRCP 26(f), ECF No. 132.

A separate Order will issue.

Nov. 2, 2018

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 17-1596

THE DISTRICT OF COLUMBIA AND THE STATE OF
MARYLAND, PLAINTIFFS

v.

DONALD J. TRUMP, INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS PRESIDENT OF THE UNITED STATES,
DEFENDANT

Filed: July 25, 2018

ORDER

Having considered Defendant's Motion to Dismiss (ECF No. 21) and Plaintiffs' Opposition thereto, following oral argument, it is, for the reasons stated in the accompanying Opinion, this 25th day of July, 2018,

ORDERED:

1. Defendant's Motion to Dismiss (ECF No. 21) is **DENIED** insofar as it seeks to dismiss Plaintiffs' claims against the President in his official capacity that the President and the Trump International Hotel and all its appurtenances in Washington, D.C. and any and all operations of the Trump Organization with respect to the same have violated the Foreign

and Domestic Emoluments Clauses of the U.S. Constitution. Plaintiffs have stated viable causes of action as to those claims.

2. The Court **DIRECTS** the parties to consult and submit a Joint Recommendation to the Court suggesting the next steps to be taken in the case, including whether any further amendment of the Amended Complaint is necessary, what the time for the President to file an Answer herein should be, what the general outline of any proposed discovery should be, and any other matter the parties deem appropriate to bring to the attention of the Court.
 - a. The Joint Recommendation shall be submitted within twenty-one (21) days hereof.
3. The Court **DEFERS** ruling on the President's Motion to Dismiss the individual capacity claims against him (ECF No. 112).
4. Any further hearing to consider the arguments in Defendant's Individual Capacity Motion to Dismiss will be set in consultation with counsel.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 17-1596

THE DISTRICT OF COLUMBIA AND THE STATE OF
MARYLAND, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, DEFENDANT

Filed: July 25, 2018

OPINION

In a previous Opinion¹ the Court held that Plaintiffs, the District of Columbia and the State of Maryland, have standing to challenge actions of President Donald J. Trump, in his official capacity,² that they believe violate

¹ See Opinion (Mar. 28, 2018), ECF No. 101 (Standing Opinion).

² On February 23, 2018, without objection by the President, Plaintiffs filed a Motion for Leave to File an Amended Complaint which would add him as a Defendant in his individual capacity. On March 12, 2018, the Court granted the Motion, accepting the proposed Amended Complaint that accompanied the Motion. Mem. Order (Mar. 12, 2018), ECF No. 94. The Court, however, decided to proceed on the official capacity claims separately so that its Standing Opinion addressed only the standing arguments raised by the President in his official capacity. On May 1, 2018, the President, in his individual capacity, filed a separate Motion to Dismiss. Def.'s Mot. Dismiss (May 1, 2018), ECF No. 112 (Individual Capacity Motion).

the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.³

Plaintiffs have alleged that the violations consist of the President's actual or potential receipt, directly or indirectly, of payments by foreign, the federal, and state governments (or any of their instrumentalities) in connection with his and the Trump Organization's ownership of the Trump International Hotel in Washington, D.C.⁴ They seek declaratory relief establishing their

The Court will address the individual capacity claims and the arguments to dismiss them in a separate Opinion. The present Opinion addresses only those arguments pertaining to the President's official capacity as set forth in his Motion to Dismiss.

³ The **Foreign Emoluments Clause**, U.S. Const. art. I, § 9, cl. 8, provides that "no Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The **Domestic Emoluments Clause**, U.S. Const. art. II, § 1, cl. 7, provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."

⁴ Both the original and Amended Complaint alleged violations going well beyond those involving the Hotel in the District of Columbia. The Court, in its Standing Opinion, found that Plaintiffs had demonstrated the requisite injury-in-fact for standing purposes only with respect to the Hotel and to the activities of the Trump Organization relating to it. It held that, while the President's and the Trump Organization's operations outside the District of Columbia might at some other time and/or some other place be the subject of a lawsuit or lawsuits, they were not part of the present one.

rights *vis-à-vis* the President's actions as well as injunctive relief prohibiting him from further violating the Clauses.

The President has moved to dismiss the Amended Complaint for failure to state a claim. Although the President made this argument in his Motion to Dismiss and the parties addressed the issue in their briefs in support of and in opposition to the President's Motion, the Court deferred deciding the meaning and applicability of the Clauses until the issue of standing was resolved. Having decided that issue in favor of Plaintiffs, the Court turns to the issue of what the Clauses mean and whether Plaintiffs have otherwise stated claims under them.

For the reasons that follow, the Court determines that Plaintiffs have convincingly argued that the term "emolument" in both the Foreign and Domestic Emoluments Clauses, with slight refinements that the Court will address, means any "profit," "gain," or "advantage" and that accordingly they have stated claims to the effect that the President, in certain instances, has violated both the Foreign and Domestic Clauses. The Court **DENIES** the Motion to Dismiss in that respect.

I. FACTUAL AND PROCEDURAL BACKGROUND

A full account of the facts alleged in this case is set out in the Court's Standing Opinion.⁵ For present purposes, the Court briefly recapitulates the facts necessary to consider the issue at hand.

⁵ For a more detailed discussion of the facts alleged in the Amended Complaint, see the Court's Standing Opinion. Standing Op. at 2-7.

Many facts are undisputed or essentially undisputed. Donald J. Trump is the President of the United States and the sole or a substantial owner of both the Trump Organization LLC and The Trump Organization, Inc. (collectively, the Trump Organization), umbrella organizations under which many, if not all, of the President's various corporations, limited-liability companies, limited partnerships, and other entities are loosely organized. Am. Compl. ¶¶ 20, 29 (Mar. 12, 2018), ECF No. 95. Of particular importance in the present suit is the President's ownership, through the Trump Organization, of the Trump International Hotel in Washington, D.C. (the Hotel).

The Hotel is a five-star, luxury hotel located on Pennsylvania Avenue, N.W., in Washington, near the White House. *Id.* ¶ 34. While the President does not actively manage the Hotel, through the Trump Organization, he continues to own and purportedly controls the Hotel as well as the bar and restaurant, BLT Prime, and the event spaces located within the establishment. *Id.* ¶¶ 29, 34-36. Directly or indirectly, the President actually or potentially shares in the revenues that the Hotel and its appurtenant restaurant, bar, and event spaces generate. *Id.*

On January 11, 2017, shortly before his inauguration, the President announced that he would be turning over the "leadership and management" of the Trump Organization to his sons, Eric Trump and Donald Trump, Jr. *Id.* ¶ 30. Prior to taking office, he also announced that all profits earned from foreign governments would be donated to the U.S. Treasury. *Id.* ¶ 46. The Trump Organization stated that it would not be tracking all payments it might receive from foreign governments and

only planned to make an estimate with regard to such payments. *Id.* However, following his inauguration and, as of the date of the filing of this action, June 12, 2017, the President had made no such “donations” to the U.S. Treasury.⁶ *See* Am. Compl. ¶¶ 46, 138. Despite these pronouncements, Plaintiffs allege that the President continues to own and have intimate knowledge of the activities of the Trump Organization. *Id.* ¶ 31. Indeed, according to Plaintiffs, at the outset of his Presidency one of his sons stated that he would be providing business updates to the President regarding the Organization on a quarterly basis and, although the President may have formed a trust to hold his business assets, it appears that he remains able to obtain distributions from this trust at anytime and may have actually received such payments from time to time. *Id.* ¶¶ 29, 31-32.⁷

⁶ According to a February 2018 press report, the President stated that he had paid to the U.S. Treasury profits the Hotel had received from foreign governments. No details with respect to such payments, however, were provided, viz., when the payments were made, which governments or their instrumentalities made them, how much each paid, how the amounts each paid were calculated, who verified the calculations, and how much was calculated over what period of time. *See* David A. Fahrenthold & Jonathan O’Connell, *Trump Organization Says It Has Donated Foreign Profits to U.S. Treasury, but Declines to Share Details*, Wash. Post (Feb. 26, 2018), https://www.washingtonpost.com/politics/trump-organization-says-it-has-donated-foreign-profits-to-us-treasury-but-declines-to-share-details/2018/02/26/747522e0-1b22-11e8-ae5a-16e60e4605f3_story.html?utm_term=.d8a282e07ec0. Nor is there any indication as to whether the President has made any such payments since the payments reported in February 2018.

⁷ The Court notes that, as reported by the press, the President’s trust allows him to withdraw money from any business at any time,

Since the President’s election, a number of foreign governments or their instrumentalities have patronized or have expressed a definite intention to patronize the Hotel, some of which have indicated that they are doing so precisely because of the President’s association with it. Am. Compl. ¶¶ 39-43. The President has at no time sought the consent of Congress for him to accept the revenues the Hotel receives or could potentially receive from these foreign governments, nor has Congress ever approved the receipt of such revenues. *Id.* ¶ 33.

In addition, at least one State—Maine—patronized the Hotel when its Governor, Paul LePage, and his entourage visited Washington to discuss official business with the Federal Government, including discussions with the President. Pls.’ Opp’n. at 8 (Nov. 7, 2017), ECF No. 46.

Plaintiffs further allege that the Hotel has received a benefit, which they say is an “emolument,” from the Federal Government by virtue of the General Services Administration (GSA) Lease which governs the Trump Organization’s use of the Old Post Office Building, the site of the Hotel. Am. Compl. ¶¶ 80-86. Thus Section 37.19 of the Old Post Office Lease states: “No . . .

and that the trustees “shall distribute net income or principal to Donald J. Trump at his request,” or whenever they “deem appropriate.” The trustees of the trust are Donald Trump, Jr. and the Trump Organization Chief Financial Officer Allen Weisselberg. Drew Harwell, *Trump Can Quietly Draw Money from Trust Whenever He Wants, New Documents Show*, Wash. Post. (Apr. 3, 2017), https://www.washingtonpost.com/politics/trump-can-quietly-draw-money-from-trust-when-ever-he-wants-new-documents-show/2017/04/03/7f4e0002-187c-11e7-9887-1a5314b56a08_story.html?utm_term=.b2e411341812.

elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.” *Id.* ¶ 82. Despite a previous statement from a GSA official that the President would be in violation of the Lease unless he fully divested himself of all financial interest in the Lease, following the President’s inauguration, the GSA reversed its position, determining that the President was in fact in compliance with the Lease. *Id.* ¶¶ 83-84. Since then, the Trump Organization and through it the President have enjoyed the benefits of the Lease.

Plaintiffs allege that these actions of the President, through the Trump Organization, violate both the Foreign and Domestic Emoluments Clauses.

The issue before the Court at this juncture is whether Plaintiffs’ allegations state viable claims for relief with respect to the President’s purported violations of the Foreign and Domestic Emoluments Clauses.

The key dispute the parties have is over the meaning of the term “emolument”⁸ in the Clauses, although more can and will be said about other terms within the Clauses.

Plaintiffs submit that the President’s actions clearly offend the Clauses. An “emolument,” they say, citing among other things the definition of the term in a considerable number of dictionaries contemporaneous with the Constitutional Convention, as well as the purpose of

⁸ The President does not appear to dispute that, under Plaintiffs’ interpretation of the term, the Amended Complaint would state a claim or claims for relief.

the Clauses to prevent against possible undue influence upon the federal official, is any “profit,” “gain” or “advantage.” Am. Compl. ¶¶ 23-28; Pls.’ Opp’n at 29-30. Accordingly, say Plaintiffs, the Clauses were framed so as to flatly bar the receipt by anyone holding office under the authority of the United States, including the President, of any profit, gain, or advantage of any nature or kind whatsoever from any foreign, the federal, or state government. Pls.’ Opp’n at 29. No exception exists, Plaintiffs continue, even if the foreign, federal, or domestic donor receives a *quid pro quo* from the officeholder in connection with the officeholder’s private undertakings. It is enough that the President directly or indirectly receives money from foreign, the federal, and domestic government officials who patronize his Hotel; the Emoluments Clauses are violated.

The President argues that the Emoluments Clauses do not apply to his actions at all—citing (albeit fewer) other dictionary definitions more or less contemporaneous with the adoption of the Clauses to the effect that an “emolument” refers to a “profit arising from an office or employ.” Def.’s Mot. Dismiss at 32 (Sept. 29, 2017), ECF No. 21-1. Based on this definition and what he argues is the purpose and historical context of the Clauses, the President submits that an “emolument” pertains only to a payment made in connection with a particular employment over and above one’s salary as, say, President of the United States, so that payments to a federal official for any independent services rendered, such as for the rental of hotel rooms or event spaces privately owned by the officeholder, or payments for meals at his restaurants, privately owned, are payments entirely separate and apart from an “emolument” paid to

the President qua President. *Id.* at 31-32. Accordingly, the Amended Complaint, in the President’s view, does not state plausible claims for relief. He urges the Court to dismiss it on these grounds.

Although the President himself does not make the argument, as a preliminary matter one of the *Amici Curiae* suggests that the President is not covered by the Foreign Emoluments Clause at all because his elective office does not “arise under the authority” of the United States. *See* Br. for Scholar Seth Barrett Tillman & The Judicial Education Project as *Amici Curiae* in Support of Def. (Oct. 6, 2017), ECF No. 27-1 (Professor Tillman). The Court deals briefly with this latter argument at the outset.

II. STANDARDS FOR CONSTITUTIONAL INTERPRETATION

The Court begins with a review of the standards for judicial interpretation of a clause in the Constitution.

Although there has been much public debate, especially in recent years, over which theory or theories should be applied in interpreting constitutional provisions—ranging from strict constructionism,⁹ originalism¹⁰ and original

⁹ Strict constructionism, referred to sometimes as “strict originalism,” is the theory that constitutional interpretation requires following the literal text and specific intent of the Constitution’s drafters. *See, e.g.,* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 19 (3d ed. 2006).

¹⁰ While the distinction between strict constructionism and more moderate originalism is not always clear, originalism is “more concerned with the adopters’ general purposes than with their intentions in a very precise sense.” In other words, originalism focuses

meaning¹¹ to the purposive approach¹² and the Living Constitution,¹³ with perhaps shadings in-between—the parties do not lock horns over this. Both sides embrace a blend of original meaning and purposive analysis (i.e., relying on external aids, especially dictionary definitions more or less contemporaneous with the Constitutional debates and, insofar as possible, the intent of the Framers) in support of their view that the Emoluments Clauses should or should not apply to the President and, if applicable, to which of his actions they should apply.¹⁴

on the Framers' general concepts when drafting a particular constitutional provision rather than their specific intent at the time. *See id.*

¹¹ Original meaning is yet another variation on originalism propounded by Justice Antonin Scalia which looks to historical practices and the understanding at the time of the drafting of the Constitution to determine the original meaning of a particular constitutional provision. *See id.* at 20.

¹² The purposive approach seeks to interpret a constitutional provision within the context of its purpose. “Purposive Construction,” *Black’s Law Dictionary* (9th ed. 2009).

¹³ Those who promote the theory of a “Living Constitution” argue that the Constitution must be able to adapt to current needs and attitudes that have changed since the original drafting. In other words, the Constitution does not have one fixed meaning but is a dynamic document the meaning of which can change over time. *See, e.g.,* Kermit Roosevelt, *Originalism and the Living Constitution: Reconciliation* at 1 (July 2007), <https://www.acslaw.org/sites/default/files/Kermit%20Roosevelt%20Vanderbilt%20Paper%207-2007.pdf>.

¹⁴ Although the parties' briefs now and again seem to suggest that their interpretation of the Emoluments Clauses and especially the meaning of the term “emolument” are self-evident almost to the point of evoking the Plain Meaning Rule, neither side of course goes that far. But this is perhaps a convenient starting place to question the logic of the President's view that an “emolument” has

Supreme Court precedent confirms that a blend of textualism and purposivism should guide the Court's approach.

The meaning of a Constitutional provision "begin[s] with its text." *City of Boerna v. Flores*, 521 U.S. 507, 519 (1997). Where the text is clear, "there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731-32 (1931) (citing, *inter alia*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)). Moreover, in interpreting the text, the Court is "guided by the principle that [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *Sprague*, 282 U.S. at 731). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meaning that would not have been known to ordinary citizens in the founding generation." *Id.* at 576-77. To determine the original public meaning, the Supreme Court has looked to founding-era

to be employment-related and therefore when he receives emoluments from foreign states, *e.g.*, for private services rendered, his actions are not covered by the Emoluments Clauses. Accepting the President's argument *arguendo*, why doesn't logic suggest that the foreign and domestic government payments he receives in connection with the Hotel are in fact an "emolument" to his salary as President? Especially when foreign governments are on record as saying that they have been or will be patronizing the Hotel precisely because the President is the President? And what if the foreign and state governments pay a premium over market to patronize the Hotel? In other contexts, padded contracts have been held to cover illegitimate payments over and above otherwise legitimate payments for services rendered.

dictionaries and other contemporaneous sources. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014) (discussing founding-era dictionary definitions and the Framers’ use of the word “recess” in the Constitution’s Recess Appointments Clause); *Heller*, 554 U.S. at 581-86 (looking to founding-era dictionaries, William Blackstone’s *Commentaries on the Laws of England*, and State constitutions to determine the meaning of the Second Amendment).

When a constitutional provision is ambiguous, however, the Court has recognized the need “to consider the Clause’s purpose and historical practice.” *Noel Canning*, 134 S. Ct. at 2559, 2568 (“[I]n interpreting the Clause, we put significant weight upon historical practice.”) (emphasis omitted); *id.* at 2559 (“[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.”) (citation and quotation marks omitted); *see also Heller*, 554 U.S. at 592 (“This meaning is strongly confirmed by the historical background of the [provision].”). Importantly, moreover, the Supreme Court has treated executive practice and precedent “as an interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.” *Noel Canning*, 134 S. Ct. at 2560, 2562-63 (evaluating past historical practice and discussing Government ethics opinions to inform the Court’s determination “of what the law is”).

III. THE EMOLUMENTS CLAUSES

Because one of the *Amici Curiae* has suggested that the Foreign Emoluments Clause does not apply to the President at all, the Court briefly addresses this issue

before turning to the meaning of the term “emolument” itself.¹⁵

A. “Office of Profit or Trust under [the United States]”

Amicus Curiae Professor Seth Barrett Tillman of the Maynooth University Department of Law argues that the Foreign Emoluments Clause does not extend to the President because the Presidency does not qualify as an “Office of Profit or Trust under [the United States].” The Framers, he says, distinguished between different federal offices and drafted different rules for these distinct federal positions. Tillman Br. at 2, 4. Specifically, Professor Tillman argues that an office “under the United States,” which is the language used in the Foreign Emoluments Clause, refers to a federal *appointed* position that “is created, regularized, or defeasible by statute.” *Id.* at 7. According to Professor Tillman, the Clause does not reach elected positions; to the contrary, he says, only express language can reach the Presidency.

Professor Tillman claims that this conclusion is supported by both the text and history of the Constitution. He submits, for example, that in the Colonial Period the phrase “Office under the Crown” was a commonly-used drafting convention that referred only to appointed—not elected—positions, a distinction that he suggests remains operative in the United Kingdom today. *Id.* at 8-9. The Framers of the Constitution and the First

¹⁵ There is no dispute that the President is covered by the Domestic Emoluments Clause. He is named in the text and is the sole subject of the Clause. *See* U.S. Const. art. II, § 1, cl. 7 (“The President shall. . . .”).

Congress, he continues, adhered to this drafting convention. He points to an anti-bribery statute enacted in 1790 in which Congress declared that a defendant convicted of bribing a federal judge “shall forever be disqualified to hold any office of honor, trust, or profit under the United States.” *Id.* at 13 (citing An Act for the Punishment of Certain Crimes, ch. 9, 1 Stat. 112, 117 (1790)). Professor Tillman argues that this statute could not have been understood to include the Presidency because Congress does not have the power to add new qualifications for federal elected positions. *Id.* In further support of his theory, he points out that, in 1792, the Senate directed President George Washington’s Secretary of the Treasury, Alexander Hamilton, to draft a financial statement listing the “emoluments” of every person holding “any civil office or employment under the United States.” *Id.* at 15 (citing 1 Journal of the Senate of the U.S.A. 441 (1820) (May 7, 1792 entry)). Since Hamilton’s response did not include the President, Vice President, Senators, or Representatives, *Amicus* says this is a further indication that the founding-era generation did not consider the phrase “office under the United States” to extend to elected positions. *Id.* at 15-16.

Despite *Amicus*’ citations to a select number of historical examples, the Court finds that the text, history, and purpose of the Foreign Emoluments Clause, as well as executive branch precedent interpreting it, overwhelmingly support the conclusion that the President holds an “Office of Profit or Trust under [the United States]” within the meaning of the Foreign Emoluments Clause.

1) *Text*

Beginning with the text of the Clause, the only logical conclusion, when read with the rest of the Constitution, is that the President holds an “Office of Profit or Trust under [the United States].” The Constitution repeatedly refers to the President as holding an “office.” See, e.g., U.S. Const. art. II § 1, cl. 1 (“[The President] shall hold his Office during the Term of four Years[.]”); *id.*, cl. 5 (eligibility requirements for the “Office of President”); *id.* cl. 8 (requiring the President take an oath to “faithfully execute the Office of President of the United States.”). And if text is to be given its plain meaning, the “Office of the President” is surely one of both profit and trust. See *Sprague*, 282 U.S. at 731-32 (stating that the Constitution’s “words and phrases were used in their normal and ordinary” meaning). The President receives compensation for his services (profit) and is entrusted with the welfare of the American people (trust). See, e.g., Deborah Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 Brooklyn J. L. & Pol’y 63, 81 (“The term ‘Office of Profit’ refers to an office in which a person in office receives a salary, fee, or compensation. The term ‘Office of Trust,’ refers to offices involving ‘duties of which are particularly important.’”) (citing *Application of the Emoluments Clause to a Member of the President’s Council on Bioethics*, 29 Op. O.L.C. 55, 61-62 (2005)).¹⁶

¹⁶ The OLC or Office of Legal Counsel is an office within the Department of Justice that drafts legal opinions for the Attorney General and provides its own written opinions and other advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and other components of the Department of Justice. See “Office of Legal Counsel,” The United

The text also indicates that the President’s “Office of Profit or Trust” is one “under the United States.” As the Domestic Emoluments Clause illustrates, the term “United States” is used in the Constitution to distinguish between the federal and state governments. *See* U.S. Const. art. II, § 1, cl. 7 (forbidding emoluments from the United States or “any of them,” referring to the States). As a federal office holder, then, the President holds his office “under the United States.”

Indeed, reading the phrase “Office of Profit or Trust under [the United States]” to exclude the President would lead to an essentially absurd result. Consider Article I, Section 3, cl. 7 of the Constitution, which provides that an impeached official shall be disqualified from holding “any Office of honor, Trust or Profit under the United States.” U.S. Const. art. I, § 3, cl. 7. As a Memorandum issued by the Brookings Institution highlights, “[i]f the President did not hold an office ‘under the United States,’ a disgraced former official would be forbidden from every federal office in the land, but could

States Department of Justice, <https://www.justice.gov/olc>. Although not binding on courts, OLC opinions are entitled to considerable weight because they “reflect[] the legal position of the executive branch” and “provid[e] binding interpretive guidance for executive agencies.” *United States v. Arizona*, 641 F.3d 339, 385 n.16 (9th Cir. 2011) (Bea, J., concurring) (quoting Congressional Research Service, Authority of State and Local Police to Enforce Federal Immigration Law, Sept. 17, 2010, <http://www.ilw.com/immigrationdaily/news/2010,1104-crs.pdf>), *aff’d in part, rev’d in part*, 567 U.S. 387 (2012)); *see also Cherichel v. Holder*, 591 F.3d 1002, 1016 & n.17 (8th Cir. 2010) (“We note, however, that while OLC opinions are generally binding on the Executive branch, the courts are not bound by them.”) (citations omitted); *N.Y. Times Co. v. U.S. Dep’t of Justice*, 138 F. Supp. 3d 462, 478 (S.D.N.Y. 2015); *Public Citizen v. Burke*, 655 F. Supp. 318, 321-22 (D.D.C. 1987).

be President.” Norman Eisen, Richard Painter, & Laurence Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* at 8, Brookings Institution (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (Brookings Memorandum).¹⁷

In all, reading the Constitution as a complete document rather than piecemeal establishes that the President holds an “Office of Profit or Trust under [the United States].”

2) *Original Public Meaning & Purpose*

Even if the text were ambiguous, the historical context and purpose of the Foreign Emoluments Clause confirm that the Framers understood the Presidency to be an “Office of Profit or Trust under [the United States].” As one historical scholar has noted, when the totality of founding-era evidence is considered, “an avalanche buries [Tillman’s] fanciful claims.” Prakash, *supra* note 17, at 147.

To start, the Federalist Papers on numerous occasions refer to the President as the occupier of an “office.” See, e.g., The Federalist No. 39 (James Madison) (“The President of the United States is impeachable at any time during his continuance in *office*.”) (emphasis

¹⁷ For further examples of the “bizarre consequences” resulting from the interpretation advanced by Professor Tillman, see the Brookings Memorandum’s discussion at pages 8-9. *Id.* (noting that under Professor Tillman’s interpretation, the President could simultaneously hold a seat in Congress, sit in the Electoral College, and be subject to a religious test); see also Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol’y 143, 148-51 (2009).

added); The Federalist Nos. 66 (Alexander Hamilton) (“It will be the *office* of the President . . . ” (emphasis added), 68 (“the *office* of President”) (emphasis added)). Though Professor Tillman places great emphasis on the conduct of Washington and Hamilton, he curiously fails to explain why both these individuals on other occasions also refer to the “*office* of President.” See, e.g., Letter from George Washington to Solomon Bush (Nov. 24, 1789), Library of Congress Digital Collection, <https://www.loc.gov/collections/george-washington-papers/?fa=segmentof%3Aamgw2.022%2F&sp=3&st=slideshow&sb=shelf-id> (referring to his election to the “Office of President of the United States”); Letter from Alexander Hamilton to George Washington (Sept. 1788), <https://founders.archives.gov/documents/Hamilton/01-05-02-0037> (discussing Washington’s “acceptance of the office of President”).

Moreover, in light of the purpose of the Foreign Emoluments Clause, as discussed in greater detail below,¹⁸ the “office” of the President was explicitly understood to be one of “Profit or Trust under [the United States].” The few discussions surrounding the Clause indicate that the Framers were extremely concerned about possible improper and undue influences on the President in particular. See pages 34-36, *infra*. Edmund Randolph, at the Virginia Ratification Convention, expressly described the Clause as applying to the President. 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* 486 (2d ed. 1891) (stating that

¹⁸ See discussion in Section III.B.3, *infra*.

the Clause protects against the threat of the “*President* receiving emoluments from foreign powers”) (emphasis added). Insofar as that is so, the Framers must have understood him to hold an “Office of Profit or Trust under [the United States].”

Professor Tillman’s argument that the First Congress must have understood the phrase “Office of Profit or Trust under [the United States]” to exclude the President because of the existence of the 1790 anti-bribery statute is especially perplexing. That Congress would have intended a person convicted of bribing a federal judge to be banned from holding every federal office *except* the office of President is, in the Court’s view, altogether unlikely.

3) *Executive Branch Precedent and Practice*

Finally, if the foregoing considerations were not in and of themselves dispositive of Professor Tillman’s argument, consistent executive branch practice and precedent over the years have definitively put his thesis to rest. As the OLC stated in 2009, “[t]he President surely “hold[s] an[] Office of Profit or Trust[.]” *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009). This statement was fully consistent with prior OLC opinions that had applied the Foreign Emoluments Clause to the President. *See, e.g., Proposal That the President Accept Honorary Irish Citizenship*, 1 Supp. Op. O.L.C. 278, 278 (1963) (“I believe that acceptance by the President of honorary Irish citizenship would fall within the spirit, if not the letter, of [the Foreign Emoluments Clause].”).

The Court concludes that the President holds an “Office of Profit or Trust under [the United States]” and, accordingly, is subject to the restrictions contained in the Foreign Emoluments Clause.

The question remains: What are those restrictions?

B. “Emolument”

Having determined that both Emoluments Clauses apply to the President, the Court must now decide what the term “emolument” within them means.

1) *Text*

While both parties begin with the text of the Clauses, they offer significantly different textual interpretations.

Plaintiffs argue that the text indicates a clear intention that a broad definition of “emolument,” applies, that it means any “profit,” “gain,” or “advantage.” Not only was this definition more common at the time of the drafting,¹⁹ they say. This definition best accords with the surrounding text of the Clauses. Indeed, Plaintiffs continue, both Clauses contain expansive modifiers. The Foreign Emoluments Clause bans “*any*” “Emolument . . . of *any kind whatever*.” Pls.’ Opp’n at 33. Similarly, the Domestic Emoluments Clause prohibits the President’s receipt of “*any other* Emolument.” In Plaintiffs’ view, these modifiers indicate that the term was meant to have the widest possible scope and applicability. *Id.* at 35.

¹⁹ See the discussion regarding the original public meaning of the term in Section III.B.2, *infra*.

These expansive modifiers, Plaintiffs argue, stand in marked contrast to the only other place in the Constitution where the term “emolument” appears, the Incompatibility Clause, which restricts increases in the compensation of members of Congress.²⁰ That clause contains a restrictive modifier, limiting its applicability to the “Emoluments *whereof*,” suggesting its limited applicability to the office of Congressmen alone. Plaintiffs dispute that any meaningful comparison can be made between the Incompatibility Clause and the Emoluments Clauses since neither of the latter two contains such a restrictive modifier. Pls.’ Opp’n at 41 n.28.

Despite the President’s argument to the contrary, Plaintiffs say that interpreting “emolument” to cover essentially anything of value would not create redundancies within the Foreign Emoluments Clause’s separate ban on “presents.” Rather, they submit, the term “present” in the Foreign Clause was likely intended to ensure that the acceptance of any unsolicited, unreciprocated “gift” given merely as a sign of gratitude would be covered, whereas the prohibition against receipt of an “emolument” would reach payments made with the more obvious intention to influence. *Id.* at 34-35 n.22. The point is that both types of payments would be covered.

The President, while acknowledging that the broader definition of “emolument” advanced by Plaintiffs also

²⁰ The Incompatibility Clause, U.S. Const. art. I, § 6, cl. 2, provides: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the *Emoluments* whereof shall have been encreased during such time.” (emphasis added).

existed during the founding era, asserts that this should be of no importance because the term has to be read in context with the rest of the words of the Emoluments Clauses under the familiar rule of construction known as *noscitur a sociis*.²¹ Doing so, he submits, supports his position that an “emolument” is only a payment made as compensation for official services.

The President claims that this narrower definition of “emolument” is more consistent with the nature of the other prohibited categories in the Foreign Clause. “Present,” “office,” and “title” are all things personally conferred or bestowed upon a U.S. official. Def.’s Mot. Dismiss at 33. The terms “any” and “any kind whatever,” he says, are included in the Clauses simply to ensure that every type of identified compensation, e.g., “present,” “office,” “title”, is captured by the Clause. This is not, he claims, a basis to choose whether “emolument” has a separate meaning. Def.’s Reply at 19 (Dec. 1, 2017), ECF No. 70.

The President argues that his position is further bolstered by the text of the Domestic Emoluments Clause where, he says, “compensation” is qualified by “for his services,” meaning that “any other Emolument” must also be qualified by “for his services.” Def.’s Mot. Dismiss at 33. In effect, the President argues that the Domestic Emoluments Clause should read: “The President shall, at stated Times, receive for his Services, a

²¹ *Noscitur a sociis* “is a rule of construction applicable to all written instruments” and applies to terms “the meaning naturally attaching to them from their context.” *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); see also “*Noscitur a sociis*,” *Black’s Law Dictionary* (9th ed. 2009).

Compensation, . . . and he shall not receive [for his services] within that Period any other Emolument[.]”

Further, referring to the Constitution as a whole, the President maintains that the Incompatibility Clause actually supports his argument that “emolument” refers to compensation for an officeholder’s services. Def.’s Reply at 20. In his view, because the Incompatibility Clause treats an “emolument” as an aspect of an office that cannot be increased, it expressly ties an emolument to an official’s employment and duties, which suggests the same meaning for the term in the Emoluments Clauses. *Id.* Acknowledging that the Incompatibility Clause contains a restrictive modifier, the President dismisses this as a result of the fact that it deals with a specific office—i.e., the civil office for which salary has been increased—whereas the Foreign Emoluments Clause does not include any such office-related limitation. *Id.* In other words, because the Foreign Emoluments Clause does not reference a specific office, it supposedly has a broader reach than the Incompatibility Clause. It regulates not only compensation or benefits for jobs held by former Senators or Congressmen; it extends to benefits payable to any federal official in his capacity as a federal official. *Id.* The term “emolument” is not meant to have a broader scope.

Finally, says the President, interpreting “emolument” to cover anything of value would create unnecessary redundancies within the Foreign Clause because it would include within its scope the term “present,” which necessarily has a separate and undisputed meaning. Interpreting a term to create such a redundancy, he continues, runs counter to Supreme Court precedent, which

states that “every word must have its due force, and appropriate meaning” because “it is evident” that “no word was unnecessarily used, or needlessly added.” Def.’s Mot. Dismiss at 36 (quoting *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840)).

The Court agrees with the parties that the term “emolument” must be read in harmony with the surrounding text of the Emoluments Clauses. But ultimately it finds Plaintiffs’ arguments more persuasive. The text of both Clauses strongly indicates that the broader meaning of “emolument” advanced by Plaintiffs was meant to apply. As Plaintiffs point out, the Foreign Clause bans, without Congressional approval, “*any* present, Emolument, Office, or Title, of *any kind whatever*, from any King, Prince or foreign State.” U.S. Const. art. I, § 9, cl. 8 (emphasis added). Use of such expansive modifiers significantly undermines the President’s argument that this Clause was meant to prohibit only payment for official services rendered in an employment-type relationship. If there were any doubt as to the limits of the Foreign Clause, the Framers used the word “any” twice, ensuring a broad and expansive reach. The President’s argument that these modifiers merely ensure that the Foreign Clause bans receipt of every type of “present,” “emolument,” “office,” or “title” is unconvincing. Even without the inclusion of the modifier “of any kind whatever” in the Foreign Clause, it would still ban every type of prohibited category because it provides no exceptions. If “no word was unnecessarily used,” as the President argues, Def.’s Mot. Dismiss at 36, his own position runs aground. The more logical conclusion is the one that Plaintiffs urge:

The use of “any kind whatever” was intended to ensure the broader meaning of the term “emolument.”

The phrase “*any other* Emolument” in the Domestic Emoluments Clause suggests the same broad interpretation of the term. The Court does not read the Clause to qualify “emolument” by the words “for his services.” The use of “any other” in the Clause once again points firmly in Plaintiffs’ direction. The Court, in effect, construes the Clause to read: “The President shall . . . receive for his Services, a Compensation, . . . and he shall not receive [for any reason] within that Period any other Emolument [of any kind].” But ultimately, even allowing that the term “emolument” might be qualified by the words “for his services” in the Domestic Clause, this amounts to no silver bullet for the President. Logic equally suggests that the payments, direct or indirect, that he receives from domestic governments in connection with the Hotel are in fact “emoluments” to his salary as President. Again, it has been alleged that the State of Maine patronized the Hotel when its Governor, Paul LePage, and his staff visited Washington to discuss official business with the Federal Government, including holding discussions with the President as President, Pls.’ Opp’n. at 8, and when, on at least one of those trips, Governor LePage and the President appeared together at a news conference at which the President signed an executive order to review actions of the prior administration that established national monuments within the National Park Service, which could apply to a park and national monument in Maine, which President Obama had established over Governor LePage’s objections in 2016. *Id.*

Equally unpersuasive is the President’s argument that the meaning of the term “emoluments” in the Incompatibility Clause somehow undermines Plaintiffs’ claims. As Plaintiffs point out, unlike the Emoluments Clauses, the Incompatibility Clause contains a restrictive modifier limiting the “Emoluments whereof” mentioned there to an expressly referenced office, viz. the office for which compensation has been increased by Congress. It most assuredly weighs in favor of Plaintiffs’ argument that the Framers felt the need to include such a modifier. If “emolument” were always to be read as a synonym for salary or payment for official services rendered, this modifier in the Incompatibility Clause would have been unnecessary.

Nor does interpreting “emolument” to mean “profit,” “gain,” or “advantage,” as the President suggests, render the term “present” in the Foreign Emoluments Clause redundant. As the President himself concedes, a “present” in the founding era was defined then, as it is today, as something “bestowed on another without price or exchange.” Def.’s Mot. Dismiss at 37. It has been noted that historically unsolicited gifts, i.e. presents, were commonly given by European heads of state as a matter of custom. *See* Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* 1-5 (2014). In contrast, the term “emolument,” used in reference to a “profit,” “gain,” or “advantage” from any kind of exchange²² enables the Foreign Clause to reach private commercial transactions that would not be covered by the term “present.” Thus, even if the term “emolument” was sometimes used

²² *See* Section III.B.2, *infra*, for a more detailed discussion on the ordinary use of the term.

synonymously with the term “present,” its use in the Foreign Emoluments Clause would ensure that the Clause covered all types of financial transactions—solicited or unsolicited, reciprocated or unreciprocated, official or private.

On the other hand, the President’s cramped interpretation of the term would seem to create its own concerning redundancies within the Constitution. Characterizing an “emolument” as “the receipt of compensation for services rendered by an official in an official capacity,” Def.’s Mot. Dismiss at 31, is tantamount to defining the transaction as nothing less than one of federal bribery, a crime which prohibits a federal public official from, directly or indirectly, receiving or accepting “anything of value” in return for “being influenced in the performance of any official act.” 18 U.S.C. § 201(b)(2). Given that Article II, Section 4 of the Constitution already addresses the crime of bribery, making it an impeachable offense,²³ there would have been little need to include two additional and distinct Emoluments Clauses prohibiting the acceptance of money from foreign or state governments for official services rendered. Moreover, it seems highly unlikely that the Framers would have intended bribery to be both an impeachable offense and, at the same time, an activity Congress could consent to when a foreign government donor is involved. The President makes no attempt to come to terms with this anomaly.

²³ U.S. Const. art. II, § 4 provides: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

Accordingly, given the text of both Clauses, the Court begins with a strong presumption that the term “emolument” should be interpreted broadly to mean “profit,” “gain,” or “advantage,” essentially covering anything of value.²⁴

2) *Original Public Meaning*

Because the Constitution was “written to be understood by the voters,” *Heller*, 554 U.S. at 576, it is important to consider the meaning of the term “emolument” against the backdrop of what ordinary citizens at the time of the Nation’s founding would have understood it to mean. Though the parties apparently agree that the term “emolument” had at least two meanings at the time of the Constitutional Convention, they diverge as to its ordinary, common usage by the founding generation.

Plaintiffs contend that the most common definition of emolument at the time was “profit,” “gain,” or “advantage.” Pls. Opp’n at 31 (citing 1 Johnson, *A Dictionary of the English Language* (6th ed. 1785); Bailey, *An Universal Etymological English Dictionary* (20th ed. 1763)). Indeed, they cite an article by Professor John Mikhail of Georgetown University Law Center in

²⁴ At various times Plaintiffs use the term “anything of value,” which the President argues leads to absurd consequences. Hr’g Tr. at 7:8- 8:13, 26:20-28:8, 41:20-25, June 11, 2018 (Hr’g Tr.). The Court relies on the dictionary definitions of the period of “profit,” “gain,” or “advantage,” see the discussion in Section III.B.2, *infra*, which the Court reads in most contexts as essentially synonymous with the words “anything of value.” However, to the extent these terms may differ, the Court interprets the term “emolument” consistent with the dictionary definitions, i.e., “profit,” “gain,” or “advantage.”

which, following exhaustive research, he concluded that “every English dictionary definition of ‘emolument’ from 1604 to 1806” includes Plaintiffs’ broader definition. *Id.* (citing John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523-1806*, 1-2 (June 30, 2017), <https://ssrn.com/abstract=2995693>). Moreover, say Plaintiffs, the word was often used in this broad sense by drafters of State constitutions, by Blackstone, by Supreme Court Justices, and by the Framers themselves. *Id.* at 31-32 (citing Pa. Const., art. V (1776) (“[G]overnment is . . . instituted . . . not for the particular emolument or advantage of any single man.”); John Mikhail, “*Emoluments*” in *Blackstone’s Commentaries*, Balkinization, May 28, 2017, <https://balkin.blogspot.com/2017/05/emolument-in-blackstones-commentaries.html> (listing instances in which Blackstone used the word to mean “family inheritance, private employment, and private ownership of land”); John Mikhail, *A Note on the Original Meaning of “Emolument,”* Balkinization, Jan. 18, 2017, <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html> (providing examples of the Framers—including Jefferson, Washington, and Madison—using the word to refer to “the consequences of ordinary business dealings”); *Himley v. Rose*, 9 U.S. (5 Cranch) 313, 318-19 (1809) (Johnson, J.) (“profits and advantages” from land ownership)).

On the other hand, Plaintiffs submit that the definition advanced by the President—“profit arising from an office or employ”—was far less common. Citing the Mikhail article, Plaintiffs assert that while the definition they advance can be found in virtually every founding-era dictionary, the President’s definition appears in less

than 8% of these dictionaries. *Id.* at 32 (citing Mikhail, *The Definition of “Emolument,” supra*, at 1-2). This, according to Plaintiffs, confirms that the President’s narrow definition was not the ordinary meaning of the term “emolument” that voters of the time would have understood.

In response, the President invites the Court’s attention to alternate sources that he claims define “emolument” as a “profit arising from an office or employ.” Def.’s Mot. Dismiss at 34 (citing *Barclay’s A Complete and Universal English Dictionary on a New Plan* (1774); 1 John Trusler, *The Difference, Between Words, Esteemed Synonymous, in the English Language; And, the Proper Choice of Them Determined* 154-55 (1766)). The President submits that the use of the term to refer to receipt of value for one’s services rendered in an official capacity is consistent with these particular contemporaneous dictionary definitions. *Id.* at 34-35. In fact, he cites examples from the Oxford English Dictionary as far back as 1480, 1650, and 1743, providing as one of two definitions: “[p]rofit or gain arising from station, office, or employment; dues; reward, remuneration, salary.” *Id.* (citing Oxford English Dictionary, Oxford University Press, *Emolument*, OED Online (Dec. 2016), <http://www.oed.com/view/Entry/61242>).

The President also criticizes Plaintiffs’ “mechanical counting of dictionaries,” noting that the Mikhail article fails to account for frequency of usage. Def.’s Reply at 17. He argues that at the time of the Nation’s founding, an “emolument” was a common characteristic of federal office, described by the Supreme Court as “every species of compensation or pecuniary profit derived from a discharge of the duties of office.” Def.’s Mot. Dismiss

at 31 (quoting *Hoyt v. United States*, 51 U.S. 109, 135 (1850)). In light of this view of contemporaneous common usage, the President asserts that his definition is more likely the original public meaning of the term.

His narrower definition, the President says, is also closely related to the etymology of the word “emolument,” which references “profit from labor” or “profit from grinding corn.” *Id.* at 35 (citing Walter W. Skeat, *An Etymological Dictionary of the English Language* 189 (1888) (emolument: “profit, what is gained by labour”); *The Barnhart Dictionary of Etymology* 326 (1988) (emolument: “*n.* profit from an office or position. 1435, in *Proceedings of the Privy Council*; borrowed through Middle French *émolument*, and directly from Latin *émolumentum* profit, gain, (originally) payment to a miller for grinding corn, from *émolere* grind out (*é*-out + *molere* to grind; see MEAL grain))). Because Plaintiffs, and the Mikhail article upon which they rely, ignore dictionaries that include variations of this etymologically rooted definition, the President claims they significantly understate the percentage of dictionaries supporting his position. Def.’s Reply at 18-19.

The President argues that Plaintiffs “expansive construction is further undermined by a proposed constitutional amendment that would have extended the prohibitions of the Foreign Emoluments Clause to all private citizens.” Def.’s Mot. Dismiss at 44. Specifically, the amendment, which was proposed in 1810, would have prohibited any citizen of the United States from accepting, without the consent of Congress, “any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power.” Def.’s Mot. Dismiss at 44-45 (citing Proposing an Amendment to the

Constitution, S.J. Res. 2, 11th Cong., 2 Stat. 613 (1810)). The consequence of doing so, under the proposed amendment, would have been revocation of one's citizenship. *Id.* While acknowledging that no debates were held on this proposed amendment, the President contends that it is "implausible" that the amendment would have been understood to revoke the citizenship of anyone who might be engaged in commerce with foreign governments or their instrumentalities. *Id.* at 45. The original public meaning of "emolument," he concludes, could not therefore be as broad as Plaintiffs propose.

Again, in the Court's view, Plaintiffs carry the day.

The clear weight of the evidence shows that an "emolument" was commonly understood by the founding generation to encompass any "profit," "gain," or "advantage." Though the Court agrees that mere counting of dictionaries may not be dispositive, it nonetheless remains highly remarkable that "every English dictionary definition of 'emolument' from 1604 to 1806 relies on one or more of the elements of the broad definition DOJ rejects in its brief." Mikhail, *The Definition of "Emolument," supra*, at 1-2.²⁵ Moreover, "92% of these dictionaries define 'emolument' exclusively in these terms, with no reference to 'office' or 'employment.'" *Id.* No less important is the fact that even the few sources that do reference an office or employment as part of their definition of "emolument," include as well the definitions

²⁵ In writing his article, Professor Mikhail looked at "how 'emolument' is defined in English language dictionaries published from 1604 to 1806, as well as in common law dictionaries published from 1523 to 1792. To document its primary claims, the article includes over 100 original images of English and legal dictionaries published between 1523 and 1806." *Id.*

of “gain, or advantage,” a point the President fails to address in his pleadings. *Id.* at 8 n.26 (noting that Barclay’s full definition of “emolument” is “profit arising from profit or employ; *gain or advantage.*” (emphasis added)). Further, the President relies heavily on two pre-Constitutional Convention sources, Barclay (1774) and Trusler (1776), despite the fact that, as Professor Mikhail points out, there is “little to no evidence” that either of these two dictionaries “were owned, possessed, or used by the founders.” Mikhail, *The Definition of “Emolument,” supra*, at 13 (noting that “neither of these dictionaries is mentioned in the more than 178,000 searchable documents in the Founders Online database, which makes publicly available the papers of the six most prominent founders.”). On the other hand, in the four dictionaries which have been deemed by Justice Antonin Scalia and Bryan A. Garner as “the most useful and authoritative’ English dictionaries from 1750-1800,”²⁶ “emolument,” consistent with Plaintiffs’ view, is variously defined as “profit,” “gain,” or “advantage.” *Id.* at 18 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 (2012)).

In addition to its broad meaning in a far greater number of founding-era dictionaries, the term “emolument” was also used in a broad sense in eighteenth century legal and economic treatises. As Professor Mikhail

²⁶ Those dictionaries are: Samuel Johnson, *A Dictionary of The English Language* (1755); Nathan Bailey, *A Universal Etymological English Dictionary* (1721); Thomas Dyche & William Pardon, *A New General English Dictionary* (1735); and John Ash, *The New And Complete Dictionary Of The English Language* (1775). See Mikhail, *The Definition of “Emolument,” supra*, at 14-18.

points out, in his *Commentaries on the Laws of England*, Blackstone uses the word “emolument” on at least sixteen occasions, the majority of those not tied to the performance of official duties or public office. See Mikhail, “*Emolument*” in *Blackstone’s Commentaries*, *supra*, (listing examples). Blackstone, for example, refers to the benefits of third-party beneficiaries as “the emolument of third persons,” discusses the “emoluments arising from inheritance,” and references “pecuniary emoluments” in the context of bankruptcy. 2 William Blackstone, *Commentaries on the Laws of England* *30 (“The thing given in lieu of tithes must be beneficial to the parson, and not for the *emolument* of third persons only”) (emphasis added); *76 (“The heir, on the death of his ancestor, if of full age, was plundered of the first *emoluments* arising from his inheritance, by way of relief and primer seisin; and, if under age, of the whole of his estate during infancy.”) (emphasis added); *472 (“[W]hereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary *emoluments*, upon condition they surrender up their whole estate to be divided among their creditors[.]”) (emphasis added).²⁷

²⁷ See also *id.* App. §§ 1, 2 (discussing conveyances of land together with all “privileges, profits, easements, commodities, advantages, *emoluments*, hereditaments, and appurtenances whatsoever”) (emphasis added); 1 Blackstone, *106 (“[W]hereby the whole island and all its dependencies, so granted as aforesaid, (except the landed property of the Atholl family, their manorial rights and *emoluments*, and the patronage of the bishopric and other ecclesiastical benefices) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.”) (emphasis added); *id.* *470 (“At the original endowment of parish churches, the freehold of the church,

Similarly, Adam Smith in his *The Wealth of Nations*—a treatise which the Framers were unquestionably well aware of²⁸—used the term “emolument” twice to refer to instances involving private market transactions. See 1 Adam Smith, *Inquiry into the Nature and Causes of the Wealth of Nations* 92 (9th ed. 1799) (“The monopolists, by keeping the market constantly under-stocked . . . sell their commodities much above the natural price, and raise their *emoluments*, whether they consist in wages or profit, greatly above their natural rate.”) (emphasis added); 2 Smith, *id.*, at 234 (“[The bank] makes a profit likewise by selling bank money at five per cent agio, and buying it in at four. These different *emoluments* amount to a good deal more than what is

the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants, and with intent that the same *emoluments* should ever afterwards continue as a recompence for the same care.”) (emphasis added); 4 Blackstone, *430 (“emolument of the exchequer”).

²⁸ Benjamin Franklin, James Madison, Robert Morris, and James Wilson were all known to have referenced Smith’s book. See, e.g., Brief of *Amici Curiae* by Certain Legal Historians on Behalf of Pls. at 7 n.19 (Nov. 28, 2017), ECF No. 69 (Legal Historians Br.) (citing 23 *The Papers of Benjamin Franklin* 241-43 (1983) (W. B. Willcox, ed.) (noting that “Smith’s *Wealth of Nations*” was sent to Franklin); 6 *The Papers of James Madison* 62-115 (W. T. Hutchinson & W. M. E. Rachal, eds., 1969) (including “Smith on the *Wealth of Nations*” in his book list); David Lefer, *The Founding Conservatives* 245-246 (2013) (Morris “found Smith’s thought so persuasive . . . that he gave out copies to members of Congress”); 1 *Collected Works of James Wilson* 60-79, 73-74 (K.L. Hall & M.D. Hall eds., 2007) (quoting Smith’s remarks on banking); Mikhail, *The Definition of “Emolument,” supra*, at 12 (same).

necessary for paying the salaries of officers, and defraying the expense of management.”) (emphasis added).

Though the President cites to a Supreme Court decision in support of his claim that his narrow definition was more commonly used, his reliance on the Court’s language in *Hoyt v. United States*, in this Court’s view, is misplaced. In *Hoyt*, the Supreme Court was interpreting an 1802 statute referring to “the annual emoluments of any collector” of the customs. *Hoyt v. United States*, 51 U.S. 109, 135 (1850) (citing 2 Stat. 172, § 3 (1802)). Given that the term was tied to a particular office in that context, *Hoyt* has no broader teaching for understanding the term “emolument” in the present case.²⁹

There is, moreover, a substantial body of evidence suggesting that the founding generation used the word “emolument” in a variety of contexts reaching well beyond payments tied to official duties.

²⁹ In fact, as Ms. Sills, a Non-Resident Fellow at Georgetown University Law Center, notes, in contrast to *Hoyt*, “other Supreme Court opinions reflect an understanding that the meaning of the term extends beyond compensation associated with a governmental office.” Sills, *supra*, at 93 (citing *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 586 (1837) (“The proprietors have, under these grants, ever since continued to possess and enjoy the emoluments arising from the tolls taken for travel over the bridge; and it has proved a very profitable concern.”); *Town of East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 516 (1850) (“That with the exception of the time when the bridge of the petitioners has been impassable, and said town of Hartford has by law been compelled to keep up said ferry, the said town of Hartford has not made any use of said ferry as a franchise, or derived any benefit or emolument therefrom, since the year 1814.”)).

Starting with the debates leading up to and during the Constitutional Convention, there are several instances of delegates discussing “emoluments” in a sense that cannot logically be read to mean simply payment for services rendered in an official capacity. For example, during the debates in the Continental Congress on the Articles of Confederation, George Walton, a delegate from Georgia, stated: “The Indian trade is of no essential service to any Colony. . . . The *emoluments* of the trade are not a compensation for the expense of donations.” “[July 1776],” *Founders Online*, National Archives, last modified April 12, 2018, <http://founders.archives.gov/documents/Adams/01-02-02-0006-0008> (emphasis added). Later on, at the Virginia Ratification Convention, Edmond Randolph, when discussing the purpose of the Foreign Emoluments Clause, used the term in a broad sense, stating “[a]ll men have a natural inherent right of receiving *emoluments* from any one, unless they be restrained by the regulations of the community. . . . ” 3 Elliot, *supra*, at 465 (emphasis added). A logical reading of both sentences clearly reflects an understanding that “emolument” covers private market transactions, not merely official ones.

George Washington himself used the term “emolument” frequently in private commercial contexts consistent with Plaintiffs’ interpretation. *See, e.g.*, “Proclamation on Intercourse with British Warships, 29 April 1776,” *Founders Online*, National Archives, last modified November 26, 2017, <http://founders.archives.gov/documents/Washington/03-04-02-0132> (referring to “wicked Persons, preferring their own, present private

Emolument to their Country’s Weal”) (emphasis added); “Virginia Nonimportation Resolutions, 22 June 1770,” *Founders Online*, National Archives, last modified November 26, 2017, <http://founders.archives.gov/documents/Jefferson/01-01-02-0032> (calling for a boycott of sellers of British and European goods who “have preferred their own private *emolument*, by importing or selling articles prohibited by this association, to the destruction of the dearest rights of the people of this colony.” (emphasis added)).³⁰ As President Trump himself notes, Washington’s conduct “has been accorded significant weight.” Def.’s Mot. Dismiss at 44 (citing Akhil Amar, *America’s Unwritten Constitution* 309 (2012) (“Washington set precedents from his earliest moments [as President]. . . . Over the ensuing centuries, the constitutional understandings that crystallized during the Washington administration have enjoyed special authority over a wide range of issues.”)).

In fact, it seems that when the founding generation intended “emolument” to refer only to an official salary or payments tied to holding public office, they did so expressly. For example, The Federalist Papers, understood to have been penned by Hamilton and Madison, refer to “emoluments *of office*.” The Federalist No. 55 (emphasis added). Washington also used this phrase in his correspondence. See Letter from George Washington to Joseph Jones (Dec. 14, 1782), Library of Congress Digital Collection, https://www.loc.gov/resource/mjm.01_0833_0835/?sp=2 (“if both were to fare equally alike

³⁰ For more examples of Washington’s use of the term “emolument,” see Mikhail, *The Definition of “Emolument,” supra*, at 19-20 n.117; Legal Historians Br. at 23 n.68.

with respect to the emoluments *of office*”) (emphasis added).

Ignoring this large accumulation of historical evidence, the President places considerable emphasis on the failed constitutional amendment proposed in 1810, which sought to revoke the citizenship of any individual who accepted or retained “emoluments” from a foreign government. For a proposal that never became law, and apparently underwent virtually no debate by the Framers, it is doubtful that much, if any weight should be accorded to it. But if nothing else, insofar as the bill enjoyed any support, it was at the very least reflective of the extreme concern of its proponents over the potentially corrupting influence of payments from foreign governments.

In the Court’s view, the decisive weight of historical evidence supports the conclusion that the common understanding of the term “emolument” during the founding era was that it covered any profit, gain, or advantage, including profits from private transactions. Consideration of the purpose of both Emoluments Clauses confirms the broad interpretation of the term suggested by Plaintiffs.

3) *Constitutional Purpose*

Plaintiffs argue that even if the meaning of the term “emolument” is deemed ambiguous, the constitutional purpose of the Clauses indicates that it was Plaintiffs’ broader definition that was intended. Pls.’ Opp’n at 32 (citing *Noel Canning*, 134 S. Ct. at 2561). As to the Foreign Emoluments Clause, Plaintiffs argue that the purpose of the Clause was to prevent the least possibility of undue influence and corruption being exerted

upon the President by foreign governments. *Id.* at 34. That is, the Framers created a prophylactic rule to prevent the slightest chance of such influence. *Id.* Plaintiffs assert that the President’s narrow interpretation, which they emphasize essentially boils down to the equivalent of a prohibition against bribery, would completely erode this aim. Bribery as a crime is very difficult to establish, they point out, and any requirement that a *quid pro quo* for official services has to be established would be easy to circumvent while at the same time difficult to prove. *Id.* at 42-43. It therefore seems highly unlikely that the Framers would have wanted to leave a large loophole that would preclude the Clause from accomplishing any meaningful purpose. *Id.*

As to the Domestic Emoluments Clause, Plaintiffs argue that it reflects a similar intention to “eliminate any pecuniary inducement the President might have to betray his constitutional duty in solely serving the People of the United States.” *Id.* at 35. Citing *The Federalist Papers*, Plaintiffs assert that the Framers worried about any state government or its officials being able to tempt the President and cause him “to surrender” his “judgment to their inclinations,” while forcing states to compete with each other to “appeal[] to his avarice.” *Id.* (citing *The Federalist No. 73* (Alexander Hamilton)). Thus, say Plaintiffs, it makes sense to infer that the Framers intended the term “emolument” to sweep broadly. *Id.* Moreover, because the Domestic Clause only covers “emoluments” and not “presents” as the Foreign Clause does, Plaintiffs point out that the President’s narrow definition of “emoluments,” insofar as it would only cover payments for official services (i.e., bribery), would permit large—possibly unlimited—cash

payments from the federal and state governments, so long as the payments were made for non-official personal services or so long as they are characterized simply as non-*quid pro quo* “presents.” *Id.* at 43-44. These concerns, Plaintiffs argue, warrant interpreting “emolument” to encompass essentially “anything of value.”

The President disputes that either the Foreign or Domestic Clause was intended to have the broad reach Plaintiffs advocate. Rather than being “comprehensive conflict-of-interest provisions covering every conceivable type of activity,” he argues that the Clauses were only intended to prohibit receipt of specifically identified categories of compensation. Def.’s Reply at 21. For example, he says, the Foreign Emoluments Clause was adopted against the backdrop of a prevailing custom among European sovereigns to bestow valuable presents upon the conclusion of treaties. In his view, this concern was reflected in Edmond Randolph’s speech at the Virginia Ratification Convention where he discussed an incident in which King Louis XVI of France bestowed gifts on American diplomats. Def.’s Mot. Dismiss at 38-39 (citing 3 Elliot, *supra*, at 465-66; Thomas Jefferson, Notes of Presents Given to American Diplomats by Foreign Governments, ca. 1791). The President submits that it is more likely that the Framers wanted to prevent incidents such as these rather than to prevent federal officials from maintaining private businesses. *Id.*

Similarly, according to the President, the Domestic Emoluments Clause was adopted to ensure that the President’s compensation would remain unaltered during his tenure, not to prevent him from acting on the

same terms as every other citizen in transacting private business. *Id.* at 40.

The President claims that these narrower intentions are supported by the fact that it was common at the time of the founding for federal officials to maintain their own private businesses. Def.'s Reply at 21. He argues that, had the Framers intended to encompass benefits from private commercial transactions, they surely would have raised this issue. Yet, the President notes, the debates reflect no concern over constraints on private business. *Id.*; Def.'s Mot. Dismiss at 40-41.

The President also argues that Plaintiffs' interpretation would create absurd consequences today. Def.'s Mot. Dismiss at 51-52. For example, he claims that if the Court were to adopt Plaintiffs' interpretation, it would mean that a federal official's stock holdings in a global company would violate the Foreign Emoluments Clause if some of that company's earnings could be traced to foreign governments. *Id.* at 52. In light of extremes such as this, the President urges the Court to reject Plaintiffs' broad interpretation.

Notwithstanding the parade of horrors the President calls up, the Court does not see how the historical record reflects anything other than an intention that the Emoluments Clauses function as broad anti-corruption provisions.

The Foreign Emoluments Clause was unquestionably adopted against a background of profound concern on the part of the Framers over possible foreign influence upon the President (and, to be sure, upon other federal officials). It is true that European heads of state

before 1787 frequently conferred gifts on foreign statesmen, undoubtedly in many instances for the express purpose of currying favor with them. See Teachout, *Corruption in America*, *supra*, at 1-5. For example, Charles Coteworth Pinckney, a delegate to the Constitutional Convention from South Carolina who is credited with providing the final language for the Foreign Emoluments Clause, when speaking later at the South Carolina Ratification Convention, referred to the bribe of “Charles II., who sold Dunkirk to Louis XIV.” See 4 Elliot, *supra*, at 264 (Pinckney discussing the susceptibility of the President to bribes). By the time of the Constitutional Convention, the delegates were “deeply concerned that foreign interests would try to use their wealth to tempt public servants and sway the foreign policy decisions of the new government.” Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 361 (2009); see also Sills, *supra*, at 72 (noting that Madison recorded that “15 delegates used the term ‘corruption’; no less than 54 times” during the Constitutional Convention) (citing James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol’y 174, 174-76, 181-82 (1994)).

Interestingly, during the Convention, the Framers did not include a Foreign Emoluments Clause in the first drafts of the Constitution. But the omission was soon perceived as being inconsistent with the Articles of Confederation, which had provided that: “[N]or shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State.” Articles of Confederation of 1781, art.VI. This provision in the Articles,

without a doubt, was drastic. Apparently in the view of some at the time, such a flat prohibition against any such offerings by foreign governments could prove needlessly insulting to the foreign powers that only intended by their offering to express some sort of gratitude to representatives of the United States. Accordingly, there was a sense that a more flexible provision was needed. And very soon it came about. In general, federal officials would be prohibited from receiving any such benefits from foreign governments but, in appropriate circumstances, Congress would still be able to approve such offerings. See Sills, *supra*, at 69-71. Once the Foreign Emoluments Clause incorporated this compromise, it appears to have sailed through the Constitutional Convention. Pinckney introduced what would become the final language of the Clause on August 23, 1787. As reported by James Madison, Pinckney's rationale was to establish "the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence." 2 Max Farrand, *The Records of the Federal Convention of 1787* 389 (Max Farrand ed., Yale Univ. Press 1911). Joseph Story would later explain that the Foreign Emoluments Clause was adopted to protect against "foreign influence of *every sort*." Joseph Story, 3 *Commentaries of the Constitution* 215-16 (1833) (emphasis added).

These concerns were carried forward to the ratification debates in the States. For example, during the Virginia Ratification Convention, in conjunction with a debate over Presidential elections, Edmond Randolph explained the purpose of the Foreign Emoluments Clause as a restriction "provided to prevent corruption." See 3 Elliot, *supra*, 465. At the same Convention, George

Mason responded, expressing concern that it would be “difficult to know whether [the executive] receives emoluments from foreign powers or not” and that “the great powers of Europe” would “be interested in having a friend in the President of the United States.” *Id.* at 484.

These anti-corruption concerns spilled over as well into discussion of the Domestic Emoluments Clause. Alexander Hamilton, in *The Federalist No. 73*, wrote that power over the President’s salary would allow the legislature to “tempt him by largesses, to surrender at [his] discretion his judgment to their inclinations.” Hamilton went on to say that “power over a man’s support is a power over his will.” *Id.* To combat this potential influence over the President, Hamilton emphasized that the Domestic Emoluments Clause should be applied broadly to protect the President’s independence:

They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.

Id. Hamilton’s statements most assuredly reflect a broader concern than merely “ensuring that a President’s compensation remained unaltered during tenure.” *Def.’s Mot. Dismiss* at 39.

Given these fundamental preoccupations, the President's interpretation of the limited meaning of the Emoluments Clauses cannot be the correct one. Yet again, his narrow interpretation of the word "emolument" would reduce the Clauses to little more than a prohibition of bribery which, in addition to already being addressed elsewhere in the Constitution,³¹ is, as Plaintiffs argue, a very difficult crime to prove. The recent Supreme Court case *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which involved receipt by the Governor of Virginia of numerous cash and in-kind benefits from a constituent, demonstrates the difficulty of determining precisely what constitutes an "official act" sufficient to establish a criminal *quid pro quo*. After *McDonnell*, "[t]o qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so." *Id.* at 2372. Merely "setting up a meeting, talking to another official, or organizing an event" is not sufficient. *Id.* How difficult would it be, then, to demonstrate which payments made to the President by foreign, the federal, or domestic governments were being offered to him in an official capacity? As Professor Teachout has noted, "[c]orruption, in the American tradition, does not just include blatant bribes and theft from the public till, [it] encompasses many situations where politicians and public institutions serve private interests at the public's expense." Teachout, *Corruption in America*, *supra*, at 2. Where, for example, a

³¹ U.S. Const. art. II, § 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

President maintains a premier hotel property that generates millions of dollars a year in profits, how likely is it that he will not be swayed, whether consciously or subconsciously, in any or all of his dealings with foreign or domestic governments that might choose to spend large sums of money at that hotel property?³² How, indeed, could it ever be proven, in a given case, that he had actually been influenced by the payments? The Framers of the Clauses made it simple. Ban the offerings altogether (unless, in the foreign context at least, Congress sees fit to approve them).³³

³² As recently reported in the press, the President’s Hotel in Washington “is one of [his] best performing properties.” The President’s recent financial disclosure listed the revenue of the Hotel at \$40.4 million for the 2017 calendar year. Steve Eder, Eric Lipton, & Ben Protes, *Trump Discloses Cohen Payment Raising Questions About Previous Omission*, N.Y. Times (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-financial-disclosure.html>. It remains to be seen how much of that revenue comes from foreign, federal, and domestic governments.

³³ Recognizing the possibility of foreign influence on the actions of federal officials in general, Congress enacted the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342, which prevents federal employees, including the President, from accepting any more than a *de minimis* “gift or decoration,” except in accordance with certain proscribed provisions. Those provisions require federal officials to file reports of such offerings with their respective agencies, which then review the filings for compliance with the Act. *Id.* § 7342(f).

The statute holds interesting implications for the present case. It applies to a “gift” from a foreign government—essentially synonymous with the term “present” in the Foreign Emoluments Clause—but does not cover “emoluments.” This seems to suggest that, in enacting the statute, Congress understood that “emolument” had a meaning separate and distinct from “present” (i.e., gift) in the Foreign Clause.

Contrary to the President’s assertion that the history surrounding the Clauses’ adoption is “devoid of concern about private commercial business arrangements,” several State constitutions adopted prior to the Convention were specifically designed to prevent public officials from placing their private commercial interests over their duties to the American people. *See, e.g.*, Pa. Const. art. V (1776) (“That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular *emolument* or advantage of any single man, family, or set of men, who are a part only of that community.”) (emphasis added); Virginia Declaration of Rights, art. IV (1776) (“That no man, or set of men, are entitled to exclusive or separate *emoluments* or privileges from the community, but in consideration of public services. . . .”) (emphasis added). Though the President places much emphasis on the fact that many of the Framers and early Presidents maintained private businesses that “likely” transacted with foreign and domestic governments, he offers no evidence confirming this in fact to have been so. In any event, it must be remembered that the Emoluments Clauses only prohibit profiting from transactions with foreign, the federal, or domestic *governments*; they do not prohibit all private foreign or domestic transactions on the part of a federal official. Absent the least evidence that early

Further, the statute establishes a procedure for obtaining the approval Congress is required to give under the Foreign Clause, delegating to various agencies the actual authority to approve a foreign “gift” (i.e., “present”). Any other “profit,” “gain,” or “advantage” received from a foreign government—as Plaintiffs have appropriately defined “emolument”—would be left to Congressional approval on a case-by-case basis.

Presidents maintained businesses involving foreign and domestic *governments*, the President's argument in this regard, even if theoretically relevant, is based wholly on speculation.

Finally, the Court does not accept the President's argument that construing the term "emolument" broadly would result in the absurd consequences of which he warns. The historical record demonstrates that the Framers were fundamentally concerned with transactions that could potentially influence the President's decisions in his dealings with specific foreign or domestic governments, not with *de minimis* situations.³⁴ Clearly "emoluments" such as mutual funds or "mere stock holdings by a covered official in companies that conduct business globally," Def.'s Mot. Dismiss at 52, of the sort that could be traced to a foreign or domestic *government* are *de minimis*. It is highly doubtful that instances such as these could be reasonably construed as having the potential to unduly influence a public official.³⁵ On the other hand, sole or substantial ownership of a business that receives hundreds of thousands or millions of dollars a year in revenue from one of its hotel properties where foreign and domestic governments are known to stay (often with the express purpose of cultivating the

³⁴ Yet another very familiar Latin precept to the fore: *De minimis non curat lex* ("The law takes no note of trifles.").

³⁵ If, however, the federal official owned a majority stake in a company that transacted extensive business with foreign or domestic governments or if it could be shown that a foreign or domestic government was using the company as a conduit to improperly influence the federal official, this would almost certainly no longer be *de minimis*.

President's good graces) most definitely raises the potential for undue influence, and would be well within the contemplation of the Clauses.³⁶

The Court is satisfied, consistent with the text and the original public meaning of the term “emolument,” that the historical record reflects that the Framers were acutely aware of and concerned about the potential for foreign or domestic influence of any sort over the President. An “emolument” within the meaning of the Emoluments Clauses was intended to reach beyond simple payment for services rendered by a federal official in his official capacity, which in effect would merely restate a prohibition against bribery. The term was intended to embrace and ban anything more than *de minimis* profit, gain, or advantage offered to a public official in his private capacity as well, wholly apart from his official salary.

³⁶ The President has argued that former Secretary of Commerce Penny Pritzker's stock holdings in Hyatt Hotels, which foreign and presumably state governments may have patronized, could constitute Emoluments Clause violations under Plaintiffs' interpretation. Similarly, counsel has suggested that President Obama's book sales to a foreign government, from which he presumably received royalties, could be prohibited based on Plaintiffs' interpretation of what constitutes “emoluments.” Hr'g Tr. at 27:5-17; 33:2-21. The Court obviously does not have sufficient facts before it as to those transactions to be able to hypothesize whether or not they involved Emoluments Clause violations. As far as the Court can tell, no one ever raised such challenges. In any event, the fact that no one may have challenged these transactions in no way establishes that Plaintiffs' interpretation of the term “emolument” in the present case is erroneous.

4) *Executive Branch Precedent and Practice*

In further support of their position, Plaintiffs emphasize that the Office of Legal Counsel (OLC) and the Comptroller General of the United States³⁷ have consistently interpreted the term “emolument” to cover “any profits” accepted from a foreign or domestic government. Pls.’ Opp’n at 36 (citing *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 119 (1993)). The Government has reached this conclusion, Plaintiffs emphasize, even in the absence of “direct personal contact or relationship between the [federal officer] and a foreign government.” Pls.’ Opp’n at 36, 47 (citing 17 Op. O.L.C. at 117-119 (concluding that the Foreign Emoluments Clause applied to federal officers who were also partners in law firms that did business with foreign governments)). Plaintiffs cite a recent opinion of the Office of Congressional Ethics (OCE)³⁸ which they claim is directly on point. *Id.* at 37 (citing OCE Report, Review No. 17-1147 (June 2, 2017)). In that opinion, the OCE determined that a federal officeholder’s acceptance of

³⁷ As to the OLC, see note 16, *supra*. The Comptroller General heads the Government Accountability Office, an agency within the legislative branch of the federal government. It carries out audit, evaluative, and investigative assignments, provides legal analyses to Congress, and issues legal decisions. “Office of the Comptroller General,” U.S. Government Accountability Office, <https://www.gao.gov/about/workforce/ocg.html>.

³⁸ The Office of Congressional Ethics (OCE) of the U.S. House of Representatives is an independent, non-partisan entity charged with reviewing allegations of misconduct against Members, officers, and staff of the U.S. House of Representatives. “Learn about the Office of Congressional Ethics,” Office of Congressional Ethics, <https://oce.house.gov/>.

profits derived from the rental of rooms to a foreign government violated the Foreign Emoluments Clause. *Id.* Plaintiffs urge the Court to give considerable weight to these Government opinions, noting that the President has cited no precedent from any of these agencies applying his narrower definition of “emolument.” *Id.*

Notwithstanding his inability to cite opinions squarely in his favor, the President insists that his position is not inconsistent with the Government opinions Plaintiffs cite. Indeed, he says, the facts underlying many of the opinions on which Plaintiffs rely in fact involved proposed employment relationships between a federal official and a foreign government. Def.’s Reply at 22. For example, he says, two of the OLC opinions cited by Plaintiffs concerned the prospective rendering of personal services by the federal official to the foreign government. *Id.* (citing *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 156-57 (1982) (a Nuclear Regulatory Commission employee could not “on his leave time” work for an American consulting firm on a project for the Mexican government where the firm secured the contract based solely on the employee’s expertise and would pay the employee using foreign funds); Memorandum from H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, O.L.C., *Re: Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales*, at 1 (May 23, 1986), available at <https://www.politico.com/f/?id=00000158-b547-db1e-a1f9-ff7f60920001> (Foreign Emoluments Clause could apply to NASA scientist accepting a fee for providing consulting

services to a foreign university)). Thus, he claims, the Government opinions upon which Plaintiffs rely are distinguishable from the instant case.

The President also cites a 1981 OLC opinion and a 1983 Comptroller General decision, both relating to President Ronald Reagan's retirement benefits from the State of California, which he contends, implicitly at least, run counter to Plaintiffs' position. Def.'s Reply at 24; Def.'s Mot. Dismiss at 47-48 (citing *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, (1981); Comp. Gen. B-207467, 1983 WL 27823 (1983)). In those decisions, both Government entities determined that while in office, President Reagan could continue to receive retirement benefits from the State of California, where he had served as Governor, without violating the Domestic Emoluments Clause. Def.'s Mot. Dismiss at 47. According to President Trump, these decisions cannot be squared with Plaintiffs' definition of "emolument," since retirement benefits surely fall within "anything of value." Def.'s Reply at 24.

Historical practice, the President says, supports his position. He points to a business transaction President Washington had with the Federal Government wherein, as a private citizen, he purchased several lots of public land at a public sale. Though Washington himself had authorized the sale and the sale was conducted by the Commissioners of the District of Columbia, President Trump notes that no one at the time voiced Domestic Emoluments Clause concerns. This, he claims, indicates that private commercial transactions were not thought as being within the scope of the Clause. Def.'s Mot. Dismiss at 43 (citing Certificate for Lots Purchased

in the District of Columbia (Sept. 18, 1793), <http://founders.archives.gov/documents/Washington/05-14-02-0074>). This is especially important, he submits, because President Washington's conduct has been accorded great weight in constitutional interpretation. Def.'s Reply at 26.

Moreover, the President notes, President Washington's conduct was hardly unique. The President highlights the fact that many early Presidents engaged in private commerce, suggesting that it is reasonable *to infer* that at least some of their transactions must have been with foreign or state government entities. *Id.*

The Court finds executive branch precedent and practice overwhelmingly consistent with Plaintiffs' expansive view of the meaning of the term "emolument." The President has not cited a single Government opinion that conclusively supports his position. He simply submits that his proposed definition is "not inconsistent" with existing precedent. That sort of argument clearly does not make the grade. OLC pronouncements repeatedly cite the broad purpose of the Clause and the expansive reach of the term "emolument." *See, e.g., Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 (1987) ("Consistent with its expansive language and underlying purpose, the [Foreign Emoluments Clause] has been interpreted as being 'particularly directed against every kind of influence by foreign governments upon officers of the United States, based upon historic policies as a nation.'" (quoting 24 Op. Att'y Gen. 116, 117 (1902) (emphasis omitted))); *Applicability of the Emoluments Clause to Nongovernment Members of ACUS*, 17 Op. O.L.C. 114,

121 (1993) (“The language of the Emoluments Clause is both sweeping and unqualified.”); Memorandum for Andrew F. Oehmann, Office of the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Invitation by Italian Government to officials of the Immigration & Naturalization Service & a Member of the White House Staff* at 2 (Oct. 16, 1962), <https://www.justice.gov/olc/page/file/935741/download> (noting “the sweeping nature of the constitutional prohibition and the fact that in the past it has been strictly construed, being directed against every possible kind of influence by foreign governments over officers of the United States.”); *see also* Sills, *supra*, at 84-85 (“Longstanding OLC and DOJ opinions dating back to 1902 have embraced this definition.”). The main takeaway from executive precedent stands in bold relief: The Emoluments Clauses are intended to protect against any type of potentially improper influence by foreign, the federal, and state governments upon the President.

Further, in line with the purposive analysis when deciding whether a particular arrangement is constitutional, Government officials have carefully considered the extent to which the arrangement at issue contains the potential for improper influence.³⁹ When that potential has been determined to exist, the Government has found Emoluments Clause violations. Take, for instance, the 1993 OLC opinion cited by Plaintiffs that

³⁹ The purposive analysis effectively brings down the President’s argument that “absurd consequences” would result from Plaintiffs’ interpretation of the term. None of the hypotheticals he cites are of the sort that would suggest the possibility of improper influence over the President. *See* discussion in Section III.B.3, *supra*.

concerned members of the Administrative Conference of the United States (ACUS),⁴⁰ who were also lawyers at private law firms. The question was whether they could receive partnership distributions from their firms where the firms received fees from foreign government clients. The OLC concluded that this was prohibited even though the lawyers “did not personally represent a foreign government, and indeed where they had no personal contact with that client of the firm.” 17 Op. O.L.C. at 119. In reaching this conclusion, the OLC stated:

Because the amount the Conference member would receive from the partnership’s profits would be a function of the amount paid to the firm by the foreign government, the partnership would in effect be a conduit for that government. Thus, some portion of the member’s income could fairly be attributed to a foreign government. We believe that acceptance of that portion of the member’s partnership share would constitute a prohibited emolument.

Id. This language directly contradicts the President’s suggestion that there can be no violation of the Foreign Clause if the federal official is receiving benefits in a private capacity.⁴¹

⁴⁰ ACUS is a nonpartisan, independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure. “About,” Administrative Conference of the United States, <https://www.acus.gov/>.

⁴¹ Though the OLC subsequently reconsidered its conclusion in this case on the ground that the private members of the ACUS were not in fact officials within the meaning of the Foreign Emoluments Clause, it did not revise its previous analysis that the monies were in

One of the OCE's more recent opinions leaves little doubt that official action is not required before there can be an Emoluments Clause violation. In a June 2, 2017, opinion, the OCE directly addressed the question of whether a federal official's acceptance of profit derived from the rental of rooms to a foreign government runs afoul of the Foreign Emoluments Clause. The OCE concluded that "the term 'emoluments' is not limited to payments from a foreign government that result from an individual's official duties" but that "the receipt of profit from a foreign government for rental property may implicate the constitutional prohibition against receipt of 'any emolument' of 'any kind whatever' from a foreign state." See OCE Report, Review No. 17-1147 at 12-13 (June 2, 2017), https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings_6.pdf.

The President falls back on the Government opinions concerning President Reagan's California retirement funds, but the Court finds those decisions easily distinguishable. As Plaintiffs suggest, both the OLC and the Comptroller General reached the conclusion that there was no Domestic Emoluments Clause violation after determining that the retirement benefits from his time as Governor Reagan of California had become "vested rights" before he took office as President Reagan of the United States. See *President Reagan's Ability to Receive Retirement Benefits from the State of Cali-*

fact "emoluments" covered by the Clause. *Applicability of the Emoluments Clause to Nongovernmental Members of ACUS*, 34 Op. O.L.C. (June 3, 2010), https://www.justice.gov/sites/default/files/olc/opinions/2010/06/31/acus-emoluments-clause_0.pdf.

formia, 5 Op. O.L.C. 187, 187-88 (1981) (stating the benefits were “vested rights” rather than “gratuities which the State is free to withdraw.”); Comp. Gen. B-207467, 1983 WL 27823, at *3 (1983) (reaching the same conclusion because the benefits were “previously earned,” “fully vested,” and “set by statute”). Both decisions place great emphasis on whether the benefits at issue would be the type that could potentially influence the President. Given the vested nature of the retirement benefits prior to Governor Reagan’s ascendancy to the Presidency, both the OLC and Comptroller General determined that they were not likely to have any effect. *See* 5 Op. O.L.C. at 192 (concluding that state pension “benefits are not emoluments in the constitutional sense,” and their “receipt does not violate the spirit of the Constitution because they do not subject the President to any improper influence.”); Comp. Gen. B-207467, 1983 WL 27823, at *3 (finding it “highly unlikely that the President could be swayed in his dealings with the State of California by the prospect of having his pension diminished or rescinded by the State.”). On the other hand, profits received from foreign or domestic governments that patronize the Trump International Hotel for the express purpose of potentially currying favor with a sitting President present a stark contrast to the fully vested retirement benefits that then-Governor Reagan earned from the State of California which the State of California was not free to withdraw.

President Trump’s appeal to historical practice does not aid his argument. As noted previously, he has provided no evidence—none—that any trading partners of the early Presidents actually were either foreign or domestic *governments*. Though he relies heavily on a

purported potential Domestic Emoluments Clause violation by President Washington—the surrounding facts of which are seriously incomplete (e.g., What sort of public auction was held? How was it advertised? How many bidders were involved?)—as Plaintiffs note, Washington later made clear that he was “ready to relinquish” the property if necessary, which itself calls into question the actual relevance of this transaction. *See* Letter from George Washington to the Commissioners for the District of Columbia (Mar. 14, 1794), *Founders Online*, National Archives, last modified November 26, 2017, <http://founders.archives.gov/documents/Washington/05-15-02-0289>. In any event, even indulging the inference that President Trump urges the Court to make regarding President Washington’s purchase of public land, the Court would not find this single example substantial enough, when weighed against the vast amount of historical evidence, textual support, and executive branch precedent to the contrary, to support the President’s narrow construction of the term “emolument.”

Executive branch precedent and practice have clearly and consistently held, apart from *de minimis* instances,⁴² that both Emoluments Clauses prohibit Presidents from receiving any profit, gain, or advantage from foreign, the federal, or domestic governments, except in the case of the Foreign Clause, where Congress approves. Based on precedent from the OLC and Comptroller General, there would be an exception, at least under the Domestic Emoluments Clause, where the thing of value received by the federal office holder, after the fashion of the Reagan-California pension precedent, was fully vested

⁴² *Cf.* note 33, *supra*, regarding the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342.

and infeasible before the federal official became a federal official, the rationale being that the benefit would lack any potential to influence the federal office-holder in his decision-making.⁴³

* * *

For the foregoing reasons, the Court finds the President is subject to both Emoluments Clauses of the Constitution and that the term “emolument” in both Clauses extends to any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments. This includes profits from private transactions, even those involving services given at fair market value.⁴⁴ In the case of the Foreign Emoluments Clause, unless Congress approves, receipt of the emolument is prohibited. In the case of the Domestic Clause, receipt of any emolument is flatly prohibited.

IV. THE PRESIDENT’S MOTION TO DISMISS

A. Legal Standard

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) will be granted if the allegations in a complaint do not “contain sufficient factual matter, accepted as true, to ‘state a claim to

⁴³ See pages 45-46, *supra*.

⁴⁴ But again there is the matter of private services compensated at a level above fair market value. If the President’s definition of “emolument” is accepted, i.e., that it applies only to payments made to him qua President, what is to be made of payments to the Hotel by foreign, federal, or state governments at a premium over market? See note 14, *supra*. According to the President’s attorney at oral argument, the answer is there is nothing to be done. See Hr’g Tr. at 33:22-34:10 (stating that this would not be an Emoluments Clause violation because “[i]t’s just more profit”).

relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (citation and quotation marks omitted). “[I]n evaluating a Rule 12(b)(6) motion to dismiss, a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint.” *Nemet Chevrolet, Ltd. v. Consumer Affairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

B. The Applicability of the Emoluments Clauses

Based on the foregoing, the Court finds that the Amended Complaint states plausible claims against the President under both the Foreign and Domestic Emoluments Clauses.⁴⁵

⁴⁵ During oral argument, the President’s counsel claimed that only two alleged violations are before the Court: 1) Hotel stays by foreign governments; and 2) the General Services Administration (GSA) Lease. Hr’g Tr. at 6:7-15; 43:23-25. However, in the course of their pleadings, Plaintiffs have asserted at least two other possible violations of the Domestic Emoluments Clause. One pertains to the issue of State government patronage of the Hotel and the other to tax subsidies granted to the Hotel by the District of Columbia. These allegations do not specifically appear in the Amended Complaint. *But see* Am. Compl. ¶ 98 (“Upon information and belief, federal, state, and local governments, or their instrumentalities, have made and will continue to make payments for the use of facilities owned or operated by the defendant for a variety of functions. The defendant will receive a portion of those payments, which constitute emoluments prohibited by the Domestic Emoluments Clause.”).

1) *Foreign Emoluments Clause Violations*

With respect to the Foreign Emoluments Clause, Plaintiffs have alleged that foreign governments or their instrumentalities have patronized the Trump International Hotel, spending government funds to stay at the Hotel, eat at its restaurant, and sponsor events in the Hotel’s event spaces. Am. Compl. ¶¶ 39-43. They have done so in some cases with the express intention to cater to the good graces of the President. For example, the Amended Complaint alleges that the Kingdom of Saudi Arabia spent thousands of dollars at the Hotel between October 1, 2016, and March 31, 2017, and that the Embassy of Kuwait, moving from another private hotel in the District, held its National Day celebration at

Even so, the Court notes that the President is already on fair notice as to these two additional allegations by reason of Plaintiffs’ subsequent pleadings. The overarching purpose of Plaintiffs’ case is to pursue the extent to which any precluded entities may have unduly bestowed actual or potential benefits upon the President through their patronage of the Trump International Hotel. The specific examples cited in the Amended Complaint are no more than that—examples. They do not limit Plaintiffs’ ability to inquire only into the specific examples alleged. It is therefore inaccurate to say that only two possible violations are before the Court. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests’. . . . [It] does not need detailed factual allegations.”) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Here, Plaintiffs have sufficiently identified the possibility of these additional potential violations through their pleadings, which should at least permit them to be further explored on discovery. That said, at some point if need be, the Court will entertain a motion to further amend the Amended Complaint to embrace these and other appropriately “specific” alleged violations.

the Hotel on February 22, 2017. *Id.* ¶¶ 40-41. Plaintiffs allege that the President has received or potentially could receive the profits derived from these foreign governments through his ownership of the Hotel through the Trump Organization. *Id.* ¶¶ 29, 34-36. Finally, Plaintiffs allege (and the President does not contest) that he has not received consent of Congress to receive such monies from foreign governments. *Id.* ¶ 33.

The Court finds that these allegations plausibly state a claim under the Foreign Emoluments Clause.

2) *Domestic Emoluments Clause Violations*

Plaintiffs make several claims with respect to the Domestic Emoluments Clause.

i. The GSA Lease

Plaintiffs allege that the Hotel received an emolument from the Federal Government in the form of the GSA Lease, which governs the Hotel's use of the Old Post Office Building in the District of Columbia, where the Hotel is situated. Section 37.19 of the Old Post Office Lease states: "No . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom." Am. Compl. ¶ 82. Plaintiffs allege that, before the President's inauguration, the then-Deputy Commissioner of the GSA indicated that the President would be in violation of the Lease unless he fully divested himself of all financial interests in it. *Id.* ¶ 83. Shortly after his inauguration, the President replaced the Acting Administrator of the GSA. *Id.* Plaintiffs allege that several weeks later, on March 16, 2017, less than two months into his term, the President released a proposed budget for 2018 that

increased the GSA's funding, while cutting back on other the funding of other agencies. *Id.* ¶ 84. On March 23, 2017, the GSA issued a letter determining that the President and the Hotel were not in violation of the Lease. *Id.* Plaintiffs allege that the GSA's abrupt about-face position was and is in direct contradiction of the plain terms of the Lease and that, by determining that the Hotel was and is in compliance with the Lease, the Federal Government bestowed upon the President an emolument in violation of the Domestic Emoluments Clause. *Id.* ¶ 86.

These allegations plausibly state a claim under the Domestic Emoluments Clause.

ii. Patronage of the Hotel by State Governments

In addition to foreign governments patronizing the Hotel, Plaintiffs claim that at least one State—Maine—has patronized the Hotel, spending state funds for its Governor and his entourage to stay at the Hotel and to frequent its facilities during an official visit of those officials to Washington, including an encounter with the President where Presidential action of interest to the Governor took place. Pls.' Opp'n. at 8. Plaintiffs allege on information and belief other States may have done likewise. *See* Am. Compl. ¶ 98.

These allegations plausibly state a claim under the Domestic Emoluments Clause.

iii. Tax Concessions from the D.C. Government

Plaintiffs further claim that, in connection with the Hotel, the President has received substantial tax concessions from the District of Columbia. Pls.' Opp'n at 12 (noting that “just one week after the election, the

President’s company re-filed a previously dismissed lawsuit against the District, seeking a reduction in its tax bill for the Hotel.”). At the time of the briefing in this case, the Trump Organization had only applied for District of Columbia tax concessions. Since then, the District’s tax authorities, according to a report in the *Washington Post*, after dismissal of a previously filed lawsuit, in fact granted the Hotel a reduction in the Organization’s 2018 tax bill, for a savings of \$991,367.00.⁴⁶

These allegations plausibly state a claim under the Domestic Emoluments Clause.

As with their Foreign Emoluments Clause claim, Plaintiffs allege that the President has received all the foregoing benefits on account of his ownership of the Hotel. Am. Compl. ¶¶ 29, 34-36.⁴⁷

The Court finds that these allegations, depending on the evidence adduced, would fairly establish Plaintiffs’ claims challenging the President’s receipt of emoluments from the federal and state governments under the Domestic Emoluments Clause.

⁴⁶ See Jonathan O’Connell, *Tax Official Reduce Trump’s Tax Bill on D.C. Hotel by Nearly \$1 Million*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/news/business/wp/2018/01/12/tax-officials-reduce-trumps-tax-bill-on-d-c-hotel-by-nearly-1-million/?utm_term=.6b527c071c30.

⁴⁷ Congress is not mentioned in the Domestic Emoluments Clause. Consequently, it has no role to approve or disapprove the acceptance of any “emoluments” a federal official may receive from the federal or state governments.

V. CONCLUSION

In sum, Plaintiffs have plausibly alleged that the President has been receiving or is potentially able to receive “emoluments” from foreign, the federal, and state governments in violation of the Constitution: They have stated viable claims for relief under both the Foreign and Domestic Emoluments Clauses.

Accordingly, the President’s Motion to Dismiss is **DENIED** insofar as it pertains to the claims which the Court has determined Plaintiffs have standing to pursue, viz., that the President may have violated the Foreign and Domestic Emoluments Clauses of the Constitution insofar as he is involved, directly or indirectly, with the Trump International Hotel in Washington, D.C.

The Court **DIRECTS** the parties to promptly consult and within twenty-one (21) days submit a Joint Recommendation suggesting the next steps to be taken in the case, including whether any further amendment of the Amended Complaint is necessary, what the time for the President to file an Answer herein should be, what the general outline of any proposed discovery should be, and any other matter the parties deem appropriate to bring to the attention of the Court.

The Court will address the President’s Motion to Dismiss the individual capacity claims against him in a subsequent Opinion.

A separate Order will **ISSUE**.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

July 25, 2018

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 17-1596

THE DISTRICT OF COLUMBIA AND THE STATE OF
MARYLAND, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, DEFENDANT

Filed: Mar. 28, 2018

ORDER

Having considered Defendant's Motion to Dismiss (ECF No. 21) and Plaintiffs' Opposition thereto, following oral argument, it is, for the reasons stated in the accompanying Opinion, this 28th day of March, 2018,

ORDERED:

1. Defendant's Motion to Dismiss (ECF No. 21) is **DENIED-IN-PART** insofar as it disputes Plaintiffs' standing to challenge the involvement of the President with respect to the Trump International Hotel and all its appurtenances in Washington, D.C. and any and all operations of the Trump Organization with respect to the same;

2. Defendant's Motion to Dismiss (ECF No. 21) is **GRANTED-IN-PART WITHOUT PREJUDICE** as to the operations of the Trump Organization and the President's involvement in the same outside the District of Columbia;
3. The Court's ruling on Defendant's Motion to Dismiss is **DEFERRED-IN-PART** in that the Court has yet to rule on Defendant's remaining arguments regarding the meaning of the Emoluments Clauses of the U.S. Constitution and whether Plaintiffs have otherwise stated claims under the Emoluments Clauses;
4. A further hearing to consider the remaining arguments in Defendant's Motion to Dismiss will be set in consultation with counsel.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 17-1596

THE DISTRICT OF COLUMBIA AND THE STATE OF
MARYLAND, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, DEFENDANT

Filed: Mar. 28, 2018

OPINION

This suit alleges that President Donald J. Trump has violated the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.¹ Plaintiffs, the District of Columbia and the State of Maryland, submit that the President is violating these Clauses because the Trump Organization, in which he has an ownership interest and

¹ The Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, provides that “no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.” The Domestic Emoluments Clause, U.S. Const. art. II, § 1, cl. 7, provides: “The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.”

from which he derives financial benefits, owns and operates a global business empire, including hotels, restaurants, and event spaces. The President's receipt of these benefits is said to offend the sovereign, quasi-sovereign, proprietary, and *parens patriae* interests of the State of Maryland and the District of Columbia. Plaintiffs seek declaratory relief establishing their rights *vis-à-vis* the President's actions as well as injunctive relief prohibiting him from further violating the Clauses.

The President has filed a Motion to Dismiss, arguing, *inter alia*, that Plaintiffs lack standing to pursue the litigation, i.e., that they have shown no injury-in-fact, fairly traceable to his acts, or likely to be redressed by any court order. Plaintiffs reject all these propositions. Although the parties have briefed other arguments pertaining to the viability *vel non* of Plaintiffs' suit,² the Court held oral argument limited to the issue of standing and advised the parties that it would address that issue in a stand-alone Opinion and Order. This is that Opinion and Order.

For the reasons that follow, the Court **DENIES-IN-PART** the Motion to Dismiss and finds that Plaintiffs do have standing to challenge the actions of the President with respect to the Trump International Hotel and its appurtenances in Washington, D.C., as well as the operations in the Trump Organization with respect to them.

² One of those arguments pertains to the meaning of the word "emolument" in the Clauses. For the sole purpose of determining the standing question, the Court will assume that "emolument" covers "anything of value," as alleged in the Amended Complaint. Am. Compl. ¶¶ 25-27, ECF No. 95. The Court will address the President's arguments pertaining to the meaning of the term in a separate Opinion pending further oral argument.

It **GRANTS-IN-PART WITHOUT PREJUDICE** the Motion to Dismiss as to Plaintiffs' standing with respect to the operations of the Trump Organization and the President's involvement in the same outside the District of Columbia. The Court **DEFERS** ruling on other arguments in the Motion to Dismiss pending further oral argument.³

I. FACTUAL BACKGROUND

The basic facts are not in dispute.

A. The Parties

Plaintiffs are the District of Columbia and the State of Maryland. The District of Columbia is a municipal corporation and the local government for the territory constituting the seat of the Federal Government. Am. Compl. ¶ 18. The State of Maryland is a sovereign State of the United States. *Id.* ¶ 19.

Donald J. Trump is the President of the United States, originally sued in his official capacity, subsequently added as a Defendant in his individual capacity.⁴

³ See note 2, *supra*.

⁴ On February 23, 2018, without objection by Defendant, Plaintiffs filed a Motion for Leave to File an Amended Complaint which adds the President as a Defendant in his individual capacity. On March 12, 2018, the Court granted the Motion, accepting the proposed Amended Complaint that had accompanied the Motion. Mem. Order (Mar. 12, 2018), ECF No. 94. The parties have agreed that the Court should apply the arguments in the President's pending Motion to Dismiss (ECF No. 21) to the Amended Complaint with respect to Plaintiffs' official capacity claims. See Mem. Order (Mar. 12, 2018). The President has indicated that he wishes to file a Motion to Dismiss with respect to Plaintiffs' individual capacity claims. Def.'s Resp. at 2 (Mar. 8, 2018), ECF No. 93. He will be permitted to do

Am. Compl. ¶ 20. He is the sole owner of both the Trump Organization LLC and The Trump Organization, Inc. (collectively, the Trump Organization), an umbrella organization under which many, if not all, of his corporations, limited-liability companies, limited partnerships, and other entities are loosely organized. *Id.* ¶ 29. Through these various business entities, the President owns and receives payments from a number of properties, hotels, restaurants, and event spaces in the United States and abroad. *Id.* Of particular importance in the present suit is the President’s ownership, through the Trump Organization, of the Trump International Hotel in Washington, D.C. (the Hotel).

The Hotel is a five-star, luxury hotel located on Pennsylvania Avenue, N.W., in Washington, near the White House. *Id.* ¶ 34. While the President does not actively manage the Hotel, through the Trump Organization, he owns and purportedly controls the Hotel as well as the bar and restaurant, BLT Prime, and the event spaces located within the establishment. *Id.* ¶¶ 29, 34-36. Directly or indirectly, the President shares in the revenues that the Hotel and its appurtenant restaurant, bar, and event spaces generate. *Id.*

B. The Alleged Violations

On January 11, 2017, shortly before his inauguration, the President announced that he would be turning over the “leadership and management” of the Trump Organization to his sons, Eric Trump and Donald Trump, Jr. *Id.* ¶ 30. Prior to taking office, he also announced that all profits earned from foreign governments would be

so. The Court will deal with the viability of the individual capacity claims in a subsequent Opinion and Order.

donated to the U.S. Treasury. *Id.* ¶ 46. The Trump Organization stated that it would not be tracking all payments it might receive from foreign governments and only planned to make an estimate with regard to such payments. *Id.* As of the date of the filing of this action, the President had made no such “donations” to the U.S. Treasury.⁵ *See* Am. Compl. ¶¶ 46, 138. Despite these announcements, Plaintiffs allege that the President continues to own and know about the activities of the Trump Organization. *Id.* ¶ 31. Indeed, according to Plaintiffs, one of the President’s sons has stated that he would be providing business updates to the President regarding the Organization on a quarterly basis and, although the President has formed a trust to hold his business assets, it appears that he remains able to obtain distributions from this trust at anytime. *Id.* ¶¶ 31-32.

Since the President’s election, a number of foreign governments have patronized or expressed a definite intention to patronize the Hotel, some of which have indicated that they are doing so precisely because of the

⁵ According to a recent press report, the President has stated that he has now paid to the U.S. Treasury the profits the Hotel has received from foreign governments. No details with respect to such payments, however, have been provided, viz., how the payments were calculated, who verified the calculations, how much was calculated over what period of time, and which foreign payor(s) were involved. *See* David A. Fahrenthold & Jonathan O’Connell, *Trump Organization Says It Has Donated Foreign Profits to U.S. Treasury, but Declines to Share Details*, Wash. Post (Feb. 26, 2018), https://www.washingtonpost.com/politics/trump-organization-says-it-has-donated-foreign-profits-to-us-treasury-but-declines-to-share-details/2018/02/26/747522e0-1b22-11e8-ae5a-16e60e4605f3_story.html?utm_term=.d8a282e07ec0.

President's association with it. *Id.* ¶¶ 39-43. For example, the Amended Complaint alleges that the Kingdom of Saudi Arabia spent thousands of dollars at the Hotel between October 1, 2016, and March 31, 2017. *Id.* ¶ 41. Plaintiffs also cite a statement from a Middle Eastern diplomat who told the *Washington Post*, "Believe me, all the delegations will go there." *Id.* ¶ 39. An Asian diplomat allegedly agreed, explaining "Isn't it rude to come to [the President's] city and say, 'I'm staying at your competitor?'" *Id.*

Plaintiffs further allege that at least some foreign governments have withdrawn their business from other hotels in the area not affiliated with the President and have transferred it to the Hotel. As an example, they assert that the Embassy of Kuwait held its National Day celebration at the Hotel on February 22, 2017, despite having made a prior "save the date reservation with the Four Seasons hotel." *Id.* ¶ 40.

Plaintiffs also contend that the President has been more than a passive actor with respect to the Hotel. Since his election, the Hotel has specifically sought to market itself to diplomats by hiring a "director of diplomatic sales" and by hosting an event where it pitched the Hotel to approximately 100 foreign diplomats. *Id.* ¶ 37. The President himself has appeared at the Hotel on several occasions, while a number of members of his administration continue to live there. *Id.* ¶ 38. As a result, Plaintiffs allege that goods and services at the Hotel have been marketed at a premium level since the election. *Id.* ¶ 100. A portion of benefits, particularly expenditures by foreign governments, is said to have been passed along to the President through the Trump Organization. *Id.* ¶ 29.

In addition, at least one State—the State of Maine—patronized the Hotel when its Governor, Paul LePage, visited Washington to discuss official business with the Federal Government, including discussions with the President. Pls.’ Opp’n. at 8, ECF No. 46. Indeed, on one of those trips, the President and Governor LePage appeared together at a news conference at which the President signed an executive order to review orders of the prior administration that established national monuments within the National Park Service, which could apply to a park and national monument in Maine, which President Obama had established over LePage’s objections in 2016. *Id.*

Plaintiffs submit that the President’s receipt of benefits from these sources violates both the Foreign and Domestic Emoluments Clauses.

C. Plaintiffs’ Alleged Injuries

The District of Columbia and Maryland claim they have been harmed by the President’s alleged violations in several ways.

First, Maryland alleges injuries to its **sovereign interests**.⁶ It claims a special interest in “enforcing the terms on which it agreed to enter the Union,” Am. Compl. ¶ 104, stating that the Emoluments Clauses were “material inducements” to its decision to enter the Union and that it retains the power to enforce those provisions today. *Id.* ¶ 106. Maryland also claims injury to its sovereign

⁶ The District of Columbia concedes that it cannot allege injury to a sovereign interest because it is not a sovereign. *See* Pls.’ Opp’n at 6 n.1; Hr’g Tr. at 180:24-25, Jan. 25, 2018, ECF No. 92 (Hr’g Tr.).

interests in that it receives tax revenues from comparable hotels, bars, restaurants and event spaces within the State of Maryland located nearby the Hotel, which it has lost and will continue to lose because patrons choose to avail themselves of the Hotel as opposed to comparable establishments in Maryland. *Id.* ¶¶ 116-118.

Second, both Plaintiffs submit that their **quasi-sovereign interests** are harmed in that the President’s violations have placed them in an “intolerable dilemma.” *Id.* ¶ 110. In particular, they claim a governmental interest in the enforcement of their respective laws pertaining to taxation, zoning, and land use involving real property that the President may own or seek to acquire. *Id.* ¶ 108. They allege that the President’s receipt of emoluments from other States of the United States, in violation of the Domestic Emoluments Clause, forces them, on the one hand, to choose between granting requests for exemptions or waivers by the Trump Organization for activities conducted within Maryland and the District of Columbia and losing revenue or, on the other hand, denying such requests by the President’s organization and risk being placed at a disadvantage *vis-à-vis* other States that have agreed to grant the Organization such concessions. *Id.* ¶ 110.⁷

Third, Plaintiffs assert injuries to their own **proprietary interests**. The District of Columbia states that it

⁷ The *Washington Post*, for example, has reported that the District of Columbia Office of Tax and Revenue granted substantial tax reductions to the Hotel of approximately \$1 million. See Jonathan O’Connell, *Tax Official Reduce Trump’s Tax Bill on D.C. Hotel by Nearly \$1 Million*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/news/business/wp/2018/01/12/tax-officials-reduce-trumps-tax-bill-on-d-c-hotel-by-nearly-1-million/?utm_term=.6b527c071c30.

directly owns building and land interests in properties in the District of Columbia that directly compete with the Hotel, and which are either losing business to the Hotel or which face the imminent prospect of losing such business by virtue of the President's continuing involvement in the Hotel. Am. Compl. ¶¶ 119-129. Specifically, the District of Columbia claims it possess an ownership or financial interest in the Walter E. Washington Convention Center (Washington Convention Center), the Washington Convention Center and Sports Authority (also known as Events D.C.), and the Carnegie Library. *Id.* ¶¶ 120-122.

The State of Maryland maintains that it has a direct financial interest in the Montgomery County Conference Center, which is part of the Bethesda North Marriott Hotel located in Bethesda, Maryland, (approximately thirteen miles from the Hotel)⁸ as well as in the gambling proceeds it receives from the casino at the MGM Hotel in the National Harbor, located approximately ten miles from the Hotel across the Potomac River in lower Prince George's County, Maryland. Am. Compl. ¶¶ 117, 131-32; Pls.' Opp'n at 16, 23. Maryland argues that, like the District of Columbia, it is harmed because these entities compete with the Hotel for the business of both foreign and domestic governments and that the President's violations of the Emoluments Clauses have illegally skewed the hospitality market in his favor. Am. Compl. ¶ 130.

Finally, the District of Columbia and the State of Maryland assert that they are entitled to pursue this litigation on behalf of their respective residents as *parens*

⁸ See Def.'s Mot. Dismiss at 23, ECF No. 21-1.

patriae.⁹ As *parens patriae*, they allege that the President's violations cause competing companies and their employees within the respective jurisdictions to lose business, wages, and tips, which in turn generate a range of market distortions that restrict and curtail opportunity, diminish revenues and earnings, and hamper competition. Am. Compl. ¶¶ 113-115.

The President disputes all these purported injuries and seeks dismissal of the suit, *inter alia*, on the ground that Plaintiffs have not shown that they have standing to pursue it. ECF No. 21.

II. LEGAL STANDARDS

A. Motion to Dismiss

A party may move for dismissal of a suit pursuant to Federal Rule of Civil Procedure 12(b)(1) where the court lacks subject matter jurisdiction over the claims alleged in the complaint. Fed. R. Civ. P. 12(b)(1). “Article III gives federal courts jurisdiction only over ‘cases and controversies,’ U.S. Const. art. III, § 2, cl. 1, and the doctrine of standing identifies disputes appropriate for judicial resolution.” *Miller v. Brown*, 462

⁹ *Parens Patriae* standing is a “judicial construct that does not lend itself to a simple or exact definition.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). It means literally “parent of the country” and has its roots in common law, and literally refers to a State’s right as sovereign to step into litigation as guardian of persons under legal disability. *Id.* at 600. It has developed in American law to be a theory of standing by virtue of which a State may assert a quasi-sovereign interest on behalf of its citizens in general. *Id.* at 600-01, 607. The term is discussed further *infra*.

F.3d 312, 316 (4th Cir. 2006) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982)). As the party asserting jurisdiction, the plaintiff bears the burden of proving that the district court has subject matter jurisdiction. See *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). In considering whether to dismiss for lack of jurisdiction, the court may consider “evidence outside of the pleadings without converting the proceeding into one for summary judgment.” *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (quoting *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 768).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) will be granted if the allegations in a complaint do not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (citation and quotation marks omitted). “[I]n evaluating a Rule 12(b)(6) motion to dismiss, a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint.” *Nemet Chevrolet, Ltd. v. Consumer Affairs. com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

B. Article III Standing

To establish “the irreducible constitutional minimum of standing,” a plaintiff must “clearly . . . allege

facts demonstrating” that it has “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). An “injury-in-fact” has been defined as “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). The injury must be “legally and judicially cognizable,” and the dispute must be one that “is traditionally thought to be capable of resolution through the judicial process.” *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). “[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

Of particular relevance to this proceeding, States are not “normal litigants for the purposes of invoking federal jurisdiction” and are entitled to “special solicitude” in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007). Indeed, the invasion of three types of unique State interests justifying standing were identified by the Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, being (a) sovereign interests; (b) nonsovereign interests; and (c) quasi-sovereign interests. 458 U.S. at 601-02.

Thus, States have a sovereign interest in “the power to create and enforce a legal code, both civil and criminal” as well as in the “demand of recognition from other

sovereigns,” such as in the recognition of borders. *Id.* at 601.

However, “[n]ot all that a State does . . . is based on its sovereign character.” *Id.* Like private parties, a State may “have a [nonsovereign] variety of proprietary interests,” which a State may pursue in court, including its ownership of land or participation in a business venture. *Id.* at 601-02.

The *Snapp* Court recognized two distinct categories of quasi-sovereign interests held by States. First, “a State has a quasi-sovereign-interest in not being discriminatorily denied its rightful status within the federal system.” *Id.* at 607. Second, a State has an interest in the “health and well-being—both physical and economic—of its residents.” *Id.* In these actions, the State is said to sue in its capacity as *parens patriae*. When suing in that particular capacity, the State must be more than a nominal party and must allege more than an “injury to an identifiable group of individual residents.” *Id.* The injury must be of the type “that the State, if it could, would likely attempt to address through its sovereign lawmaking power.” *Id.* If so, the State likely is deemed to have standing as *parens patriae* to bring the suit. *Id.*

III. STANDING

A. Injury-in-Fact

The first requirement for Article III standing is that the plaintiff articulate an injury-in-fact, “which helps to ensure the plaintiff has a ‘personal stake in the outcome of the controversy.’” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). While hypothetical

or conjectural injuries will not suffice, an allegation of future injury may be sufficient if the threatened injury is “certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401, 409 (2013). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, [since] on a motion to dismiss [the court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561 (citation and quotation marks omitted). At the same time, it has been said that “[i]njury-in-fact is not Mount Everest.” *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (Alito, J.).

Plaintiffs submit that their injuries are sufficiently concrete and imminent to satisfy the requirement of injury-in-fact. It should be noted, however, that, during oral argument, Plaintiffs clarified that their alleged competitive injuries—namely, Maryland’s claimed injuries to its sovereign interest in taxes, to both parties’ proprietary interests, and, to some extent, to both parties’ *parens patriae* interests—centered almost exclusively around the District of Columbia-based Trump International Hotel and its appurtenant restaurant, bar, and event space, whereas the alleged injuries to their sovereign and certain of their quasi-sovereign interests were said to have “no boundaries.” Hr’g Tr. at 62-63.

The President disputes that any of Plaintiffs’ alleged injuries, bounded or not, in fact exist much less that they satisfy the standard for injury-in-fact.

The Court finds that Maryland has suffered no injury to its sovereign interests¹⁰ but that both Plaintiffs have stated cognizable injuries to their quasi-sovereign, proprietary, and *parens patriae* interests.

1) *Maryland's Sovereign Interests.*

The State of Maryland asserts two distinct sovereign interests.

i. Detrimental Reliance in Joining the Union.

First, Maryland claims a sovereign interest in enforcing the terms upon which it entered the Union. Am. Compl. ¶¶ 104-106. It argues that because its 1776 Declaration of Rights contained a precursor to the United States Constitution's Emoluments Clauses, the Court should infer that Maryland felt strongly about preventing corruption when it joined the Union and therefore has standing to enforce these terms. Pls.' Opp'n at 14.

The President counters that this injury is not judicially cognizable because Maryland is essentially asking the Court to adjudicate "abstract questions of political power," which is beyond its authority under Article III. Def.'s Mot. Dismiss at 10, ECF No. 21-1 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 484-84 (1923)); Hr'g Tr. at 69. In any event, says the President, even if Maryland's alleged detrimental reliance were cognizable, the Amended Complaint contains no plausible allegation to

¹⁰ Again, the District of Columbia has no sovereign interest to be offended. See note 6, *supra*.

support a claim that Maryland's present-day interpretation of "emolument" induced it to join the Union. Def.'s Mot. Dismiss at 11-12.

The Court is unaware of any legal support for the proposition that a State may establish injuries to its sovereign interest, by alleging reliance on the expectation that one of its own constitutional provisions pre-dating the federal Constitution would be carried forward to the federal Constitution when it joined the Union, when a comparable provision was in fact carried forward but is not at some later time being enforced to that State's satisfaction. As the President suggests, States may not serve as "roving constitutional watchdog[s]" raising any issue "no matter how generalized or quintessentially political." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011). Lack of legal precedent aside, more fatal to Maryland's argument is the highly doubtful historical proposition that a causal connection existed between the inclusion of the Emoluments Clauses in the federal Constitution and Maryland's decision to ratify it. Even the most casual student of American history would likely conclude that Maryland would have ratified the federal Constitution for a myriad of reasons with or without inclusion of the Clauses and, if carried forward, without regard to the strictness with which over time they would be enforced. The inclusion of a "precursor" to the Emoluments Clauses in Maryland's pre-Union Declaration of Rights and the State's alleged frustration that the Clauses are not being appropriately enforced today establishes no injury-in-fact to Maryland's sovereign interests for standing purposes.

ii. Tax Revenues.

Maryland, as sovereign, relying on the Supreme Court's decision in *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992), also argues that it has suffered a "direct injury in the form of a loss of specific tax revenues," Pls.' Opp'n at 14. Maryland invites the Court's attention to the revenue it receives from the sales and room-rental taxes on Maryland hotels, restaurants, and event spaces that compete with the Hotel for government business. Pls.' Opp'n at 18-19. Because this is a competitive injury, Maryland asserts, for standing purposes, it is not required to submit actual lost tax or sales data. *Id.*; Hr'g Tr. at 59-60.

The President argues that Maryland's supposed tax revenue injury is too general to qualify as an injury-in-fact. In contrast to *Wyoming*, he says, where there was "unrebutted evidence" of a specific loss of revenue by reason of a tax on coal going back several years, Maryland is engaged in extreme speculation about potential future tax loss of general hospitality revenues. Def.'s Mot. Dismiss at 13 (citing *Wyoming*, 502 U.S. at 445, 447-50); Hr'g Tr. at 34, 76-77. He submits that it is altogether improbable that Maryland's tax coffers will suffer any injury at all. Def.'s Mot. Dismiss at 14.

The Court agrees with the President. Though Maryland looks to the competitor standing theory in support of its lost tax revenue injury, in marked contrast to the losses to its proprietary interests, as will be discussed *infra*, the case law indicates that a plaintiff has the burden of showing "a direct injury in the form of a loss of specific tax revenues." *Wyoming*, 502 U.S. at 448. A "decline in general tax revenues" is not enough. *Id.* (citing *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.

1976)). As the President points out, in *Wyoming*, the Supreme Court was satisfied that a direct injury was shown because there was “[u]nrebutted evidence demonstrat[ing] that, since the effective date of the [applicable] Act, Wyoming ha[d] lost severance taxes” every year for a period of almost three years. *Id.* at 445-46. Though Maryland points out that *Wyoming* was decided at the summary judgment stage, that would seem to make little difference at the Motion to Dismiss stage. Just to get through the gate at this point, Maryland has to demonstrate with at least some measure of specificity how much tax revenue it may have lost to the Hotel. It has not done so. As distinguished from the other competitive injuries to be discussed presently, Maryland’s suggestion of loss of tax revenue is too speculative for the Court to find that it constitutes injury-in-fact for standing purposes. *See Florida v. Mellon*, 273 U.S. 12, 17-18 (1927) (claimed loss of tax revenue was too speculative, remote and indirect to establish standing).

The Court finds that neither claimed injury to Maryland’s sovereign interests satisfies the injury-in-fact prong of the standing test.

2) *District of Columbia’s and Maryland’s Quasi-Sovereign Interests*.¹¹

Both Plaintiffs assert injury to their quasi-sovereign interests.

With respect to the President’s alleged violations of the Domestic Emoluments Clause, Plaintiffs argue that

¹¹ The District of Columbia, as a United States territory, is “similarly situated to a State in this respect” and may assert quasi-sovereign interests in federal court. *See Snapp*, 458 U. S. at 608 n.15.

they have been placed in an “intolerable dilemma” in that, on the one hand, they are forced to choose between granting the Trump Organization’s requests for special concessions, exemptions, waivers, and the like, thereby losing revenue, and, on the other hand, denying such requests and risk being placed at a disadvantage *vis-à-vis* other States that already have been or may in the future be constrained to grant such concessions. Am. Compl. ¶¶ 107-112. Because this dilemma supposedly violates the “fundamental principle of *equal* sovereignty among the States,” Pls.’ Opp’n at 7-8 (quoting *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013)), Plaintiffs claim injury-in-fact, hence standing, to protect their “position among . . . sister States.” *Id.* at 9 (quoting *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 451 (1945)).

As to the Foreign Emoluments Clause, Plaintiffs allege that the President’s violations deny them their “rightful status in the federal system” because the Federal Government becomes responsive to the desires of foreign governments rather than to those of the States. *Id.* (citing *Snapp*, 458 U.S. at 607). Since these injuries supposedly occur each time the President receives an emolument from any location, Plaintiffs argue they have been injured in the past and continue to be injured by the President’s actions. *Id.* at 11-12.¹² They claim standing under *Snapp* to vindicate their interests in “securing observance of the terms under which [they] participate[] in the federal system.” *Snapp*, 458 U.S. at 607-08.

¹² It is through these claimed injuries that Plaintiffs seek to encompass the President’s other business activities beyond the Washington-based Hotel, both national and global. Hr’g Tr. at 62-63.

The President's position is that these claimed injuries are again based on a "speculative chain of possibilities," such that they cannot be deemed "certainly impending." Def.'s Mot. Dismiss at 17 (citing *Clapper*, 568 U.S. at 410, 414). To start, the President points out that Maryland has not alleged that it is faced with any threatened need to grant concessions to him or his Organization. In fact, he says, the Amended Complaint does not even allege that the Trump Organization or the President do any business in Maryland. Though the District of Columbia is home to the Hotel, the President argues that, as to it, any hypothetical special treatment of the Hotel, were the District to provide such treatment, would be a self-inflicted injury. *Id.* at 17-18. Further, he maintains that it is purely conjectural that other States would grant favors or concessions to the President's businesses in violation of their own laws. He submits that it requires even greater speculation to say that he would retaliate against Plaintiffs if they failed to grant such concessions. *Id.* at 18. At best, the President says, Plaintiffs' alleged injuries are an "abstract threat to federalism," not an injury-in-fact cognizable for standing purposes under Article III. Def.'s Reply at 5, ECF No. 70.

This issue requires careful parsing. The Court has located no case that recognizes an "intolerable dilemma" as the basis for establishing injury-in-fact for standing purposes, whether suffered by a State, a business, or an individual litigant. Yet what cannot be denied is that Trump Organization hotels and, through it, the President have reportedly been accorded substantial tax concessions by at least the District of Columbia and the State of Mississippi. *See* Steve Eder & Ben

Protest, *Hotel Carrying New Trump Brand Secures \$6 Million Tax Break*, N.Y. Times (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/business/trump-hotel-scion-mississippi-tax-rebate.html>; O'Connell, *Tax Official Reduce Trump's Tax Bill on D.C. Hotel by Nearly \$1 Million*, note 7, *supra*. At the time of the briefing in this case, the Trump Organization had merely applied for these District of Columbia concessions. Since then, however, the District's tax authorities, according to a report in the *Washington Post*, in fact granted the Hotel a reduction in its 2018 tax bill for a savings of \$991,367.00. See O'Connell, *Tax Official Reduce Trump's Tax Bill on D.C. Hotel by Nearly \$1 Million*, note 7, *supra*.

Tax authorities in the District of Columbia have declared (and those in Mississippi would presumably take the same position) that these concessions were routine and that no favoritism was involved. But, while ordinarily there may be a presumption of regularity as far as the decisions of the tax authorities are concerned, the fact remains that Trump Organization hotels, from which the President allegedly derives substantial illegal profits, have been the beneficiaries of these decisions. Nor can the mere say-so of the tax authorities—at least in the District of Columbia—be taken as the final word that its tax concessions were merely “routine.” As has been reported in the press and as noted in the Amended Complaint and confirmed at oral argument, almost immediately after the President took office, federal regulations were amended so that the former U.S. Post Office, which is the site of the Trump International Hotel, which could not previously be leased to someone associated with the Federal Government, suddenly could be leased to someone despite that someone's connection

with the Federal Government. *See* Am. Compl. ¶¶ 80-88; Hr'g Tr. at 150-51; Bryon Tau, *GSA Says Trump Hotel Not in Violation of Lease*, Wall Street J. (Mar. 23, 2017), <https://www.wsj.com/articles/gsa-says-trump-hotel-not-in-violation-of-lease-1490315114>. This abrupt administrative about-face at a minimum gives pause before accepting any claim that the tax concessions given to the Hotel by the District of Columbia tax authorities were “routine.” Given these circumstances, there is a decent possibility, at least as far as the Hotel in Washington is concerned, that the District of Columbia may have felt itself effectively “coerced” into granting special concessions to the Hotel and that Maryland may feel itself under pressure to respond in similar fashion.

There is yet another consideration Plaintiffs find concerning. As reported in the press, Governor Paul LePage of the State of Maine stayed at the Hotel on an official visit to Washington during the spring of 2017, met with the President, and not long after appeared with the President at a news conference at which the President signed an executive order to review national monuments that are part of the National Park Service, which could apply to a park and national monument in Maine, which President Obama had established over LePage’s objections in 2016. *See* Pls.’ Opp’n at 8 (citing Miller & Thistle, *Luxury hotels, fine dining for LePage on taxpayers’ dime*, Portland Press Herald (July 23, 2017), <https://goo.gl/xPxeeP>; Sambides, *Leaked report advises Trump to open Maine monument to commercial forestry*, Bangor Daily News (Sept. 18, 2017), <https://goo.gl/Un5cmK>); *see also* Scott Thistle, *LePage Joins Trump for Signing of Order to Review Designations of National Monuments*, Portland Press Herald (Apr.

27, 2017), <https://www.pressherald.com/2017/04/26/lepage-joins-trump-for-executive-order-signing-ceremony/>. Leaving aside how Maine's citizens may have felt about the propriety of their Governor living large at the Hotel while on official business in Washington, the fact that States other than Maryland or the District of Columbia (while, not a State) might patronize the Hotel while on official business in Washington rather clearly suggests that Maryland and the District of Columbia may very well feel themselves obliged, i.e., coerced, to patronize the Hotel in order to help them obtain federal favors.

In the Court's view, these circumstances do not, as the President maintains, involve numerous inferential leaps to demonstrate injury to the quasi-sovereign interests of Maryland and the District of Columbia insofar as the President's purported violations of the Domestic Emoluments Clause are concerned. At least with respect to the D.C.-based Hotel's operations, Plaintiffs have adequately demonstrated that their quasi-sovereign interests in this particular way have been injured-in-fact.

That said, the Court finds it is considerably more difficult to conclude that Plaintiffs' quasi-sovereign interests have been offended by Trump Organization operations outside the District of Columbia. There appears to be no "actual or imminent" injury to either Plaintiff, for example, with respect to the decision of the State of Florida or any other State to patronize the Trump Organization's Mar-a-Lago facility in Palm Beach. In that respect, any alleged injury to Maryland or the District of Columbia seems much more "hypothetical and conjectural," not "concrete and particularized." To be sure, while Florida or other States in which Trump Or-

ganization operations are located may be able to successfully establish their own injury-in-fact for standing purposes were they to bring Emoluments Clause suits with respect to those operations, Plaintiffs here cannot. The Court holds that Plaintiffs' injuries-in-fact to their quasi-sovereign interests for standing purposes have been shown, but only as to the Trump Organization and the Hotel operations in the District of Columbia and the President's involvement with respect to the same.

3) *District of Columbia's and Maryland's Proprietary Interests.*

Both Plaintiffs allege that they have proprietary interests in entities that compete with the Hotel. Specifically, the District of Columbia owns the Washington Convention Center, located within the District, which it argues competes directly with the Hotel for similar events involving both foreign and domestic governments. Pls.' Opp'n at 22-23. Maryland, as both a landlord and through its management authority in overseeing the activities of the Bethesda Marriott Conference Center, submits that it has a direct financial interest in the Conference Center, which competes with the Hotel for foreign and domestic business. Am. Compl. ¶ 131; Hr'g Tr. at 169. Maryland also claims a proprietary interest in the gambling proceeds it receives from the MGM National Harbor casino pursuant to Maryland law. Pls.' Opp'n at 23 (citing Md. Code. Ann., State Gov't § 9-1A-26(a)(1)). Because the casino is integrated into the MGM Hotel and adjacent to the Gaylord Hotel, Maryland says its proprietary interests are directly affected when an individual or, more to the point, a foreign or domestic government, chooses to stay at the

President's Hotel instead of the MGM or Gaylord, because Maryland suffers a loss to its income stream. *Id.* at 24.

Plaintiffs thus argue that the President's violations of both the Foreign and Domestic Clauses have left them with an "inability to compete on an equal footing" with the Hotel. *Id.* It is this loss of the "opportunity to compete," they claim, that establishes an alternative injury sufficient for Article III standing. *Id.* at 24-25 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)). Relying on this theory of "competitor standing," Plaintiffs again argue that they are not obliged to provide "a balance sheet with 'lost sales data' they can link directly to the President." *Id.* at 25 (quoting *TrafficSchool.com Inc. v. Edriver Inc.*, 658 F.3d 820, 825 (9th Cir. 2011)). Rather, they submit that they have shown injury-in-fact because their position "in the relevant market place is affected adversely." *Id.* (citing *Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993)).

Once again, the President argues that Plaintiffs' alleged injuries, this time to their proprietary interests, are highly speculative—far from "certainly impending" in nature. Def.'s Reply at 8 (citing *Clapper*, 568 U.S. at 409). It is not enough, says the President, for Plaintiffs to merely allege that they compete with the Hotel. They must show an "actual or imminent increase in competition, which increase . . . will almost certainly cause an injury-in-fact." *Id.* at 9 (quoting *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010)). The President disputes that any of the entities in which Plaintiffs claim a proprietary interest are comparable to the Ho-

tel. Given the substantial differences between the venues and the “diffuse and competitive” hospitality market in the area, he says, Plaintiffs have not met their burden. *Id.* at 10-11.

While the Court has agreed with the President as to certain of Maryland’s claims of injury to its sovereign interests, it finds that Plaintiffs have met their burden as to their claims with respect to injuries to at least some of their proprietary interests.¹³

The Supreme Court has recognized that plaintiffs with an economic interest have standing to sue to prevent a direct competitor from receiving an illegal market benefit leading to an unlawful increase in competition. *See, e.g., Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971) (concluding that an association of open-end investment companies and several individual companies had standing to challenge a regulatory decision allowing national banks to operate collective investment funds because they were sufficiently injured by the competition the regulation authorized); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151-52, 158 (1970) (holding an association of data processing service

¹³ Maryland’s claim of injury based on the purported loss of proceeds from gambling at the MGM facility is, in the Court’s view, too attenuated to establish injury-in-fact to its proprietary interests, just as its claim of lost tax revenues from the MGM or Gaylord operations could not sustain a claim of injury-in-fact to its sovereign interest. In fact, as the Court elicited at oral argument, the Trump International Hotel does not even offer casino gambling. But Maryland’s claim of injury to its proprietary interest is sustained with respect to its participation in the Bethesda Marriott Conference Center.

providers had standing to challenge a regulation allowing banks to provide such services because they had an injury in the form of future lost profits). In such cases, a plaintiff must show that it is “sufficiently injured by the competition . . . to create a case or controversy.” *Inv. Co. Inst.*, 401 U.S. at 620.

Several courts have interpreted a sufficient competitive disadvantage to mean that a plaintiff must show that it “personally competes in the same arena” with the party that has received an illegal benefit. *See, e.g., Ctr. for Reprod. Law v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002); *Becker v. FEC*, 230 F.3d 381, 387 n.5 (1st Cir. 2000); *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998); *In re U.S. Catholic Conf.*, 885 F.2d 1020, 1029 (2d Cir. 1989). “Because increased competition almost surely injures a seller in one form or another, [a plaintiff] need not wait until ‘allegedly illegal transactions . . . hurt [it] competitively.’” *Sherley*, 610 F.3d at 72 (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). Thus, in competitor standing cases, lost sales data are not required to prove a competitive injury; instead basic economic logic will permit a finding that a plaintiff will suffer an injury-in-fact. *See, e.g., Traffic School.com*, 653 F.3d at 825 (“A plaintiff who can’t produce lost sales data may therefore establish an injury by creating a chain of inferences showing how defendant’s false advertising could harm plaintiff’s business.”); *Sherley*, 610 F.3d at 74 (noting that, although it was not certain how likely the plaintiffs would lose funding to the challenged projects, “having been put into competition with those projects, the [plaintiffs] face a substantial enough probability to deem the injury to them imminent”).

In the present case, Plaintiffs have attached to their Opposition to the Motion to Dismiss declarations of experts stating that the entities in which Plaintiffs claim a proprietary interest in fact compete in the same arena as the Hotel for certain customers and events. *See generally* Rachel J. Roginsky Decl., ECF No. 47; Christopher C. Muller Decl., ECF No. 48. Roginsky, a private consultant with expertise in assessing competition in the hotel industry, indicates that both the Washington Convention Center and the Hotel host events and meetings for up to 1,200 people and offer overlapping services for such events, including high-end catering and customized menu planning. Roginsky Decl. ¶ 31. Because of their close proximity—less than one mile apart—both the Washington Convention Center and the Hotel are equally accessible to federal agencies, law firms, and large businesses that would seek to use the spaces. *Id.* ¶ 30. She also concludes that both facilities are of “similar class and image.” *Id.* ¶ 32. Additionally, Events D.C., a District of Columbia-controlled entity, caters to both foreign and domestic governments and a portion of its revenue is based on demand for use of the Washington Convention Center. Am. Compl. ¶¶ 120-22; Hr’g Tr. at 105:6-10 (noting that the Washington Convention Center has previously hosted the Food and Drug Administration, the Treasury Department, and the Department of Commerce).

Maryland submits that its proprietary interests are also comparable to and compete in the same arena with the Hotel. While the State of Maryland does not have a proprietary interest in the hotel attached to the Bethesda Marriott Conference Center, the Conference

Center itself, in which the State does have such an interest, has 39,000 square feet of meeting and event space, which compete directly with the Hotel's 38,000 square feet of meeting and event space. Am. Compl. ¶ 131; Hr'g Tr. at 105; Roginsky Decl. ¶ 41. The Conference Center has a large ballroom, has hosted embassy events in the past, and, compared with the Hotel, is essentially equidistant from many foreign embassies. Hr'g Tr. at 105.

Importantly, and contrary to the President's assertions, Plaintiffs allege that they are more than just competitors in the same arena as the Hotel. They argue they have been placed at a competitive disadvantage because the President, by virtue of the pre-eminence of his office, is unfairly skewing the hospitality market in favor of his Hotel. He is not merely a market participant, they say; he is actively diverting business from Plaintiffs' entities. In fact, Plaintiffs cite specific instances of foreign governments foregoing reservations at other hotels in the arena and moving them to the President's Hotel. *See* Pls.' Opp'n at 17 (noting that both Kuwait and Bahrain moved events from the Four Seasons and Ritz Carlton to the Hotel after the President was elected). Statements from foreign diplomats have confirmed that they will almost certainly be doing likewise. *See* Am. Compl. ¶ 39. Plaintiffs further allege that, since the President's election, the Hotel has raised its prices to premium levels and has increased its profits. *See id.* ¶¶ 100-01 (alleging that the starting rate for "guest rooms" at the Hotel increased to \$500 on most nights, which is hundreds of dollars more than when the Hotel first opened shortly before the presidential election); Pls.' Opp'n at 18 (noting the Trump Organization,

the Hotel's parent company, turned a \$1.97 million profit during the first four months of 2017 despite having predicted a loss of \$2.1 million for the same period).

Though the President emphasizes that the Four Seasons and Ritz Carlton hotels are not Plaintiffs' properties, the Court concludes, based on fairly straightforward economic logic, that the properties which Plaintiffs do have a proprietary interest in are in fact disadvantaged in much the same way as those two hotels have been. *See Massachusetts v. EPA*, 549 U.S. at 525 n.23 ("Even a small probability of injury is sufficient to create a case or controversy.") (quoting *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993)). In other words, Plaintiffs have alleged sufficient facts to show that the President's ownership interest in the Hotel has had and almost certainly will continue to have an unlawful effect on competition, allowing an inference of impending (if not already occurring) injury to Plaintiffs' proprietary interests. *Sherley*, 610 F.3d at 72 (citing *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002)); *see also TrafficSchool.com, Inc.*, 653 F.3d at 825-26 ("Evidence of direct competition is strong proof that plaintiffs have a stake in the outcome of the suit, so their injury isn't 'conjectural' or 'hypothetical.'").

The Court finds Plaintiffs have successfully articulated injury-in-fact to at least some of their proprietary interests.

4) *District of Columbia's and Maryland's Parens Patriae Interests.*

In addition to claiming injury to their sovereign, quasi-sovereign, and proprietary interests, Plaintiffs

also assert, as *parens patriae*, injury to the economic welfare of their residents.¹⁴ Specifically, Plaintiffs allege that their residents participate in a “thriving hospitality industry that comprises a substantial part of [their] economies.” Am. Compl. ¶ 113. They claim their residents are harmed by the President’s alleged violations of both Emoluments Clauses because the competitive playing field is illegally tilted towards the President’s Hotel, resulting in competitive disadvantage to Plaintiffs’ resident businesses, which in turn curtails the opportunities and diminishes the earnings of their residents. *Id.* ¶ 114.¹⁵

While acknowledging that in certain instances States have been precluded from bringing a *parens patriae* suit against the Federal Government, Plaintiffs nevertheless submit that *parens patriae* standing is proper here because they are “assert[ing] [their] rights under federal law,” rather than attempting to nullify a federal law. Pls.’ Opp’n at 27 (citing *Massachusetts v. EPA*, 549 U.S. at 520 n.17). Moreover, they say, the competitive injury impacts a significant sector of their economies, in

¹⁴ See note 9, *supra*. As indicated there, *parens patriae* refers to the theory of standing by which a State may assert a quasi-sovereign interest, i.e., “public or governmental interests that concern the State as a whole,” on behalf of its citizens. *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)); see also *Snapp*, 458 U.S. at 600-01, 607. Though the District of Columbia is not a sovereign State, the Supreme Court has recognized that U.S. territories may sue as *parens patriae* and assert quasi-sovereign interests. See *Snapp*, 458 U.S. at 608 n.15; see also note 11, *supra*.

¹⁵ Maryland’s interest as *parens patriae* does extend to, among other residents, the MGM and Gaylord Hotel facilities in the National Harbor in Prince George’s County.

consequence of which Plaintiffs come to court as more than nominal parties. *Id.* at 26, 28.

The President argues that Plaintiffs cannot avail themselves of *parens patriae* standing for two distinct reasons. First, he challenges Plaintiffs' characterization of this as a *parens patriae* suit. This is precisely the type of *parens patriae* action, he says, that the Supreme Court prohibited in *Massachusetts v. Mellon*, because a suit against the President in his official capacity is effectively a suit against the United States. Def.'s Mot. Dismiss at 19-20 (citing *Mellon*, 262 U.S. at 485-86). In any event, the President argues, even if Plaintiffs could bring this suit against the Federal Government, *parens patriae* standing would still fail because Plaintiffs have not alleged a concrete injury, and to bring a *parens patriae* action, the State must be "more than a nominal party," it must allege an injury suffered by a "substantial segment of its population." *Id.* at 21 (citing *Snapp*, 458 U.S. at 607). According to the President, the Amended Complaint does not plausibly allege such an injury, positing instead a general injury caused by a single Hotel to no more than an "identifiable group of individual residents," which is not sufficient. *Id.*

It is true that this suit was originally filed against the President in his official capacity. And it is also true that, ordinarily, with respect to actions actively taken in a government official's "official capacity," the suit ordinarily amounts to a suit against the United States. But a suit against a Federal Government official is not necessarily the equivalent of a suit against the United States, where, as here, despite the "official capacity" styling of the suit, the challenged actions by the Government official fall well outside his "official duties." *Cf.*

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949) (“There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. . . . The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.”). It remains to be seen whether the President should be in this case in his individual capacity¹⁶ in addition to or in lieu of his official capacity. But looking beyond the simple denomination of his status at this point, it is clear that the gist of the Amended Complaint is that the President’s purported receipt of emoluments, as previously defined, has nothing at all to do with his “official duties.” As the President himself concedes, Plaintiffs are challenging the President’s acceptance of money taken through private transactions—something that has “nothing to do with the President’s service . . . as President,” Def.’s Mot. Dismiss at 30.

The Court is satisfied that Plaintiffs may properly bring this action against the President in his official capacity without running afoul of *Mellon*. As clarified by the Supreme Court in *Massachusetts v. EPA*, “there is a critical difference between allowing a State to protect her citizens from the operation of federal statutes (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to

¹⁶ See note 4, *supra*.

do.)” 549 U.S. at 520 n.17 (citation and quotation marks omitted). Indeed, the cases the President urges this Court to look to involve States attempting to “nullify federal law” or to challenge the operation of a federal statute. See, e.g., *Virginia ex rel. Cuccinelli*, 656 F.3d at 270 (challenging the constitutionality of the individual mandate in the Affordable Care Act by alleging it conflicted with a later enacted State statute); *Hodges v. Abraham*, 300 F.3d 432, 436-37 (4th Cir. 2002) (noting that challenging the constitutionality of a Department of Energy action taken pursuant to the National Environment Protection Act on behalf of the State’s citizens would be an improper *parens patriae* suit). In contrast, in the present case the District of Columbia and Maryland are asserting that their rights under the Emoluments Clauses of the U.S. Constitution are being violated by the President’s private profiteering. This distinguishes the *parens patriae* standing in the present case from both *Cuccinelli* and *Hodges*, where it was not found, and comes within the type of *parens patriae* suit contemplated by *Massachusetts v. EPA*.

Despite the President’s attempt to distinguish *Massachusetts v. EPA*, the fact that Congress had granted a procedural right to bring actions challenging the Environmental Protection Agency’s actions in that case does not affect the outcome here. In determining that Massachusetts had standing to bring the suit there, the Supreme Court did not rely on this procedural right alone; it also emphasized the “special position and interest” of Massachusetts as a sovereign State and its “stake in protecting its quasi-sovereign interests.” *Massachusetts v. EPA*, 549 U.S. at 518, 520. Similar considerations are present here.

The Court is also satisfied that both the District of Columbia and Maryland are more than nominal parties. They allege competitive injuries affecting a large segment of their populations. The Amended Complaint alleges that in 2014, visitors to the District of Columbia generated approximately \$6.81 billion in spending and drove \$3.86 billion in wages for 74, 570 employees engaged in the hospitality industry. Am. Compl. ¶ 113. In Maryland, of more than 140,000 employees in the hospitality industry around the State, more than 72,000 work in the counties that border the District of Columbia.¹⁷ Am. Compl. ¶ 113. Further, there are at least 15 “high-end” restaurants and hotels in Maryland and 32 in the District of Columbia that can be said to either directly compete with the Hotel’s restaurant, BLT Prime, or with the Hotel itself, for event and meeting spaces. Roginsky Decl. ¶ 24; Muller Decl. ¶¶ 24-26. Plaintiffs allege that the bottom lines of all of these businesses are directly influenced by the President’s purported violations. Pls.’ Opp’n at 28.

In the Court’s view, that is enough. It can hardly be gainsaid that a large number of Maryland and District of Columbia residents are being affected and will continue to be affected when foreign and state governments choose to stay, host events, or dine at the Hotel rather than at comparable Maryland or District of Columbia establishments, in whole or in substantial part simply because of the President’s association with it. The Court concludes that Plaintiffs are not attempting to “stand in the shoes” of a limited number of businesses

¹⁷ Compare *Snapp*, 458 U.S. at 609 (concluding Puerto Rico had a substantial interest, hence standing, to pursue a *parens patriae* suit despite the fact that only 787 jobs were affected).

as the President suggests, Hr’g Tr. at 34, 83; they are, quite plausibly, trying to protect a large segment of their commercial residents and hospitality industry employees from economic harm.

Finally, as discussed in relation to Plaintiffs’ proprietary interests, the competitor standing line of cases also confirms that Plaintiffs have alleged more than a speculative possibility of future injury to their quasi-sovereign interests. See Section III.A.3, *supra*.

The Court finds that Plaintiffs have sufficiently stated a concrete injury-in-fact to their *parens patriae* interests in protecting the economic welfare of their residents.

B. Traceability

In addition to demonstrating an injury-in-fact in order to establish Article III standing, Plaintiffs must show a “causal connection between the injury and the conduct complained of,” such that it is fairly traceable to the defendant’s actions. *Lujan*, 504 U.S. at 560 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, (1976)).

Plaintiffs argue that the injuries they have sustained to their various interests easily satisfy the traceability requirement under the competitor standing theory. See Pls.’ Opp’n at 21-22 (citing *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013)); Hr’g Tr. at 140-42. They analogize their situation to *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 508 U.S. 656 (1993), where the Supreme Court held the petitioner had standing to challenge the City of Jacksonville’s ordinance granting preferential treatment to certain minority-

owned businesses in the awarding of city contracts under the Equal Protection Clause. In so holding, the Supreme Court clarified that the claimed injury in issue was the inability of plaintiffs to compete on an equal footing, not the loss of the contract. *Id.* at 666. Accordingly, the Supreme Court found that it followed that the ordinance had caused the petitioner's injury. *Id.* at 666 n.5. Similarly, Plaintiffs here argue that the Court should apply basic economic logic to find the traceability prong for standing satisfied. The Court should do so, they contend, because Plaintiffs are harmed when their competing facilities lose the business of foreign or domestic states attracted to the President's Hotel simply because it is the President's Hotel. The presence of third parties, say Plaintiffs, does not change the ultimate conclusion. Pls.' Opp'n at 20-21.

The President makes much of the proposition that third party actors beyond his control are involved in the challenged transactions. *See* Def.'s Mot. Dismiss at 15-16; Hr'g Tr. at 153-55. He cites several Fourth Circuit cases that discuss the difficulty of showing causation when third parties "must act in order for an injury to arise or be cured." Def.'s Mot. Dismiss at 15 (citing *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013); *Frank Krasner Enterprises, Ltd. v. Montgomery County*, 401 F.3d 230, 236 (4th Cir. 2005)). Because individuals choose to stay at hotels, eat at restaurants, and stage events at a certain location for a wide variety of reasons, the President argues, it is altogether speculative to suggest that foreign or domestic government officials are choosing to stay at the Hotel in order to confer benefits on him, as opposed to the many other

reasons which may motivate their decisions. *Id.* at 16; Hr'g Tr. at 154.

The Court is not persuaded by the President's arguments.

In the first place, as the Court suggested at oral argument, accepting the President's third party argument would render impossible any effort to ever engage in Foreign or Domestic Emoluments Clause analysis because action by a foreign or domestic government, i.e., by a third party, is always present by definition.

In the second place, none of the cases cited by the President are competitor standing cases. *Frank Krasner*, for example, a case upon which the President relied heavily at oral argument, involved a gun show promoter's challenge to a county law that denied public funding to venues that displayed guns. 401 F.3d at 232, 233. As a result of the county law, a venue that had been leased to the plaintiff for prior gun shows refused to lease to him for an upcoming gun show. The plaintiff sued the county, challenging the law under the First and Fourteenth Amendments as well as Maryland law. *Id.* at 233. In determining that the plaintiff lacked standing to sue the county, the Supreme Court noted that "importantly" the private venue was not a party to the lawsuit and that it stood directly in the way between the plaintiff and the county's challenged conduct. *Id.* at 233, 236. The case at bar is quite different. Here, the government official himself is the one allegedly receiving illegal benefits, not a third party not before the Court. Indeed, when the injury is the loss of an opportunity to fairly compete rather than the loss of the benefit itself, the presence of third party actors in the marketplace has been found not to destroy traceability.

See, e.g., Ne. Fla. Chapter of Associated General Contractors, 508 U.S. at 666 n.5 (causation was present even though there was no showing that any petitioner would have received the contract absent the ordinance); *Int'l Bhd. of Teamsters*, 724 F.3d at 212 (noting that the causation and redressability requirements were “easily satisfied” because absent the challenged program, the petitioners would not have been subject to increased competition). The more relevant question, then, is whether the *increase of competition* can be fairly traced through the third party’s intervening action back to the President. The Court is satisfied that it can.

Plaintiffs have plausibly alleged they have been subjected to increased competition as a result of the President’s purported violations. Their allegation is bolstered by explicit statements from certain foreign government officials indicating that they are clearly choosing to stay at the President’s Hotel, because, as one representative of a foreign government has stated, they want him to know “I love your new hotel,” a sentiment the President appears to suggest he likes “very much.” *See* Am. Compl. ¶¶ 39, 55 (alleging that in 2015, the President said about Saudi Arabia: “They buy apartments from me. . . . They spend \$40 million, \$50 million. Am I supposed to dislike them? I like them very much.”). Again, since the election, foreign governments have indisputably transferred business from the Four Seasons and Ritz Carlton hotels in the District to the President’s Hotel. *See* Pls.’ Opp’n at 17.

The President’s argument that these facilities are not Plaintiffs’ facilities fails to persuade for at least two reasons. First, these examples fairly suggest that the

entities in which Plaintiffs do have a proprietary interest are suffering comparable detriment. Second, even though not directly owned by Plaintiffs, the Ritz Carlton and Four Seasons hotels are part of the District of Columbia industry encompassed within the District's *parens patriae* interest, as well, it may be said, are all the members of the hospitality industry in nearby Maryland to the extent they are within the scope of Maryland's *parens patriae* interest.

As for the injury-in-fact to Plaintiffs' quasi-sovereign interests insofar as they may be constrained to grant favors to the Trump Organization or patronize the Hotel in order to obtain federal benefits on a par with certain other States, traceability is also easily satisfied.

The Court finds the injuries to Plaintiffs' quasi-sovereign, proprietary, and *parens patriae* interests to be fairly traceable to the President's alleged violations.

C. Redressability

The third and last prong of the Article III standing inquiry requires Plaintiffs to show that their injury-in-fact, if traceable to the President, is also likely to be redressed by a favorable court decision.

In their Amended Complaint, Plaintiffs request both injunctive and declaratory relief, which they allege will appropriately redress their injuries. They argue that even if foreign or domestic state governments continue to patronize the Hotel, a court order enjoining the President from receiving "emoluments," as defined for present purposes, "would certainly 'reduce[] to some extent'" their competitive disadvantage. Pls.' Opp'n at 22 (quoting *Massachusetts v. EPA*, 549 U.S. at 526). That is, if the President is prohibited from personally

receiving emoluments from these sources in the future, the likelihood is that their patronage of the Hotel will be “reduced to some extent,” and in consequence all the competitive businesses in the District and Maryland will be placed on a more equal footing with the Hotel. Hr’g Tr. at 174; Pls.’ Opp’n at 22.

Plaintiffs submit the Court has the authority to impose both declaratory and injunctive relief against the President, noting that the Supreme Court has “long held” that federal courts “ha[ve] the authority to determine whether [the President] has acted within the law.” Pls.’ Opp’n at 56 (quoting *Clinton v. Jones*, 520 U.S. 681, 703 (1997)). This includes “the power to restrain unconstitutional presidential action” through injunctive and declaratory relief. *Id.* (citing *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952)). According to Plaintiffs, the fact that the President is the sole defendant in this case does not change the analysis, since this is “one of those rare instances when only injunctive relief against the President himself will redress [the plaintiffs’] injury.” *Id.* (quoting *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996)). While acknowledging that in different contexts the Supreme Court has stated that courts may not enjoin the President in the performance of “official duties,” Plaintiffs note that it has distinguished ministerial duties—involving simple, non-discretionary actions—where injunctive relief may be appropriate. *Id.* at 58-59 (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867)). In a similar vein, if injunctive relief were granted in this case, Plaintiffs argue that no official duties would be implicated.

Rather, the injunction would simply prevent the President from receiving monies to which, under the Constitution, he is not entitled to and which he is receiving through his private businesses—something not even “colorably within the powers of the President.” Hr’g Tr. at 168. In any event, Plaintiffs emphasize that the requested declaratory relief is capable of providing sufficient redress, Pls.’ Opp’n at 57, “by resolving the quintessential controversy the Declaratory Judgments Acts was intended to remedy.” Hr’g Tr. at 16. In short, Plaintiffs say the Court is able to resolve this controversy merely by declaring which of the parties is correct on the law. *Id.*

The President maintains that Plaintiffs’ alleged injuries are not “likely to be redressed” by a court order: First because it is highly speculative that third-party government consumers would stop patronizing the Hotel even if Plaintiffs prevailed on their claims. Any hypothetical injunction, therefore, would not cure the competition of which Plaintiffs complain. Def.’s Mot. Dismiss at 16. Second, the President submits that the Court lacks authority to issue an injunction against him in the performance of his official duties. *Id.* at 54 (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867); *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). While the President concedes that the Supreme Court has left open the question of whether a court may enjoin the President in the performance of ministerial duties, he maintains that the requested relief is far afield of ministerial. An injunction regarding the President’s finances, he says, would require significant judgment, planning, and discretion. Def.’s Reply at 29. And even assuming his actions were only ministerial in nature, he

says, no court has ever issued an injunction against a President in his official capacity when he was the sole defendant. *Id.* He urges the Court to exercise similar restraint here.

The President also argues the Court lacks authority to issue a declaratory judgment. In support of this proposition, he relies primarily on a statement in Justice Scalia's *concurring* opinion in *Franklin v. Massachusetts*. See 505 U.S. 788, 829 (1992) (Scalia, J., concurring) (“[The Court] cannot remedy appellees’ asserted injury without ordering declaratory or injunctive relief against appellant President Bush, and since [the Court] ha[s] no power to do that,” the “appellees’ constitutional claims should be dismissed.”). Apart from the unconstitutionality of the relief Plaintiffs seek, the President says, if the Court were to only issue declaratory relief, it would amount to an impermissible advisory opinion. Hr’g Tr. at 100, 171.

The Court does not believe that the requested injunctive or declaratory relief would violate the separation of powers doctrine. Language from later Supreme Court cases runs directly contrary to the quoted statement of Justice Scalia in *Franklin*. Six years after Justice Scalia’s statement in *Franklin*, in *Clinton v. New York*, the Supreme Court expressly stated that a declaratory judgment against the President could redress the plaintiff’s injuries. See *Clinton v. New York*, 524 U.S. 417, 433 n.22 (1998) (noting that, having found an injury-in-fact, traceability and redressability were “easily satisfied” because “each injury is traceable to the President’s cancellation of [certain act provisions], and [it] would be redressed by a declaratory judgment that the cancellations are invalid.”); see also *Nixon v. Fitzgerald*, 457

U.S. 731, 780-81 (1982) (White, J., dissenting) (“Neither can there be a serious claim that the separation-of-powers doctrine insulates Presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts’ injunctive powers. . . . Indeed, . . . it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review. Regardless of the possibility of money damages against the President, then, the constitutionality of the President’s actions or their legality under the applicable statutes can and will be subject to review.”) (internal footnote and citations omitted).

The Court also disagrees that the President’s status as the sole defendant changes this analysis, given that no official other than he could be sued to enforce the purported violations at issue. “[I]t would be exalting form over substance if the President’s acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he and/or the Congress has delegated the performance of duties to federal officials subordinate to the President and one or more of them can be named as a defendant.” *Nat’l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974). While the Court is not prepared to say at this juncture what precise form injunctive relief, if any, could take, what seems entirely plausible is that an appropriate injunction of some sort could be fashioned, were Plaintiffs to succeed on the merits. *See* Hr’g Tr. at 149-52 (discussing possible injunction options).

In any event, it is entirely possible, as Plaintiffs suggest, that a declaratory judgment alone could redress the injury, leaving it to the President to determine in good faith how he might comply with it. The Court sees no barrier to its authority to grant either injunctive or declaratory relief.

There is yet another observation to be made with respect to the redressability argument. As the Supreme Court reiterated in *Massachusetts v. EPA*, if the injury can be “reduced to some extent,” then a plaintiff has met the redressability prong for standing. *Massachusetts v. EPA*, 549 U.S. at 525-26 & n.23. Again, it is true that the Court cannot prevent any and all third party foreign or domestic government actors from patronizing the Hotel, but that continues to miss the point. The ultimate issue is not a flat prohibition against such patronage by foreign or domestic states, but whether “to some extent” their incentive to cater to the President will be reduced if he can no longer receive the benefits which, through the Hotel, he currently derives. All of this is to say that Plaintiffs’ injuries are likely to be redressed by a favorable court decision.

* * *

Summarizing the Court’s holding as to Article III standing, Plaintiffs have alleged injuries-in-fact to their quasi-sovereign, proprietary, and *parens patriae* interests that are concrete and particularized, actual and imminent. Those injuries are fairly traceable to the President’s purported conduct and are likely to be redressed by the Court through appropriate injunctive and declaratory relief if Plaintiffs succeed on the merits.

Plaintiffs have successfully cleared the first and primary hurdle for Article III standing.

Even so, an important question remains: What is it exactly that Plaintiffs have standing to challenge?

Plaintiffs assert that the President's actions have violated the Emoluments Clauses in many ways, not only with respect to the operations of the Hotel in the District of Columbia, but also through Trump Organization operations all over the United States, indeed around the world. But because Plaintiffs have to establish standing as to all claims made, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), the Court specifically inquired at oral argument which claims the Plaintiffs believe extend beyond the Hotel. Plaintiffs conceded that their competitive injuries (i.e., to their proprietary and *parens patriae* interests) were limited to the District of Columbia-based Hotel. Hr'g Tr. at 62-63. But they went on to contend their sovereign and quasi-sovereign interests were essentially boundless, *id.*, the implication being that the injury to these interests was sustained on the basis of Trump Organization operations everywhere and anywhere, e.g., whether in the District of Columbia, in Florida, in China, or elsewhere. *See id.*

The Court finds that Plaintiffs' claims sweep too broadly. There is good reason why their standing should be recognized *vis-à-vis* the Hotel in Washington D.C., given the immediate impact on Plaintiffs in respect to the Hotel's operations. It is a considerable stretch, however, to find the requisite injury-in-fact to these particular Plaintiffs that is traceable to the Trump Organization's or, through it, the President's conduct outside the District of Columbia. How indeed, for instance, have Maryland or the District of Columbia suffered and

how are they suffering immediate or impending injury as a result of whatever benefits the President might be deriving from foreign and state government patronage at the Trump Organization's Mar-a-Lago property in Florida or in the grant of patents to the Trump Organization or Trump relatives by China? In this respect, the Court, quite simply, sees neither immediate nor impending harm to Plaintiffs. Hence, the Court finds that these particular Plaintiffs lack standing to challenge the operations of the Trump Organization or the benefits the President may receive from its operations outside the District of Columbia. But to be perfectly clear: The Court reaches this conclusion only with respect to these Plaintiffs and the particular facts of the present case. This is in no way meant to say that other States or other businesses or individuals immediately affected by the same sort of violations alleged in the case at bar, e.g., a major hotel competitor in Palm Beach (near Mar-a-Lago) or indeed a hotel competitor anywhere in the State of Florida, might not have standing to pursue litigation similar to that which is in process here.

IV. PRUDENTIAL STANDING

In addition to the Article III requirements, “the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). Prudential standing is a doctrine “not exhaustively defined,” but includes “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches” and “the requirement that a plaintiff’s complaint fall within the zone of interests protected

by the law invoked.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

The President argues that these prudential standing requirements bar Plaintiffs’ claims, even if they arguably satisfy Article III.

A. Zone of Interests

Whether a plaintiff comes within the “zone of interests” protected by the law invoked “is an issue that requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Id.* at 1387; *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1307 (2017). Though first formulated in a case brought under the Administrative Procedure Act, the Supreme Court has since made clear “that it applies to all statutorily created causes of action.” *Lexmark*, 134 S. Ct. at 1388. However, “[t]he test is not meant to be especially demanding.” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

As an initial matter, Plaintiffs question whether the test even continues to exist, following the Supreme Court’s decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), where the court termed the label prudential standing “inapt.” Pls.’ Opp’n at 53.

In any event, Plaintiffs argue that, if the test does apply, they fall squarely within the zone of interests of the Emoluments Clauses. *Id.* at 53-54. The Domestic Clause, they say, specifically mentions the “United States” and “any of them.” Maryland and by implication the

District of Columbia are clearly within the zone of interests of that Clause. The Foreign Emoluments Clause is meant to preserve presidential independence and prevent corruption. Their claims, they say, are at the “heart” of what both Clauses are intended to protect, and if for any reason they would be deemed not to fall within the zone of interests of the Clauses, then it is likely no one ever would—a conclusion they urge this Court to reject. *Id.* at 54.

Finally, Plaintiffs argue that they are entitled to pursue an equitable action under the Emoluments Clauses. They submit that courts have long allowed suits to enjoin unconstitutional actions by public officials even where plaintiffs are not preemptively asserting a defense to a pre-enforcement action. *Id.* at 51. This is true, they contend, with respect to allegations of violations of the Constitution’s structural provisions. *Id.* at 52 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010)).

The President disputes any suggestion that *Lexmark* abrogated the zone of interests test, citing cases in which courts have continued to apply the test post-*Lexmark*. Def.’s Reply at 15-16. He urges the Court to adopt the interpretation set forth by Judge Daniels in *CREW et al. v. Trump*, No. 17-cv-458 (S.D.N.Y. Dec. 21, 2017), namely that the history of the Emoluments Clauses indicates that they were not meant to protect commercial competitors so that a plaintiff asserting such a competitive injury necessarily falls outside the zone. Hr’g Tr. at 125-126. But, says the President, to the extent the Emoluments Clauses “could be seen to create a private right,” Plaintiffs fall outside the zone of interests, which

“serve[s] to limit the role of the courts in resolving public disputes” by asking “whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.” Def.’s Mot. Dismiss at 28 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

Further, while conceding that the Supreme Court has not limited equitable causes of action against federal officers solely to the pre-enforcement context, the President submits that this case is not a proper suit for the grant of equitable relief. *Id.* at 26-27; Def.’s Reply at 14. He disputes that Plaintiffs are not preemptively asserting a defense to a potential enforcement action. Def.’s Mot. Dismiss at 27. Plaintiffs, he says, are not “exposed to regulation or enforcement action by the President’s alleged receipt of prohibited emoluments.” Def.’s Reply at 15.

The Court need not engage the issue of whether the zone of interests test has been abandoned. Assuming it has not been, the Court finds that Plaintiffs fall within the zone of interests of the Emoluments Clauses. The Court disagrees with the conclusion reached by Judge Daniels in *CREW et al. v. Trump*, No. 17-cv-458, that the draftsmen of the Constitution did not have competitors in mind when they composed the Emoluments Clauses, with the implication that no competitors anywhere are ever within the zone of interests of the Clauses. But the Emoluments Clauses clearly were and are meant to protect all Americans. The President concedes as much. Hr’g Tr. at 126-27. That being so, there is no reason why Plaintiffs, a subset of Americans who have demonstrated present injury or the immediate

likelihood of injury by reason of the President’s purported violations of the Emoluments Clauses, should be prevented from challenging what might be the President’s serious disregard of the Constitution. Under the President’s interpretation, it would seem that no one—save Congress which, as discussed momentarily, may never undertake to act—would ever be able to enforce these constitutional provisions.

The Court sees no problem in invoking its equitable jurisdiction here. Precedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution. *See, e.g., Bond v. United States*, 564 U.S. 211, 225-26 (2011) (“[W]here the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government.”); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (noting that the Government offered no reason or authority for why an Appointments Clause or separation of powers claim should be treated differently than any other constitutional claim in granting equitable relief) (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (“[E]quitable relief ‘has long been recognized as the proper means for preventing entities from acting unconstitutionally.’”)). Though the President attempts to draw a distinction based on the cases exposing a plaintiff to a potential enforcement action, he cites no support for the proposition to the effect that equitable relief is limited solely to that context. Indeed, to the contrary, the Court sees a strong parallel between cases where “Congress allegedly exceeded the limits on

its legislative power in a manner that exposed plaintiffs to injurious regulation,” Def.’s Reply at 14, and the present case, where the President is allegedly violating constitutional provisions in a way that exposes Plaintiffs to injurious illegal economic competition.

The Court finds that Plaintiffs fall within the zone of interests of the Emoluments Clauses for prudential standing purposes.

B. Political Question

The “political question” doctrine provides another “narrow exception” to the rule that the “[j]udiciary has a responsibility to decide cases properly before it.” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-195 (2012). A case “involves a political question . . . where there is a ‘textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). In such cases, a “court lacks authority to decide the dispute” even if a plaintiff meets other standing requirements. *Id.*

Plaintiffs say the political question doctrine does not apply and that the Court may properly resolve this case. Initially, they point out that only the Foreign Emoluments Clause mentions Congress, whereas the Domestic Emoluments Clause contains no such provision. Pls.’ Opp’n at 54. To the extent the Domestic Emoluments Clause gives States a cause of action, it is direct. Congress has no role to play. And, say Plaintiffs, even though the Foreign Emoluments Clause allows Congress to approve receipt of emoluments, this does not

remove the issue from the scope of judicial review, citing several cases the Supreme Court has decided which involved similar consent-of-Congress provisions. *See id.* (citing *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6 (2009) (Tonnage Clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 342-43 (1964) (Export-Import Clause); *Canton R. Co. v. Rogan*, 340 U.S. 511 (1951) (same)). The President's reading of the Foreign Emoluments Clause, Plaintiffs argue, would turn the Clause "on its head," by essentially allowing the President to receive an unending stream of "emoluments" until such time, if ever, Congress might stir to action and ban them. *Id.* at 55. The mere potential for Congressional action, they say, should not warrant a departure from the rule that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* (citing *Susan B. Anthony List*, 134 S. Ct. at 2347).

The President maintains that Congress is better equipped to address whether his actions violate the Foreign Emoluments Clause since the Constitution specifically vests in Congress the power to waive Foreign Emoluments Clause restrictions. Def.'s Mot. Dismiss at 29. With regard to the Domestic Emoluments Clause he argues that "[e]quity counsels restraint in abrogating centuries-long tradition of resolving emoluments-related issues through these political processes." *Id.*

On this issue, Plaintiffs prevail. The political question doctrine does not impede court action in this case.

First, of course, the Domestic Emoluments Clause clearly does not assign any oversight role to Congress or any other entity. Insofar as a State has a right to

pursue a violation of the Clause, it may do so directly and Congress has nary a say about it.

As for the Foreign Emoluments Clause granting Congress the power to consent to receipt of certain “emoluments,” the language of the Clause is not “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Zivotofsky*, 566 U.S. at 195. If that were so, the Supreme Court would not have decided other cases involving constitutional provisions containing similar consent-of-Congress provisions. *See, e.g., Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6 (2009) (reaching the merits of a Tonnage Clause challenge); *Dep’t of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 342-43 (1964) (holding that the tax in question violated the Export-Import Clause). The President cites no authority to the contrary.

Also absent in this case is “a lack of judicially discoverable and manageable standards for resolving” this issue, which might otherwise call into play the political question doctrine. *Zivotofsky*, 566 U.S. at 195. It is well settled that courts have authority to determine whether the President “has acted within the law.” *Clinton v. Jones*, 520 U.S. 681, 703 (1997); *see also Nixon v. Fitzgerald*, 457 U.S. at 753-54 (“It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States”). A plain reading of the Foreign Emoluments Clause compels the conclusion that receiving emolu-

ments, as have been provisionally defined here, is impermissible unless and until Congress consents.¹⁸ Accordingly, in absence of Congressional approval, this Court holds that it may review the actions of the President to determine if they comply with the law. The Court is satisfied that this case “requires careful examination of the textual, structural, and historical evidence put forward by the parties,” which, after all is “what courts do.” *Zivotofsky*, 566 U.S. at 201.

The political question doctrine does not bar judicial review in this case.

V. CONCLUSION

Plaintiffs have sufficiently alleged that the President is violating the Foreign and Domestic Emoluments Clauses of the Constitution by reason of his involvement with and receipt of benefits from the Trump International Hotel and its appurtenances in Washington, D.C. as well as the operations of the Trump Organization with respect to the same. Plaintiffs have demonstrated their standing to challenge those purported violations because they have shown injury-in-fact, fairly traceable to the President’s acts, and that the injury is likely redressable by the Court. Neither prudential considerations of standing nor the political question doctrine preclude this conclusion. The Court, however, given the

¹⁸ The thrust of the President’s argument that only Congress can act is particularly concerning. Suppose a majority (simple? two-thirds?) of Congress (the House? the Senate? both?) is controlled by one party—that of the President. And suppose the Congress never undertakes to approve or disapprove the President’s receipt of such “emoluments.” The President could continue to receive unlimited “emoluments” from foreign and state governments without the least oversight and with absolute impunity.

particular allegations of this suit, finds that Plaintiffs lack standing to challenge possible constitutional violations by the President involving operations of the Trump Organization outside the District of Columbia from which the President may receive personal benefits.

For the foregoing reasons, the President's Motion to Dismiss the suit is **DENIED-IN-PART** insofar as it disputes Plaintiffs' standing to challenge the involvement of the President with respect to the Trump International Hotel in Washington, D.C. and its appurtenances and any and all operations of the Trump Organization with respect to the same. The Motion to Dismiss is **GRANTED-IN-PART WITHOUT PREJUDICE** as to the operations of the Trump Organization and the President's involvement in the same outside the District of Columbia. The Court's ruling on Defendant's Motion to Dismiss is **DEFERRED-IN-PART** in that the Court has yet to rule on the remaining arguments regarding the meaning of the Emoluments Clauses and whether Plaintiffs have otherwise stated claims under the Clauses.

A further hearing to consider the President's remaining arguments will be set in consultation with counsel.

A separate Order will **ISSUE**.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

Mar. 28, 2018