No. 20-330

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Motion for Leave to File Brief and Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* Supporting Petitioner

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October 14, 2020

Motion for Leave to File Brief as *Amici Curiae* Supporting Petitioner

Amici curiae Scholar Seth Barrett Tillman and the Judicial Education Project respectfully move for leave to file a brief explaining why this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. Notice of intent to file this brief was provided to Respondents on October 6, 2020, with less than ten days' notice. Respondents granted consent on October 8, 2020, six days before the filing deadline. Notice of intent to file this brief was provided to Petitioner on October 8, 2020. The Petitioner has not yet responded to the request. These requests were untimely under Supreme Court Rule 37(a)(2).

Scholar Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University Department of Law, Ireland. Tillman is one of a very small handful of academics who has written extensively on the Constitution's "office"-language, including the Foreign Emoluments Clause. Since 2008, Tillman has consistently written that the Foreign Emoluments Clause's "Office . . . under" the United States language does not encompass the presidency. Tillman was also the first scholar to write that Emoluments Clauses claims could not be brought against President Trump in his official capacity.[1]

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[1] Seth Barrett Tillman, *The Emoluments Clauses Lawsuits's Weak Link: The Official Capacity Issue*, Yale J. of Reg. Notice & Comment (Aug. 15, 2017), http://perma.cc/759Y-CC2R.

Tillman has taught equity and remedies for nine academic years.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation.

Amici curiae can provide the Court with additional grounds on which the judgment below should be reversed or vacated. Specifically, the Respondents erred by suing the President in his official capacity.

The Petitioner and Respondents would suffer no prejudice if the Court permitted this brief to be filed, particularly since the Respondents were granted a 60-day extension to file their responsive brief. Therefore, Scholar Seth Barrett Tillman and the Judicial Education Project respectfully request that the Court permit this brief to be filed.

Respectfully submitted,

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Questions Presented

The Court should grant certiorari and supplement the question that the Petitioner presented with an additional question:

> Whether Plaintiffs lack standing because the Defendant in his official capacity did not cause, and therefore cannot redress, Plaintiffs' alleged injuries?

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Interest of Amici Curiae[1]

Scholar Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University Department of Law, Ireland. Tillman is one of a very small handful of academics who has written extensively on the Constitution's "office"-language, including the Foreign Emoluments Clause. Since 2008, Tillman has consistently written that the Foreign Emoluments Clause's "Office . . . under" the United States language does not encompass the presidency. Tillman was also the first scholar to write that Emoluments Clauses claims could not be brought against President Trump in his official capacity.[2] Tillman has taught equity and remedies for nine academic years.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation.

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[1] Rule 37 statement: As noted in the motion for leave to file this brief, timely notice of intent to file was not provided to the parties. The Respondents consented. The Petitioner has not yet responded to *Amici*'s request. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

[2] Seth Barrett Tillman, *The Emoluments Clauses Lawsuits's Weak Link: The Official Capacity Issue*, Yale J. of Reg. Notice & Comment (Aug. 15, 2017), http://perma.cc/759Y-CC2R.

Summary of Argument

For two reasons, this lawsuit takes a "form . . . which has never been seen before: the official-capacity-but-private-conduct suit."[3] First, Plaintiffs sued President Trump exclusively in his official capacity. But they have not alleged that Donald J. Trump's conduct as President has violated the Constitution. Plaintiffs have not alleged that the President violated the Constitution pursuant to any government policy or custom. Nor could they make such a showing. At most, Plaintiffs have complained of quintessentially personal conduct taken by Donald J. Trump and by Trump-affiliated private commercial entities. Here, the federal government did not *cause* the purported violation of the Constitution.

Second, even if Plaintiffs' suit were successful in establishing liability, any judicial remedy could only run against the federal government or the office of the President. But that order cannot control Donald J. Trump's personal conduct. Nor could that order enjoin the conduct of Trump-affiliated private commercial entities, which are not parties to this lawsuit. In short, a judicial order in this case could run against the federal government or the office of the President, but could not run against Donald J. Trump personally. For this reason, Plaintiffs have failed to demonstrate that their purported injuries could be *redressed* by a favorable judicial decision.

These two errors demonstrate why Plaintiffs lack Article III standing. The President in his official

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[3] *CREW v. Trump*, 971 F.3d 102, 115 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc).

capacity did not *cause* Plaintiffs' alleged injuries. And a judicial remedy against the Official-Capacity Defendant cannot possibly *redress* Plaintiffs' alleged injuries. For these reasons, Plaintiffs cannot satisfy the causation and redressability elements of Article III standing.

Plaintiffs should have sued Donald J. Trump *personally*. And Plaintiffs' failure to sue Trump personally was not a mere technical pleading error. Plaintiffs have sued the *wrong* defendant. These jurisdictional defects warrant reversing the Second Circuit's decision.

Nevertheless, the Solicitor General has not asked the Court to address whether Plaintiffs had standing to sue the President in his official capacity. The Petitioner and Respondents agree on this jurisdictional issue. Therefore, to assure itself of jurisdiction, the Court should add a supplemental question presented:

> "Whether Plaintiffs lack standing because the Defendant in his official capacity did not cause, and therefore cannot redress, Plaintiffs' alleged injuries."

In light of the parties' lack of adversity, the Court should appoint an *amicus curiae* to argue that Plaintiffs lack standing to sue the President in his official capacity.

Finally, this petition may become moot for one reason or another. If this case becomes moot, there are several grounds on which the Court should summarily reverse or vacate the decision below.

Argument

I. The Constitution Can Generally be Violated in Two Capacities.

Generally, government officers can violate the Constitution in two capacities. First, a government officer violates the Constitution in his official capacity if, and only if, a government "'policy or custom' . . . played a part in the violation of federal law."[4] With an official-capacity case, the named defendant is a nominal placeholder. The suit, in fact, lies against the government entity that adopted the policy or custom.

Second, a government officer violates the Constitution in his individual capacity if the officer was acting under the *color of law*, but was not acting pursuant to a government policy or custom.[5] The distinction between an official-capacity suit and an individual-capacity suit does not turn on the remedy sought.[6]

Consider two hypotheticals to illustrate the distinction between an official-capacity claim and an individual-capacity claim. First, a prison adopts an official policy that requires prison guards to open and read all mail between prisoners and their attorneys.

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[4] *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citations omitted).

[5] *Id. See* 42 U.S.C. § 1983.

[6] *But see* Plaintiffs' Supplemental Memorandum at 33, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 1:17-cv-01154-EGS), ECF No. 50, https://bit.ly/2Zxnbby ("Quite simply, whether a suit is an official- or personal-capacity suit turns on the nature of the relief sought: a suit seeking injunctive or declaratory relief, rather than monetary damages, is always an official-capacity suit."). The *Blumenthal* plaintiffs were entirely incorrect.

A prison guard, following that policy, reads a prisoner's privileged correspondences. Such a policy would be patently unconstitutional. And the prisoner could sue the prison guard and warden for violating his civil rights pursuant to an official, albeit unconstitutional, government policy. In this hypothetical official-capacity suit, the prison guard and warden are nominal defendants. And the suit would continue even if the prison guard and warden were no longer employed by the prison. The court would simply substitute their successors' names onto the caption, so long as the prison continues to follow the illegal custom or policy. In an official capacity case, the actual and only defendant is the government entity—that is, the prison.[7] And any judicial remedy would run against the prison. For example, an injunction would preclude the prison from prospectively enforcing its unconstitutional policy.

In the second hypothetical, a prison guard wrongfully unseals and reads a prisoner's privileged mail. He does so while working in the prison mailroom, where he had lawful access to unopened correspondences. The guard's decision to open and read the prisoner's mail was his own initiative, absent any government policy or custom. Indeed, the

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[7] *See Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) ("The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official." (citations omitted)).

prison policy expressly prohibited guards from reading privileged mail. In this hypothetical suit, the prisoner could sue the guard in his individual capacity. Why? Because the guard acted under the *color of law*. The guard violated the prisoner's civil rights while he was wearing a prison guard uniform, and while he was on duty as a prison employee. Moreover, his government employment provided him with lawful access to the prison mail room. Finally, the guard had apparent authority to intercept the mail. Here, any judicial remedy would run against the prison guard. A court could award damages. The individual-capacity suit could proceed against the guard even if he resigned from prison service. This suit would be the quintessential individual capacity claim.

These two hypotheticals illustrate the two capacities in which government officers are generally sued. But there is a third, less common way in which a government officer can be sued: he can be sued *personally*. Consider a third hypothetical: a prison guard broke into the law offices of the prisoner's attorney while the guard was off-duty and out of uniform. The guard then opened and read the prisoner's privileged correspondences. The prisoner was injured in the same way as the prisoners were in the two prior hypotheticals. Such conduct is tortious, and, perhaps, criminal. But this conduct would not support a cognizable federal civil rights claim. The wrong was not performed pursuant to a government policy or custom. Therefore, the prisoner could not sue the guard in his official capacity. Likewise, the guard did not act under the color of law. Therefore, the prisoner could not sue the guard in his individual capacity.

In this third hypothetical, the guard's conduct was no different from the actions of a private tortfeasor, who lacked any connection to the government. Indeed, no government conduct is at issue. Given these facts, the prisoner could not bring a civil rights lawsuit. In theory, the prisoner could sue the guard *personally* for the guard's private conduct. But such a lawsuit would only be viable if state or federal law created a cause of action. In the absence of an express or implied cause of action, the prisoner would be out of luck.

II. The Emoluments Clauses Can Be Violated in Three Fashions.

There are two constitutional provisions at issue in this appeal. First, the Foreign Emoluments Clause 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."[8] The constitutional tort is the wrongful "accept[ance]" of a proscribed "present, Emolument, Office, or Title" by a person holding an "office . . . under [the United States]."[9] Second, the Domestic Emoluments Clause

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[8] U.S. Const. art. I, § 9, cl. 8 (emphasis added).

[9] *Amici* contend that that the President is not subject to the Foreign Emoluments Clause. *See* Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* Supporting Petitioner, *In re Donald J. Trump (District of Columbia v. Donald J. Trump)*, Sup. Ct. No. 20-331 (U.S. filed Oct. 14, 2020). The Second Circuit did not reach this issue. In the Second Circuit en banc proceedings below, Judge Menashi only "assum[ed]" that the President "may" be subject to the

provides that "[t]he President . . . shall not *receive* within that Period any other Emolument from the United States, or any of them."[10] Here, the constitutional tort is the wrongful "recei[pt]" of a proscribed "Emolument" from the federal government or from a state by the President. These two provisions can be violated in three separate fashions: (1) official capacity, (2) individual capacity, and (3) personally.[11]

Here, we will consider three hypotheticals based on the Foreign Emoluments Clause. (In this analysis, *Amici* assume that such claims are otherwise justiciable, and Plaintiffs have a valid cause of action.[12]) First, the State Department established a policy that *requires* ambassadors to accept foreign state gifts without seeking congressional consent. This policy would be patently unconstitutional. An ambassador who follows the policy, and accepts a

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Foreign Emoluments Clause. *CREW v. Trump*, 971 F.3d 102, 111 n.16 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc) ("arguing [the Foreign Emoluments Clause] does not [apply to the President]" (citing Brief of *Amici Curiae* Scholar Seth Barrett Tillman and the Judicial Education Project in Support of Defendant-Appellee at 16–25, *CREW v. Trump*, 939 F.3d 131 (2d Cir. 2019) (No. 18-0474-cv), App. ECF No. 135, https://bit.ly/2X1kFZv)).

[10] U.S. Const. art. II, § 1, cl. 7 (emphasis added).

[11] The Thirteenth and Nineteenth Amendments also regulate private conduct. *See* Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 Const. Comm. 217, 220 (1995). Therefore, these two provisions can be violated by a defendant personally, and in his official capacity or individual capacity.

[12] *Amici* contend that the President is not subject to the Foreign Emoluments Clause. *See supra* note 9.

foreign state gift on his own behalf, would be following the announced State Department policy. But in doing so, he would also violate the Foreign Emoluments Clause in his official capacity. A plaintiff with standing and a cause of action could sue the ambassador in his official capacity. In that suit, the ambassador would be the nominal plaintiff, but the real party in interest would be the State Department, which had adopted the unconstitutional policy. And any judicial remedy would enjoin the State Department from prospectively enforcing its unconstitutional government policy.

In the second hypothetical, the State Department has not adopted any policy or custom that requires staff to accept foreign state gifts. However, an ambassador decides to accept a foreign state's gift. While on duty, he tells a foreign government via official diplomatic communications on government stationery that he will accept a particular, expensive diplomatic state gift. In accepting the gift, the ambassador directs the foreign state to place the gift on the mantle of his diplomatic residence, which is owned by the federal government.

Here, the ambassador did not violate the Foreign Emoluments Clause pursuant to any government policy or custom. But the ambassador committed the constitutional tort under the color of law: he "accept[ed]" the prohibited foreign gift through the use of his apparent authority and used government property to do so: his diplomatic residence. As a result, the ambassador would have violated the Foreign Emoluments Clause in his individual capacity. A plaintiff with standing and a cause of action could sue the ambassador in his individual

capacity. The offending ambassador would be the actual defendant, rather than the State Department. The State Department had not adopted any policy or custom that led to this constitutional violation. And any judicial remedy would run against the ambassador alone, even if he left federal service.

There is a third fashion in which the ambassador could violate the Foreign Emoluments Clause. Let's assume that the King of Blackacre is a good friend of an American citizen. Later, that American is appointed as the ambassador to Blackacre. The King then gives that ambassador an expensive state gift, in light of the goodwill the two men had shared prior to the ambassador's appointment. And the ambassador personally accepts that gift, without making use of any apparent authority or government property.

Here, the ambassador did not accept the gift pursuant to a State Department policy or custom. Thus, an official capacity case is not possible. Moreover, the ambassador did not accept the gift under the color of law. Therefore, an individual capacity case is not possible. At most, a plaintiff with standing and a cause of action could bring a suit *personally* against the ambassador for violating the Foreign Emoluments Clause.

III. Plaintiffs Lack Standing Because the Defendant in His Official Capacity Did Not Cause, and Therefore Cannot Redress, Plaintiffs' Alleged Injuries.

Plaintiffs in this case, and in parallel litigation, have alleged that President Trump violated the Foreign and Domestic Emoluments Clause in his official capacity. But Plaintiffs cannot show that a government "'policy or custom' *must* have played a part in the violation of federal law."[13] The President is not similarly situated to the ambassador who accepts a foreign gift pursuant to an official State Department policy. Nor is the President similarly situated to the ambassador who accepts foreign gifts under the color of law. Rather, the President is a passive recipient of distributions from Trump-affiliated private commercial entities, which, Plaintiffs allege, are conducting business transactions with foreign and domestic governments and their instrumentalities.[14] Even accepting Plaintiffs' account, no government conduct is at issue. The mere fact that the President indirectly accepted purported emoluments during his term in office, does not make those acts, *ipso facto*, government conduct, much less government conduct taken pursuant to a government policy or custom.

The Department of Justice ("DOJ") contended that the Domestic Emoluments Clause does "not apply to the President as a private individual."[15] If the DOJ's analysis were correct, then the President

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[13] *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (emphasis added) (citations omitted).

[14] Seth Barrett Tillman, *Business Transactions and President Trump's "Emoluments" Problem*, 40 Harv. J.L. & Pub. Pol'y 759, 765 n.18 (2017).

[15] President of the United States' Statement of Interest at 1, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-01596-PJM), ECF No. 100, https://bit.ly/2ZwxSuX.

could escape the limitations of the Domestic Emoluments Clause by quietly accepting prohibited emoluments on his own, without relying on apparent authority or government property. However, the DOJ's analysis is not correct: A President can violate the Constitution even through his purely personal conduct. The Domestic Emoluments Clause applies to the President at *all* times during his tenure and in all capacities. Nevertheless, the fashion in which he receives the purportedly proscribed emoluments dictates the nature of a plaintiff's suit: official capacity, individual capacity, or a suit personally against the defendant. Official capacity and individual capacity claims are not the only options; they are not two sides of the same coin.

Plaintiffs' decision to sue the President exclusively in his official capacity denies them standing for two reasons. First, assuming that there is an "injury in fact," Plaintiffs have failed to show that there is a "causal connection between the injury and the conduct complained of" by the defendant they chose to sue.[16] Specifically, the "[P]laintiffs have never suggested that any act of" President Trump in his *official* capacity—the only named Defendant in this case—"has caused, will cause, or could possibly cause any injury to them."[17] They have only challenged Donald J. Trump's quintessentially private conduct, as well as actions taken by Trump-affiliated private commercial entities. Given the factual allegations put forward in Plaintiffs' Second Amended Complaint, the only actions that could

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[16] *See Lujan v. Defs*. of Wildlife, 504 U.S. 555, 560 (1992).

[17] *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc).

cause Plaintiffs' purported injuries were taken by Trump *personally* or by those Trump-affiliated private commercial entities.

Second, Plaintiffs have failed to demonstrate that their injuries could be "'redressed by a favorable decision.'"[18] Indeed, based on the facts alleged in the Second Amended Complaint, it will be *impossible* for Plaintiffs' purported injuries to be "redressed by a favorable decision." Why? The District Court lacks the power to issue a judgment against the defendant in his private capacity.[19] Plaintiffs did not include as defendants in this case Donald J. Trump, the private individual, and Trump-affiliated private commercial entities. Therefore, any possible remedy could not run against them. A plaintiff lacks standing where the district court cannot "order [the defendant] to do anything in her official capacity to redress [the plaintiff's] alleged injuries."[20]

In this case, the only named defendant is the President in his official capacity—that is, the United States as sovereign. As a result, the District Court would only have jurisdiction to issue a judgment against the government, the sovereign, its policies, and its property. The District Court would not have jurisdiction to issue a judgment against Trump's property. Based on the factual allegations in the

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[18] *Lujan*, 504 U.S. at 561 (citations omitted).

[19] *See also Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (explaining that "a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity").

[20] *Bishop v. Smith*, 760 F.3d 1070, 1089 (10th Cir. 2014) (quoting *Cressman v. Thompson*, 719 F.3d 1139, 1147 (10th Cir. 2013)).

Second Amended Complaint, any relief that might actually redress Plaintiffs' claims, should it be granted, must run against Trump *qua* the individual, and *his* property. The District Court would be powerless to order a redress of Plaintiffs' grievances because the District Court cannot extract a remedy from a stranger to the litigation. Indeed, in this litigation, it would violate Donald J. Trump's due process rights to issue a judgment against him personally. Trump *qua* the individual was not served, was not represented by personal counsel of his choice, and was not able to mount any defense in that capacity.[21]

This conclusion is not changed if the third-party payments to Trump-affiliated private commercial entities were motivated by the clout of the President's position. For example, the capacity analysis with respect to the Domestic Emoluments Clause does not hinge on whether the state government's motive for giving the purported emoluments was to enjoy future benefits from the President. The fact that the President would not have received the purported emoluments but for his being President does not turn either a private or an individual-capacity constitutional violation into an official-capacity claim. The reason is simple. Official-capacity claims are tied to the office-holder's conduct: the *accepting* or *receiving* proscribed emoluments must be driven by a government policy or custom. The capacity analysis does not turn on whether the

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[21] *See also Graham*, 473 U.S. at 168 ("Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense.").

payment of the emoluments was based on a third-party's expectation of future benefits.

Without question, "'the President is the only person who alone composes a branch of government,'" and therefore "'[t]he interest of the man' is often 'connected with the constitutional rights of the place.'"[22] But the President still has "'personal'" affairs.[23] Plaintiffs have alleged specific constitutional torts. The actus reus of the Emolument Clauses is accepting or receiving proscribed emoluments by a covered person. These actions have only been alleged to occur through distributions to the President's personal accounts from Trump-affiliated private commercial entities. Plaintiffs did not allege that Trump engaged in government-related conduct, followed a government policy or custom, or acted under the color of law.

Here, sophisticated Plaintiffs made a strategic choice. Having chosen to sue the wrong party, Plaintiffs cannot establish the causation and redressability prongs of Article III standing. Even with novel claims based on the Emoluments Clauses, Plaintiffs still need to comply with the well-established rules of capacity and standing.[24]

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[22] *CREW v. Trump*, 971 F.3d 102, 111 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc) (quoting *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (quoting Federalist No. 51)).

[23] *CREW*, 971 F.3d at 114 (Menashi, J., dissenting from the denial of rehearing en banc) (quoting *Mazars USA*, 140 S. Ct. at 2034).

[24] *Amici* raised the capacity issue before the District Court. *See* Brief for Scholar Seth Barrett Tillman as *Amicus Curiae* in Support of Defendant at 30 n.122, *CREW v. Trump*, 276 F.

IV. The Court Should Add a Supplemental Question Presented, and Appoint an *Amicus Curiae* to Argue That Plaintiffs Lack Standing to Sue the President in His Official-Capacity.

Throughout the course of this litigation, and in two other parallel cases, the President in his official capacity has been represented by the DOJ. In this case, and in the others, DOJ has agreed with Plaintiffs that an official capacity case is proper. If DOJ is mistaken, and the official capacity case is not proper, then the President would have to "promptly retain[ ] [private] counsel for that purpose."[25] In those circumstances, the DOJ would have no further role to play in this litigation.

Still, proceedings from parallel litigation suggest that the President's private counsel would agree with DOJ on this question. During oral arguments in *District of Columbia v. Trump*, the Maryland District Court referenced Tillman and JEP's argument concerning the appropriateness of the official-

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Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), ECF No. 37-1, https://bit.ly/3iDgCtN. Tillman, in 2017, was also the first to raise this issue in the academic literature. *See supra* note 2. *Cf. CREW v. Trump*, 971 F.3d 102, 117 n.31 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc) ("The statement [by Judge Leval], issued more than three years after the operative complaint was filed, is the first time that anyone in this case has suggested that the President should have been sued in his private capacity.").

[25] *CREW*, 971 F.3d at 133 n.9 (Leval, J., filing a Statement in Support of the Denial of En Banc Rehearing).

capacity suit.[26] Subsequently, the District of Columbia and Maryland, filed an Amended Complaint to include a claim against the President in his individual capacity.[27] In that case, the President retained private counsel.[28] And the President's private counsel maintained that only an official capacity claim would be proper.[29] All of the parties in all three cases maintain that an official-capacity action is proper. And they are not alone.

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[26] Tr. of Mot. Proceedings at 5:5–14, *District of Columbia v. Trump* (D. Md. Jan 25, 2018), ECF No. 92, https://bit.ly/3lhZbkf ("First, this is a suit against the President in his official capacity and yet, I understand the plaintiffs are also arguing that what he's done here is really as an individual. He's benefiting individually. There's at least one amicus brief I read that seem to suggest that if he's sued in his official capacity, that changes the ballgame. Address that issue, if you will, somewhere along the way since if I'm correct in understanding plaintiff's position, it's because he's personally profiting, not because he is the President of the United States."). *Id.* at 44:21–24, 46:2–5, 97:17–25, 170:18–171:5. *See also* Motion for Leave to Amend Complaint at 2, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 90-1, https://bit.ly/30Xgsrl.

[27] *See* Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of Neither Party with Respect to Motion to Dismiss on Behalf of Defendant in his Individual Capacity at 1, *District of Columbia v. Donald J. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-01596-PJM), ECF No. 114, 2018 WL 2159867, http://bit.ly/2sb58Wn.

[28] *CREW*, 971 F.3d at 133 n.9 (Leval, J., filing a Statement in Support of the Denial of En Banc Rehearing) (citing Notice of Appearance, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-01596), ECF No. 109).

[29] Reply in Support of Motion to Dismiss at 10, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-01596-PJM), ECF No. 118 ("Claims under the Emoluments Clauses must be brought against the President in his official capacity.").

Before the District Court in this action, twenty-one law professors filed an *amicus* brief in support of Plaintiffs. They contended that "a judicial remedy that redresses Plaintiffs' injuries would not require the President to take any action—or decline to take any action—in his official capacity."[30] With respect to the Domestic Emoluments Clause, they wrote, "however the case is captioned," the President would only need to "cease accepting emoluments from government clients," which "are not official acts."[31] The law professors were absolutely correct. But they apparently did not recognize that their argument undermined the propriety of the official-capacity complaint. In a brief filed before the Second Circuit, a mostly-overlapping cohort of the same law professors made *no mention whatsoever* of the capacity issue.[32] The professors have not explained why they now think that an official-capacity claim is proper.

Given the posture of this lawsuit, the parties are not adverse on the question of whether Plaintiffs' case is properly pleaded as an official-capacity action. And the Court's jurisdiction turns on this question.

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[30] Brief of Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction as *Amici Curiae* in Support of the Plaintiffs at 13–14, *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), ECF. No. 64-1, https://bit.ly/36GgKGA.

[31] *Id.*

[32] Brief for *Amici Curiae* Scholars of Administrative Law, Constitutional Law and Federal Jurisdiction in Support of Appellants and Urging Reversal, *CREW v. Trump*, 939 F.3d 131 (2d Cir. 2019) (No. 18-0474-cv), App. ECF No. 40, https://bit.ly/3d7tZBk.

Therefore, if certiorari is granted, the Court should add an additional question presented:

> Whether Plaintiffs lack standing because the Defendant in his official capacity did not cause, and therefore cannot redress, Plaintiffs' alleged injuries.

The Court should also appoint an *amicus curiae* to argue that question. This question is a threshold jurisdictional issue. The concern that animates the appointment of an *amicus* is particularly pronounced when there is a lack of adversity concerning threshold issues, such as whether the Court has jurisdiction. The Supreme Court has regularly appointed an *amicus* to argue potentially-jurisdictional questions that neither party raised.[33] Appointment of an *amicus* would be appropriate in this case.

V. If This Case Becomes Moot, There Are Several Grounds on Which the Court Should Summarily Reverse or Vacate the Second Circuit's Judgment.

This case may become moot for one reason or another. In that event, there are several grounds on which the Court should summarily reverse or vacate the judgment below. First, Plaintiffs lack standing because the Defendant in his official capacity did not cause, and cannot redress, Plaintiffs' alleged injuries.

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[33] *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 756 (2013); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 155–56 (2013); NFIB v. Sebelius, 567 U.S. 519, 543–46 (2012).

Second, under *Ruhrgas* and *Sinochem*, the Supreme Court has recognized that certain "nonmerits threshold question[s]" may warrant "dismissal short of reaching the merits."[34] Plaintiffs' decision to improperly plead their case as an official capacity action is such a "threshold question[]."[35]

Third, Plaintiffs lacked an equitable cause of action to challenge purported ultra vires government conduct.[36] Therefore, the District Court lacked equitable jurisdiction to hear the case.[37] The Court has recognized this defect in another case. *Trump v. Sierra Club* stated that the federal government had "made a sufficient showing at this stage that the plaintiffs have no cause of action."[38]

Fourth, there would be strong prudential reasons to vacate the lower-court decision under the *Munsingwear* doctrine.[39] The Second Circuit failed to

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[34] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 433 (2007) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)).

[35] *Sinochem*, 549 U.S. at 433.

[36] *See* Brief of *Amici Curiae* Scholar Seth Barrett Tillman and Judicial Education Project in Support of Defendant-Appellant, *D.C. and Maryland v. Trump* at 2–23, App. No. 20-1839 (4th Cir. filed Sept. 25, 2020), App. ECF No. 16-1, https://bit.ly/34yQyLs.

[37] *See* Josh Blackman & Seth Barrett Tillman, *What is the Plaintiffs' Cause of Action in the Wall Litigation?*, The Volokh Conspiracy (July 31, 2019), https://perma.cc/F5Z2-VEDB.

[38] *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). A petition for a writ of certiorari is currently pending in *Sierra Club*. *See* Supreme Court Docket No. 20-138. The Court may choose to hold the three Emoluments Clauses cases pending the resolution of *Sierra Club*.

[39] *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) ("'Our ordinary practice in

consider the significant separation of powers questions that would be raised if this sort of suit could proceed against the sitting President. Judge Menashi in the Second Circuit, and Judge Wilkinson in the Fourth Circuit, ably identified these risks.[40] These concerns apply to *Trump v. CREW*, as well as to the other Emoluments Clauses cases pending before the Court. In short, the judgment below about "the authority of the Presidency itself" need not survive this "particular President."[41]

Conclusion

The petition for a writ of certiorari should be granted. The Court should add a supplemental question about whether Plaintiffs have standing to sue the President in his official capacity. Because the parties are not adverse on this question, the Court should appoint an *amicus curiae* to present these alternate grounds for reversing the decision below. Finally, if this case becomes moot, there are several

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disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss.'" (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482–483 (1990))).

[40] *CREW v. Trump*, 971 F.3d 102, 115 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc) ("'[H]istory 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.'" (quoting *In re Trump*, 958 F.3d at 298 (Wilkinson, J., dissenting from en banc judgment))).

[41] *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

grounds on which the decision below should be summarily vacated.

Respectfully submitted,

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