No. 18-2488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISTRICT OF COLUMBIA; STATE OF MARYLAND,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States of America,
in his official capacity and his individual capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
Case No. 8:17-cv-01596
Judge Peter J. Messitte

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had statutory jurisdiction because the claims at issue present federal questions arising under the Emoluments Clauses of the United States Constitution. 28 U.S.C. § 1331. This Court has appellate jurisdiction because the district court effectively denied the President's absolute-immunity defense by commencing discovery without ruling on his motion to dismiss. *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc); *Nero v. Mosby*, 890 F.3d 106, 125 (4th Cir. 2018); 28 U.S.C. § 1291; CA4 Doc. 23, at 4-8. Discovery commenced on December 3, 2019, and the President filed a timely notice of appeal on December 14, 2019. JA270-74.

STATEMENT OF ISSUES

I. Whether Maryland and D.C. have Article III standing.

II. Whether the President is absolutely immune in his individual capacity.

III. Whether Maryland and D.C. have a cause of action to enforce the Emoluments Clauses against the President in his individual capacity.

IV. Whether Maryland and D.C. have stated a claim under the Emoluments Clauses.

STATEMENT OF CASE

President Donald J. Trump took office on January 20, 2017. Six months later, the District of Columbia and the State of Maryland (Plaintiffs) filed this lawsuit against him in his official capacity alleging violations of the Foreign Emoluments Clause and the Domestic Emoluments Clause. The Foreign Emoluments Clause 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." U.S. Const. Art. I, § 9, cl. 8. The Domestic Emoluments Clause provides that the President shall receive a salary and states that "he shall not receive … any other Emolument from the United States, or any of them." U.S. Const. Art. II, § 1, cl. 7. Plaintiffs allege that the President is violating these Clauses because state, federal, and foreign officials have paid money to companies affiliated with the President's preexisting business operations—in particular, the Trump International Hotel in Washington, D.C. (Hotel)—in exchange for services. JA37-57. Along with similar lawsuits filed against President Trump in New York and Washington, D.C., this case is one of the first attempts to have the federal courts enforce the Emoluments Clauses against a sitting President.

The Department of Justice (DOJ), which serves as counsel to the President in his official capacity, filed a motion to dismiss the complaint. The motion argued that: (1) Plaintiffs do not have Article III standing to pursue their claims because they have not been harmed; (2) there is no cause of action under the Clauses; and (3) Plaintiffs failed to state a claim under the Clauses. D.Ct. Doc. 21. At a hearing on DOJ's first two arguments, the district court asked Plaintiffs to consider amending the complaint to also sue the President in his individual capacity. *See, e.g.*, D.Ct. Doc. 92, at 44:5-46:17; 97:17-25; 170:18-25. Plaintiffs reluctantly sought leave to amend the Complaint solely for that purpose, noting that their request was "prompted by the Court's questioning at

oral argument" and that they "continue[d] to believe that suing the President for violating these Clauses in his official capacity is proper and reflects 'the reality that the defendant's conduct is illegal by virtue of the fact that he is President.'" D.Ct. Doc. 90-1, at 2 (quoting Amici Br. of Scholars at 18 (D.Ct. Doc. 56-1)). The district court granted leave to amend on March 12, 2018; Plaintiffs filed an amended complaint later that day. JA24-121. The President promptly retained separate counsel to represent him in his individual capacity.

On March 28, 2018, the district court granted in part and denied in part DOJ's motion to dismiss the official-capacity claims for lack of standing and a cause of action. JA122-68. The Court held that Plaintiffs "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." JA123. But it rejected Plaintiffs' "standing with respect to the operations of the Trump Organization and the President's involvement in the same outside the District of Columbia." JA123; *see also* JA159-60.

The district court also held that Plaintiffs had an implied cause of action under the Emoluments Clauses to sue the President in his official capacity. JA161-62. According to the district court, the Emoluments Clauses were meant to "protect all Americans," and thus the injuries alleged by Plaintiffs fell within the Clauses' zone of interests. JA162-63. The district court also held that these injuries were redressable through an injunction or declaration against the President in his official capacity. JA154-

58. The district court scheduled argument on the third argument in DOJ's motion to dismiss—failure to state a claim under the Emoluments Clauses—for June 11, 2018. D.Ct. Doc. 108.

Meanwhile, the President, in his individual capacity, had filed a separate motion to dismiss on May 1, 2018. D.Ct. Doc. 112. The motion incorporated DOJ's justiciability and merits arguments, and it separately argued, among other things, that the President is entitled to absolute immunity in his individual capacity and that there is no *Bivens* cause of action under the Emoluments Clauses. Given the district court's scheduling order, the President sought to expedite briefing on his motion to dismiss so it could also be argued at the June 11 hearing. D.Ct. Doc. 110. The district court granted the motion to expedite, and the parties finished briefing the motion on May 25, 2018. D.Ct. Doc. 118. But the district court denied the President's request to participate at the hearing, explaining that "[t]he extent to which, if at all, the Court will entertain oral argument on the President's Motion to Dismiss in his individual capacity will be addressed at a later time." JA171.

On July 25, 2018, the district court rejected the DOJ's motion to dismiss the official-capacity claims on the merits. JA172-225. In so ruling, the district court accepted Plaintiffs' broad reading of the Emoluments Clauses to cover "any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments," including "profits from private transactions, even those involving services given at fair market value." JA218. In the

district court's view, Plaintiffs plausibly stated violations of the Emoluments Clauses under this interpretation. JA219-22.

But the court did not rule on the motion to dismiss the individual-capacity claims, stating only that it would "address the individual capacity claims and the arguments to dismiss them in a separate Opinion." JA172 n.2. The court added: "Any further hearing to consider the arguments in Defendant's Individual Capacity Motion to Dismiss will be set in consultation with counsel." JA225. On August 15, 2018, the parties filed a Status Report in which Defendants asked the Court to resolve the motion "at its earliest possible convenience given that, if the motion is denied, having the official and individual claims on different tracks may complicate discovery and ultimately lead to an inefficient allocation of party and judicial resources." JA230. On December 3, 2018, with fact discovery about to commence, the President asked for a status conference on the motion and outlined how his immunity had already been impaired by his participation in pretrial proceedings. JA266-68. Later that day, the Court entered an order opening discovery. JA270-73.

With discovery open, Plaintiffs quickly propounded almost forty subpoenas to third parties, including to The Trump Organization, seeking sweeping discovery on (among other things) the identify of every guest who had stayed at the Hotel or spent money there, the amount that was spent, marketing and other communications between the Hotel and potential customers, and the distribution of revenues within The Trump

Organization and its affiliates. The subpoenas demanded production of documents by the first week of January 2019. *See, e.g.*, D.Ct. Doc. 148-1.

By December 14, 2018, the district court still had not ruled on the President's pending motion to dismiss. Nor had it set a conference to discuss the motion. As a result, the President filed a notice of appeal, JA274, along with a motion to stay proceedings pending the appeal, D.Ct. Doc. 148. That motion explained that the Court's "refusal to consider the [immunity] question" has "subjected [the President] to further pretrial procedures, and so effectively denied him … immunity," which this Court treats as a decision denying the motion to dismiss on immunity grounds. *Jenkins*, 119 F.3d at 1159. The President, accordingly, had the right to an immediate appeal. *Id.*; *see also Nero*, 890 F.3d at 125.

The district court expedited briefing on the President's stay motion and asked the parties to address "whether the Court can dismiss without prejudice the claims against President Trump in his individual capacity, and if so, whether it should do so." JA276. In response to that request, and notwithstanding the docketing of this appeal, Plaintiffs filed a purported Rule 41(a) "notice of voluntary dismissal" seeking to dismiss the case "without prejudice" against the President "in his individual capacity to allow the claims against President Trump in his official capacity to move forward expeditiously." JA277. Although the stay motion was later mooted by this Court's decision to hear argument on DOJ's mandamus petition and accompanying stay, *see In re: Donald J. Trump*, No. 18-2486 (Docs. 9, 10), the President in his individual capacity

filed a reply explaining why Plaintiffs' attempted voluntary dismissal was defective, D.Ct. Doc. 158.

STANDARD OF REVIEW

This appeal raises a number of interrelated legal questions about the legal viability of Plaintiffs' claims, all of which are reviewed *de novo* with no deference to the district court. *See Frank Krasner Enterprises, Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (Article III standing); *Nero*, 890 F.3d at 117 (effective denials of absolute immunity (citing *Goldstein v. Moatz*, 364 F.3d 205, 211 (4th Cir. 2004)); *Garris v. Norfolk Shipbuilding & Drydock Corp.*, 210 F.3d 209, 211 (4th Cir. 2000) (existence of a cause of action); *U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (failure to state a claim under Rule 12(b)(6)).

SUMMARY OF ARGUMENT

The novelty of this action is eclipsed only by its legal shortcomings. From the beginning of the Republic, Presidents have maintained private business interests while in office. But until this case, no court had ever determined: (1) that a State alleging "competitive" and "quasi-sovereign" injuries has Article III standing to assert violations of the Emoluments Clauses; (2) that the President's immunity from suit offers no protection from the distractions of such litigation while in office; (3) that the President may be sued in his individual capacity for injunctive and declaratory relief; (4) that the Constitution authorizes States to bring a cause of action under the Emoluments Clauses in federal court; or (5) that the receipt of profits from market transactions with foreign

or domestic governments could constitute a violation of those Clauses. The district court adopted all of these arguments. This Court's appellate jurisdiction extends to them all, and this Court should exercise that authority to reverse and dismiss the amended complaint with prejudice.

To begin, Plaintiffs do not have Article III standing. Maryland and D.C. have no "quasi-sovereign" interest that is implicated by the President's interest in the Hotel. And the notion that the President's interest is what causes government officials to stay there—rather than location, convenience, luxury, accommodations, price, sheer personal preference, general support for the President, or myriad other factors—is far too speculative to support standing. Regardless, such a competitive injury would not fall within the "zone of interests" of the Emoluments Clauses. The Framers designed those Clauses to prevent corruption and to protect the President's independence—not to protect the financial interests of private businesses that want to compete with the President's commercial ventures.

Even if Plaintiffs had standing, the President is absolutely immune from this suit. Absolute immunity bars individual-capacity lawsuits against the President for the official actions he takes after assuming office. That is precisely the kind of lawsuit that the Court confronts here; indeed, Plaintiffs concede that they could not maintain this suit if the President were no longer in office. The Supreme Court has held that the costs of allowing such suits to distract the President from official duties outweigh any

countervailing interests. *Nixon v. Fitzgerald*, 457 U.S. 731, 748-56 (1982). That precedent must be respected.

Further, there is no such thing as a federal claim for equitable relief against a government official in his individual capacity. That is one reason why claims under the Emoluments Clauses must be brought against the President in his official capacity. It is also why Plaintiffs lack a cause of action under the Constitution generally, and the Emoluments Clauses specifically. The only constitutional claim that the Supreme Court has fashioned against federal officials in their individual capacity is one for money damages to remedy certain violations of the Fourth, Fifth, and Eighth Amendments. Plaintiffs do not seek money damages or allege such violations. The Supreme Court has "cast doubt on the authority of courts to extend or create private causes of action" because that decision "is one better left to legislative judgment." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). It is difficult to imagine a more glaring failure to heed this guidance than the creation of a new private right of action under the Emoluments Clauses, which States can use to sue a sitting President in his individual capacity for equitable relief.

Finally, Plaintiffs cannot state a claim under the Emoluments Clauses. The district court's application of those Clauses to prohibit any interest arising from business transactions with foreign or domestic governments contradicts the Constitution's text, its original understanding, and the undisputed practices of early Presidents, including George Washington. It also casts doubt on many benign

transactions that were never previously seen as unconstitutional, including the profits that President Obama received from his book sales. The more accurate definition of "emoluments" is payment in compensation for personal services performed through official acts or in employment-type relationships. That definition avoids historical embarrassments, advances the anti-corruption concerns that underpin the Emoluments Clauses, and requires dismissal with prejudice.

ARGUMENT

I. This Court Can Dismiss The Amended Complaint On A Number Of Grounds.

The Court has appellate jurisdiction because the district court effectively denied absolute immunity.[1] That does not mean, however, that absolute immunity is the only issue before the Court. The Court can decide whether Plaintiffs have standing before reaching other merits issues. "'The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). "'To this end, '[e]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496

[1] Whether this Court has appellate jurisdiction is the subject of Plaintiffs' motion to dismiss this appeal. *See* CA4 Doc. 16. In light of this Court's order deferring any action on that motion pending argument on the merits of this appeal, CA4 Doc. 20, the President does not repeat his arguments but refers the Court to his response. *See* CA4 Doc. 23.

F.3d 326, 334 (4th Cir. 2007) (quoting *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986)). In immunity-based appeals, this Court is "obliged to take notice if plaintiffs lacked standing as the absence of standing would be a jurisdictional defect." *Williams v. Hansen*, 326 F.3d 569, 574 n.4 (4th Cir. 2003); *accord Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002); *Duit Const. Co. Inc. v. Bennett*, 796 F.3d 938, 940 (8th Cir. 2015); *McNair v. Synapse Group Inc.*, 672 F.3d 213, 223 n.10 (3d Cir. 2012).

Similarly, when an immunity-based appeal "directly implicate[s]" another legal issue or claim, "the Court of Appeals ha[s] jurisdiction over this issue" too. *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007). Therefore, "jurisdiction over an interlocutory appeal . . . also provides a basis for consideration of other district court rulings that are 'inextricably intertwined'" with immunity or that are "'necessary to ensure meaningful review of the … immunity question.'" *Henry v. Purnell*, 501 F.3d 374, 376 (4th Cir. 2007) (quoting *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996)). "Claims are 'inextricably intertwined' when the resolution of one claim necessarily resolves the other claim." *Id.* This rule applies to all immunity-based appeals. *See V.S. v. Muhammad*, 595 F.3d 426, 430 (2d Cir. 2010) (absolute immunity); *Nieves–Márquez v. Puerto Rico*, 353 F.3d 108, 123 (1st Cir. 2003) (Eleventh Amendment immunity); *S & Davis Intern., Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000) (foreign sovereign immunity).

At least two of the President's grounds for dismissal meet this standard. First, the President's argument that Plaintiffs lack a cause of action under *Bivens* would "necessarily resolve" his entitlement to absolute immunity. *Henry*, 501 F.3d at 376. The

Supreme Court agrees. In *Wilkie*, the Court declined to recognize "a new *Bivens* damages action for retaliating against the exercise of ownership rights" in an interlocutory appeal from the denial of qualified immunity. 551 U.S. at 549 & n.4. This allowed the Court to avoid the question of immunity altogether. Other courts have followed suit. *See, e.g.*, *Doe v. Rumsfeld*, 683 F.3d 390, 393-397 (D.C. Cir. 2012); *Vance v. Rumsfeld*, 701 F.3d 193, 197-203 (7th Cir. 2012) (en banc).

Second, this Court has appellate jurisdiction to address whether Plaintiffs have sufficiently alleged any element of their claim. Here, too, the Supreme Court agrees. In *Hartman v. Moore*, the Court ruled on the "definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before [it] on interlocutory appeal." 547 U.S. 250, 257 n.5 (2006). And, in *Ashcroft v. Iqbal*, it addressed the "elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity." 556 U.S. 662, 675 (2009). The question of whether Plaintiffs have stated a claim under the Emoluments Clauses is thus "'inextricably intertwined with' … and 'directly implicated by'" the "immunity defense." *Id.* at 673.[2]

[2] The President also sought dismissal of the individual-capacity claims on venue and personal-jurisdiction grounds. D.Ct. Doc. 112, at 4-8. Because these issues are not intertwined with immunity and do not implicate subject-matter jurisdiction, this Court's jurisdiction over them is less clear and the President has not sought interlocutory appellate review. But the President does not waive, and expressly preserves, his right to raise those defenses on remand or in any subsequent appeal.

II. The Amended Complaint Should Be Dismissed.

A. Plaintiffs lack Article III standing.

No plaintiff, not even a State, is exempt from Article III's standing requirements. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011). "Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affects the plaintiff in a personal and individual way" and "is actual or imminent, not conjectural or hypothetical." *Gill v. Whitford*, 138 S. Ct. 1916, 1929, 1932 (2018) (cleaned up). Neither D.C. nor Maryland has suffered such an injury.

Quasi-Sovereign Injuries: Plaintiffs have not suffered what the district court (inaccurately) called "quasi-sovereign" injuries. The district court concluded that, due to the President's supposed violations of the Emoluments Clauses, officials from D.C. and Maryland "may feel" pressured to grant tax incentives to The Trump Organization. JA139-40. Although D.C. officials apparently insisted they felt no such pressure, the district court did not believe them—citing unrelated conduct by the General Services Administration ("GSA") for the extraordinary proposition that *all* federal and state officials must "feel 'coerced' into granting special concessions to the Hotel." JA139. And though Maryland did not allege that The Trump Organization has any current or planned business in the State, the district court flatly concluded, with no explanation, that Maryland still feels pressure to award it tax incentives. JA139. The district court also found that officials from D.C. and Maryland "may … feel" obliged to stay at the

Hotel because, one time, the former Governor of Maine stayed there and the President later signed an executive order that supposedly favored Maine. JA139-40.[3]

This reasoning is off the mark. "Feeling" pressure to award tax incentives is not a concrete injury. *Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977); *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 459-60 (6th Cir. 2017). D.C. already awarded tax incentives for the Hotel, and nothing suggests that this routine decision was related to any desire to grant the President prohibited emoluments. Nor do D.C. or Maryland allege that The Trump Organization will "imminent[ly]" request tax incentives from those jurisdictions for any other project. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Even if it did request a tax incentive, Plaintiffs do not allege that they would award one to compete with their sister jurisdictions by providing a financial benefit to the President—instead of to, for example, generate tax revenue and jobs or to benefit the President in other ways (by benefiting his family or his brand). The decision to award tax incentives, moreover, is entirely up to the Plaintiffs and thus would be a "self-inflicted" injury. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976).

[3] These injuries only possibly relate to the *Domestic* Emoluments Clause. The court did not endorse the Plaintiffs' alleged quasi-sovereign injury under the Foreign Emoluments Clause—that violations threaten to make the President "responsive to the desires of foreign governments rather than to those of the States." JA137-38. "Such a generalized interest ... is too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

The same goes for the alleged pressure that Plaintiffs "feel" to stay at the D.C. hotel. Not only is this pressure not concrete, not imminent, not plausibly caused by a desire to financially benefit the President, and entirely self-inflicted, it also defies common sense. Plaintiffs do not allege that, on the off chance they have official business with the President of the United States, they would stay at *a five-star hotel*—instead of, say, sleeping in their own beds in D.C. (or one hour away in Annapolis). Any such allegation would be wildly implausible: Maryland and D.C. would not approve such an unnecessary expenditure, and such stays would not cause the President to take official actions favorable to them. That the former Governor of Maine allegedly "liv[ed] large at the Hotel" one time in 2017 changes nothing. JA139-40. These far-fetched theories of injury are nowhere close to proving Article III standing.[4]

Proprietary Injuries: Plaintiffs have not suffered "proprietary" injuries. The district court reasoned that, due to the President's alleged violations of the Emoluments Clauses, D.C. and Maryland could lose opportunities to host events at the Washington Convention Center and Bethesda Marriott Conference Center. JA141-46 & n.13. But this "competitive injury" is too speculative for Article III standing.

[4] Under Plaintiffs' theory of the case, any tax incentives to the Trump Organization or official stays at the Hotel would be *illegal* emoluments. Because courts "assume that [plaintiffs] will conduct their activities within the law," a future intent to break the law does not provide standing for forward-looking relief. *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). Plaintiffs' standing is refuted by their own legal theory.

To invoke the "competitor standing" doctrine, the plaintiff must "demonstrate that it is 'a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action.'" *KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004). "The nub" of the doctrine is that "a challenged agency action authorizes allegedly illegal transactions that will *almost surely* cause petitioner to lose business." *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001). "[O]verly speculative … predictions of future events (especially future actions to be taken by third parties)" do not suffice. *United Transp. Union v. ICC*, 891 F.2d 908, 912-13 & n.7 (D.C. Cir. 1989).

Speculation is all that Plaintiffs have. They assume that state, federal, and foreign officials—a diverse array of third parties not before the court—will host events at the Hotel, rather than the Washington Convention Center or the Bethesda Marriott Conference Center, because the President might receive some part of the profits. Not because the Hotel provides better accommodations. Not because the Hotel is located conveniently in the heart of D.C. Not because the officials simply like the President, enjoy BLT Prime, prefer the Trump brand, admire the Old Post Office building, or a host of other idiosyncratic reasons. And not because they prefer to host events at the Hotel or *any other space* besides the Washington Convention Center and Bethesda Marriott Conference Center. Judge Daniels persuasively explained why this "wholly speculative" theory of standing does not work:

> Even before [President Trump] took office, he had amassed wealth and fame and was competing … in the restaurant and hotel business. It is only natural that interest in his properties has generally increased since he

> became President.… Aside from [his] public profile, there are a number of reasons why patrons may choose to visit [his] hotels and restaurants including service, quality, location, price and other factors related to individual preference.

CREW v. Trump, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017). In short, Plaintiffs' theory of injury is far "too speculative" to come within the competitor-standing doctrine. *Am. Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 148-49 (D.C. Cir. 1977).

***Parens Patriae Injuries*:** Plaintiffs have failed to establish standing under a parens patriae theory. The district court concluded that D.C. and Maryland could use this theory to sue on behalf of businesses in their jurisdictions, which are allegedly harmed by unfair competition with the Hotel. JA146-50. That conclusion is wrong for three main reasons.

First, it is entirely speculative whether those businesses are harmed because of the President's alleged violations of the Emoluments Clauses—as just explained. If those businesses did not suffer a sufficient injury, *a fortiori* Maryland and D.C. cannot invoke that injury on their behalf.

Second, "[t]he Supreme Court has clearly established that a parens patriae action cannot be maintained against the Federal Government." *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002). While this appeal involves claims against the President in his *individual* capacity, the rule against bringing parens patriae actions against the federal government applies here because, as explained below, Plaintiffs challenge conduct by the President of the United States *as President*. *See infra* II.B-C.

Third, parens patriae is unavailable here because Plaintiffs are "stepping in to represent the interests of particular citizens"—namely, the businesses in or near D.C. who compete with the Hotel. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). "In order to maintain [a parens patriae] action, the State must articulate an interest apart from the interests of particular private parties"; it must invoke its own "quasi-sovereign interest," such as "the health and well-being … of its residents *in general*." *Id.* at 607 (emphasis added); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938) (That the State "asserts an economic interest" is insufficient for parens patriae standing where the suit is "in reality for the benefit of particular individuals."). This parens patriae suit, however, "represents nothing more than a collectivity of private suits" by D.C. and Maryland businesses against the President for unfair competition. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). Any injury to Plaintiffs, beyond the injuries to those businesses, could only be nominal. That is why a parens patriae suit is inappropriate here. *See United States v. Johnson*, 114 F.3d 476, 482 (4th Cir. 1997).

Zone of Interests: Even if Plaintiffs otherwise have Article III standing, they still must prove that they fall within the "zone of interests" that the Emoluments Clauses protect. The zone-of-interests test applies to claims arising under the Constitution; in fact, "it is *more* strictly applied when a plaintiff is proceeding under a constitutional provision." *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (cleaned up) (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)).

A plaintiff falls outside the constitutional zone of interests if its "interests are marginally related to or inconsistent with the purposes implicit in the constitutional provision." *Id.* (cleaned up) (quoting *Clarke*, 479 U.S. at 399). That is the case here.

The interests asserted by D.C. and Maryland have virtually nothing to do with the purposes of the Emoluments Clauses. As explained below, the Clauses were intended to prevent corruption and protect the President's independence. *See infra* II.D.2. "Nothing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition." *CREW*, 276 F. Supp. 3d at 187.

In concluding otherwise, the district court simply stated that the Emoluments Clauses "protect all Americans." JA162. Of course they do. But the point of the zone-of-interests test is that those protections are not *judicially enforceable* by certain parties, even though the parties otherwise have Article III standing. *TAP Pharm. v. HHS*, 163 F.3d 199, 207 (4th Cir. 1998) ("[T]he entire thrust of the … zone of interests test" is that it "requires something more than Article III standing. Accepting an interpretation of the test broad enough to accommodate [any plaintiff's] claim … would make discernment of this additional element almost impossible."). Even if "[i]t may appear unjust that a zealous advocate, armed with concrete injury, should be barred from challenging an executive action that it finds unlawful," the zone-of-interests test is "a construct that permits government officials to act … without the prospect of protracted court challenges from those whose interests" are more appropriately "resolved in the

halls of Congress …, not in the courtrooms of our country." *Leaf Tobacco Exporters Ass'n, Inc. v. Block*, 749 F.2d 1106, 1116 (4th Cir. 1984).

B. The President has absolute immunity.

The doctrine of absolute immunity requires dismissal of this action against the President in his individual capacity. Absolute immunity shields a government official from individual-capacity litigation. *See Imbler v. Pachtman*, 424 U.S. 409, 418-19 (1976); *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017); *e.g.*, *Cady v. Arenac Cty.*, 574 F.3d 334, 342 (6th Cir. 2009). "The purpose of conferring absolute immunity is to protect officials not only from ultimate liability but also from all the time-consuming, distracting, and unpleasant aspects of a lawsuit, including discovery." *District of Columbia v. Jones*, 919 A.2d 604, 611 (D.C. 2007). It follows, then, that "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler*, 424 U.S. at 419 n.13. That is the only way "to spare the official the tribulation and expense of defending the suit at all." *Chang v. United States*, 246 F.R.D. 372, 374 (D.D.C. 2007).

The Supreme Court has broadly applied absolute immunity to foreclose civil suits against the President in his individual capacity for official actions taken while in office. *See Nixon*, 457 U.S. at 748-56 . As the Court has explained, the reasons underlying absolute immunity apply with special force to the President. *Id.* The President is the quintessential official "whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Absolute

immunity ensures that he can focus on carrying out the obligations of his Office without the distraction of virtually limitless litigation whose risks he would personally bear. *Nixon*, 457 U.S. at 751-53.

The Supreme Court has emphasized that absolute presidential immunity is justified by historical tradition and functional considerations that are grounded in the President's "unique position in the constitutional scheme." *Id.* at 749. Several of the leading lights at the Nation's founding (and in the decades thereafter) insisted that the President must be immune from constant judicial scrutiny so that he may concentrate on the task of governing. *Id.* at 750 n.31. The passage of time has only intensified these concerns; the President holds "supervisory and policy responsibilities of utmost discretion and sensitivity," *id.* at 750, concerning "matters likely to arouse the most intense feelings," *id.* at 752. The President's prominence makes him "an easily identifiable target," yet the public interest demands that he be able "to deal fearlessly and impartially with the duties of his office." *Id.* at 752-53. Presidential immunity guards against "this personal vulnerability," *id.* at 753, not just for his "particular functions," but for his official responsibilities more generally, *id.* at 755-56.

In *Nixon* itself, the Supreme Court held President Nixon absolutely immune from potential liability arising from his firing of a government whistleblower. *See id.* at 734-41, 756-57. The Court pointedly rejected the argument that President Nixon was not entitled to immunity because, according to the whistleblower, the President's decision to fire him violated a federal statute and thus fell outside the lawful bounds of

the Office. It was enough, in the Court's view, that the whistleblower's firing fell "within the outer perimeter of [the President's] authority"—namely, oversight of the Executive Branch. *Id.* at 757. For that reason, President Nixon was absolutely immune from individual liability based on the firing. *Id.*

This case implicates the same concerns that warranted absolute presidential immunity in *Nixon*. Plaintiffs premise individual liability not on generally applicable laws that would apply to President Trump regardless of whether he is serving as President; they premise individual liability on a legal theory that, by its terms, is triggered only because of the Office he holds. The amended complaint makes clear that Plaintiffs' theory of liability depends on the President's exercise of the official duties. JA117-19. By necessity, Plaintiffs thus concede they had no claim until the President assumed the office. Under their theory, the President's liability arises precisely because he became, and remains, the President of the United States.[5]

That is a sufficient basis for recognizing absolute immunity. Just as the President should not have to fear that individuals will hold him personally liable for what he does as President, neither should he have to fear individual liability simply because he is

[5] The doctrine of absolute presidential immunity addressed in *Nixon* is different from the temporary presidential immunity addressed in *Clinton v. Jones*, 520 U.S. 681 (1997). In *Jones*, President Clinton argued that he was temporarily immune, during his time in office, from claims regarding conduct that predated his Presidency. That immunity is not relevant here because this case, unlike *Jones*, does not involve potential liability for conduct that predated the President's election and that is "unrelated to any of [the President's] official duties." *Id.* at 686; JA117-19.

President. The concerns underpinning *Nixon* are at their apex here. Because the President constantly makes decisions on policy "matters likely to arouse the most intense feelings" and is "an easily identifiable target," 457 U.S. at 752-53, lawsuits challenging conduct that would be lawful but for his office are a recipe for politically motivated litigation. It is "this personal vulnerability" that the doctrine of absolute presidential immunity was designed to neutralize. *Id.* at 753. If Plaintiffs want to sue the President for acts taken while in office, they must sue him in his official capacity. But he is absolutely immune from any suit, including this one, seeking to impose individual liability based on his assumption of the Presidency itself.[6]

C. Plaintiffs cannot sue the President in his individual capacity under the Emoluments Clauses.

Plaintiffs have no cause of action against the President in his individual capacity under the Emoluments Clauses. Such a claim must be brought against the President in his official capacity. This does not mean that official-capacity claims are proper either; as DOJ has persuasively explained, there is no implied cause of action against the President under the Emoluments Clauses. *See* Govt. Mandamus Pet'n, No. 18-2846, at

[6] The applicability of absolute presidential immunity in this case is not affected by the fact that Plaintiffs, unlike the plaintiff in *Nixon*, seek declaratory and injunctive relief rather than damages. To begin, no court has ever held that officials can be sued in their individual capacity for equitable relief; the novelty of the Plaintiffs theories cannot save them. And even assuming that Plaintiffs can maintain a *Bivens* action for equitable relief under the Emoluments Clauses, *but see infra* II.C.2, the reasons animating absolute immunity would still apply. Civil suits for equitable relief, no less than those for damages, are time-consuming and distract the President from his official duties. *Cf. Mississippi v. Johnson*, 71 U.S. 475, 501 (1867).

17-20. But under no circumstances can Plaintiffs' claims be brought against the President in his individual capacity, for two reasons. First, there is no implied cause of action under the Constitution against a federal official in his individual capacity for declaratory and injunctive relief. Second, even if there were, that implied cause of action would not extend to the Emoluments Clauses.

1. Claims under the Emoluments Clauses must be brought against the President in his official capacity.

Plaintiffs' claims against the President in his individual capacity under the Emoluments Clauses fail at the outset. The Foreign Emoluments Clause applies to a federal official holding an "Office of Profit or Trust," U.S. Const. Art. I, § 9, cl. 8, while the Domestic Emoluments Clause applies to "[t]he President," U.S. Const. Art. II, § 1, cl. 7. By their terms, these Clauses apply only to persons holding those offices. As Plaintiffs put it below, the President's alleged "conduct is illegal" here "*by virtue of the fact that he is President*." D.Ct. Doc. 90-1 at 2 (emphasis added). Had the President not been elected and assumed the duties of that office, no claim would lie against him. That should be the end of the matter. "[A]ny action that charges [a federal] official with wrongdoing while operating in his or her official capacity as a United States agent operates as a claim against the United States" and thus may not be brought as an individual-capacity suit. *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

The remedy sought by Plaintiffs underscores that this is not a suit against the President in anything other than his official capacity. Plaintiffs do not seek to enjoin the President's purely personal or private conduct, and they have not argued that they would have a claim against President Trump once he leaves office. This case is thus not like controversies that, for example, arise from conduct predating the assumption of federal office. *See Jones*, 520 U.S. at 694. In short, this is not a suit against an individual who happens to be President; this dispute exists solely *because* that person is President. As a result, the claims can be asserted only against the President in his official capacity.

2. Plaintiffs have no cause of action to sue the President in his individual capacity under the Emoluments Clauses.

Plaintiffs have no cause of action to sue the President in his individual capacity for alleged violations of the Emoluments Clauses. The Constitution itself provides no express cause of action against government officials in their individual capacities. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017). Nor has Congress provided a statutory cause of action for constitutional violations by federal officers, *id.*, despite having done so for state officers, 42 U.S.C. § 1983. Thus, the only cause of action against federal officers in their individual capacities is *Bivens*, an implied action for damages under the Fourth, Fifth, and Eighth Amendments. *Abbasi*, 137 S. Ct. at 1854-55. The narrow and circumscribed scope of the implied *Bivens* action is not available for *any* equitable claims, nor for claims under the Emoluments Clauses—equitable or otherwise. Plaintiffs' claims against the President in his individual capacity should be dismissed.

a. There is no *Bivens* action against a federal official for equitable relief.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court authorized an implied cause of action for damages against federal agents who had violated the Fourth Amendment. 403 U.S. 388, 397 (1971). Although the text of the Amendment does not provide a damages remedy "in so many words," the Court nevertheless created one because Congress had not foreclosed such a cause of action in "explicit" terms and there were no "special factors" suggesting that the Court should "hesitat[e]" in the face of congressional silence. *Id.* at 396-97. The Court later extended *Bivens* to certain damages actions under the Fifth and Eighth Amendments. *Davis v. Passman*, 442 U.S. 228, 248-49 (1979); *Carlson v. Greene*, 446 U.S. 14, 24-25 (1980).

The *Bivens* action is limited to individual-capacity claims. *Doe v. Chao*, 306 F.3d 170, 184 (4th Cir. 2002). This, however, is widely recognized as a "legal fiction," because government actors are sued in their *individual* capacity for *official* conduct, and "the federal government in practice functions as the real party in interest." Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 Geo. L. J. 65, 65 (1999). "[T]he only distinction between personal-capacity and official-capacity suits is on whom the plaintiff is seeking to impose liability; in both cases, the official is acting under color of law." *DeLong v. IRS*, 908 F.2d 966, 1990 WL 101402, at *1 (4th Cir. 1990) (table opinion) (citing *Kentucky v. Graham,* 473 U.S. 159 (1985)). *Bivens* itself made clear that it was creating a remedy for a violation committed

not by a private actor, but by "a federal agent *acting under color of his authority*." 403 U.S. at 389 (emphasis added).[7]

In the decades since *Bivens*, courts have affirmed that this cause of action against an officer in his individual capacity is limited to damages claims. *See, e.g., Abbasi*, 137 S. Ct. at 1863 (describing "*Bivens* liability" as "personal liability for damages."); *Wilkie*, 551 U.S. at 550 (2007) (describing a "*Bivens* remedy" as a "freestanding remedy in damages"); *Solida*, 820 F.3d at 1093 ("*Bivens* does not encompass injunctive and declaratory relief."). Several times, the Supreme Court has distinguished *Bivens* actions from equitable claims. *See, e.g., Abbasi*, 137 S. Ct. at 1858 (*Bivens* action was created for circumstances in which "equitable remedies prove insufficient"). It has even called "injunctive relief" an "alternative" to *Bivens*, noting that "when [such] alternative methods of relief are available, a *Bivens* remedy usually is not." *Id.* at 1863.

"[U]nlike the *Bivens* remedy, … injunctive relief has long been recognized as the proper means for preventing [government actors] from acting unconstitutionally." *Corr. Servs. Corp.*, 534 U.S. at 74. Thus, an individual-capacity suit is "both inappropriate and

[7] The legal fiction of a government actor's "individual capacity" was constructed in order to "fill[] a gap in cases where sovereign immunity bars a damages action against the United States." *Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016); *see also Bivens*, 403 U.S. at 409-10 (Harlan, J., concurring in judgment) (recognizing that "individual official liability" for damages is a necessary "substitute" for "a direct remedy against the Government … [which] remains immune to suit"). In other words, the actor is only named in his individual capacity in a damages suit because the plaintiff seeks money from him personally. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949). This avoids the sovereign-immunity bar because, in theory, the liability imposed "will not require action by the sovereign or disturb the sovereign's property." *Id.*

unnecessary for claims seeking solely equitable relief against actions by the federal government." *Solida*, 820 F.3d at 1094. Equitable claims brought against government officials for allegedly violating the Constitution are properly styled as "official capacity" suits. *Kirby v. City of Elizabeth*, 388 F.3d 440, 452 n.10 (4th Cir. 2004) (concluding that injunctive relief pursuant to a constitutional claim "could only be awarded against the officers in their official capacities"); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 257 n.5 (4th Cir. 2018) (similar), *vacated*, 138 S. Ct. 2710 (2018).

In fact, no court has *ever* recognized an equitable cause of action against a federal officer in his individual capacity because it is widely understood that "[i]f equitable relief rather than damages is sought from a federal official, it must be obtained against him in his official capacity." *Arocho v. Nafziger*, 367 F. App'x 942, 948 n.5 (10th Cir. 2010). To be certain, courts have sometimes used imprecise language to describe the individual nature of the officer's role in these suits, confusing the capacity in which the officer carries out the challenged state action (as an individual officer) with the capacity in which the officer is liable for the relief sought (as an agent of the state). *See, e.g., McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (an official-capacity suit) (citing *S.C. Wildlife Fed. v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008));[8] *Clean Air Council v. Mallory*,

[8] *South Carolina Wildlife*, which this Court cited in *McBurney* for its "individual capacity" statement, does not use the term "individual capacity" but rather discusses the role of the officer as an "individual defendant," in what is clearly an effort to

226 F. Supp. 2d 705, 712 (E.D. Penn. 2002) (an official-capacity suit). But the President is unware of any case that actually recognizes a cause of action for injunctive relief against federal officers in their individual capacities.

The absence of any such case underscores the flaws in Plaintiffs' individual-capacity claims. Suits for equitable relief are brought against defendants in their official capacities; *Bivens* actions are limited to damages claims. Plaintiffs here have opted for prospective relief, and so their only proper cause of action is an official-capacity suit.

b. In all events, there is no *Bivens* action for violations of the Emoluments Clauses.

Even if *Bivens* could theoretically support an equitable action, it would not do so here because, regardless of the remedy sought, there is no *Bivens* action available for violations of the Emoluments Clauses. In the nearly fifty years since *Bivens* was decided, the Supreme Court has recognized an implied cause of action in only two other cases—both of which were decided within a decade of *Bivens*. The first involved a gender-discrimination claim for damages under the Fifth Amendment's Due Process Clause, brought against a Congressman by his female assistant. *Davis*, 442 U.S. at 248-49. The second was an Eighth Amendment claim for damages brought against federal jailers for failing to provide adequate medical treatment. *Carlson*, 446 U.S. at 24-25. Since 1980,

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distinguish the officer from the sovereign for the purposes of sovereign immunity. 549 F.3d at 333. *South Carolina Wildlife*, like *McBurney*, was an official-capacity suit.

"*Bivens* actions have been limited to only [these three] constitutional rights, and the Court has 'consistently refused to extend *Bivens* liability to any new context or new category of defendants.'" *Johnson*, 2016 WL 4593467, at *6 (quoting *Corr. Servs. Corp.*, 534 U.S. at 68); *Cioca v. Rumsfeld*, 720 F.3d 505, 510 (4th Cir. 2013) (collecting cases). The Supreme Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675). There is no basis for extending that disfavored remedy to a claim against the President under the Emoluments Clauses.

i. A "special-factors" analysis applies because the claims arise in a new *Bivens* context.

The Supreme Court has foreclosed lower courts from creating individual-capacity remedies against government actors in new contexts when "there are special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 1857. This case presents a "new *Bivens* context," because it "is different in a [number of] meaningful way[s] from previous *Bivens* cases decided by [the Supreme] Court." *Id.* at 1859. Foremost, "the constitutional [provisions] at issue" here are unique. *Id.* The Supreme Court has never recognized a *Bivens* action for claims brought under the Emoluments Clauses, or, for that matter, *any* structural constitutional provision. Rather, *Bivens* has been limited to deprivations of certain "individual rights" contained in the Bill of Rights. *Johnson*, 2016 WL 4593467, at *6-7 (rejecting *Bivens* action brought under

federal statutes). Plaintiffs allege deprivations of business profits, tax revenues, and political power—not individual constitutional rights. JA57-68, ¶¶ 103-33.

Moreover, "the rank of the officer[] involved" in this case—the chief executive of the United States—is different from the law-enforcement agents, the Congressman, and the jailers involved in the Court's previous *Bivens* cases. *Abbasi*, 137 S. Ct. at 1859. And, unlike in *Bivens*, *Davis*, and *Carlson*, there is no "judicial guidance as to how [the President] should respond to the problem" presented here, as these Clauses and their effects on a President's business activities have not previously been litigated. *Id.* at 1860. Finally, as explained above, there is a substantial "risk of disruptive intrusion by the Judiciary into the functioning of other branches," and "the presence of potential special factors that previous *Bivens* cases did not consider." *Id.*

These distinctions highlight the novelty of Plaintiffs' claims. Because this case presents a new *Bivens* context, their individual-capacity claims may only proceed against the President if they survive a special-factors analysis. *Id.*

ii. A *Bivens* remedy is not available because special factors counsel hesitation.

In conducting a special-factors analysis, courts must consider "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858. A "special factor counselling hesitation" is anything that would "cause a court to hesitate before

answering that question in the affirmative." *Id.* There are a number of reasons for this Court not just to hesitate, but to reject the extension of *Bivens* to this new setting.

First, claims under the Foreign Emoluments Clause, by their nature, involve "matters that directly affect significant diplomatic and national security concerns." *Lebron v. Rumsfeld*, 670 F.3d 540, 553 (4th Cir. 2012). Under the Constitution, foreign policy is the "prerogative of the Congress and President." *Abbasi*, 137 S. Ct. at 1861. Judicial intrusion into this "realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Id.* (quoting *Christopher v. Harbury*, 536 U.S. 403, 417 (2002)). This is a factor strongly counselling deference to Congress regarding the availability of a legal remedy. *Id.* Indeed, Congress has acted in this area both historically, *see, e.g.,* Act of January 3, 1881, ch. 32, § 3, 21 Stat. 603 (authorizing acceptance of presents from foreign governments), and recently, *see, e.g.*, 37 U.S.C. § 908 (providing consent to civil employment of certain military personnel by certain foreign armed forces); 10 U.S.C. § 1060 (providing general consent to employment by military forces of a newly democratic nation). The Supreme Court has been reticent to "creat[e] a new judicial remedy" for alleged constitutional violations when "existing remedies" better reflect "conflicting policy considerations," even when those remedies "do not provide complete relief for the plaintiff." *Bush v. Lucas*, 462 U.S. 367, 388 (1983).

Second, this suit "implicates 'the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications.'"

Abbasi, 137 S. Ct. at 1861 (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004)). Plaintiffs' allegations implicate confidential communications between the President and other heads of state, JA47-48, ¶¶ 65-66 (phone conversations between the President and the Taiwanese and Chinese Presidents); JA126-27 (President's relationship and communications with the Governor of Maine), executive decisions made by his office, JA48, ¶ 66 (affirmation of the One-China policy); JA126-27 (executive order concerning national monuments), and communications within the Executive branch, JA49 ¶ 70 (communications between the President and his Press Secretary); JA39 ¶ 38 (President's relationship and communications with his Treasury Secretary and Small Business Administration Administrator); JA53-54 ¶¶ 87-88 (President's relationship and communications with the National Park Service); JA55 ¶¶ 92-94 (President's relationship and communications with the State Department and U.S. embassies). Plaintiffs therefore ask the Court to "interfere in an intrusive way with sensitive functions of the Executive Branch" and "would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged." *Abbasi*, 137 S. Ct. at 1860-61.

Third, this litigation has the potential to divert the President's attention from his official duties. That would be true even if this dispute were limited to a pure issue of law, given the level of attention it would command. But Plaintiffs instead seek extensive discovery. Such "burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself," likewise are special

factors counseling hesitation because they "prevent [the President] … from devoting the time and effort required for the proper discharge of [his] duties." *Id.* at 1860.

Fourth, and last, Plaintiffs are challenging "more than standard law enforcement operations." *Id.* at 1861. This case concerns a novel situation involving the highest-ranking executive officer in the United States and allegations regarding his relationships with foreign and domestic states. A *Bivens* action here "would assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court." *Id.*

Ultimately, in considering whether to recognize a new *Bivens* cause of action, a court must ask: "who should decide whether to provide for a damages remedy, Congress or the courts?" *Id.* at 1857. As the Supreme Court has explained, the correct answer "most often will be Congress." *Id.* This case is no exception. Plaintiffs' claim should be dismissed.

D. Plaintiffs have not alleged plausible violations of the Emoluments Clauses.

Even assuming Plaintiffs have standing and a cause of action to bring their claims under the Emoluments Clauses, and that the President is not absolutely immune from suit, dismissal is still warranted because the amended complaint is premised on an expansive and untenable interpretation of the Constitution. The district court accepted a sweeping interpretation of the Emoluments Clauses, holding that they bar the President from receiving "any profit, gain, or advantage, of more than *de minimis* value,

received by him, directly or indirectly, from foreign, the federal, or domestic governments" including "profits from private transactions, even those involving services given at fair market value." JA218. But the text of the Constitution, the contemporaneous understanding of the term "emolument," and historical practice contradict the district court's reading. Under the Foreign Emoluments Clause, an "emolument" is a profit arising from office or employment in service of another government, and under the Domestic Emoluments Clauses, it is a profit from service as President. The Emoluments Clauses, therefore, do not prohibit officials from engaging in private business transactions.

At the outset, it is common ground that the term "emolument" was understood to encompass both narrow and broad meanings at the time the Constitution was drafted and ratified. *Compare Barclay's A Complete and Universal English Dictionary on a New Plan* (1774) (defining "emolument" as a "profit arising from an office or employ"),[9] *with* 1 Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "emolument" to mean "profit," "gain," or "advantage"); JA191. As a result, the judicial task is to interpret the Constitution's use of this term in the specific context of the provisions at

[9] *See also* Oxford University Press, Emolument, OED Online (Dec. 2016), http://www.oed.com/view/Entry/61242 (citing examples dating back to 1480, 1650, and 1743 as defining "emoluments" as "[p]rofit or gain arising from station, office, or employment; dues; reward, remuneration, salary); Walter W. Skeat, *An Etymological Dictionary of the English Language* 189 (1888) ("profit, what is gained by labour"); Black's Law Dictionary (10th ed. 2014) ("Any advantage, profit, or gain received as a result of one's employment or one's holding of office").

issue. When a term "takes on different meanings in different contexts," courts must "interpret the relevant words not in a vacuum, but with reference to the [constitutional] context." *Torres v. Lynch*, 136 S. Ct. 1619, 1625-26 (2016). Resolution of the pertinent question, accordingly, requires more than simply marshaling the contemporaneous dictionaries. The Court must carefully explore how the Constitution uses the term and the supporting evidence regarding the understanding of the Clauses' scope. As explained below, that review substantiates the President's definition and renders the district court's expansive interpretation of "Emolument" unsustainable.

1. The Constitution's text and the contemporary understanding of "Emolument" show that it means payment arising from an office or employ for services that a covered official rendered.

This Court's "inquiry begins with the text of the Constitution." *Altman v. City of High Point*, 330 F.3d 194, 200 (4th Cir. 2003). The Constitution refers to "emoluments" three times. Each time, the term is tied to compensation in exchange for the performance of labor by a covered official. None of these constitutional provisions suggests that the term covers *any* financial interest resulting from a market transaction, unrelated to the provision of services by the official, to which a domestic or foreign government happens to be a counterparty. In fact, the relevant context forecloses such a broad reading.

The Foreign Emoluments Clause forbids those covered by it from "accept[ing] … any present, Emolument, Office, or title, of any kind whatsoever, from any King, Prince, or foreign state" unless Congress consents. U.S. Const. Art. I, § 9, cl. 8. Each

of these categories describes things conferred or bestowed upon an officeholder personally. More importantly, nothing in the text suggests that the categories extend to private transactions unrelated to an official's personal services or labor. In fact, inclusion of the term "present" would be redundant if "Emolument" already prohibits any "gain" or "advantage." This is a primary flaw in the district court's approach, as courts must "give effect, if possible, to every clause and word" in the relevant text. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also Marbury v. Madison*, 1 Cranch 137, 174 (1803) (rejecting an interpretation of the Constitution that would render "[t[he subsequent part of the section [as] mere surplusage," because "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it"); *NLRB. v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 633 (4th Cir. 2013) (similar). Only the President's definition preserves independent meaning for the term "present."

The district court focused on the modifiers in the Foreign Emoluments Clause, which prohibit the receipt of "any" Emolument "of any kind" whatsoever. JA190. But these modifiers do not define the term itself; they just clarify that all instances of each category are included, without exception. *Cf. Small v. United States*, 544 U.S. 385, 388 (2005) (the phrase "any sum," while a "catchall" phrase, does not "define what it catches"). Emoluments historically can be provided in a variety of forms: salary, commissions, even forage for horses. *See, e.g., McLean v. United States*, 226 U.S. 374, 382 (1912). But that does not mean that private transactions unrelated to compensation in

exchange for the performance of official duties or personal services nonetheless qualify as an "Emolument."

The text of the Domestic Emoluments Clause also supports the President's narrower definition. It provides that the President "shall … receive for his Services, a Compensation" but not "any other Emolument from the United States, or any of them." U.S. Const. Art. II, § 1, cl. 7. This usage plainly treats "Emolument" as synonymous with compensation for the President's official services. And it in no way supports the district court's broad interpretation, which would cover any "gain" or "advantage." The district court relied upon the modifier "any other" as embracing the broader definition, JA190, but, again, this modifier simply distinguishes the President's approved salary from forbidden additional compensation to be paid by the States or the federal government for his services as President. As Alexander Hamilton explained: "Neither the Union, nor any of its members, will be at liberty to give, nor will [the President] be at liberty to receive, any other emolument than that which may have been determined by the first act"—meaning the statute providing for the President's compensation when he takes office. The Federalist No. 73 at 493-94 (Jacob E. Cooke ed., 1961).

The final appearance of "emolument" in the Constitution likewise reinforces the narrower definition. The Ineligibility Clause prohibits any sitting "Senator or Representative" from being 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." U.S. Const. Art. I, § 6, cl. 2. Here too, "Emolument" is plainly an aspect of official employment. Once more, the district court's focus on the modifier "whereof," JA191, misses the point. At most, the Ineligibility Clause is concerned with the compensation that Members of Congress might derive from particular civil offices. The Foreign Emoluments Clause, by contrast, has a broader prohibition that prevents an officeholder from receiving any income on account of his office or any employment or equivalent relationship with a foreign government. But the text of neither provision warrants expanding "Emolument" to cover transactions unrelated to an employment-type relationship.

The evidence of the original public understanding supports the President's reading. Empirical research covering tens of thousands of texts from the second half of the eighteenth century, including the historical papers of many of the Constitution's Framers,[10] found that in instances where the recipient of the emolument is an official, "the narrower sense of 'emolument' is the one overwhelmingly used." Phillips & White, *supra*, at 224. This evidence of usage is more compelling than just tallying dictionaries.

[10] The analysis included the writings of George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, Alexander Hamilton, and James Madison from the National Archives' Founders Online collection, as well as (1) Evans Early American Imprint Series, which consists of nearly two-thirds of all books, pamphlets, and broadsides known to have been printed in this country from 1640 to 1821; and (2) Hein Online, which consists of legal materials. James Phillips & Sara White, *The Meaning of Emolument(s) in 18th-Century American English: A Corpus Linguistic Analysis of American English from 1760-1799*, 59 So. Texas L. Rev. 181, 203 (2017).

It confirms that the President's interpretation—not the district court's—would have, in context, "been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

Nor is the President's reading "secret or technical." *Id.* It closely tracks the etymology of "emolument," which derives from the profit associated with one's labor. *See, e.g., The Barnhart Dictionary of Etymology* 326 (1988); *The Oxford Dictionary of English Etymology* 310 (1966). And the President's narrower definition appears in numerous dictionaries from the founding era, as even the sources relied upon by the district court establish.[11]

In sum, the President's definition of "emolument" is supported by the actual text of the of the relevant constitutional provisions, was the one used far more frequently in the relevant context, and is rooted in the historical understanding of the term. The evidence regarding the original understanding of the term thus weighs heavily in the President's favor.

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[11] The Court placed heavy emphasis on a law professor's article, which asserted that "every English dictionary definition of 'emolument' from 1604 to 1806 relies on one or more of the elements" of the broader definition. JA196 (citing John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries*, 1523-1806, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693). This overstates the findings of that paper; of the forty English-language dictionaries examined in that article, three do not include the broader definition but contain only variations of "profit gotten by labor and cost,"—a close variation of the President's proposed definition. *See id.* (dictionary definition numbers 4,7, and 11). And nine out of the forty dictionaries contain the President's proposed definition or its variation of "profit from labor." *Id.* (dictionary definition numbers 4, 5, 7, 11, 15, 21, 23, 30, and 35).

2. The President's narrower reading advances the expressed purpose of the Emoluments Clauses.

The President's reading is consistent with the Founders' understanding of the underlying purposes of the Emoluments Clauses: to limit corrupting influences on the officeholders arising from compensation for services they performed. The Foreign Emoluments Clause was drawn nearly verbatim from the Articles of Confederation. At that time, there was a "custom prevail[ing] among the European sovereigns, upon the conclusion of treaties, of bestowing presents of jewelry or other articles of pecuniary value upon the minister of the power with which they were negotiated," with "[t]he same usage [being] repeated upon the minister's taking leave at the termination of his mission." 1 *A Digest of the International Law of the United States* 757 (Francis Wharton ed., 1886) (quoting letter from John Q. Adams, Secretary of State, to Richard Rush, Minister to Great Britain (Nov. 6, 1817)). "[A]t the time of the Founding," in other words, "the new republic was conscious of the European custom of bestowing gifts and money on foreign officials" and the Framers "wanted government officials to avoid future undue influence." *CREW*, 276 F. Supp. 3d at 187. The Domestic Emoluments Clause likewise was designed to prevent any "pecuniary inducement to renounce or desert the independence intended for [the President] by the Constitution." Federalist No. 73, at 494.

The Founders were thus concerned with divided loyalties arising from dual employment or other compensation tied to personal services. There is no evidence,

however, that the Clauses were a response to concerns over ordinary commercial transactions. In fact, the debate over whether elected officials should receive compensation at all focused on ensuring that good candidates would be willing to serve without using the office itself to gain additional payment for services. *See, e.g.,* James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 43-46 (Gaillard Hunt & James Brown Scott eds., 1920); *id.* at 402 ("the Legislature would make their own wages . . . too low, so that men ever so fit could not serve unless they were at the same time rich"); 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 371-72 (2d ed. 1891); *id.* at 484 ("it is not many years ago—since the revolution—that a foreign power offered emoluments to persons holding offices under our government"); *id.* at 440 ("It is asserted that it will be very difficult to find men sufficiently qualified as legislators without the inducement of emolument. I do believe that men of genius will be deterred, unless possessed of great virtues."); *id.* at 368 ("the principal source of corruption in representatives is the hope or expectation of offices and emoluments"). But neither Plaintiffs nor the district court identified any contemporaneous discussion about the need to constrain private business pursuits by public officials, let alone the need to force them to relinquish ownership interests in private businesses. In fact, in 1810, Congress proposed a constitutional amendment that would have extended the Foreign Emoluments Clause to private citizens—an absurd proposal if the Clause prohibits private business pursuits. *See*

Proposing an Amendment to the Constitution, S.J. Res. 2, 11th Cong., 2 Stat. 613 (1810). The district court's novel interpretation thus finds no support in the evidence regarding the actual purpose of the Clauses.

3. Historical practice refutes the assertion that the Emoluments Clauses bar officeholders from engaging in private market transactions with domestic and foreign governments.

The Supreme Court has placed "significant weight upon historical practice" when interpreting the Constitution. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *Mistretta v. United States*, 488 U.S. 361, 399 (1989) (citing the "contemporaneous practice by the Founders themselves" as "significant evidence of the scope of the Constitution"). The historical practice of the early Presidents fatally undermines the district court's reading of the Clauses.

As the district court acknowledged, George Washington, Thomas Jefferson, James Madison, and James Monroe all oversaw substantial agricultural operations during their presidencies. JA212-13. Washington operated a grist mill during his presidency that exported flour and cornmeal to "England, Portugal, and the island of Jamaica." *Ten Facts about the Gristmill*, George Washington's Mount Vernon, bit.ly/2S39b5S (Fact 9). Thomas Jefferson exported tobacco to Great Britain. *See* Letter from Thomas Jefferson to William A. Burwell (Nov. 22, 1808), *in* 11 *The Works of Thomas Jefferson* 75-76 (Paul Leicester Ford ed., 1905).

Perhaps most telling, Washington transacted business in his private capacity with the federal government while he was President. He purchased, through a public sale,

federal land in what is now D.C. *See* Certificate for Lots Purchased in the District of Columbia (Sept. 18, 1793), bit.ly/2FXydgf. The sale was authorized by Washington and conducted by the Territory's commissioners—all of whom were intimately involved in the adoption of the Constitution.[12] *See* Letter from Commissioners for the District of Columbia to George Washington (Sept. 16, 1793), bit.ly/2S1OXcK.

These purchases would have been unconstitutional under the district court's reading of "Emolument." That those most familiar with the Constitution's enactment engaged in such transactions, without any documented objection to them on constitutional grounds, supports the President's reading. But notwithstanding the Supreme Court's instruction to place "significant weight" on "historical practice," *Noel Canning,* 134 S. Ct. at 2559, the district court accorded this history *no* weight. It found the evidence of the early Presidents' agricultural businesses to be generally irrelevant without proof of actual transactions with state and foreign governments, JA208-09, even though such transactions were common at the time. And it simply shrugged off Washington's undisputed participation in the purchase of land from the federal government, making no effort to reconcile this publicly disclosed sale with its

[12] One of the three D.C. Commissioners had attended the Constitutional Convention (as had Washington), and the other two had voted in the state ratification conventions. *See* Letter from Thomas Johnson, David Stuart, and Daniel Carroll as the Commissioners for the District of Columbia to George Washington (Mar. 23, 1794), bit.ly/2vGAfZX; *Debates in the Federal Convention*, *supra*, at lxxxiv (Carroll); 1 *Debates in the Several State Conventions*, *supra*, at 324 (Johnson); 3 *id.* at 654 (Stuart).

interpretation of the Domestic Emoluments Clause. JA212-23. This Court should not follow suit. "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

4. The district court's broad reading of the Emoluments Clauses would render numerous accepted practices by officeholders unconstitutional.

Finally, the district court's adoption of the broadest possible meaning of "Emolument" would lead to absurd and ahistorical results. It would, for example, render unconstitutional:

- President Obama's retention during his time in office of treasury bonds, which accrue interest and thus would constitute a benefit "from the United States" under the Domestic Emolument Clause. *See* President Obama's 2015 Financial Disclosure Report, bit.ly/2FLe91d.

- Royalties on foreign book sales received by President Obama while in office, which would violate the Foreign Emoluments Clause if purchased by an instrumentality of a foreign government, such as a public university. *See Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities,* 18 Op. O.L.C. 13, 15 (1994); Barack and Michelle Obama's 2009 Tax Return, bit.ly/2sIsKCf (reporting foreign income of approximately $1.6 million in 2009 for President Obama).

- The retention of stock holdings of companies that conduct business globally and thus presumably obtain at least some valuable benefits from foreign governments. Yet numerous officials have been confirmed despite retaining large stock holdings without any concern being raised about violation of the Foreign Emoluments Clauses. *See, e.g., Confirmation of Nelson A. Rockefeller as Vice President of the United States,* H.R. Rep. No. 93-1609, at 39-40 (1974) (noting Vice President Nelson A. Rockefeller's extensive stock holdings in Exxon, Standard Oil of California and Indiana, and Texaco); *Nomination of Penny Pritzker to be Secretary of the U.S. Department of Commerce: Hearing Before the S. Comm. On Commerce, Science, and Transportation*, S. Hrg. 113-619, 113th Cong.

(2013) (noting former Commerce Secretary Penny Pritzker's stock holdings in the Hyatt Hotel Corporation).

- Even state pensions received by a federal officeholder would constitute violations of the Domestic Emolument Clause, under the district court's theory that any "advantage" or "benefit" paid by the State is an emolument. *Contra The Honorable George J. Mitchell U.S. Senate*, B-207467, 1983 WL 27823, at *3 (Comp. Gen. Jan. 18, 1983) (holding that President Reagan's pension from California could not "be construed as being in any manner received in consequence of his possession of the Presidency").

In an attempt to sidestep the consequences of its sweeping interpretation, the district court created an exception for *de minimis* violations of the Emolument Clauses. JA209. But whatever the proper reading of "emolument," the Constitution does not exempt *modest* emoluments. Indeed, the district court recognized that the Clauses "[b]an the offerings altogether." *Id.* at 208. The President's reading, in contrast, recognizes that the term "emolument" does not include these examples because the benefit at issue was not received in exchange for personal services provided by the official to a foreign government, or to a state government in exchange for the performance of official acts. That the district court recognized the need to create atextual exceptions underscores the untenable nature of its decision.

CONCLUSION

For the reasons stated above, the claims against the President in his individual capacity should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because it contains 12,285 words, excluding the parts exempted by Rule 32(f).

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I certify that on January 24, 2019, this document was served on all parties or their counsel of record through the CM/ECF system.

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