No. 18-474

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS UNITED, INC., JILL PHANEUF, ERIC GOODE,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEE PRESIDENT DONALD J. TRUMP

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INTRODUCTION

Plaintiffs-appellants Restaurant Opportunities Centers United, Inc. (ROC United), Jill Phaneuf, and Eric Goode (collectively, the hospitality plaintiffs) ask this Court to hold that they have judicially cognizable interests allowing them to pursue claims that President Donald J. Trump is violating the Foreign and Domestic Emoluments Clauses of the Constitution because, among other things, he holds a financial interest in hotels and restaurants patronized by foreign or domestic government officials. This Court should affirm the district court's judgment dismissing their claims as non-justiciable.

As an initial matter, the hospitality plaintiffs fail to establish Article III standing by alleging that they are injured as a result of an increase in competition for foreign or domestic government business at their hotels, restaurants, and event planning services. Standing "is not 'an ingenious academic exercise in the conceivable' . . . but requires . . . a factual showing of perceptible harm." *Summers v. Earth Island Instit.*, 555 U.S. 488, 499 (2009) (alteration omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)). The hospitality plaintiffs' assertion that they will suffer competitive harm is inadequate given the lack of plausible, concrete, non-speculative allegations that they are likely to lose foreign or domestic government business to the hotels and restaurants in which the President has a financial interest. Moreover, the hospitality plaintiffs fail to adequately allege that any such competitive injury is traceable to the alleged violations of the Emoluments Clauses or redressable by an injunction in their

favor. The alleged violations are the President's receipt of anything of value from foreign or domestic governments, yet plaintiffs cannot show that government patrons are likely to choose the President's businesses over their own because of the President's *financial interests* in those businesses, rather than for any of the myriad other reasons that such independent third parties may elect to patronize the businesses that are affiliated with the President. In an effort to elide these fundamental flaws with their standing argument, the hospitality plaintiffs invoke the competitor-standing doctrine. But that doctrine is inapposite here because the alleged unlawful benefit of having a Presidential financial interest in a business patronized by government customers is not the type of conduct that can be presumed to inevitably harm competitors as a matter of economic logic, especially in the context of determining whether there is adequate injury to adjudicate a constitutional challenge to presidential action.

In any event, the hospitality plaintiffs' allegations of competitive injury fall outside the zone of interests of the Emoluments Clauses. All agree that the Emoluments Clauses are designed to prevent federal officers from being influenced and corrupted in making their official decisions. By contrast, plaintiffs' asserted interest—loss of hospitality market share to a federal officer who also happens to be a business competitor—is not even arguably the type of injury that the Clauses are intended to protect against. Avoiding commercial competition from businesses in which the President holds a financial interest is so marginally related to the interests

protected by the Emoluments Clauses that the hospitality plaintiffs are improper litigants to raise the violations alleged. And plaintiffs' contention that the zone-of-interests test does not apply at all to structural constitutional claims is contrary to law and logic, both of which foreclose conferring a right to litigate such claims on plaintiffs with so remote a relationship to the provisions invoked.

In sum, this case is not really about commercial harms, let alone the regulatory harms that implicate the Emoluments Clauses. Rather, it is an academic debate about the meaning and application of the Emoluments Clauses that the plaintiffs have asked the courts to resolve for ideological reasons. As the caption reflects, this suit was originally filed by Citizens for Responsibility and Ethics in Washington (CREW), a political advocacy organization. But the district court correctly held that CREW could not satisfy standing by asserting harm based on a diversion of resources theory, and CREW does not even appeal that holding. Although the hospitality plaintiffs who were added to the first and second amended complaints continue to press this lawsuit, they present a political debate outside the context of any concrete dispute over the rights of individuals that would be appropriate for an Article III court to resolve. Because there is not "a real need to exercise the power of judicial review in order to protect the[ir] interests," "allowing courts to oversee . . . executive action" concerning compliance with the Emoluments Clauses "would significantly alter the allocation of power" among the three branches of government. *Summers*, 555 U.S. at 493. This Court should affirm the dismissal of this manufactured lawsuit.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court over their federal constitutional claims pursuant to 28 U.S.C. § 1331. JA 30 (¶ 32). On December 21, 2017, the district court held that the plaintiffs lacked standing and dismissed for lack of jurisdiction. SA 2, 30. Plaintiffs filed a timely notice of appeal on February 16, 2018. JA 354-55. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the hospitality plaintiffs lack Article III standing to bring their claims under the Emoluments Clauses.

II. Whether the hospitality plaintiffs' alleged competitive injuries fall outside the zone of interests of the Emoluments Clauses.

STATEMENT OF THE CASE

A. The Emoluments Clauses

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

The Domestic Emoluments Clause provides that the President "shall . . . receive for his Services" a fixed compensation during his tenure and "he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7.

B. The Parties

Plaintiff CREW is "a nonprofit, nonpartisan corporation" engaged in "education, advocacy, and enforcement" to advance its stated mission of "protecting the rights of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our political system against corruption, and reducing the influence of money in politics." JA 27 (¶ 21). CREW was the sole plaintiff in the initial complaint, which was filed just three days after President Trump's inauguration. JA 8. Although CREW alone initiated this litigation, it has expressly abandoned its appeal of the district court's holding that it lacks Article III standing. Br. 4 n.2.

Plaintiff-appellant ROC United is a nonprofit member-based corporation. JA 29 (¶ 28). ROC United has nearly 25,000 restaurant-employee members, over 200 restaurant members, and about 3,000 diner members. JA 24 (¶ 11). The organization owns and operates a restaurant in New York City, with another restaurant "opening . . . soon in Washington, D.C." *Id.* ROC United's members include restaurants in Washington, D.C., and New York that ROC United alleges both serve "diplomats and other officials of foreign states, the United States, and various state and local governments traveling on government business" and also "host and/or cater government events." JA 66 (¶ 195).

Plaintiff-appellant Jill Phaneuf is a resident of Washington, D.C. who "works with a hospitality company to book events for two hotels" in Washington: the Carlyle

Hotel and the Glover Park Hotel. JA 25-26 (¶ 15). Ms. Phaneuf alleges that she "seeks to book embassy functions, political functions involving foreign governments, and functions for organizations that are connected to foreign governments, in addition to other events in the Washington, D.C. market," and that "[h]er compensation is directly tied to a percentage of the gross receipts of the events that she books for the hotels." JA 26 (¶ 15).

Plaintiff-appellant Eric Goode is a resident of New York and the owner of several hotels, restaurants, bars, and event spaces in New York. JA 26 (¶ 18). Mr. Goode's hotels include "the Maritime Hotel located in Chelsea; the Bowery Hotel and Ludlow Hotel, both in the Lower East Side; and the Jane Hotel in the Meatpacking District." *Id.* Mr. Goode's restaurants include "the Park, Waverly Inn, and Gemma, the last of which is located in the Bowery Hotel." *Id.* Mr. Goode alleges that his "hotels and restaurants have attracted multiple foreign government clients and events, and have also hosted U.S. government officials and state officials" traveling on official government business. JA 26-27 (¶ 18).

Defendant Donald J. Trump is the President of the United States. Plaintiffs allege that the President owns and controls hundreds of businesses worldwide, including some doing business as the Trump Organization. JA 33-34 (¶ 42). Plaintiffs' hospitality-based allegations of violations of the Emoluments Clauses focus primarily on the President's financial interest in the Trump-branded hotels in New York City and Washington, D.C. (including the BLT Prime restaurant located in the

Trump International Hotel in D.C.), as well as the Trump Grill restaurant located in the Trump Tower office building in New York City. JA 36-37, 67 (¶¶ 56-59, 196). But plaintiffs also allege a variety of violations of the Emoluments Clauses that are entirely unrelated to the hospitality industry. *See, e.g.*, JA 42-49 (¶¶ 90-108, 111-129).

C. Prior Proceedings

1. Plaintiff CREW filed this lawsuit on January 23, 2017 (JA 8), alleging that the President has violated and continues to violate the Foreign and Domestic Emoluments Clauses through his financial interests in his businesses. CREW amended its complaint in April 2017 to add as plaintiffs ROC United and Ms. Phaneuf and amended the complaint again in May to add Mr. Goode. JA 8. Plaintiffs seek declaratory and injunctive relief. JA 83-84.

Plaintiffs allege that, under their interpretation of the Emoluments Clauses, the President violates the Clauses whenever his businesses receive "anything of value, monetary or nonmonetary," from an instrumentality of a foreign or domestic government (JA 22-23, 31 (¶¶ 7, 37)), including foreign-government payments for the purchase of goods, food, and services at hotels and restaurants run by businesses in which the President has financial interests (JA 38-41 (¶¶ 64-87)). Plaintiffs further allege that "no proposed plan announced by [the President] or his attorneys can make [the President's] conduct constitutional or otherwise remedy the[] constitutional violations." JA 79, 81-82 (¶¶ 254, 267). In that regard, the complaint notes that then-President-elect Trump announced on January 11, 2017, that he would turn over the

leadership and management of the Trump Organization to his adult sons and a Trump Organization executive. *Donald Trump's News Conference: Full Transcript and Video*, N.Y. Times (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html (Transcript) (cited in JA 34 (¶ 43 & n.10)). At the cited news conference, the President-elect also announced that, among other measures, he had disposed of his easily liquidated assets, that his illiquid assets had been or would be conveyed to a trust, and that he pledged to donate to the U.S. Treasury all profits from foreign governments' patronage of his hotels and similar businesses in order to avoid even the appearance of a conflict of interest. *See id.*; *see also* SA 4. Despite these protections, plaintiffs allege that the President's plan is insufficient because he did not "relinquish[] *ownership* of his businesses or even establish[] a blind trust." JA 34 (¶ 43).

The hospitality plaintiffs allege injuries arising from their purported competition with the President's hotels and restaurants for business from foreign or domestic government officials. Ms. Phaneuf alleges that because she seeks to book events at hotels that compete with hotels in which the President has an interest, she will lose "commission-based income." JA 73 (¶ 225). Mr. Goode alleges that "[a]s a hotel and restaurant owner," he will be "harmed due to loss of revenue" by the President's "ongoing financial interest in businesses which receive payments from foreign states, the United States, or state or local governments." JA 75 (¶ 234). And ROC United alleges that its restaurant and restaurant-employee members have been

injured by "lost business, wages, and tips" resulting from increased competition with the President's restaurants. JA 25 (¶ 13); *see also* JA 67-72 (¶¶ 199-203, 212, 216-20). Notably, however, despite asserting that their hotels and restaurants "are frequented by foreign and domestic government officials" (JA 267 (¶ 24 (Mallios Decl.)); *see also, e.g.*, JA301-03 (¶¶ 47-48 (Goode Decl.))), and despite asserting that a *non*-plaintiff allegedly lost a foreign government client to one of the President's hotels (JA 39-40 (¶¶ 72-74)), none of the hospitality plaintiffs have identified a concrete instance where they have lost business to an establishment in which the President had a financial interest. Nor do they address whether any lost business is attributable to the President's *financial interest* in the competing establishments, as opposed to his brand affiliation or any of myriad other factors.

2. On December 21, 2017, the district court granted the President's motion to dismiss for lack of standing. Because the court held that it lacked jurisdiction over plaintiffs' claims, it did not reach the question whether plaintiffs had stated a cognizable claim under the Emoluments Clauses. SA 2 n.1.

The district court held that plaintiffs ROC United, Ms. Phaneuf, and Mr. Goode lacked standing because they had failed to establish causation and redressability. SA 12-14. The court emphasized that the hospitality plaintiffs could not adequately show that any loss of foreign or domestic government business was due to the President's financial interest in competing hotels and restaurants, as opposed to any of the other reasons why customers might prefer his establishments

to theirs. *See id.* The district court also held that CREW lacks organizational standing (SA 17-25)—a holding that CREW does not appeal (Br. 4 n.2).

The district court additionally held that "[t]he zone of interests doctrine demonstrates that the Hospitality Plaintiffs are not the right parties to bring a claim under the Emoluments Clauses." SA 15. The court found there was "simply no basis" (SA 17) to conclude that the hospitality plaintiffs' alleged competitive injury fell within the zone of interests of the Emoluments Clauses because "[n]othing in the text or history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition" (SA 15). The court also determined that the Foreign Emoluments Clause claim should be dismissed for prudential reasons because it implicates political questions and is not ripe for review. SA 25-29.

Accordingly, the district court dismissed plaintiffs' complaint for lack of jurisdiction and entered judgment. This appeal followed.

SUMMARY OF ARGUMENT

The Article III standing requirement is a fundamental aspect of the separation of powers, and it applies with special rigor where judicial review of Executive Branch action is sought. As the district court correctly held, the plaintiffs here have failed to satisfy the elements of constitutional standing. Indeed, with CREW no longer a plaintiff, the hospitality plaintiffs do not even contend that they have standing to challenge the various non-hospitality-related violations of the Emoluments Clauses alleged in the complaint.

The hospitality plaintiffs fundamentally err in contending that they have standing to challenge the alleged violations of the Emoluments Clauses that are based on the President's receipt of value from foreign or domestic governments that patronize hotels or restaurants in which he has a financial interest. Although the complaint and declarations allege that government officials will prefer to patronize the President's establishments instead of plaintiffs' businesses, that alleged injury is purely speculative. Moreover, even if such an injury exists, it is neither fairly traceable to the alleged Emoluments Clauses violations nor likely redressable by an injunction against them. There is simply no basis to speculate that the independent decisions of government customers are based on the President's *financial interest* in any competing businesses, rather than their affiliation with the Trump brand and family or ordinary factors (such as location, price, quality, etc.) that are unrelated to the asserted violations of the Emoluments Clauses.

Unable to make the concrete showing of economic harm needed to establish Article III standing, plaintiffs invoke the competitor-standing doctrine, but that doctrine is inapplicable here. Courts have recognized competitor standing where the government's unlawful action has afforded the type of benefit to a competitor that economic logic presumes will inevitably injure the plaintiff. This, however, is unlike the typical competitor-standing case because there is no basis in economic logic to presume that the President's mere financial interest in a business inevitably confers a competitive advantage over these particular plaintiffs' hotels and restaurants, for the

reasons already discussed. Moreover, this is hardly an ordinary commercial dispute and given the heightened separation of powers principles at stake in a constitutional challenge to the actions of the President, this Court should be particularly reluctant to adopt the lax presumption of injury that plaintiffs advocate.

In any event, the district court also correctly held that plaintiffs' claims fall outside the zone of interests of the Emoluments Clauses. As plaintiffs' own brief confirms, the Emoluments Clauses were intended to guard against the corruption of federal officers' decisionmaking. There is no plausible argument that they were intended to protect the unrelated economic interests of market participants that seek to avoid competition from businesses in which federal officers happen to have a financial interest. Plaintiffs urge this Court to hold that the zone-of-interests test does not apply to structural constitutional claims, but they identify no valid basis for that ad hoc distinction. The Supreme Court and this Court have made clear that the test applies to constitutional claims, and the underlying rationale of denying a cause of action to remote plaintiffs equally applies to the Emoluments Clauses and other structural constitutional protections.

STANDARD OF REVIEW

On appeal from a district court's dismissal for lack of standing, this Court reviews the court's "factual findings for clear error and its legal conclusions *de novo*." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015). In assessing the plaintiffs' assertion of standing, this Court "accept[s] as true

all material allegations of the complaint[ ] and . . . construe[s] the complaint in favor of the complaining party." *Id.* (second and third alterations in original) (quoting *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008)). "In deciding a Rule 12(b)(1) motion, the court may also rely on evidence outside the complaint." *Id.* The plaintiffs bear the burden of "alleg[ing] facts that affirmatively and plausibly suggest that [they have] standing to sue." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). "While the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." *Baur v. Veneman*, 352 F.3d 625, 636-37 (2d Cir. 2003); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO BRING THEIR CLAIMS UNDER THE EMOLUMENTS CLAUSES

A. Standing Is Fundamental To Article III's Case-Or-Controversy Requirement And Cannot Be Satisfied By Speculative Allegations

"Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting U.S. Const. art. III, § 2, cl. 1). The Supreme Court has stressed that "[t]his fundamental limitation preserves the 'tripartite structure' of our Federal Government, prevents the Federal Judiciary from 'intrud[ing] upon the powers given

to the other branches,' and 'confines the federal courts to a properly judicial role.'" *Id.* (second alteration in original) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

The standing doctrine is "rooted in the traditional understanding of a case or controversy." *Spokeo*, 136 S. Ct. at 1547. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). As the Supreme Court has emphasized, the "standing doctrine accomplishes this by requiring plaintiffs to 'alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf.'" *Town of Chester*, 137 S. Ct. at 1650 (alterations in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

Plaintiffs must establish three elements that are the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)—that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. The Supreme Court has admonished that "[a]bsent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon*, 426 U.S. at 38.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1).

The Supreme Court has thus rejected standing theories that rest on a "speculative chain of possibilities." *Clapper*, 568 U.S. at 410-14 (citing cases, and denying standing premised on a series of assumptions about whether the government would engage in a particular form of surveillance against particular communications); *see also, e.g.*, *DaimlerChrysler*, 547 U.S. at 344 (state taxpayers' asserted injury from tax credits was "conjectural or hypothetical" because it "require[d] speculating that elected officials will increase a taxpayer plaintiff's tax bill to make up a deficit"). This Court has held likewise. *See, e.g.*, *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 94 n.3 (2d Cir. 2015) (allegations of lower profits based on future sales "far too speculative to serve as the basis for an Article III injury-in-fact" because the sales were not imminent); *Port Wash. Teachers' Ass'n v. Board of Educ. of Port Wash. Union Free Sch. Dist.*, 478 F.3d 494, 499-500 (2d Cir. 2007) ("conclusory statements" that plaintiffs would risk civil liability or professional discipline were insufficient because "the theoretical possibility that either *might* occur in the future does not amount to injury in fact").

Similarly, plaintiffs cannot establish traceability and redressability where the alleged injury-in-fact depends on the decisions of independent third parties whose

actions the court can neither predict nor control. As the Supreme Court has explained, for an "injury that results from the independent action of some third party not before the court," it is "purely speculative" whether the injury "fairly can be traced to the challenged action of the defendant." *Simon*, 426 U.S. at 41-43; *see also id.* at 43 ("It is equally speculative whether the desired exercise of the court's remedial powers" in such a suit would redress the plaintiffs' injuries.).

In *Simon*, for example, low-income plaintiffs lacked standing to challenge the government's grant of favorable tax treatment to nonprofit hospitals that offered only emergency-room services to indigent patients. Although the Court assumed "that some members [of the plaintiff organizations] have been denied [hospital] service," it stressed that "injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant." *Simon*, 426 U.S. at 40-41. The Court explained that it did not follow from plaintiffs' allegations that the denial of hospital access "in fact result[ed]" from the government's challenged tax ruling or that a court-ordered return to the prior tax policy would result in plaintiffs "receiving the hospital services they desire," because it was "speculative" whether the hospitals' decisions were made with "regard to the tax implications." *Id.* at 42-43. Likewise, in *Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993), this Court held that Medicare beneficiaries had no standing to challenge a statutory cap on doctors' charges because the asserted injury—an increase in charges for poorer beneficiaries who previously benefited from doctors charging wealthier beneficiaries at levels

higher than the cap—"would be the product of independent choices by physicians from among a range of economic options." *Id.* at 919-20; *see also Town of Babylon v. Federal Hous. Fin. Agency*, 699 F.3d 221, 229-30 (2d Cir. 2012) (plaintiffs lacked standing to challenge bank regulators' policy bulletin that allegedly encouraged change in bank lending practices because even if the bulletin were vacated, "national banks would remain entirely free to treat [plaintiffs] on an unfavorable basis").

As noted, the standing requirement for plaintiffs to have a non-speculative injury that is traceable and redressable serves fundamental separation-of-powers principles. The Supreme Court has long emphasized that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). It thus protects the judicial process from being converted into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 473 (quotation marks omitted).

Finally, because any relaxation of the standing inquiry "is directly related to the expansion of judicial power," the "standing inquiry has been especially rigorous when

reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper*, 568 U.S. at 408-09 (quotation marks omitted); *see also Spokeo*, 136 S. Ct. at 1552 (explaining that the injury-in-fact requirement "applies with special force" where "a plaintiff files suit to require an executive agency to 'follow the law'"). Thus, courts should not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury" from the alleged violation. *Valley Forge*, 454 U.S. at 474; *see also Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (emphasizing the separation-of-powers principles underlying standing requirements in the course of dismissing a dispute between members of different branches of government).

B. The Hospitality Plaintiffs Lack Article III Standing

The hospitality plaintiffs lack Article III standing for several reasons. First, they do not even attempt to show (and cannot succeed in showing) that they have standing to assert any of the alleged violations of the Emoluments Clauses that are not related to the President's hospitality businesses in New York or Washington, D.C. Second, the hospitality plaintiffs do not (and cannot) show that they are likely to lose hospitality business from foreign or domestic governments as a result of the President's alleged financial interests in New York and D.C. hotels and restaurants. Third, the hospitality plaintiffs cannot avoid the consequence of their failure to adequately allege lost business by invoking the competitor-standing doctrine, which is

inapposite here because the alleged unlawful benefit of a Presidential financial interest in a business with foreign or domestic government customers is not of the type that economic logic dictates will inevitably impose competitive injury on the plaintiffs.

1. Non-hospitality-related violations

Unlike CREW, the hospitality plaintiffs' alleged injuries are tied to competition with the President's New York and D.C. hotel and restaurant businesses, as their declarations emphasize. *See, e.g.*, JA 269 (Phaneuf Decl.) (describing "efforts to book government events at two Kimpton Hotels in Washington, D.C."); JA 294 (Goode Decl.) (describing "my hotels and restaurants in New York City that I believe compete with Defendant's hotels and restaurants"). So too for the alleged injuries of ROC United's members. *See, e.g.*, JA 256 (¶ 3 (Colicchio Decl.)) ("My restaurants and other businesses in New York City compete with restaurants and businesses located in Trump International Hotel & Tower New York, Trump Tower, and Trump SoHo New York."); JA 263 (¶ 2 (Mallios Decl.)) (asserting competition with "Defendant's restaurants in New York City"); JA 285 (Jayaraman Decl.) (describing "restaurants in Washington, D.C. and New York City that employ ROC [United] members, and that are similar to restaurants that Defendant owns or that are otherwise located in Trump-branded properties").[1]

[1] Although ROC United alleges that it owns the restaurant COLORS in Detroit (JA 29 (¶ 28)), it makes no specific allegation regarding harm to its Detroit business.

The bulk of the alleged Emoluments Clauses violations described in the second amended complaint, however, are in no way tied to competition with the hospitality plaintiffs' restaurants or hotels. Those allegations include the purchase of real estate in Trump World Tower and related accusations (JA 42-44 (¶¶ 90-108)); the grant of Chinese trademarks (JA 45-46 (¶¶ 111-18)); payments from distribution of "The Apprentice" and spin-off television programs (JA 47 (¶¶ 119-21)); real estate projects and associated agreements in the United Arab Emirates and Indonesia (JA 47-49 (¶¶ 122-27)); and the Trump Old Post Office LLC's lease with the General Services Administration, and any tax credit, for the Old Post Office Building in Washington, D.C. (JA 50-52 (¶¶ 130-48)). Likewise, to the extent plaintiffs allege any violations of the Emoluments Clauses arising from any hospitality transactions in locations other than New York and D.C., they have not alleged that they compete in such locations and will suffer injuries there. To the contrary, plaintiffs' expert declarations rely on the close geographic proximity of plaintiffs' properties and the President's businesses in New York and D.C. when attempting to establish competitive injury. *See* JA 278-80 (Roginsky Decl.) (relying on "locational proximity" of the New York hotels); JA 306 (Muller Decl.) (describing assignment as evaluating any competition "between the plaintiffs' and the defendant's restaurants, cafes, and event and meeting spaces serving food and beverages in New York City and Washington, D.C.").

Accordingly, the hospitality plaintiffs have failed to allege any injury whatsoever from any violations of the Emoluments Clauses unrelated to the President's financial

interests in hotels and restaurants in New York City and Washington, D.C. That alone is sufficient to establish their lack of standing to challenge the majority of the violations alleged in the complaint. *See District of Columbia v. Trump*, 291 F. Supp. 3d 725, 742 (D. Md. 2018) (holding that Maryland and the District of Columbia lacked standing to challenge alleged violations of the Emoluments Clauses occurring outside their jurisdictions, such as at the Trump Organization's Mar-a-Lago facility in Florida). Notably, the hospitality plaintiffs never address the overbreadth of their complaint in light of CREW's decision not to appeal the dismissal of its claims.

2. Lost business from foreign or domestic governments at hotels and restaurants in New York City and Washington, D.C.

Even limited to the alleged violations of the Emoluments Clauses concerning New York and D.C. hospitality establishments in which President Trump has a financial interest, the hospitality plaintiffs fail to satisfy Article III's standing requirements. It is entirely speculative (a) whether the hospitality plaintiffs are likely to be injured by losing business to those establishments for foreign or domestic government customers, (b) whether any lost business is traceable or redressable given that such government customers' decisions could be based on myriad factors other than the President's financial interest in the establishments, and (c) whether the President's interest in the establishments may also have countervailing effects on the hospitality plaintiffs' businesses.

a. To begin, the hospitality plaintiffs have not satisfied their burden of demonstrating injury in fact. They have not alleged a concrete, imminent, and non-speculative loss of foreign or domestic government business to President Trump's hotels and restaurants. *See, e.g.*, *Clapper*, 568 U.S. at 410-14; *Allco Fin. Ltd.*, 805 F.3d at 94 n.3.

For example, Ms. Phaneuf alleges that she is "actively seeking to book and curate numerous events at the Carlyle Hotel and Glover Park Hotel for foreign and domestic governmental officials and entities," and notes that she has "reached out to" or "met with" representatives of three foreign governments, one of whom expressed "interest[] in renting the Cocktail Garden of the Glover Park Hotel for an event." JA 273 (¶¶ 21-24). She also believes that these event spaces compete with the Trump International Hotel. JA 271-72 (¶¶ 9-10, 12). Even taken together, these assertions amount to no more than the speculation that a foreign or domestic government *might* consider booking an event with Ms. Phaneuf and that this hypothetical client *might* instead book with the Trump International Hotel. As discussed, such speculation is wholly inadequate to satisfy the injury-in-fact requirement of Article III standing.

Similarly, Mr. Goode asserts that his hotels and restaurants compete with some of the President's businesses in New York (JA 294 (¶ 2)), and he states that his properties "are regularly frequented by foreign and domestic government officials." JA 301 (¶ 47); *see also* JA301-03 (¶¶ 47-49) (providing examples of such patrons). But Mr. Goode does not allege any particularized instances of government customers who

are now likely to choose to patronize the President's hotels and restaurants instead of his own. To the contrary, Mr. Goode's declaration indicates that he has received business from Trump hotels. JA 300 (¶ 36) ("On at least 55 occasions, concierges at various Trump hotels have booked reservations for Trump hotel guests at the Waverly Inn.").

Although some of ROC United's members assert that they view certain restaurants located in Trump-branded properties as competitors, they too fail to allege a concrete and non-speculative likelihood of lost business from foreign or domestic government customers. *See* Br. 17. The closest they come is a declaration from one member asserting a decline in tax-exempt sales at one of his restaurants over a one-month period from November to December 2016. JA 267 (¶ 28 (Mallios Decl.)). Even assuming *arguendo* a decline in tax-exempt sales following the election, that of course falls far short of demonstrating government customers lost to the President's restaurants—rather than, for example, lost business to other restaurants, fewer government travelers following the election, or tightened dining budgets of government customers.[2]

[2] Although the complaint also contains conclusory allegations that ROC United's own restaurant COLORS competes with the President's restaurants (JA 71 (¶ 214)), plaintiffs made no effort to support this allegation and their brief on appeal does not even mention COLORS.

Similarly, although the hospitality plaintiffs' experts opine that plaintiffs' hotels and restaurants compete with the President's businesses for government clientele, the experts stop short of predicting that the hospitality plaintiffs will lose government customers to the President's businesses. Ms. Roginsky concludes that "government travelers . . . rent rooms and suites at the Trump SoHo, the Trump International New York, [and plaintiffs' properties] the Bowery, the Maritime, and the Beekman." JA 284 (¶ 50). Ms. Roginsky does not opine, however, that any government travelers will elect to stay at the President's hotels instead of the hospitality plaintiffs' properties, and she acknowledges that "government travelers choose their hotels based on a variety of factors such as price, location, class, and availability." *Id.* Similarly, while Dr. Muller states that the hospitality plaintiffs' restaurants "compete[] for corporate, government, and transient banquet business" with the Trump SoHo (*see, e.g.*, JA 318 (¶ 70)), he does not separate out competition for government business from corporate or other business, nor does he support this conclusion other than to note the number of government offices within a two-mile radius of the allegedly competing ventures (*see* JA 319 (¶ 76); *see also* JA 312, 315-16, 322 (¶¶ 36, 57, 94)).[3]

[3] In addition, as the government informed the district court in November 2017, the owner of the Trump SoHo announced a plan to buy out the remainder of its management and license agreement with the Trump Organization by the end of 2017, which further undermines the hospitality plaintiffs' reliance on any alleged injury from competition with the Trump SoHo or with the restaurants located in that hotel. Dkt. No. 101 (Nov. 24, 2017).

The hospitality plaintiffs' failure to allege a non-speculative loss in foreign or domestic government business is particularly stark in contrast to their specific allegation that at least one *non-plaintiff* has lost identifiable business to the President's establishments. The plaintiffs allege that "[t]he Embassy of Kuwait held its National Day celebration at Trump International Hotel on February 22, 2017." JA 39 (¶ 72). Plaintiffs further allege that "[p]rior to the election, a 'save the date' reservation had been made with the Four Seasons hotel, where the event had been held previously." *Id.* (¶ 74). But the Four Seasons hotel is *not* a plaintiff in this case. Thus, as with plaintiffs' emphasis on the alleged efforts of the Trump Organization to build business among government customers (Br. 11-12), it does not suffice for plaintiffs to show that businesses in which the President has an interest are profiting or that others have lost business to the President's establishments: instead, they must show an injury that is particularized to them. *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008) ("'[I]njury-in-fact' requirement means that a plaintiff must have personally suffered an injury."). Yet, even though the second amended complaint was filed in May 2017 (JA 10), and plaintiffs' declarations were filed in August 2017 (JA 12-13)—months after the President's inauguration—plaintiffs have not alleged any concrete examples where *plaintiffs themselves* have lost the business of a government customer to an establishment in which the President has a financial interest.

b. Even if the plaintiffs had adequately alleged an injury in fact from loss of foreign or domestic government business to restaurants and hotels affiliated with the President, any such injury is not fairly traceable to the alleged violations of the Emoluments Clauses or likely redressable by an injunction against them. The satisfaction of those elements of Article III standing is too speculative because plaintiffs' alleged loss of business depends on the independent choices of third-party government customers who may patronize the President's restaurants and hotels for any number of reasons unrelated to his financial interests in those establishments. *See, e.g.*, *Simon*, 426 U.S. at 41-43; *Garelick*, 987 F.2d at 919-20.

For starters, as the district court correctly recognized, even setting aside the President's "public profile, there are a number of reasons why patrons may choose to visit [the President's] hotels and restaurants[,] including service, quality, location, price and other factors related to individual preference." SA 13; *see also* JA 284 (¶ 50 (Roginsky Decl.)). Moreover, even for those government customers who may be motivated specifically by the President's affiliation with the hotels and restaurants (*see* Br. 38-39), they are not necessarily motivated by his *financial interest* in the establishments. They may focus instead, for example, on the businesses' relationship with the President's brand or his family's financial interests, such that they would continue to patronize the businesses even absent the President's own financial interest. And this seems particularly likely given the fact that the President has *already* pledged to donate all profits from foreign governments' patronage of his hotels and

restaurants to the U.S. Treasury. *See* Transcript, *supra* p. 8, cited at JA 34 (¶ 43 (Second Am. Compl.)); SA 4 (district court opinion).

Indeed, plaintiffs themselves concede (Br. 43) that even if they "received all the relief they seek, some officials could continue to favor the President's hotels to show brand loyalty to him, or to enrich his adult children, or for legitimate competitive reasons." *See also* SA 13 (observing that the President "had amassed wealth and fame and was competing against the Hospitality Plaintiffs in the restaurant and hotel business" before he took office). And plaintiffs further underscore this by relying on alleged lost business to the Jean-Georges restaurant in the Trump International Hotel in New York, which is unrelated to the alleged violations of the Emoluments Clauses given that plaintiffs do not allege that the President even has a financial interest in the restaurant itself (as opposed to the hotel). *Compare* Br. 3, 18, *and* JA 67 (¶ 196), *with* JA 35-41 (¶¶ 46-89).

In short, as the district court recognized, the Emoluments Clauses "do not prohibit [the President's] businesses from competing directly with the Hospitality Plaintiffs." SA 14. Thus, even if the court were to order the President "not to personally accept any income from government business," it would "have no power to lessen the competition inherent in any patron's choice of hotel or restaurant." *Id.*; *see Allco Fin. Ltd.*, 805 F.3d at 98 ("merely voiding its competitors' contracts would not redress [plaintiff's] injury"—plaintiff "must show, at a minimum, that the requested relief provides a path for [plaintiff] to eventually obtain" a contract).

c. Although the hospitality plaintiffs acknowledge that "some government officials" would patronize the President's establishments regardless of his financial interests, they insist that at least some others would not and thus "the President's acceptance of emoluments has injured them by placing a distinct, illegal thumb on the competitive scales." Br. 43. As noted, this position is inherently speculative because there is no basis to assume that *any* of the government customers specifically motivated by the President's financial interests would otherwise have patronized plaintiffs' particular businesses rather than the countless other hotels and restaurants in New York and Washington, D.C.

Moreover, the speculative nature of plaintiffs' argument is exacerbated by their failure to account for potentially countervailing effects of the President's financial interests in any competing businesses. Just as some government officials may be inclined for various reasons to patronize a President's businesses, other officials may be inclined to avoid such businesses for various reasons, such as to make a political statement or to avoid any appearance of impropriety. To be sure, "the fact that an injury may be outweighed by other benefits . . . does not negate standing." *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (victims of wrongful tax advice were injured in light of the excessive fees paid as well as the costs incurred to rectify their improper tax strategies, regardless of whether they also saved taxes because the IRS had not yet penalized them for implementing those strategies). But a plaintiff may have "suffered no real injury" in the first place "where the costs and benefits are

of the same type," "arise from the same transaction," and are "offsetting." *Texas v. United States*, 787 F.3d 733, 750 (5th Cir. 2015) (discussing *Henderson v. Stalder*, 287 F.3d 374, 379-81 (5th Cir. 2002)). Here, the hospitality plaintiffs do not even attempt to speculate as to, let alone adequately allege, the *net effect* on their particular businesses of the President's financial interests in the relevant establishments. This further confirms that they lack Article III standing.

3. Competitor-standing doctrine

The hospitality plaintiffs try to evade their inability to make a non-speculative showing of lost business by invoking the competitor-standing doctrine. Br. 27-31. But contrary to their suggestion, that doctrine does not permit a plaintiff to end run the requirements of Article III standing *whenever* a competitor has received an allegedly unlawful benefit. Rather, the doctrine merely *presumes in some circumstances* that conferring an unlawful benefit on a competitor will inevitably injure the plaintiff as a matter of economic logic. And for essentially the same reasons already discussed, the alleged violations of the Emoluments Clauses do not warrant that presumption.

a. The competitor-standing doctrine initially arose in the context of cases alleging that the federal government had erroneously allowed banks to begin competing in entirely new fields of business. *See In re U.S. Catholic Conference* (*USCC*), 885 F.2d 1020, 1029 (2d Cir. 1989). Although the doctrine has expanded beyond that context, the D.C. Circuit has emphasized that "the basic requirement common to all [such] cases" is that the allegedly unlawful competitive benefit must "almost certainly

cause an injury in fact." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); *see also El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) ("The nub of the 'competit[or] standing' doctrine is that when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause [a plaintiff] to lose business, there is no need to wait for injury from specific transactions to claim standing."); *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008) ("the doctrine of 'competitor standing[]' . . . relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact").

Plaintiffs cite various cases (Br. 28) where this presumption of injury was held to be justified by the nature of the allegedly unlawful benefit conferred on the competitor. *See, e.g.*, *Adams v. Watson*, 10 F.3d 915, 922-24 (1st Cir. 1993) (holding that "the economic 'facts' alleged" were sufficient to establish competitive injury because they relied on "core economic postulates" to establish "a sufficient likelihood that the challenged [milk] pricing order will result in reduced out-of-state milk sales to Massachusetts dealers at lower prices"); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825-26 (9th Cir. 2011) (explaining that in a false advertising suit, a plaintiff "can prove his injury using actual market experience and *probable* market behavior," and finding competitive injury where the evidence suggested that the defendants' misleading endorsement was "an important factor in consumers' choice of traffic schools," and that the parties competed for the same referral revenue, with "[s]ales gained by one. . . likely to come at the other's expense" (quotation marks omitted)).

But plaintiffs overread such cases (Br. 29-30) to apply the presumption *whenever* "a party acts illegally and thereby distorts competition" or "the defendant's unlawful conduct confers a benefit on a plaintiff's competitor."

Indeed, the Supreme Court has squarely rejected "a boundless theory of standing" in which "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). Rather, competitive injury must be "based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor." *Id.* Accordingly, courts routinely reject invocations of the competitor-standing doctrine where the allegedly unlawful benefit does not presumptively dictate competitive injury as a matter of economic logic. *See, e.g.*, *El Paso Nat. Gas*, 50 F.3d at 28 (allowing a competitor to be regulated by a state agency rather than the federal agency that regulated the plaintiff was not an "injury in fact" for purposes of "'competitor standing' cases" absent evidence of "a difference in regulatory burdens"); *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (alleged reputational benefit to a competitor from enhanced regulatory burdens was "simply too attenuated and speculative"); *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (renewal of a potential competitor's license in a different market was "too remote to confer standing" based on a "'chain of events' injury" that renewal would allow the licensee to seek to relocate the license and begin competing).

b. The hospitality plaintiffs can identify no economic principle that supports their speculative assertion that the Emoluments Clauses violations alleged here—which relate to the President's *financial interests* in hotels and restaurants—confer an inevitable competitive benefit on the President's businesses in the hospitality market for foreign and domestic government patrons. This is not a case where economic logic dictates the inference that a gain in business for one direct competitor necessarily results in a loss of business for one of the other competitors. *Cf. TrafficSchool.com, Inc.*, 653 F.3d at 825-26. Nor is this a case about a commodities market where a benefit, such as a subsidy, will inevitably result in more sales by the beneficiary (who can sell at a lower price) and fewer sales by the competitor. *Cf. Adams*, 10 F.3d at 922-24. Instead, the hospitality plaintiffs allege competition in the New York and D.C. hotel and restaurant markets, where the establishments affiliated with the President are just few of many competing businesses, even accounting for similarities in location, pricing, etc.

The mere fact of some competition between a plaintiff and a defendant, which is at most what the hospitality plaintiffs have alleged here, is insufficient to establish injury. *Cf. Already*, 568 U.S. at 99; *El Paso Nat. Gas*, 50 F.3d at 27. And apart from pure speculation about the possible motivations of foreign and domestic government officials, plaintiffs have offered no reason to presume that they have lost or will lose business because the President has a *financial interest* in hotels and restaurants. As plaintiffs' own expert recognized, government patrons "choose their hotels based on

a variety of factors such as price, location, class, and availability," JA 284 (¶ 50 (Roginsky Decl.)), including potentially the affiliation with the President's brand regardless of his own financial stake. Moreover, the hospitality plaintiffs have taken no account of the fact that they may *benefit* from government officials who decide not to patronize the President's hotels and restaurants because of his financial interests in those establishments. *Cf. State Nat'l Bank*, 795 F.3d at 55; *El Paso Nat. Gas*, 50 F.3d at 28. This failure underscores the speculative nature of their alleged competitive injury.

The relaxed presumption of competitive injury that the hospitality plaintiffs urge the Court to adopt is particularly ill suited here because this case is far from an ordinary commercial dispute. Plaintiffs have brought an ideologically driven constitutional challenge against the President of the United States. The Supreme Court has "insisted on strict compliance" with the injury-in-fact standing requirement in cases like this posing acute separation-of-powers concerns. *See Raines*, 521 U.S. at 819. To be sure, this Court has applied the competitor standing analysis to constitutional disputes between political competitors in the midst of an election campaign. *E.g.*, *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). But it also has emphasized that "the requirements of Article III [must] be applied with equal rigor to cases concerning participation in the political process." *USCC*, 885 F.2d at 1030 ("[S]trongly held beliefs are not a substitute for injury in fact."). And here, applying the lax approach to competitor standing urged by plaintiffs would effectively give them "a special license to roam the country in search of governmental wrongdoing"

and convert federal courts into "ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487.

II. THE PLAINTIFFS' ASSERTED INJURIES DO NOT FALL WITHIN THE ZONE OF INTERESTS OF THE EMOLUMENTS CLAUSES

A. The Zone-Of-Interests Requirement Bars Plaintiffs From Relying Upon Injuries That Are Too Attenuated From The Purposes Of The Legal Provision Upon Which Their Claim Is Based

"Beyond the constitutional requirements" of Article III standing, a plaintiff's complaint must also fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*, 454 U.S. at 474-75; *In re Appointment of Indep. Counsel*, 766 F.2d 70, 76 (2d Cir. 1985) (explaining that the zone-of-interests "test is another hurdle for plaintiffs *after* they have satisfied the case-or-controversy requirements"). This test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit" in the legal provision invoked that "it cannot reasonably be assumed" that the provision was "intended to permit the [plaintiff's] suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (cautioning that plaintiff's injury need only be "'arguably'" within the applicable provision's zone of interests).

By providing that "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests,'" *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990), the test "serve[s] to limit the

role of the courts in resolving public disputes" by asking "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief," *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And while the test "is not meant to be especially demanding," for claims brought under the "generous review provisions" of the Administrative Procedures Act (APA), *Clarke*, 479 U.S. at 395, 399; *Patchak*, 567 U.S. at 225, the Supreme Court "ha[s] indicated that it is *more* strictly applied" where, as here, a plaintiff purports to "proceed[] under a 'constitutional . . . provision'" directly because the APA is unavailable, *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (ellipsis in original) (quoting *Clarke*, 479 U.S. at 400 n.16); *see also Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").[4]

B. The Emoluments Clauses Are Not Even Arguably Intended To Protect Against Commercial Competition From Businesses In Which Federal Officers Happen To Have A Financial Interest

It is undisputed that—as the hospitality plaintiffs themselves detail (Br. 5-8)—the Framers adopted the Emoluments Clauses to guard against the risk that

[4] In fact, plaintiffs lack an implied cause of action in equity to enforce the Emoluments Clauses against the President, which is an additional basis to affirm the dismissal of this suit. *See infra* pp. 42-43.

"officeholders' 'private interests' would improperly influence their 'exercise of public power.'" Br. 5 (quoting Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* 38 (2014)). As plaintiffs observe (Br. 5-6), the Foreign Emoluments Clause was intended to guard against the risk that the decisionmaking of an officeholder "might be unconsciously corrupted" by foreign governments, and the Domestic Emoluments Clause was intended to address the Framers' concern about "corruption from within." *See also* SA 16 (explaining that the Framers sought to protect against undue foreign influence and to ensure officeholders' independence).

Edmund J. Randolph explained at the Virginia ratification convention that the Foreign Emoluments Clause "restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state . . . . This restriction is provided to prevent corruption." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465-66 (2d ed. 1854). Likewise, Alexander Hamilton explained that, under the Domestic Emoluments Clause, "[n]either 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," thereby ensuring that the President has "no pecuniary inducement to renounce or desert the independence intended for him by the Constitution." *The Federalist No. 73*, at 493-94 (Jacob E. Cooke ed., 1961).

Yet here, there is no allegation that the President has engaged in any regulatory or other official conduct—whether taking action or refraining from action—as a result of having received any alleged emoluments related to the hospitality business, let alone that any such conduct injured the hospitality plaintiffs. Instead, plaintiffs merely object to increased competition for government customers from businesses in which the President happens to have a financial interest.

There is no support at all, however, for the proposition that the Emoluments Clauses were even arguably intended to protect against competition from a government official's businesses, let alone that such a commercial interest is at "the very *core* of those provisions," as plaintiffs assert (Br. 49). The district court was correct to observe that "[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition" from federal officers (SA 15), and plaintiffs have pointed to nothing that suggests otherwise. Indeed, they recognize (Br. 5, 48) that the Clauses were intended to prevent corruption and protect independence, and that those goals were simply the means of ensuring the fundamental integrity of the "exercise of public power" against the citizenry. Yet, they seek to have the Clauses protect against injuries wholly unconnected to such exercises of public power. Plaintiffs' more mundane objection to increased competition from businesses in which the President happens to have a financial interest is so marginally related to the Emoluments Clauses' purposes that it falls well outside the zone of interests for which judicial relief is available.

C. The Zone-Of-Interests Test Fully Applies To Claims Under The Emoluments Clauses

Plaintiffs do not and cannot dispute that the zone-of-interest test generally applies to constitutional claims. *See, e.g.*, *Valley Forge*, 454 U.S. at 475 ("[T]he Court has required that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question." (emphasis added; quotation marks omitted)); *In re Appointment of Indep. Counsel*, 766 F.2d at 74 (same). Instead, plaintiffs contend (Br. 46-48 & n.12) that there is an exception for "structural" constitutional claims, because the test either does not apply at all to such claims or (what is essentially the same thing) is satisfied for such claims whenever the plaintiff has suffered Article III injury from the alleged violation. This argument is fundamentally mistaken.

To begin, as plaintiffs concede (Br. 47 n.12), the Supreme Court has applied the zone-of-interests test to a dormant Commerce Clause claim. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) (explaining that plaintiff exchanges were "arguably within the zone of interests" of the dormant Commerce Clause in asserting right to engage in interstate commerce free of discriminatory taxes). And the courts of appeals, including this one, have done the same. *See, e.g.*, *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 474-76 (5th Cir. 2013) (holding that waste haulers' alleged injuries fell outside "the 'zone of interests' protected by the dormant Commerce Clause"); *Individuals for Responsible Gov't, Inc. v. Washoe Cty. ex rel. Bd. of Cty.*

Comm'rs, 110 F.3d 699, 703 (9th Cir. 1997) ("[T]he zone of interests test also governs claims under the Constitution in general, and under the negative Commerce Clause in particular." (quotation marks and alteration omitted)); *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 91-92 (2d Cir. 2009) (holding that plaintiffs had satisfied zone-of-interests test for dormant Commerce Clause claim). Thus, although the dormant Commerce Clause is a structural limit on state regulation of interstate commerce, *Boston Stock Exch.*, 429 U.S. at 328-29, a plaintiff cannot challenge a state law that exceeds those limits, even if it is suffering Article III injury from the law, where its own interest is sufficiently remote from the protection of interstate commerce, *Cibolo Waste*, 718 F.3d at 475-76 (plaintiffs injured by challenged law fell outside zone of interests because their own business was "purely intrastate").

Moreover, plaintiffs offer no persuasive reason for excluding structural constitutional challenges from the generally applicable zone-of-interests test, and they cite no case that so holds. They merely emphasize (Br. 47-48) that many structural provisions are designed to protect "individual liberty," and thus individuals may seek judicial relief where their liberty has been infringed *in the manner* that the structural provision at issue sought to prevent. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222 (2011) (criminal defendant convicted under federal statute that exceeded Congress's Article I authority to regulate individuals); *see also* Br. 46 (citing similar cases). By contrast, as discussed, the Emoluments Clauses are intended to protect the freedom of individuals from regulation by federal officials whose decisionmaking might be

corruptly influenced by other governments—*not* the freedom of individuals from competition for government customers with an official's private business. Whether or not the latter infringement may give rise to Article III injury, it is not even arguably within the zone of interests protected by the Emoluments Clauses.

Indeed, plaintiffs' contention that Article III standing is sufficient to enforce any structural provision of the Constitution would lead to absurd consequences. As the Supreme Court recognized in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), the zone-of-interests test stops short of "the outer boundaries of Article III" in order to preclude "plaintiffs who might technically be injured in an Article III sense" from suing where their "interests are unrelated" to the prohibitions they seek to enforce. *Id.* at 177-78; *see also id.* at 177 (noting that if any person who suffered an Article III injury could sue to enforce Title VII, "a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence").

Here, for example, if a business competitor could sue the President because of increased competition, then so could any of the competitor's employees or vendors who are financially harmed because the competitor is faring less well. Likewise, in *Bond*, the defendant's family members or any household employees could have sued to enjoin her prosecution on the ground that her incarceration would interfere with their relationships. Even more absurdly, if a publishing company had a requirements contract with the government to publish the account of the receipts and expenditure

of public money, *see* U.S. Const. art. I, § 9, cl. 7, it could raise a constitutional challenge to the government's refusal to publish the account on a timely basis. *But see National Wildlife Fed'n*, 497 U.S. at 883 (explaining that "the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the [APA]" and would fall outside the zone of interests).

To be sure, it may be more difficult for a plaintiff to demonstrate that it is or will be injured by a government official's official action that is fairly traceable to the receipt of prohibited emoluments from foreign or domestic governments. "But '[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" *Valley Forge*, 454 U.S. at 489 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)). And that is particularly apposite here, because many transactions that could violate the Emoluments Clauses would not ever involve business competitors: for example, a gift from a foreign or domestic government to a federal official.

Indeed, the Supreme Court has recognized that "[i]n a very real sense, the absence of any particular individual or class to litigate [constitutional] claims gives support to the argument that the subject matter is committed to the surveillance of

Congress, and ultimately to the political process." *United States v. Richardson*, 418 U.S. 166, 179 (1974); *see also USCC*, 885 F.2d at 1031 ("[T]he lack of a plaintiff to litigate an issue may suggest that the matter is more appropriately dealt with by Congress and the political process."). Thus, although plaintiffs criticize the district court's political-question and ripeness holdings (Br. 50-56), they cannot dispute that the court was correct in at least one fundamental respect: insofar as there is no plaintiff with Article III standing falling within the zone of interests of the Emoluments Clauses, the enforcement of those provisions is to that extent a political question committed to Congress, especially because Congress can consent to receipt of foreign emoluments. U.S. Const. art. I, § 9, cl. 8.

Finally, if anything, the zone of interests test applies "*more* strictly" because plaintiffs seek to bring a constitutional claim in the absence of a statutory cause of action under the APA or otherwise. *See Wyoming*, 502 U.S. at 469 (Scalia, J., dissenting) (quoting *Clarke*, 479 U.S. at 400 n.16). For that reason, this is not "a proper case" for courts to provide the "judge-made remedy" of an implied cause of action in equity to enjoin unconstitutional action by public officials. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1214 (D.C. Cir. 2004) (emphasizing court's "broad discretionary power to withhold equitable relief as it reasonably sees fit"). And that is all the more so because federal courts cannot issue an injunction against the President himself in an official-capacity suit, *see, e.g.*, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01

(1867); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996), and because implied equitable claims against the government traditionally are not themselves enforcement actions but rather the preemptive assertion of a defense to an anticipated enforcement action by the government, *see, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010); *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Simply put, the Emoluments Clauses claims against the President must be resolved by Congress or the public, not by the courts.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Second Circuit Rule 32.1(a)(4)(b) because it contains 10,924 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Megan Barbero
MEGAN BARBERO

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Megan Barbero
MEGAN BARBERO

ADDENDUM

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U.S. Const. art. I, § 9, cl. 8 (Foreign Emoluments Clause)

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

U.S. Const. art. II, § 1, cl. 7 (Domestic Emoluments Clause)

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

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.