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, AND 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
Case No. 17-cv-458 (The Honorable George B. Daniels)

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CORPORATE DISCLOSURE STATEMENT

Citizens for Responsibility and Ethics in Washington and Restaurant Opportunities Centers United have no parent corporations. Neither of them have stock, and hence no publicly held company owns 10% or more of their stock.

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INTRODUCTION

The scope of this appeal has narrowed considerably. President Trump does not defend two of the four grounds on which the district court dismissed the plaintiffs' claims (ripeness and political question). That leaves just two issues: Do the plaintiffs have Article III standing under the competitor-standing doctrine? And if so, does a prudential zone-of-interests test nevertheless bar this suit?

On the first question, the President no longer disputes that the plaintiffs compete with his properties. Instead, he disparages the competitor-standing doctrine itself, implying that it is a second-rate manner of satisfying Article III. To that end, he suggests that the plaintiffs should be required to produce an itemized list of specific sales that they lost as a result of his illegal conduct. But the competitor-standing doctrine is well-established and has been invoked in a wide range of contexts to demonstrate Article III standing. And not once has a competitor-standing plaintiff been required to satisfy the stringent test the President invents.

Beyond his attack on the doctrine, the President also repeatedly asserts that the plaintiffs lack standing because, in his view, it is inconceivable that foreign or domestic officials might take account of the opportunity to personally enrich him when deciding where to spend money. This argument is about as plausible as it sounds. It ignores statements from foreign diplomats, detailed allegations in the complaint, an amicus brief from former national security officials, the President's own conduct in office, and common sense. It is also squarely at odds with the theory underlying the Emoluments Clauses—namely, that there are unique risks associated with allowing foreign and domestic officials to enrich the President.

On the zone-of-interests issue, the President again tries to hold the plaintiffs to a higher standard than the law requires, claiming that there is a heightened version of the zone-of-interests test for constitutional claims. But recent Supreme Court precedent makes clear that the test poses no barrier to equitable claims alleging violations of structural provisions of the Constitution. And even if the Court were to assume that the test applies here, the plaintiffs' interests in preventing the President's unlawful profiteering and corruption of the market fall comfortably within the Emoluments Clauses' zone of interests. These interests certainly are not "so marginally related to or inconsistent with the [Clauses'] purposes" as to warrant dismissal. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

ARGUMENT

I. The plaintiffs satisfy Article III's requirements.

President Trump advances a two-pronged challenge to the plaintiffs' standing. First, he contends that this case must be dismissed because the plaintiffs have failed to identify specific customers that they lost as a result of his illegal conduct. Here, the President largely ignores the plaintiffs' theory of standing and instead refutes a different theory of his own creation. Second, the President argues that the plaintiffs lack competitor standing. In particular, he asserts that there is no reason to infer that some foreign and domestic officials will favor the President's properties based on the opportunity to financially benefit him. Here, he disregards a full section of the plaintiffs' opening brief—not to mention several amicus briefs—offering a substantial basis for that conclusion. The President's arguments for dismissing this case under Article III should therefore be rejected.

A. Because they rely on the well-established competitor-standing doctrine, the plaintiffs need not produce an itemized list of lost sales to satisfy Article III.

The President repeatedly implies that the plaintiffs have invoked a junior-varsity standing doctrine. *See, e.g.*, Pres. Br. 11, 29; *but see Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). To support that erroneous impression, the President devotes a full section of his brief to insisting that the plaintiffs have standing only if they can enumerate specific customers lost to the President's hotel and restaurant properties as an immediate consequence of his Emoluments Clause violations. Pres. Br. 21-29. This account of the required showing for Article III standing is without foundation.

Competitor-standing doctrine is hardly exotic. This Court has described it as "well-established," *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994), and the Supreme Court "routinely recognizes" standing based on competitor injury. *Clinton v. City of New York*, 524 U.S. 417, 433 (1998). The doctrine has been invoked in many cases, across many contexts, to demonstrate that plaintiffs satisfied the requirements of Article III. *See* Scholars Br. 6-18. And it rests on a simple premise: "[I]ncreased competition leads to actual economic injury." *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 738 (5th Cir. 2016). From that premise, courts have cited "economic logic to conclude that a plaintiff will likely suffer an injury-in-fact" when the defendant's unlawful conduct benefits some of the plaintiff's current competitors in a manner relevant to the plaintiff's business. *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008).

At bottom, the President's argument thus amounts to little more than a disagreement with the well-established body of competitor-standing precedent. As we have explained, the competitor-standing doctrine is founded on the premise that illegal activity can harm competitors in ways impossible to quantify with surgical exactitude. *See* Opening Br. 27-31. When that occurs, it would be unjust—and at odds with Article III—to lock the courthouse door. Judges have therefore held that a plaintiff need only "show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). As the D.C. Circuit has explained: Plaintiffs "sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate potential to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively." *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998). Put differently, courts have held that "[i]ncreased competition" resulting from a defendant's conduct is itself "a cognizable Article III injury." *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994).

This principle explains why courts have not required plaintiffs in antitrust and unfair-competition cases to provide an itemized list of specific sales that would have occurred absent the defendant's anti-competitive conduct. *See, e.g.*, *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820 (9th Cir. 2011); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (en banc). It explains why courts do not demand such showings when plaintiffs rely on competitor standing to challenge price orders, regulations, and subsidies. *See, e.g.*, *Canadian Lumber*, 517 F.3d at 1332 (rejecting the argument that a plaintiff challenging a subsidy must offer an "empirical analysis linking specific [subsidies] to specific, demonstrated economic harms," such as "lost sales"); *see also Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 488 (1998); *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993). It explains why this Court did not require proof of specific lost votes when it held that Dr. Fulani had competitor standing to challenge the tax-exempt status of the League of Women Voters after it excluded her from presidential-primary debates in 1988. *See Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989). And it explains why this Court did not require proof of lost clients or donor support when it held that a pro-choice advocacy group had standing to challenge a policy benefiting pro-life "competitive adversaries" through federal-grant restrictions. *See Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002).

Simply put, competitor standing is a commonplace, commonsense doctrine. It is frequently employed in cases where illegal acts distort a marketplace. In such cases, injury may be clear, but the exact nature of that injury may be impossible to ascertain at the level of individual market participants. *See TrafficSchool.com*, 653 F.3d at 825 (authorizing a "chain of inferences" showing how a defendant's conduct would harm the plaintiff because "proving a counterfactual is never easy").

The President thus errs in demanding a list of lost customers to establish standing. Pres. Br. 22-25. The law imposes no such requirement. The plaintiffs need only show that they "personally compete[] in the same arena" as the President's properties and that his alleged illegal conduct confers an advantage on those properties that is likely to place the plaintiffs at a disadvantage. *In re U.S. Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989). As we have shown, those requirements are satisfied here. *See* Opening Br. 31-45. Competitor-standing doctrine therefore supplies the proper framework for analyzing the plaintiffs' Article III standing—and confirms that they have brought a true "case or controversy."[1]

[1] As a fallback, the President halfheartedly hints (at 32) that the hotel and restaurant markets in New York and D.C. are too complex to support application of the competitor-standing doctrine. But that is not so. The plaintiffs have shown—through detailed allegations, declarations, and unrebutted expert testimony—that they compete with the President's properties. *See* Opening Br. 13-19, 32-36.

B. **The plaintiffs meet the requirements for competitor standing.**

The President rests the remainder of his objection to Article III standing on a single contention: that his unlawful conduct isn't conferring the "type of benefit" on his properties that can be expected to injure the plaintiffs. Pres. Br. 11. He presents this argument in two forms. First, he briefly suggests that the illegal benefit he is conferring on his properties is not cognizable as a matter of law. *See id.* at 11, 30-31. Second, he asserts that the plaintiffs have failed to offer any basis for concluding that his conduct will lead some foreign and domestic governmental officials to prefer his properties. *See, e.g.*, *id.* at 2, 11, 21, 26, 29, 32. Neither argument holds water.

1. A wide range of benefits—including the acceptance of foreign and domestic emoluments—can result in cognizable competitive injury.

The President's first argument relies on a misreading of precedent. Courts have not limited competitor standing to specific kinds of "allegedly unlawful benefit[s]." Pres. Br. 30; *see also id.* at 32. As explained above, courts have recognized that market actors can be advantaged by illegal activity in many ways—and that a wide range of competitive injuries can therefore support Article III standing. To list just a few examples, courts have found standing where competitors benefited from improper subsidies, price orders, market-access limitations, regulations, anti-competitive conduct, unfair trade practices, and exclusion from election-season debates. *See* Opening Br. 27-31. Together, these decisions hold that Article III is satisfied where the defendant engages in unlawful conduct that benefits an entity competing in the same arena as the plaintiff. *See id.*; *see also Ctr. for Reprod. Law & Policy*, 304 F.3d at 183 (taking a broad view of the circumstances in which a benefit to competitors supports Article III standing).

Indeed, even the cases cited by the President support this conclusion. In *El Paso Natural Gas Company v. FERC*, for example, the court held that a natural-gas-pipeline company lacked standing to challenge FERC's decision not to exercise jurisdiction over two local distribution companies. 50 F.3d 23, 24 (D.C. Cir. 1995). The court first observed that the plaintiff was unlikely to ever compete with the distribution companies and thus fell outside the competitor-standing doctrine. *Id.* at 27. It then added that even if the plaintiff might someday compete with the distribution companies, there was no difference between FERC regulations and those that would otherwise apply. *Id.* at 28. For that reason, the plaintiff could not have suffered competitive injury as a result of FERC's decision, which would not benefit the local distribution companies. *El Paso* thus stands only for the proposition that competitor standing requires (a) competition in the same arena and (b) unlawful conduct by the defendant that confers an actual benefit on the plaintiff's competitors.

That statement of the law is confirmed by two other cases cited by the President: *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002), and *State National Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015). In *New World Radio*, the court held that a Washington, D.C. radio station lacked standing to challenge the FCC's renewal of a Maryland radio station's license. 294 F.3d at 166-69. It based this determination on a finding that the stations did not compete and would not do so unless several additional, uncertain steps occurred. *Id.* at 171-72. That holding is both consistent with *El Paso* and irrelevant here, because the plaintiffs undisputedly compete with the President's properties in D.C. and New York.

The holding in *State National Bank* is similarly consistent with *El Paso* and similarly irrelevant here. In that case, a bank filed suit against the Consumer Financial Protection Bureau to challenge regulations that applied to one of its competitors—but not to the bank itself. *See* 795 F.3d at 55. The court held that the bank lacked standing because those regulations would burden rather than benefit its competitor. *Id.* The court then added that the plaintiff's convoluted theory of how this apparent burden might somehow benefit the competitor was "too attenuated and speculative" to support standing. *Id.* *State National Bank* thus holds that *burdens* on competitors do not support competitor standing—not even when the plaintiff can rustle up a convoluted account of how that burden might occasionally have an upside. That rule sheds no light here. As we explain below, the President's illegal conduct—accepting emoluments—confers a *benefit* on his properties.

The President's reliance on *El Paso*, *New World Radio*, and *State National Bank* thus backfires. Even as those cases impose limits on competitor standing, showing that the doctrine is not boundless, they also confirm that competitor standing exists where the defendant's illegal deeds benefit an entity that currently competes in the same arena as the plaintiff and do so in a manner likely to injure the plaintiff.

That rule follows directly from *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013)—yet another case cited by the President that undercuts his position. There, Already (a footwear company) claimed it had standing to challenge Nike's trademark on the "Air Force 1" shoe, even though it had "no plans to make anything resembling" that product. *Id.* at 99. Already reasoned that it competed with Nike in the footwear market in general and was thus injured by *anything* that benefited Nike, no matter how tenuous the connection to its own business. The Supreme Court disagreed. It explained that standing does not exist in every single case where a plaintiff's competitor "benefits from something allegedly unlawful." *Id.* Rather, for a plaintiff to demonstrate standing, she must show that a competitor benefits from illegal activity *in a manner likely to injure her*. In *Already*, Nike's competitors didn't suffer concrete injury from its allegedly illegal trademark on the Air Force 1 because they had no plans whatsoever to offer similar products. Here, however, that understanding of Article III clarifies why this case *is* justiciable. The President's practice of accepting emoluments through his properties harms the plaintiffs by advantaging their direct, current competitors in an ongoing struggle to win business from foreign and domestic officials.

Competitor-standing precedent permits only a single conclusion in this case. The President has adopted an illegal practice of accepting emoluments from foreign and domestic officials. The operative complaint describes this practice in detail. As evidenced by their behavior, some officials are eager to seek influence by conferring emoluments on the President through his hotels and restaurants (among other means). The result is that his hotels and restaurants are now *more* attractive to some of those officials—and therefore, by necessity, the plaintiffs' properties are *less* attractive to that clientele. If this Court were to grant relief, that injury would be redressed. Article III requires nothing more.[2]

2. *The plaintiffs have offered a substantial basis for concluding that some officials will make decisions based on the opportunity to enrich the President.*

We now arrive at the President's final Article III argument: "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." Pres. Br 2. This claim is shot through the President's brief. It features prominently in every argument he

[2] As the plaintiffs explained in their opening brief, they need not show that a "favorable decision will relieve [their] every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). Even if some officials might continue to favor the defendant's properties for other reasons if he stopped accepting emoluments, granting the plaintiffs' requested relief would remove a thumb from the competitive scales.

advances against standing. And it is incorrect. Although the President accuses the plaintiffs of relying on "pure speculation," the plaintiffs have offered multiple reasons to conclude that the President's unlawful conduct has benefited his properties and harmed their own. It is the defendant, not the plaintiffs, who engages in speculation. He rests his case on the improbable claim that a chance to financially benefit the President of the United States has no bearing on where officials take their business.

To start, the plaintiffs have identified statements by foreign officials indicating that they are, in fact, motivated to enrich the defendant as a means of enhancing their influence. *See* Opening Br. 38-39. As the *Washington Post* reports, several diplomats have opined that "spending money at Trump's hotel is an easy, friendly gesture to the new president." *See* O'Connell & Jordan, *For foreign diplomats, Trump hotel is place to be*, Wash. Post, Nov. 18, 2016, http://wapo.st/2uMolNv. This is a fairly direct admission by officials who specialize in carefully concealing their motivations. And there is every reason to suspect that some other foreign officials feel the same way. *See id.* (quoting former Mexican ambassador who remarked that "the temptation and the inclination will certainly be there").

Any doubt should be dispelled by the extraordinary amicus brief filed by former national-security officials. That group includes former officials from the Departments of State, Commerce, Justice, and Defense, as well as the National Security Council and the National Counterterrorism Center (NCC). Of particular note, it includes two former Secretaries of State, a former Secretary of Defense, and a former Director of the NCC. These officials confirm that "our adversaries and even our allies seek *every* advantage that is available on the international stage." Natl. Sec. Br. 21. In their view, the district-court opinion in this case thus "rested upon a flawed premise." *Id.* at 24. Specifically, it "understate[d] the demonstrated likelihood that, given the opportunity, foreign officials will attempt to curry favor through private business relations with senior U.S. officials." *Id.* at 25.

As these officials explain, the district-court opinion—like the President's brief to this Court—fails to reckon with the "foundational concept of diplomatic practice that nations will seek to use *all* available rewards or incentives to influence the behavior of other nations." *Id.* (emphasis added). "While these inducements are usually aimed at the nations themselves, they can just as well be directed at particular officials, through such open and accepted means as offering tangible or intangible benefits to help a favored leader, to such hidden and illicit means as bribes, influence peddling, and other misconduct." *Id.* Therefore, the amici conclude, "far from being 'speculative,' the proposition that foreign nations have 'the will and wherewithal' to seek advantage through available avenues for rewards and inducements is an accepted tenet of modern statecraft." *Id.* at 25-26; *see also* Opening Br. 37-38.

This analysis is, by itself, sufficient to reject the President's contention that foreign officials will disregard the opportunity to financially enrich him in deciding which properties to patronize. That contention rests on nothing more than the say-so of the defendant's lawyers, whereas the national security amicus brief reflects hundreds of years of combined experience analyzing the motives of governmental officials. This is not to say that officials couldn't also favor the President's properties for other reasons—*e.g.*, to show brand loyalty. Rather, the point here is that President Trump's acceptance of emoluments creates a direct link between his bank account and his restaurants and hotels, and some officials will care about that link when deciding where to spend money. *See* Niskanen Center Br. 21 ("[R]ecognizing competitor standing is particularly appropriate in Emoluments-Clause cases given the powerful market-distorting effect a President's actions can have in light of his political title, access to power, and ability to influence world and domestic events.").

In addition, the complaint includes particularized allegations further supporting the plaintiffs' contention that officials are keen to confer financial benefits on the President. Specifically, the complaint alleges that foreign and domestic officials have been actively attempting to curry favor with President Trump, and that they have done so through various means of personally enriching him—ranging from favorable regulatory treatment of his businesses (*e.g.*, the Chinese trademark deal and the lease on the Trump International Hotel, D.C.) to control over licenses, tax breaks, and subsidies affecting the defendant's foreign ventures; to decisions about which hotels, restaurants, apartment buildings, banks, and other properties to patronize. *See* JA 45-

46 (Chinese trademarks); JA 50-52 (GSA lease); *see also* Niskanen Center Br. 9 (collecting sources and examples elaborating on this point). Because CREW is no longer a party to the litigation, some of these allegations are no longer distinct bases for liability under the Emoluments Clauses. *See* Pres. Br. 19-21. Nonetheless, these allegations remain part of the case. And they undoubtedly constitute a non-speculative factual basis for concluding that foreign officials are, in fact, motivated to seek influence over the defendant by financially enriching him.

Still another basis for that conclusion is President Trump's own conduct. Foreign and domestic officials observe the President closely. *See* Natl. Sec. Br. 21-26; Niskanen Center Br. 9-13. And what they have observed over the past few years is an individual who deliberately links his private businesses to his official role. Indeed, as we have explained, the President has made numerous public statements strongly implying that his view of foreign nations is related to how they treat the business that he continues to own. *See* Opening Br. 39 (identifying examples involving China, Turkey, and Saudi Arabia). Further, while he was still in direct control of its operations (but after he had won the election), the President's flagship hotel in Washington, D.C. hosted an event pitching itself to foreign diplomats. And the hotel has hired a "Director of Diplomatic Sales" whose job is to generate profits by luring foreign-government business from other hotels. *See* JA 37-38.

The importance of the President's private businesses to him is confirmed most clearly by the fact that he has retained an ownership stake in them, notwithstanding clear presidential and executive-branch precedent to the contrary. It would have been easy for the President to signal to foreign and domestic officials that they should afford his properties no special favor. Instead, he retained ownership, temporarily put his adult children in charge, arranged to receive regular updates, and visited his own properties on average once every three days. *See* JA 34 ¶¶ 43-44. Given that context, it is not "speculative" to conclude that some foreign and domestic officials will view the defendant's conduct as a signal that spending money at his properties to enrich him might nudge U.S. policy in a friendly direction.[3]

Finally, it is inconsistent with the design of the Emoluments Clauses to assert that the opportunity to financially enrich the President cannot tempt officials to try to influence him. These constitutional provisions rest on the Framers' contrary assumption. *See* Opening Br. 40; *see also* Legal Historians Br. 10-17. As Elbridge Gerry warned at the Constitutional Convention, "foreign powers will intermeddle in our

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[3] The President suggests that foreign officials will disregard financial benefits to him because he will donate some of the money to the U.S. Treasury. *See* Pres.. Br. 26-27. But this promise is riddled with substantial loopholes and exceptions. *See, e.g.*, Letter from Representative Elijah E. Cummings to George A. Sorial (May 24, 2017). Indeed, the Trump Organization itself has acknowledged that it would be "impractical" to identify all foreign emoluments prohibited by the Constitution. *See* Trump Organization, *Donation of Profits from Foreign Government Patronage*, https://goo.gl/ivS2kF. In any event, this scheme does not even attempt to cover the President's violations of the Domestic Emoluments Clause.

affairs, and spare no [expense] to influence them." 2 *Records of the Federal Convention of 1787*, 268 (Max Farrand ed., 1911); *see also* Natl. Sec. Br. 11 (observing that the Framers "were especially concerned that foreign nations would use financial or other means to interfere in our national security and foreign policy decisions"). That lesson is as true today as it was in 1789. It is no response to argue, as does the President, that officials may also favor his properties for myriad other reasons. The Emoluments Clauses themselves reflect a judgment by the Framers that it is uniquely dangerous to allow foreign and domestic officials to privately enrich the President. That very same judgment confirms that the opportunity to privately enrich him will influence decisions by some foreign and domestic officials.

At bottom, the President's description of foreign and domestic government officials is out of tune with reality. He starts by insisting that officials will not view the ability to affect his bank account as relevant to their decisions about where to spend money. That proposition, however, collapses on close inspection. So he retreats to a still more implausible view. He asserts that even if some officials might care about enriching him, that opportunity won't affect their behavior because they are already sufficiently motivated to patronize his properties for other reasons. On this account, there are only two kinds of officials: those who will *never* patronize his properties and those who will *inevitably* do so. There are, apparently, no officials who are on the fence about whether to patronize his properties and can be tipped toward doing so by the chance to enrich the President. Put differently, the President contends that if an official patronizes his property—and thus *doesn't* patronize the plaintiffs' properties—that decision must be so completely over-determined that the ability to confer emoluments on the President can't possibly be any part of the explanation.

Respectfully, that is not a reasonable view of the world, and it would be especially improper to accept that unsupported empirical claim at this early stage of the case. Given the considerations discussed above, it is not "speculative" to believe that *some* foreign and domestic officials will incline toward the President's properties—and away from their competitors—as a result of his willingness to accept emoluments. That is particularly true in light of the fact that New York and D.C. annually host tens of thousands of officials, many of whom live and work in easy walking distance of the plaintiffs' properties and those belonging to the President.

The plaintiffs have thus shown that they have standing. Some domestic and foreign officials will view the President's pattern of accepting emoluments as a reason to favor his properties. These officials will be more inclined to patronize his properties and, necessarily, less inclined to patronize their competitors. And the plaintiffs, as competitors, will thus be placed at a competitive disadvantage in the marketplace. To be sure, it is impossible to say which officials, specifically, will move their business for these reasons alone. But there can be no doubt that the plaintiffs are suffering the very same competitive injury that has led dozens of courts in indistinguishable circumstances to hold that Article III is satisfied.[4]

II. The zone-of-interests test poses no obstacle here.

President Trump defends the decision below on only one other ground: He contends that the zone-of-interests test requires dismissal even if he is violating the Constitution and thereby injuring the plaintiffs. But he does not identify any case from this Court or the Supreme Court that was dismissed on zone-of-interest grounds where the plaintiffs aimed to stop the violation of a structural constitutional provision and had Article III standing to do so. Nor does he deny that such claims "have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond v. United States*, 564 U.S. 211, 222 (2011).

So how could the zone-of-interests test bar this equitable suit? The answer he gives proceeds in two parts. First, he tries to hold the plaintiffs to a higher standard,

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[4] In passing, the President suggests that any harm resulting from his illegal conduct is outweighed by "other benefits." Pres. Br. 28. But even to the extent such "other benefits" exist, they cannot "negate standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). Although the President relies on *Texas v. United States*, 787 F.3d 733, 750 (5th Cir. 2015), the logic of that case is foreclosed by *Denney*. And even if it weren't, *Texas* is inapplicable, since the "costs and benefits" do not "arise from the same transaction" and there is no proof that they are "offsetting." *Id.*

More important, the fact that some officials may seek to avoid illegal conduct by declining to patronize his properties is not an offsetting "benefit" to the plaintiffs. By analogy, imagine if an antitrust defendant argued that the plaintiff lacked Article III standing because some market participants might favor the plaintiff's goods out of a principled objection to companies engaged in monopolistic behavior. That argument would be rejected out of hand. And so it should be here.

claiming that the test is more rigorous for constitutional claims. Second, he advances a cramped account of what the Emoluments Clauses mean and why they exist. He is wrong on both fronts. Recent cases make clear that the zone-of-interests test does not erect any barrier (much less a heightened one) to equitable claims alleging structural constitutional violations. The Court should therefore reject the President's argument on that ground alone. Alternatively, the Court could simply assume the zone-of-interests test applies and hold that the plaintiffs satisfy its requirements here.

A. Far from imposing a heightened requirement, the zone-of-interests test poses no obstacle for equitable claims alleging structural constitutional violations.

Quoting a 26-year-old dissent by Justice Scalia (the one the district court treated as if it were a majority opinion), the President asserts that the zone-of-interests test is "more strictly applied" in constitutional cases than in statutory ones. Pres. Br. 35. But by Justice Scalia's admission, the Supreme Court "reject[ed]" his analysis. *Wyoming v. Oklahoma*, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting). There is thus no precedent requiring a heightened version of the test for constitutional claims.

Just the opposite—the precedent forecloses such a requirement. When this Court applied the zone-of-interests test in a case presenting a constitutional claim, it noted that the test is "not a rigorous one" and held that it was easily satisfied. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 91 (2d Cir. 2009). The *Selevan* Court did so even though that case involved a claim for damages and thus implicated Justice Scalia's minority view of the test's core purpose. *See Wyoming*, 502 U.S. at 473 (Scalia, J., dissenting) ("[T]he 'zone-of-interests' test performs the same role as many other judge-made rules circumscribing the availability of damages."). This case, by contrast, involves only equitable claims, which do not implicate any known purpose for the test.

Since *Selevan*, moreover, the Supreme Court has issued three important decisions bearing on how the zone-of-interests test should be applied here. These decisions show that the test poses no barrier to equitable claims alleging structural constitutional violations—either because the test has no application to such claims or because it is necessarily satisfied by them.

The first and most important of these cases is *Lexmark International Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), which the President does not cite. In that case (a unanimous opinion by Justice Scalia), the Supreme Court reexamined the underpinnings of the zone-of-interests test and reoriented it in a way that casts grave doubt on its relevance here. *Lexmark* clarified that, although the test had "previously been classified as an aspect of 'prudential standing,'" it is actually a question of "statutory interpretation" that "does not implicate subject-matter jurisdiction." *Id.* at 1387 & nn.3-4. Because the plaintiffs here do not invoke a statute, the zone-of-interests test should not apply at all under a proper reading of *Lexmark*.

A second case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, supports this understanding. 561 U.S. 477 (2010) (*PCAOB*). There, an accounting firm invoked an equitable cause of action to enforce separation-of-powers principles. Notwithstanding a dispute over the firm's prerogative to maintain its claim, not a single Justice even hinted at a zone-of-interests requirement. Instead, the Court unhesitatingly recognized a "private right of action directly under the Constitution to challenge governmental action" violating structural provisions. *Id.* at 491 n.2. That approach was consistent with *Wyoming*, which refused to apply the zone-of-interests test to an equitable claim under the dormant Commerce Clause. *See* 502 U.S. at 473 (Scalia, J., dissenting) (acknowledging that the Court "abandon[ed] the zone-of-interests test"). As *Wyoming* and *PCAOB* show, the Court has moved away from its suggestion—contained in a footnote in a 40-year-old case also involving the dormant Commerce Clause—that the zone-of-interests test applies to equitable claims seeking to enforce structural constitutional provisions. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21, n.3 (1977). No other Supreme Court case has ever applied the zone-of-interests test to an equitable constitutional claim, prompting one judge to wonder—in an opinion cited favorably by *Lexmark*—whether *Boston Stock Exchange* "was simply anomalous." *Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 676 n.3 (D.C. Cir. 2013) (Silberman, J., concurring).

Despite *Lexmark* and *PCAOB*, the President takes the position that a judge-made, "prudential" zone-of-interests test survives those cases and somehow applies to constitutional claims. But even if that were so, a third recent decision—*Bond v. United States*—illustrates why the test would necessarily be satisfied in cases alleging violations of structural provisions. *Bond* recognizes that the "structural principles secured" by the Constitution are not just ends in themselves; they exist to "protect the individual as well." 564 U.S. at 222. For that reason, *Bond* holds that when the Constitution's structure "is compromised, individuals who suffer otherwise justiciable injury may object," and courts may "adjudicate [the] claim." *Id.* at 220, 223. As we demonstrated in our opening brief—with no response from the President—that principle applies here with full force. *See* Opening Br. 48-49.

As against all this, the President offers no reason why a prudential zone-of-interests test should bar an equitable claim alleging violations of a structural provision. Instead, he merely gestures to a few cases applying the test to dormant Commerce Clause claims and insists that the test must therefore apply everywhere and always. Pres. Br. 38-39. But like *Selevan*, these cases all predate *Lexmark*, and most of them also predate *PCAOB* and *Bond*. Further, although they use the language of the zone-of-interests test, each of these cases is more properly conceptualized post-*Lexmark* as enforcing the ancient rule that plaintiffs must assert their *own* legal rights, not those of third parties. *See Keepers, Inc. v. City of Milford*, 807 F.3d 24, 39 (2d Cir. 2015) (describing this requirement); *see also Lexmark*, 134 S. Ct. 1387 n.3 (indicating that the rule against third-party standing is the only remaining form of "prudential standing"). Put differently, the dormant Commerce Clause cases cited by the President rest on the premise that plaintiffs may not challenge laws based solely on their effect on other people—particularly where the plaintiffs themselves are "not engaged in interstate commerce." *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 475 (5th Cir. 2013).[5]

In stark contrast, this case presents no third-party-standing problem and the President does not contend otherwise. The Court would therefore be amply justified in holding—consistent with *Lexmark*, *Bond*, *PCAOB*, and *Wyoming*—that the zone-of-interests test simply does not apply (or else is necessarily satisfied) in a case like this one, involving equitable claims that allege structural constitutional violations.

[5] The President also contends that a parade of horribles would ensue if equitable claims alleging structural constitutional violations could not be dismissed under the zone-of-interests test. Pres. Br. 40-41. That is incorrect. In fact, his hypotheticals illustrate why it is unnecessary to resurrect a "prudential" zone-of-interests test in this context. First, the third-party-standing doctrine would block Ms. Bond's family from challenging her incarceration. *See Fenstermaker v. Obama*, 354 Fed. App'x 452, 454-55 (2d Cir. 2009). Second, vendors who serve the plaintiffs' businesses would lack Article III standing because they do not compete in the same arena as the President's properties. *See Already*, 568 U.S. at 99. Finally, it is unclear why the President thinks it would be so "absurd" for the publishing company he describes to have standing. Pres. Br. 38. In any event, it is hardly apparent that the Constitution would even be violated, or that the publisher would suffer any injury, were the government to publish its accounts in an untimely manner.

B. The plaintiffs' interests are not "so marginally related to or inconsistent with the purposes" of the Emoluments Clauses that they fall outside the zone of interests.

Even if this Court were to apply the zone-of-interests test, the plaintiffs readily satisfy it. The test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. It "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the [legal provision]'" that the claim is impermissible. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). "[T]he benefit of any doubt goes to the plaintiff." *Id.*

Here, the President claims that the plaintiffs' interests in preventing his unlawful profiteering fail this standard. But his argument is based on the same implausibly constricted reading of the Emoluments Clauses that forms his defense on the merits. As he sees it, the only thing the Clauses prohibit is bribery in its most blatant form: "engag[ing] in regulatory or other official conduct . . . as a result of having received" governmental emoluments. Pres. Br. 37. In other words, *quid pro quo*. And the Clauses' zone of interests and proper sphere of application, he argues, is narrower still: It doesn't cover those injured by the "quid," just the "quo."

This argument is deeply mistaken as an account of the Emoluments Clauses. We explained why in our briefing on the merits below, and our amici do the same on appeal. *See generally* Niskanen Br.; Historians Br.; Former Ethics Officials Br. To make a long story short, these Clauses are more than mere anti-bribery provisions.

Their text, history, structure, and purpose show that they are broad prophylactic measures that prohibit the acceptance of any kind of emolument from foreign or domestic governments. Together, they ensure that the President will not seek to profit from his office at the expense of the citizenry by adopting a practice of accepting improper governmental payments. As OLC has concluded, these Clauses apply even if the profit comes through commercial transactions, and irrespective of whether an official act was performed in exchange. *See* 11 Op. O.L.C. 89, 91 n.5 (1987); 17 Op. O.L.C. 114, 117 (1993); *see also* Former Gov't Ethics Officials Br. 3-13.

On that understanding of the Emoluments Clauses, there is no basis for concluding that the plaintiffs' interests are so "marginally related to or inconsistent with the purposes implicit in" the Clauses that this case must be dismissed for prudential reasons. *Patchak*, 567 U.S. at 225. The plaintiffs allege that the President is using his tenure in office as an opportunity to enrich himself by accepting financial benefits from foreign and domestic governments at his properties. His gain has been their loss. Further, his conduct has invited government officials to alter their conduct in ways that directly injure the plaintiffs and implicate the core purposes of the ban on emoluments. The zone-of-interests test requires no more. Although the President would have this Court demand proof that the Framers specifically "intended these provisions to protect [against] competition" with federal officials, Pres Br. 37, "there need be no indication" of a specific "purpose to benefit the would-be plaintiff" to satisfy the zone-of-interests test. *Clarke*, 479 U.S. at 399-400.

The President's position thus fails for a simple reason: the plaintiffs have been directly harmed by the President's unlawful profiteering and his corruption of the market. Their interests make them uniquely well positioned to enforce these Clauses, and in doing so, to vindicate the anti-corruption purposes they serve. The opinion below should be reversed and remanded to allow them an opportunity to do so.[6]

CONCLUSION

The judgment of the district court should be reversed.

[6] In the very last paragraph of his brief, the President advances a drive-by attack on the plaintiffs' cause of action and the availability of equitable relief against him. These are the same arguments he made below and that the district court did not reach, and they are not at issue on appeal. In any event, he is wrong on both counts. As *PCAOB* shows, the plaintiffs have a cause of action. *See* Dist. Ct. ECF No. 57, at 53-55; Opp. to MTD in *District of Columbia and Maryland v. Trump*, No. 17-1596, ECF No. 46, at 50-55, filed Nov. 7, 2017 (D. Md.). And there is no basis to conclude that equitable relief against the President violates the separation of powers. Quite the opposite: separation-of-powers principles illustrate why such review is necessary. *See* Dist. Ct. ECF No. 57, at 56-57; ECF No. 46 in *District of Columbia*, at 55-60.

June 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 32.1(a)(4) because this brief contains 6,978 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Baskerville font.

June 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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