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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**Second Circuit admission pending*

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 plaintiffs in this case encompass hotels and restaurants in New York and Washington, DC. One is an association of thousands of restaurant workers and hundreds of restaurants—including some of the most highly rated establishments in each city. Another co-owns several of New York's most celebrated hotels and restaurants. And a third books embassy functions for two top Washington hotels.

They are now in the unenviable position of having to compete with businesses owned by the President of the United States. Those businesses give one group of customers—foreign and domestic officials—the opportunity to enrich him personally. President Trump, in turn, has used his office as a platform to promote his businesses to these officials. Before taking office, he held an event pitching his Washington hotel to roughly 100 foreign diplomats, having hired a "Director of Diplomatic Sales" whose sole job is to generate profits by luring foreign-government business from other hotels. He has even announced that when governments "buy [things] from [him]," he "like[s] them very much." JA-42. Officials have gotten the message, expressing their intention to book rooms or hold events at the President's properties to garner his favor.

The President's conduct puts the plaintiffs at a distinct disadvantage in competing for foreign and domestic government clientele: While they can offer the finest hospitality, they cannot offer the ability to curry favor with the President.

The Framers foresaw the danger of an Executive who exploits his office for profit at the expense of the citizenry, making him susceptible to those who would "corrupt his integrity by appealing to his avarice." *The Federalist* No. 73 (Hamilton). To guard against foreign corruption, the Constitution's Foreign Emoluments Clause bars the President from accepting any "Emolument"—*i.e.*, any profit or gain—from a foreign state unless Congress consents. U.S. Const. art. I, § 9, cl. 8. And to prevent domestic corruption, the Domestic Emoluments Clause bars the President from accepting, beyond his fixed compensation, "any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl 7. These Clauses admittedly raise issues of first impression in the courts. And below, the President urged an extreme, counterintuitive reading of the Clauses that would allow him to accept all manner of payments from foreign and domestic governments.

But this Court need not confront such novel issues now. This appeal turns only on whether the plaintiffs have Article III standing and a justiciable case, and can therefore be resolved on the basis of settled law. That law includes the competitor-standing doctrine, which allows plaintiffs to establish Article III standing as a matter of economic logic when they compete with the party that benefits from the defendant's unlawful conduct. The plaintiffs here have shown—through detailed allegations, declarations, and the unrebutted testimony of hotel- and restaurant-industry experts—that they compete with the President's properties, offering simi-

lar services, prices, and quality in close proximity. To take one example: A U.N. diplomat looking to book a private event for a visiting delegation might choose among the two-star Michelin restaurants near Central Park. There are only five—including Jean-Georges at the Trump International Hotel and The Modern, a member of plaintiff ROC. They are just a five-minute cab ride apart and have virtually identical price ranges and ratings. JA 292, 312–15.[1] It is difficult to deny that these highly elite restaurants compete with each other.

Another district court recently came to the same conclusion in a separate case challenging the President's Emoluments Clauses violations. As that court explained, "plaintiffs with an economic interest have standing to sue to prevent a direct competitor from receiving an illegal market benefit leading to an unlawful increase in competition." *District of Columbia & Maryland v. Trump*, No. 17-Civ-1596, 2018 WL 1516306, at *11 (D. Md. Mar. 28, 2018). That reasoning is equally applicable here. In concluding otherwise, the district court misunderstood the nature of competitor standing, failed to address controlling precedents, and engaged in its own factual speculation while drawing every inference *against* the plaintiffs at the pleading stage. Separately and together, these errors require reversal.

[1] Jean-Georges offers a *prix fixe* menu for $218, The Modern for $228. https://perma.cc/2J4J-NQ7H; https://perma.cc/2J8T-XJR2. They were ranked #13 and #14, respectively, in *Business Insider*'s "50 Best Restaurants in America," https://read.bi/2eTCl5x. The same publication ranked them #11 and #12 among "Most Expensive Restaurants in New York City." https://read.bi/2Hq9Big. Both have TripAdvisor ratings of exactly 4.5.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2201. On December 21, 2017, it entered judgment against the plaintiffs. JA-353. On February 16, 2018, the plaintiffs timely filed their notice of appeal. JA-354–56; *see also* Fed. R. App. P. 4(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291. The plaintiffs have established Article III standing under the competitor-standing doctrine. [2]

STATEMENT OF THE ISSUES

1. Did the district court err in dismissing the plaintiffs' claims for lack of Article III standing?
2. Did the district court err in dismissing the plaintiffs' claims on the ground that they fall outside the "zone of interests" of the Emoluments Clauses?
3. Did the district court err in holding that the plaintiffs' claims present political questions that are textually committed to Congress?
4. Did the district court err in holding that the plaintiffs' claims are not ripe?

STATEMENT OF THE CASE AND OF THE FACTS

I. Nature of the case and proceedings below

The plaintiffs—competitors of the President's businesses—seek equitable relief to redress the competitive harm they suffer due to his unlawful acceptance of foreign and domestic emoluments. The district court (The Honorable George

[2] The plaintiffs in the district court included Citizens for Responsibility and Ethics in Washington (CREW). Although CREW joined the notice of appeal, CREW is no longer appealing the district court's judgment.

Daniels) granted the President's motion to dismiss for lack of jurisdiction under Rule 12(b)(1). *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (JA-324–52).

II. The Emoluments Clauses

A. The original meaning of the Clauses

When the Framers gathered in Philadelphia in 1787, they were profoundly concerned with protecting the new government from corruption—the risk that officeholders' "private interests" would improperly influence their "exercise of public power." Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* 38 (2014). Keen students of history and human nature, they knew that corruption takes many forms, and that it could slowly poison the republic. Two potential sources of corruption were seen as so uniquely intolerable that the Framers banned them outright in the Constitution.

The first was the risk that foreign governments would seek to influence federal officers by bestowing gifts, money, and other things of value upon them. *See id.* at 19–20. Although this practice was condoned across the ocean, the Framers saw a distinct danger to the new nation. *Id.* at 20. Most famously, Benjamin Franklin's acceptance of a diamond-encrusted box from King Louis XIV stoked fear that he might be unconsciously corrupted, leading Franklin to request (and receive) congressional approval to keep the present. *Id.* at 1–5; *see* 3 Farrand, *The Records of the Federal Convention of 1787*, at 327 (Edmund Randolph).

The Framers responded to these concerns with the Foreign Emoluments Clause—a flat ban on federal officials "accept[ing] 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. Through this broad language, the Framers sought prophylactically to guard against "foreign influence of every sort." 3 Story, *Commentaries on the Constitution of the United States* 202 (1833). At the same time, the Clause authorized Congress to consent to the receipt of otherwise-forbidden benefits from foreign powers—thereby transforming secretive transfers of foreign wealth into matters of vital public inquiry. Ultimately, the theory of the Foreign Emoluments Clause is that an officeholder who receives something of value from a foreign power can be imperceptibly induced to compromise what the Constitution insists be his or her exclusive loyalty: the best interest of the United States.

A second concern was corruption from within. Having spent years dissecting King George III's use of gifts, offices, and other inducements to manipulate Parliament, the Framers worried that the nation's powerful chief executive would be tempted to use his office to enrich himself, and that other parts of the government—state or federal—could seek to "corrupt his integrity by appealing to his avarice." *The Federalist* No. 73 (Hamilton). To avoid that unnerving possibility, the Framers included the Domestic Emoluments Clause. It entitles the president to receive a salary and benefits fixed by Congress ahead of time, but prevents his

compensation from being altered. More important, it categorically forbids him from receiving "any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7. This Clause cannot be waived by Congress.

The Framers' broad, preventive goals are reflected in the language they employed. Although the word "emolument" has fallen out of regular use, Founding-era dictionaries illustrate that its meaning encompassed "profit," "advantage," and "gain." JA-87–88 (Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523–1806*). Founding-era court cases confirm that "emolument" did not have a narrow, technical import, but was instead roughly synonymous with "benefit." *See, e.g.*, *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 318–19 (1809) ("profits and advantages"); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 688 (1819) ("benefit"); *Clark v. City of Washington*, 25 U.S. (12 Wheat.) 40, 53 (1827) ("profit" or "benefit" from "proceeds," "funds or revenue" from a lottery); *see also* Mikhail, *A Note on the Original Meaning of "Emolument"*, Balkinization, Jan. 18, 2017, https://perma.cc/6EA5-JEEE (showing that prominent Founding-era sources used "emolument" to refer to "the consequences of ordinary business dealings").

As Joseph Story remarked, this prohibition "puts it out of the power of any officer of the government" to decide for himself whether to accept forbidden gifts or money. 3 Story, *Commentaries* 202. Constitutional law—not individual discretion—controls the circumstances under which officeholders may accept private

financial benefits. As the Framers knew all too well, even the best among us are susceptible to being influenced when receiving gifts, money, offices, or titles.

B. The history and administration of the Clauses

Although hardly the most famous part of the Constitution, the Emoluments Clauses have long been a routine part of federal administration. Indeed, the rule against accepting "emoluments" is administered by ethics officials across the government every day. Accordingly, there is a rich body of practice and precedent from the Justice Department's Office of Legal Counsel (OLC) and the Comptroller General. *See* Chong, *Reading the Office of Legal Counsel on Emoluments*, Lawfare, July 1, 2017, https://perma.cc/LQ6D-V5AM. As those offices have recognized, the Foreign Emoluments Clause is "a prophylactic provision," 10 Op. O.L.C. 96, 98 (1986), that protects against the possibility of "undue influence and corruption by foreign governments." 18 Op. O.L.C. 13, 15 (1994). For that reason, its "drafters intended the prohibition to have the broadest possible scope and applicability." 49 Comp. Gen. 819, 821 (1970). Its domestic counterpart has likewise been given a broad reading to prevent "Congress or any of the states from attempting to influence the President through financial awards or penalties." 5 Op. O.L.C. 187, 189 (1981).

Against the backdrop of this accumulated precedent, previous presidents have taken great care to comply with their constitutional obligations. They have publicly disclosed tax returns and other financial information, divested themselves

of assets presenting the potential for conflicts, and sought OLC's advice before accepting anything that might possibly fall within the ambit of the Clauses. President Carter, for example, put his peanut farm into an independent trust to guarantee that "the Carter family [would] not be affected financially from profits or losses of any of the farm operations." *Carter Statement on Conflicts of Interest and Ethics*, N.Y. Times, Jan. 5, 1977, http://nyti.ms/2fV5Pwz. President Reagan exercised no less care, requesting a formal OLC opinion on whether he could accept—consistent with the Domestic Emoluments Clause—the pension to which he was legally entitled as the former California governor. *See* 5 Op. O.L.C. 187 (1981). And President Obama would not accept the Nobel Peace Prize without first securing an OLC opinion on whether he could do so consistent with the Foreign Emoluments Clause. *See* Memorandum for the Counsel to the President, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipts of the Nobel Peace Prize*, 2009 WL 6365082 (Dec. 7, 2009). These presidents, like many other officials, have labored to conform their actions to a widely accepted, long-established understanding of the Emoluments Clauses.

III. President Trump's violations of the Emoluments Clauses

President Trump, by contrast, has eschewed this tradition by refusing to take steps to comply with the Constitution. Although his sons are temporarily managing the business's day-to-day affairs, he receives regular updates from them and knows

that control of the company will revert to him after his term in office ends. JA-34 ¶¶ 43–44. His ownership stake creates a direct link between the President's private bank account and the success of the businesses that bear his name. Not coincidentally, the President has consistently used his official position as a platform to advertise his properties, visiting one every three days on average. Yourish & Griggs, *Tracking the President's Visits to Trump Properties*, N.Y. Times, Feb. 2, 2018, http://nyti.ms/2uILVxL.

President Trump's practice of disregarding the Emoluments Clauses has been accompanied by disregard for procedures designed to ensure compliance. Rather than secure a written OLC opinion—much less inform Congress of his financial arrangements and seek its consent—the President has refused to release his tax returns or make a public accounting of his financial entanglements. He has also asserted, in defiance of the Constitution, that his financial ties to foreign powers (including those hostile to the United States) are ungoverned by law and ethical requirements because "the president can't have a conflict of interest." *Donald Trump Interview*, N.Y. Times, Nov. 23, 2016, http://nyti.ms/2nAOfDc.

Since taking office, President Trump has only deepened his financial entanglements with foreign and domestic governments. As a result, he is receiving prohibited "emoluments." To name just a handful here: After the election, the Embassy of Kuwait moved its 2017 National Day celebration from the Four Seasons

to the Trump International Hotel D.C., paying an estimated $40,000 to $60,000 to the business that Trump owns—and reportedly did so under pressure from the Trump Organization. JA-34–40 ¶¶ 72–76. Just recently, the Embassy returned to the Trump International Hotel for its 2018 National Day celebration, despite criticism that the initial move was improper. Fahrenthold & O'Connell, *Kuwaiti embassy returns to Trump hotel*, Wash. Post, Jan. 26, 2018, http://wapo.st/2FykU7d. Similarly, in the fall of 2017, the Prime Minister of Malaysia and his delegation stayed at the Trump International Hotel while visiting Mr. Trump at the White House. Landler, *Trump Welcomes Najib Razak, the Malaysian Leader, as President, and Owner of a Fine Hotel*, N.Y. Times, Sept. 12, 2017, https://nyti.ms/2eUVsst. In contrast, the Malaysian delegation stayed at the Four Seasons when it visited in 2016. *See Malaysia DPM Arrives in Washington*, NAM News (Mar. 30, 2016), https://perma.cc/E8LD-XTGJ.

Before he took office, President-elect Trump specifically sought out this kind of business. While he still ran the Trump Organization, the Trump International Hotel D.C. held a post-election event pitching itself to roughly 100 foreign diplomats—having hired a Director of Diplomatic Sales whose sole duty is to generate profits from foreign governments. JA-37–38 ¶¶ 60–61; *see also* O'Connell & Jordan, *For foreign diplomats, Trump hotel is place to be*, Wash. Post, Nov. 18, 2016, http://wapo.st/2uMolNv. Diplomats have expressed an intention to book rooms or hold events at the hotel to curry favor with Trump. JA-38 ¶ 62. These foreign

officials' attitudes are particularly understandable in light of the President's long history of making statements that explicitly link his personal view of foreign nations with whether they help or hurt his businesses. JA-35–36 ¶¶ 51–52.

The President's embrace of emoluments is not limited to foreign officials. The Governor of Maine spent at least $35,000 in state funds on trips to Washington last spring—during which time the Governor and other state officers stayed at the President's hotel and ate at his restaurant. Miller & Thistle, *Luxury hotels, fine dining for LePage on taxpayers' dime*, Portland Press Herald, July 23, 2017, https://perma.cc/YM2V-HKHF. And the Trump International Hotel D.C. has received a substantial benefit from the General Services Administration, a federal agency. The hotel's lease with the GSA expressly forbids *any* elected federal official from benefiting from it. JA-50–52 ¶¶ 130–45. Yet just one week after the President released a proposed budget increasing the GSA's funding while cutting nearly all other non-defense-related spending, the GSA issued a letter allowing the hotel to continue with the lease, despite the very substantial benefit to its owner. *Id.*

The President has capitalized on the increased demand from foreign and domestic officials by raising the prices at his businesses since Election Day 2016. Cocktails at the Trump International Hotel D.C.—now a watering hole for foreign dignitaries, JA-37–41 ¶¶ 57–89—cost between $16 and $20 when the hotel opened in September 2016, and then spiked to a range of $24 to $100 after the election. Sid-

man, *The Cheapest Cocktail at the Trump Hotel is Now $24*, Washingtonian, Jan. 5, 2017, https://perma.cc/MH5M-47DY. The President has used the White House to market his businesses, even as they have raised prices to benefit from his office.

IV. The competitive harm to the plaintiffs caused by President Trump's violations of the Emoluments Clauses

The President's new foreign and domestic governmental patrons did not materialize out of thin air. They moved their business from existing hotels and restaurants that cater to high-end clientele. As confirmed by Christopher Muller and Rachel Roginsky—experts, respectively, in the restaurant and hospitality industries—the plaintiffs in this action compete with the President's hotels and restaurants over that exact customer base.[3] The plaintiffs have thus been placed at a competitive disadvantage by the President's constitutional violations.

1. Plaintiff Eric Goode

Eric Goode co-owns several celebrated hotels in New York, including the Bowery Hotel in the Lower East Side and Maritime Hotel in Chelsea. JA-294, JA-296–98 ¶¶ 1, 10–11, 21–22. He also co-owns numerous restaurants, including The Park, Waverly Inn, and Gemma. *Id.* These properties are frequented by diplomats

[3] Dr. Muller is Professor and former Dean of Boston University School of Hospitality Administration, with more than 30 years of experience in restaurant management, consulting, and teaching. JA-305–06 ¶¶ 1–8. Professor Roginsky has 30 years of experience in hospitality consulting and is an adjunct professor at the Boston University School of Hospitality Administration, where she teaches Hospitality Market Feasibility and Valuation. JA-276–77 ¶¶ 1–10.

and other government officials. JA-294, JA-301–03 ¶¶ 3, 47–50. Goode, a savvy businessman with intimate knowledge of his market, has concluded that "[s]ome of my hotels and restaurants compete with some of Defendant's hotels and restaurants because they have similar prices, quality and reputations that make both attractive to a common set of customers, and they are just a short cab ride away from one another." JA-294 ¶ 2; *see also* JA-73–75 ¶¶ 228–34.

This conclusion is supported by detailed factual allegations and expert testimony. As Professor Roginsky explains, "hotels compete with each other if they market to and attract customers from a common set of visitors." JA 277 ¶ 14. Hotels are "[p]rimary competitors" if they "market to and attract customers from essentially the same pool of visitors," which "occurs among lodging facilities that are similar with respect to the following criteria: location, facilities, services, amenities, class, image, and price." *Id.* ¶ 15. By definition, exposure to such competition can result in a hotel suffering economic injury. *See id.* ¶ 14.

Applying these criteria to the Bowery Hotel, it becomes clear that it competes with the Trump International Hotel New York, which is a short cab ride away. JA-279 ¶ 24. It is reasonable to further conclude that these properties compete for business from government officials. Goode's facilities have historically received significant government patronage. JA-301–303 ¶¶ 47–50. That is consistent with the fact that there are many reasons "for higher rated government visitors to

travel to New York City and stay at high-end hotels." JA-282–84 ¶¶ 42–50. Professor Roginsky concludes that "government travelers . . . rent rooms and suites at . . . the Trump International New York, the Bowery, [and] the Maritime." JA-284. It follows that competition between Goode properties and Trump properties includes competition for government business.

2. Plaintiff Jill Phaneuf

Phaneuf has been contracted to book events for the Kimpton Carlyle and Kimpton Glover Park Hotels in D.C., with a focus on embassy events and political functions involving foreign governments. JA-72–73 ¶ 221. Her compensation under her contract depends largely on payment of a percentage of gross receipts arising from events that she generates. *Id.* If she books less foreign-government business, she makes less money. *Id.* And because of the President's illegal conduct, she now faces intensified competition from Trump International Hotel D.C., which has strongly promoted its properties and sought business from the diplomatic community—the very community most eager to solicit goodwill from the President. JA-37–38, JA-73 ¶¶ 60–63, 222–25.

The Phaneuf and Muller declarations further confirm that she stands to lose as a result of the unlawful competitive advantage that President Trump's private properties now enjoy. The Carlyle and Glover Park Hotels are surrounded by embassies and government buildings, and are located within easy driving distance

of Trump International Hotel D.C. JA-269–72 ¶¶ 2–3, 12–14. Both hotels have highly rated, top-tier restaurants: the Riggsby at the Carlyle, and Casolare at Glover Park. JA-270–72 ¶¶ 5–7, 16. Each restaurant has numerous event spaces available. JA-271, JA-273 ¶¶ 8–11, 17–19. And as Phaneuf explains, these spaces compete for government business with event spaces at Trump International Hotel D.C. JA-269–72 ¶¶ 2, 12. Because Phaneuf's task is booking diplomatic business, she is harmed by the illegal benefit that the President has conferred on his own property. JA-269 ¶ 1.

Dr. Muller has carefully compared the Riggsby and Casolare restaurants to BLT Prime (the restaurant at Trump International Hotel D.C.). JA-321 ¶¶ 88–90. He has also engaged in a thorough review of event spaces at these facilities—considering size, quality, location, and distance to embassies and government buildings. JA-321–22 ¶¶ 89–91, 94. He concludes that the three event rooms at the Riggsby, and a ballroom at Casolare and its Cocktail Garden, compete with similar spaces at Trump International Hotel D.C. *See id.* Dr. Muller's unrebutted expert testimony thus confirms that the event spaces Phaneuf seeks to book for embassy events and political functions do, in fact, compete with the President's property.

3. Plaintiff ROC United

ROC United is a nonprofit organization dedicated to improving wages and working conditions in the restaurant industry. JA-286 ¶ 2. Its members include nearly 200 restaurant members and 25,000 restaurant employees. *Id.* ¶ 5. ROC sues

on behalf of itself and its members because the President's illegal conduct has exposed ROC's restaurant and worker members to increased competition with respect to prospective government business. *See id.* ¶ 6; JA-66–72 ¶¶ 195–220.

Celebrity chef Tom Colicchio explains that his ROC-member restaurants in New York compete with restaurants located in the President's New York properties because they "market to, solicit, and attract similar customers, including foreign, federal, state, and local government officials." JA-256–57 ¶ 3. Drawing on three decades in New York's restaurant industry, he then describes, in detail, why he believes that his properties compete with Mr. Trump for government business. JA-257–62 ¶¶ 8–29. James Mallios, managing partner of ROC-member restaurants Amali and Amali Mou, similarly declares that "I consider certain of Defendant's restaurants in New York City to be competitors of [my restaurants] because his restaurants are located just a short cab ride [away], and have similar prices, quality and reputations as my two restaurants." JA-263 ¶ 2. Mallios, too, regularly hosts governmental officials. JA-263, JA-267 ¶ 3, 24–29. He adds that he has seen a loss of tax-exempt sales at Amali since the election, which "reflects a decline in government business" and has led him to take costly steps in response. JA-267 ¶¶ 28–29.

Dr. Muller reviewed information about ROC members. JA-306 ¶ 11. Applying his expertise and the methodology described above, he concludes (without rebuttal) that numerous ROC members compete with the President's properties,

and do so in an environment brimming with foreign consulates and domestic government offices. To take a few examples:

- At least seven ROC restaurants compete with at least one of the restaurants at Trump Tower New York.[4]

- At least three ROC restaurants compete for government-banquet business with Trump Tower event spaces.[5]

- At least five ROC restaurants compete with at least one of the restaurants at Trump International Hotel New York, Jean-Georges and Nougatine.[6]

- At least seven ROC restaurants also compete with the event spaces at Trump International Hotel New York.[7]

- At least three ROC restaurants compete with a restaurant or event space at Trump International Hotel D.C. (BLT Prime and the event spaces it caters).[8]

To summarize: Unquestioned expert testimony, detailed factual allegations, and analyses offered by Colicchio, Mallios, and Jayaraman all confirm that ROC restaurants and worker members compete with Mr. Trump's private properties.

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[4] JA-309–10 ¶¶ 24–29; JA-264, JA-266 ¶¶ 4, 19 (Amali, Amali Mou, Café 2, Terrace 5, Espresso Bar, The Modern, Riverpark).

[5] JA-310–311¶¶ 29-34 (The Modern, Amali, Riverpark).

[6] JA-313–14 ¶¶ 43–49; JA-259–60 ¶¶ 14, 21; JA-264 ¶ 4 (Amali, The Modern, The Grammercy Tavern, Craft, Riverpark).

[7] JA-314–15 ¶¶ 50–56 (Amali, The Modern, The Gramercy Tavern, Craft, Riverpark); JA-291–92 ¶¶ 24–25 (Breslin and Spotted Pig).

[8] JA-319–22 ¶¶ 77–93 (Jaleo DC, Zaytinya, Minibar).

V. The motion to dismiss and the district court's opinion

Because the President's constitutional violations cause them competitive harm, the plaintiffs filed this suit seeking equitable relief. JA-24–27 ¶¶ 11–20. The President moved to dismiss the complaint. *See* Dist. Ct. ECF No. 35. He first argued that the plaintiffs lack Article III standing and cannot satisfy a handful of justiciability requirements. Alternatively, he argued that the plaintiffs failed to state a claim. Here he departed from all recognized interpretations of the Emoluments Clauses, contending that he may accept unlimited sums from foreign powers so long as he does not personally perform any services in exchange. *See* ECF No. 99, at 32–33.

The district court dismissed the complaint under Rule 12(b)(1). JA-324–52. *First*, it concluded that the plaintiffs lack standing. It did not dispute the plaintiffs' showing that they compete with the President's properties for government clientele. JA-336. Instead, without citing any allegations, or evidence, or competitor-standing precedents, it opined that the plaintiffs failed adequately to allege that Mr. Trump's conduct "caused [their] competitive injury and that such an injury is *redressable*." JA-335. On causation, the court speculated that the President's unlawful acceptance of emoluments while holding office will not confer an advantage on his properties because other factors might also influence where foreign and domestic government officials take their business. JA-336. On redressability, it dismissed the plaintiffs' case because "there is no remedy this Court can fashion to level the playing field

for Plaintiffs as it relates to overall competition," from both "government and non-government customers alike." JA-337. The district court added that the hypothetical possibility of congressional consent to the President's receipt of foreign emoluments defeats redressability. *Id.*

Second, the court also held that the plaintiffs lacked standing because their claims fall outside the "zone of interests" of the Emoluments Clauses. JA-338–40. The court did not cite any case dismissing, on zone-of-interest grounds, an equitable claim seeking to prevent the violation of a structural constitutional provision. Nor did it recognize the principle that, because structural provisions ultimately "protect the individual," those who suffer Article III injury are not barred from seeking equitable relief. *Bond v. United States*, 564 U.S. 211, 222 (2011). The court offered no reason why the Emoluments Clauses—structural provisions defining how federal officeholders may interact with foreign and domestic governments—would warrant an exception to this principle. Instead, the court relied entirely on a dissent from Justice Scalia, and noted that the Emoluments Clauses prohibit only *some* profiteering, not *all* profiteering.

Finally, after concluding that it lacked Article III jurisdiction, the district court proceeded to weigh in on two "prudential considerations" that had not been raised by the President. JA-348. It first held that the plaintiffs' allegations present a political question textually committed to Congress—even though numerous other

constitutional provisions with near-identical "consent of Congress" language have long been held justiciable. And second, it held that the plaintiffs' claims are unripe because Congress hasn't decided whether to consent to the President's foreign emoluments—even though the Constitution provides that such emoluments are illegal unless and until Congress affirmatively says otherwise.

STANDARD OF REVIEW

This Court reviews dismissals under Rule 12(b)(1) de novo, "accepting as true the allegations in the complaint and drawing all reasonable inferences in favor of the plaintiff." *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2d Cir. 2016). In addition, the Court is free to consider "all extrinsic evidence proffered by the parties to the district court in support of their jurisdictional positions." *Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719, 725 (2d Cir. 2017).

SUMMARY OF ARGUMENT

I. *Standing*. The competitor-standing doctrine allows plaintiffs to rely on economic logic to establish Article III standing where the defendant's unlawful conduct subjects them to increased competition. As courts have explained in cases involving antitrust, unfair competition, and regulatory challenges, a competitor plaintiff need only show that she competes in the same arena as the party who benefits from the defendant's unlawful conduct.

This suit alleges that the President has adopted an unlawful practice of accepting emoluments from foreign and domestic officials through his hotels and restaurants. There can be no doubt that plaintiffs Goode, Phaneuf, and ROC have adequately demonstrated—through detailed allegations, declarations, and expert testimony—that they compete in the same arena with the President's properties. While courts often find competitor standing in national or international markets, the plaintiffs here compete with the President's hotels and restaurants in specific and adjoining neighborhoods, offering similar goods, services, quality, and prices. It follows that they have suffered injury-in-fact.

The district court, however, held that the plaintiffs failed to establish causation and redressability. On causation, it speculated that the plaintiffs' "loss of business" could result from "government officials' independent desire to patronize Defendant's businesses." JA-336. But the plaintiffs don't argue that their only injury is loss of particular customers. Nor do they deny that government officials might weigh other considerations in deciding where to take their business. Under precedent, the relevant question is whether the plaintiffs have adequately alleged that the President's receipt of emoluments has injured them by forcing them to compete in an unlawfully skewed market. The plaintiffs' allegations are more than adequate. *First*, they have alleged that governments now prefer the President's properties because they can confer emoluments on him by going there. Foreign officials

openly admit as much. *Second*, the President himself has encouraged such conduct by stating that his regard for foreign nations is linked to how much they patronize his businesses. *Third*, it is inconsistent with the Emoluments Clauses' design to assume that the opportunity to enrich the President cannot tempt officials to influence him. The Clauses rest on the Framers' contrary assumption.

On redressability, the district court nakedly speculated that the plaintiffs could face increased competition for *non-governmental* business. But that is irrelevant; the relevant market is the one for *governmental* business at hotels and restaurants in New York and Washington. The plaintiffs allege that the President's acceptance of emoluments, in that specific market, injures them by placing an illegal thumb on the scales. If the court grants relief, this discrete competitive injury would necessarily be redressed to some degree—which is all that Article III requires.

II. *Zone of Interests*. The district court held that the plaintiffs "do not fall within the zone of interests of the Emoluments Clauses." JA-333. But contrary to the district court's rigorous view of the test—which it based on a dissenting opinion that it cited as a majority—the zone-of-interests test is undemanding, and forecloses suit only when a plaintiff's interests are "marginally related to or inconsistent with the purposes" of the relevant provision. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Neither the Supreme Court nor this Court has ever dismissed a case on zone-of-interest grounds where plaintiffs

with standing sought to prevent the violation of a structural constitutional provision. In such cases, "individuals who suffer otherwise justiciable injury may object," and courts may "adjudicate [their] claim." *Bond*, 564 U.S. at 220, 223.

In any event, the plaintiffs' interests here are directly tied to the Emoluments Clauses. An "emolument" is a "gain," and one person's gain is another's loss. The plaintiffs allege that the President is using his office to enrich himself by accepting emoluments—often at their expense. Far from being "marginally related" or "inconsistent" with the Clauses' purposes, this interest strikes at their core.

III. *Political Question and Ripeness.* The district court also justified its dismissal based on two "prudential" grounds: the political-question doctrine and ripeness. As to the first, it concluded that "this is an issue committed exclusively to Congress" because Congress may consent. JA-349. But the Domestic Emoluments Clause has no consent exception. And the Foreign Emoluments Clause makes the acceptance of emoluments illegal *unless Congress consents*—not the other way around. The "Consent of Congress" language makes no sense if the Clause can be enforced *solely* by Congress. Legislators wouldn't need to "consent" to an official's acceptance of emoluments; they could just do nothing. The wrongheadedness of this reading is confirmed by precedent addressing parallel constitutional provisions providing for congressional consent—which have long given rise to justiciable suits and have never been thought to create political questions.

The same reasons largely dispose of the district court's ripeness analysis, which holds that the claims in this case cannot be ripe until Congress decides to "confront the defendant over a perceived violation of the Foreign Emoluments Clause." JA-351. The President is violating the Clause *now.* The plaintiffs are being injured *now*. Their claims should be adjudicated on the merits.

ARGUMENT

I. The plaintiffs have Article III standing.

To pursue claims in federal court, a plaintiff "must 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, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The injury must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court has emphasized that the injury requirement is "a low threshold," meant only to ensure that "the plaintiff has a personal stake in the outcome of the controversy." *John v. Whole Foods Mkt. Grp.*, 858 F.3d 732, 736 (2d Cir. 2017).[9]

Here, President Trump's acceptance of emoluments violates rules that protect our constitutional order, and thereby affects every American. But his conduct also inflicts concrete and particularized injury on the plaintiffs. *See Ass'n of Data*

[9] Although *Clapper v. Amnesty International*, 568 U.S. 398, 409 (2013), suggested that plaintiffs must show that future injury is "certainly impending," the Court has since clarified that "an allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) (holding that an injured party "may be a reliable private attorney general to litigate [ ] issues of the public interest"). Specifically, the President's illegal acceptance of emoluments has tilted the marketplace and skewed the incentives of its participants, particularly disadvantaging (and thus injuring) the plaintiffs, who compete with his hotels and restaurants for governmental business. *See TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011); *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989).

At bottom, the plaintiffs seek only a straightforward application of settled competitor-standing precedent. President Trump has adopted an unlawful practice of accepting emoluments from foreign and domestic officials. As evidenced by their conduct and public statements, some officials are ready to play along, conferring emoluments on him—in particular, through his hotels and restaurants. As a result, the President's hotels and restaurants are now more attractive to those officials. And the plaintiffs, who compete with the President's hotels and restaurants, have been placed at a competitive disadvantage with respect to this set of potential customers. If the court were to grant declaratory or injunctive relief, that discrete injury would be redressed. The plaintiffs therefore have standing.

This conclusion follows from first principles of Article III standing doctrine and elementary laws of economics. It is also supported by Judge Messitte's rigorous opinion in *District of Columbia & Maryland v. Trump*, which upheld competitor standing on materially identical facts. *See* No. 17-Civ-1596, 2018 WL 1516306, at *10–13, *15–19 (D. Md. Mar. 28, 2018) ("*D.C. v. Trump*"). As Judge Messitte explained, "plaintiffs with an economic interest have standing to sue to prevent a direct competitor from receiving an illegal market benefit leading to an unlawful increase in competition." *Id.* at *11. That holding is fully applicable here.

A. The competitor-standing doctrine allows plaintiffs to use economic logic to demonstrate Article III standing.

The competitor-standing doctrine is "well-established." *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). Courts rely on "economic logic to conclude that a plaintiff will likely suffer an injury-in-fact" when the defendant's unlawful conduct increases competition or aids the plaintiff's competitors. *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008); *see also Clinton v. City of New York*, 524 U.S. 417, 433 (1998) ("The Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement.").

For competitor standing, a plaintiff need only "show that he personally competes in the same arena" with a party who benefits from the defendant's unlawful conduct. *In re U.S. Catholic Conference (USCC)*, 885 F.2d 1020, 1029 (2d Cir. 1989). If

that requirement is met, illegal acts that confer "some competitive advantage" on a plaintiff's competitor—or that reshape the market in a manner harmful to the plaintiff—are held to satisfy Article III's injury-in-fact requirement. *Fulani*, 882 F.2d at 626; *see also Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1197–98 (D.C. Cir. 2015); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 192 (2d Cir. 1980).

Invoking this doctrine, courts have repeatedly upheld competitor standing when the government has unlawfully tilted the marketplace to a plaintiff's disadvantage. *See, e.g.*, *Canadian Lumber*, 517 F.3d at 1332 (government's subsidization of only U.S. lumber); *Adams*, 10 F.3d at 921 (unlawful milk-pricing order); *Fulani*, 882 F.2d at 626 (IRS's unlawful grant of tax-exempt status). Relying on the same economic logic, courts have upheld Article III standing when the illegal acts of private parties increased or distorted competition against a plaintiff. *See, e.g.*, *Philadelphia Taxi Ass'n, Inc v. Uber Techs., Inc.*, 886 F.3d 332, 346 (3d Cir. 2018) (antitrust violations by Uber); *TrafficSchool.com*, 653 F.3d at 825 (unfair competition by website); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 223 (2d Cir. 2008) (banks' antitrust violations injuring cardholders); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (en banc) (sandpaper supplier's antitrust violation); *In re McCormick & Co. Pepper Prod. Mktg. & Sales Practices Litig.*, 215 F. Supp. 3d 51, 57 (D.D.C. 2016) (spice distributor's Lanham Act violations). As these cases illustrate, although the doctrine originated in cases where the government controlled access to a market in which a plaintiff

competed, it has since been applied in many other contexts. Thus, when a party acts illegally and thereby distorts competition, affected market participants may seek redress. *See, e.g.*, *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 738 (5th Cir. 2016); *Adams*, 10 F.3d at 921–23.

In competitor cases, defendants often argue that market actors' behavior is inherently too complex and dependent on third parties to support standing. But courts have uniformly held that this asks more of plaintiffs than the law requires. One court, for instance, has explained that a competitor plaintiff can show injury by describing "probable market behavior" and "creating a chain of inferences showing how defendant's [illegal acts] could harm plaintiff's business." *TrafficSchool.com*, 653 F.3d at 825. Inferential reasoning is proper here because "proving a counterfactual is never easy," especially when "the injury consists of lost sales that are predicated on the independent decisions of third parties; i.e., customers." *Id.*; *see also NicSand*, 507 F.3d at 449 (finding that 3M inflicted Article III injury on its competitor when it offered better—and allegedly illegal—deals to potential customers); *cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 (2014) (acknowledging that injury in Lanham Act cases involves an "intervening step of consumer deception," but explaining that this third-party step "is not fatal").

Similarly, defendants often assert that competitor plaintiffs lack standing because they cannot show exactly *which* customers they will lose as a result of illegal

competition. But courts have unequivocally rejected this argument, holding 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*, 610 F.3d at 73; *accord La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998).

Thus, where the defendant's unlawful conduct confers a benefit on a plaintiff's competitor, "it is presumed (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors." *Canadian Lumber*, 517 F.3d at 1334; *see also Cooper*, 820 F.3d at 738 ("It is a basic law of economics that increased competition leads to actual economic injury."); *Sherley*, 610 F.3d at 72 (same). That's why statistical evidence going into great depth about every possible causal chain in the relevant market is unnecessary, especially at the pleading stage. *See Canadian Lumber*, 517 F.3d at 1333. "Increased competition" *is itself* "a cognizable Article III injury." *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994).

Of course, this rule is not without limits. Most important, the plaintiff must actually compete in the same arena as the defendant. *See, e.g.*, *USCC*, 885 F.2d at 1029. Competitor standing thus does not apply when two parties are located hundreds of miles away from each other and there is, at best, a "vague probability" of competition, *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001), or when a

party has merely thought about competing in a market but lacks concrete plans to do so, *see New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002).

In general, though, courts take a broad view of what constitutes competition for purposes of standing. In a dispute between the Canadian Wheat Board and U.S. Customs, for instance, the court held that federal funding of a trade group that promotes (but doesn't sell) competing goods can support competitor standing. *See Canadian Lumber*, 517 F.3d at 1334. More recently, the D.C. Circuit held that the Teamsters had standing to challenge a program allowing Mexico-domiciled trucks to operate in this nation, since the program would generally cause increased competition "throughout the United States." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013). And many other cases have warned against too narrow a view of "what qualifies as participating in the . . . [relevant] market." *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014); *see also Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002) (Sotomayor, J.) (upholding standing under the analogous "competitive advocate standing" doctrine).

B. Each plaintiff has competitor standing.

Although the district court cited several decades-old competitor-injury cases, it did not properly apply this doctrine to the plaintiffs' allegations or address the leading cases cited in support of standing. Instead, it relied on legal considerations

at odds with basic premises of the doctrine—and on factual speculation lacking any foundation in the plaintiffs' allegations or the parties' evidentiary submissions.

1. Injury

The district court recognized that the plaintiffs have suffered "competitive injury." JA-335. And rightly so. Especially at the pleading stage, "[i]njury-in-fact is not Mount Everest." *Danvers Motor Co. v. Ford Motor Co.*,432 F.3d 286, 294 (3d Cir. 2005). To establish Article III injury, the plaintiffs need only show that they compete in the same arena as the defendant and that his illegal acts have caused an "actual or imminent increase in competition." *Sherley*, 610 F.3d at 73.

That standard is satisfied here. In light of the plaintiffs' detailed allegations and declarations—as well as the unrebutted expert testimony from Dr. Mueller and Professor Roginsky, JA-304–23, JA-275–84—it is reasonable to conclude that Goode, Phaneuf, and ROC "personally compete[] . . . in the same arena" with the President's properties. *USCC*, 885 F.2d at 1029; *see also D.C. v. Trump*, 2018 WL 1516306, at *12 ("Plaintiffs have alleged sufficient facts to show that the President's ownership interest in the Hotel has had and almost certainly will continue to have an unlawful effect on competition, allowing an inference of impending (if not already occurring) injury.").

In the district court, the President challenged this conclusion by advancing a hyper-granular view of competition—one that would preclude *any* conclusions

about which hotels or restaurants in the same city compete with each other. In comparing elite restaurants a few blocks apart, he even suggested that two versus three Michelin stars is an insurmountable difference. *See* ECF No. 99, at 18.

But that is not the law. Under Rule 12(b)(1), the question here is whether it is plausible to conclude that highly elite restaurants and hotels within walking distance of each other—and surrounded by foreign and domestic government offices—compete for government business. Given the many and varied circumstances under which courts have found competition in much larger and more diffuse markets, the answer to that question is yes. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 488 & n.4 (1998) (finding injury where the challenged conduct allowed persons in a national market who "might otherwise" patronize the plaintiff to instead patronize a competitor); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (allowing travel agents to challenge a rule allowing national banks to provide travel services, despite many other differences between banks and travel agencies); *Am. Inst. of Certified Pub. Accountants*, 804 F.3d at 1198 (applying "basic economic logic" to ascertain whether the plaintiffs competed with specific market participants, but not requiring proof that they offered identical services or even had the same customers).

Indeed, the plaintiffs here are far more obviously competitors. Whereas those cases involved national and international markets, this case drills all the way

down to competition in specific and adjoining neighborhoods. As anyone who has ever chosen a restaurant in Manhattan knows, although there are thousands of options, the universe of potential choices shrinks dramatically once a price point, neighborhood, and quality level have been selected. JA-308–09 ¶18; *Adams*, 10 F.3d at 922 ("[T]he narrower the relevant marketplace . . . the greater the likelihood that a plaintiff will experience future economic loss as a consequence of the competitive advantage bestowed on its direct competitor."). That is why these criteria are at the heart of most online reservation-booking systems, and why properties similar to each other in these respects inevitably compete. JA-277 ¶ 15. Accordingly, the only reasonable conclusion here is that top-tier, equivalently rated luxury hotels and restaurants located within 15–20 minutes of each other (and with similar price points) are competitors in the same arena. JA-277–78; JA-306–09. Any doubt on this point is dispelled by the unrebutted expert declarations.

The plaintiffs, moreover, have offered allegations that are more than sufficient to demonstrate how the President's illegal conduct has intensified and distorted competition. *See TrafficSchool.com*, 653 F.3d at 825. President Trump has "used his official position as President to generate business to his hotel properties and their restaurants from officials of foreign states, the United States, and/or state and local governments." JA-68 ¶ 202. To facilitate such patronage, the President's properties have hired staff solely to obtain governmental business. JA-37–38 ¶¶ 60–

61. Partly as a result, many officials have recently visited and hosted events at the President's properties in New York and Washington. JA-38–41 ¶¶ 64–86, 109. In some instances, those officials moved their events from other locations or effectively paid a premium rate for his goods and services, which now "provide a unique benefit: access to, influence on, and the good will of the President." JA-53 ¶¶ 150–52. That "unique benefit" is available only to those who contribute to the President's net worth, which he may easily learn of from news reports, private remarks, business updates, or encountering an official at his properties. JA-34, JA-38 ¶¶ 44, 62.

In short, although bound by the Emoluments Clauses, the President has repeatedly accepted emoluments from government officials. Further, he has done so openly and notoriously, ensuring that officials keen to confer financial benefits on the President know how (and where) to do so. JA-33–53 ¶¶ 42–152. At the same time, he has closely linked his presidency to his properties, visiting them regularly and conducting official business there. *See* Bump, *Trump has visited a Trump-branded property every 2.8 days of his presidency*, Wash. Post, Apr. 8, 2017. The President has thus not only violated the Emoluments Clauses, but has done so in an exceptionally public manner, adopting practices that give foreign and domestic officials a powerful incentive to patronize his properties in hopes of winning his affection.

The President's illegal conduct thereby tilts the competitive field in favor of his properties and against their competitors. *See Cooper*, 820 F.3d at 738 (explaining

the "'basic law of economics' that increased competition leads to actual economic injury"). The plaintiffs can offer outstanding goods and services. But what they can't offer is the opportunity to privately benefit the President of the United States, with all the real or perceived advantages that might result from openly helping to enrich him. And as we explain below, it is no great leap to conclude that domestic and foreign officials might see that opportunity as a salient consideration when deciding where to take their business in New York and Washington.

2. Causation

In a competitor-standing case, the relevant injury is exposure to intensified competition, which is presumed to result in harm. *See Sherley*, 610 F.3d at 73; *Canadian Lumber*, 517 F.3d at 1334; *Cooper*, 820 F.3d at 738. Logically, that presumption incorporates the causal chain necessary to satisfy traceability and redressability: Because it is a law of economics that increased competition causes injury, exposure to increased competition as a result of unlawful acts will satisfy the Article III injury requirement, and a command to cease the unlawful acts that caused the increased competition in the first place will redress the injury. For this reason, courts rarely belabor traceability and redressability analysis in competitor cases. *See Int'l Bhd. of Teamsters*, 724 F.3d at 212 (emphasizing that the "causation and redressability requirements of Article III standing are easily satisfied" where, absent the defendant's actions, "members of these groups would not be subject to increased competition");

see also Chrysler Grp. LLC v. Fox Hills Motor Sales, Inc., 776 F.3d 411, 430–31 (6th Cir. 2015); *Cooper*, 820 F.3d at 738; *Sherley*, 610 F.3d at 72; *Fulani*, 882 F.2d at 628.

Here, however, the district court concluded that the plaintiffs failed to show causation. To support this view, it speculated—without citing any allegations or evidence—that the plaintiffs' "loss of business" may result from "government officials' independent desire to patronize Defendant's businesses," which has "generally increased since he became President." JA-336. The district court added that even apart from President's violations of the Emoluments Clauses, "the Hospitality Plaintiffs may face a tougher competitive market overall." *Id.*

This reasoning rests on multiple errors. To start, it mischaracterizes the nature of the injury that is traceable to the President's illegal conduct. The plaintiffs do not argue that their only injury is "loss of business" from specific, identifiable customers. *See Sherley*, 610 F.3d at 73. Nor do they contend that they have suffered injury-in-fact from any and all increases in competition that have occurred since the election. Rather, the plaintiffs base their claims on the injury of increased competition for governmental business resulting *specifically* from the President's acceptance of emoluments. *See D.C. v. Trump*, 2018 WL 1516306, at *11.

Accordingly, the key question here is whether the plaintiffs have plausibly alleged under Rule 12(b)(1) that the President's receipt of emoluments has intensified or distorted competition for governmental business. If so, that injury is traceable to

the President's illegal conduct. And for three reasons, this is the correct conclusion. *See D.C. v. Trump*, 2018 WL 1516306, at *16.

First, the plaintiffs have alleged that some governmental officials now prefer the President's properties because they can confer emoluments on him by going there. *See id.* ("Their allegation is bolstered by explicit statements from certain foreign government officials indicating that they are clearly choosing to stay at the President's Hotel."). For example, one foreign diplomat openly declared, "Believe me, all the delegations will go there," and another echoed the same sentiment: "Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!'" JA-38 ¶ 62.

Further, numerous foreign officials have openly admitted that the opportunity to "spend[] money" at the President's properties has led them to patronize his hotels. *See* O'Connell & Jordan, *For foreign diplomats, Trump hotel is place to be* ("In interviews with a dozen diplomats . . . some said spending money at Trump's hotel is an easy, friendly gesture to the new President."). And experts on diplomatic behavior have repeatedly confirmed that the opportunity to financially benefit the President will matter to some foreign officials when deciding where to take their business. *See* Paddock et al., *Potential Conflicts Around the Globe for Trump, the Businessman President*, N.Y. Times, Nov. 26, 2016 (former State Department expert warning that "foreign government officials" will favor "doing business with the Trump

organization" to "ingratiate themselves with the Trump administration"); Helderman & Hamburger, *Trump's presidency, overseas business deals and relations with foreign governments could all become intertwined*, Wash. Post (Nov. 25, 2016) (expert on former Soviet states warning that officials from corrupt regimes will seek to exploit "[t]he gray areas Trump has between where his job as president ends and where his business interests begin"); O'Connell & Jordan, *For foreign diplomats, Trump hotel is place to be* (quoting a former Mexican ambassador as observing that "the temptation and the inclination will certainly be there").

Second, the President himself has made public statements strongly implying that his view of foreign nations is linked to how they treat his private businesses. *See D.C. v. Trump*, 2018 WL 1516306, at *16. These statements encourage officials to view the opportunity to benefit the President as a reason to prefer his properties over competitors. For instance, the President stated during his campaign, "I love China! The biggest bank in the world is from China. You know where their United States headquarters is located? In this building, in Trump Tower." JA-35–36 ¶ 51. The President made similar statements about Saudi Arabia: "I get along great with all of them. They buy apartments from me." JA-42 ¶ 96. He added: "They spend $40 million, $50 million. Am I supposed to dislike them? I like them very much." *Id.* That same year, he remarked that "I have a little conflict of interest because I have a major, major building in Istanbul." Paddock, *Potential Conflict*s.

Finally, it is consistent with the core premises of the Emoluments Clauses to infer that the opportunity to enrich the president will affect decisionmaking by governmental officials. These Clauses were designed on the assumption that foreign powers and domestic officers would actively try to gain influence over the president through financial inducements. *See* 3 Farrand, *The Records of the Federal Convention of 1787*, at 327; *The Federalist* No. 73 (Hamilton). And in the vast universe of potentially corrupting transactions, the Framers targeted personal financial benefits as uniquely capable of swaying federal officers. Their reasons for doing so are no less true today than they were in the 1780s. It would therefore be surprising if officials *didn't* view the opportunity to enrich the President as relevant to their decisions regarding which otherwise comparable businesses to patronize.

The district court did not address any of this. Nor did it evaluate the plaintiffs' factual allegations bearing on traceability or distinguish any of the competitor precedents cited above. Instead, it relied on a decades-old case that predates the competitor-standing doctrine. There, the plaintiffs offered only "unadorned speculation" that the conferral of a government benefit on a third party—who was not a competitor—would cause them harm. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

That reliance was misplaced. The plaintiffs do not offer mere guesswork about the conduct of third parties. Rather, consistent with decades of precedent,

they invoke laws of economics holding that the conferral of an illegal advantage on a competitor in the same marketplace causes injury. As Judge Messitte has explained: "When the injury is the loss of an opportunity to fairly compete . . . the presence of third party actors in the marketplace has been found not to destroy traceability. The more relevant question, then, is whether the *increase of competition* can be fairly traced through the third party's intervening action back to the President." *D.C. v. Trump*, 2018 WL 1516306, at *16. Here, the plaintiffs have offered overwhelming allegations and evidence that they compete with the President's properties—and that the President's illegal conduct creates an additional, distinct incentive for government officials to prefer his hotels and restaurants. Under settled standing doctrine, those allegations more than suffice to satisfy Article III's causation requirement. *See e.g.*, *TrafficSchool.com*, 653 F.3d at 825.

3. Redressability

The President is engaging in illegal conduct that makes patronizing his hotels and restaurants more attractive to governmental officials. Businesses that compete with those properties therefore face intensified competition with respect to that class of customers. This competitive injury is directly traceable to his unlawful acts and would be redressed if the court were to grant the plaintiffs' requested relief.

The district court, however, concluded otherwise. Without discussing any of the plaintiffs' allegations or evidence, and without citing any cases, it speculated

that "Plaintiffs are likely facing an increase in competition in their respective markets for business from all types of customers—government and non-government customers alike—and there is no remedy this Court can fashion to level the playing field for Plaintiffs as it relates to overall competition." JA-337. The district court added that an order prohibiting the President from violating the Emoluments Clauses still would "not prohibit Defendant's businesses from competing directly with the [plaintiffs]." *Id.* It thus opined that "while a court order enjoining Defendant may stop his alleged constitutional violations, it would not ultimately redress the Hospitality Plaintiffs' alleged competitive injuries." *Id.*

This reasoning is mistaken. To start, the behavior of *non-government* customers is irrelevant; the only question here is whether the President's illegal conduct has distorted competition for *governmental* business. And with respect to those customers, the plaintiffs do not seek to "level the playing field" of "overall competition." *Id.* Nor do they seek to halt the President's businesses from competing with them *at all*. *Id.* They seek only an order to stop the President from illegally conferring a competitive advantage on his properties by accepting emoluments. *See D.C. v. Trump*, 2018 WL 1516306, at *18 ("The ultimate issue is not a flat prohibition against such patronage by foreign or domestic states, but whether 'to some extent' their incentive to cater to the President will be reduced if he can no longer receive the benefits

which, through the Hotel, he currently derives."). If this improper incentive is removed from the marketplace, the plaintiffs' injury will be redressed.

It is immaterial that some government officials might continue to patronize the President's properties even if the President were to disentangle himself from his businesses that are accepting emoluments. JA-337, JA-342 (Op. 19 & n.3); *see also D.C. v. Trump*, 2018 WL 1516306, at *18 ("[I]t is true that the Court cannot prevent any and all third party foreign or domestic government actors from patronizing the Hotel, but that continues to miss the point."). There's no denying that, even if the plaintiffs 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. But it is settled that a plaintiff "need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007) (redressability where "risk of catastrophic harm" could be "reduced to some extent if petitioners received the relief they seek"). And here, the plaintiffs have reasonably established that the President's acceptance of emoluments has injured them by placing a distinct, illegal thumb on the competitive scales. *See Sherley*, 610 F.3d at 72 ("[A] seller facing increased competition may lose sales to rivals, or be forced to lower its price or to expend more resources to achieve the same sales."). Because their

requested relief would redress *this* injury—and help restore the competitive balance—the plaintiffs have shown redressability.

Finally, the district court held that the plaintiffs could not show redressability because "Congress could still consent and allow Defendant to continue to accept payments from foreign governments in competition with Plaintiffs." JA-337. This analysis does not withstand scrutiny.

First, unlike the Foreign Emoluments Clause, the Domestic Emoluments Clause does not permit Congress to authorize transactions by consenting to them. The district court's reasoning is therefore inapplicable to half of the plaintiffs' case.

And second, the Constitution makes clear that acceptance of foreign emoluments is illegal unless Congress affirmatively says otherwise. Since Congress has *not* given its consent, the President's conduct here is unlawful, and the mere possibility of congressional consent at some future point does not mean that a court order would fail to redress the ongoing injuries that support the plaintiffs' standing under Article III. Indeed, that reasoning explains why federal courts have long adjudicated challenges under other provisions that, like the Foreign Emoluments Clause, permit Congress to authorize otherwise-illegal conduct by consenting to it. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 6 (2009) (Tonnage Clause); *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 408 (1994) (Dormant Commerce Clause); *Cuyler v. Adams*, 449 U.S. 433, 439 (1981) (Compact Clause); *Dep't of Revenue v.*

James B. Beam Distilling Co., 377 U.S. 341, 344 (1964) (Import/Export Clause). The judicial power to provide redress for injury caused by illegal conduct does not dissipate whenever it is conceivable that other circumstances in the world might, at some point, alleviate that same injury. *See* Litman & Hemel, *On the Ripeness of Potted Plants and Other Non Sequiturs*, Take Care (Dec. 22, 2017) (explaining that if the district court were correct, no plaintiff could ever challenge "executive action that exceeds the scope of congressionally delegated authority, or executive action that violates a statutory prohibition," since "Congress could have authorized the action, but didn't").[10]

II. The zone-of-interests test does not bar the plaintiffs' claims.

The district court also held that, even if the plaintiffs have Article III standing, they lack "prudential" standing because their injuries "do not fall within the zone of interests of the Emoluments Clauses." JA-338. That is incorrect: the zone-of-interests test poses no barrier here.[11]

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[10] ROC has associational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) at least one of its members has standing in its own right; (2) its interests are germane to its mission, JA-286–87 ¶ 7, and (3) individual participation isn't necessary because "the organization seeks a purely legal ruling," with no "individualized relief." *Bldg. & Constr. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir. 2006).

[11] Although the district court indicated that the test is part of "prudential standing," the Supreme Court has "found that label inapt"—making clear that the test is neither a matter of prudence nor a question of standing. *Lexmark Int'l*, 134 S. Ct. at 1387 & n.3. But, however it's categorized, this test does not bar the plaintiffs' claims.

"As the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by the plaintiff." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011). This test "is not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). Plaintiffs need only show that the interests they seek to vindicate "'arguably' fall within the zone of interests" protected by the legal provision they've invoked. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017). The Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Patchak*, 567 U.S. at 225. "The test 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. *Id.*

The plaintiffs' claims easily meet that standard. For starters, neither the Supreme Court nor this Court has dismissed a case on zone-of-interest grounds where the plaintiffs sought only to prevent the violation of a structural provision of the Constitution and had Article III standing to do so. To the contrary, the Supreme Court has long allowed private parties—like the plaintiffs here—to seek equitable relief in such circumstances. *See, e.g.*, *Am. Ins. Co. v. Garamendi*, 539 U.S. 396 (2003) (foreign relations); *INS v. Chadha*, 462 U.S. 919 (1983) (bicameralism and presentment); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (Compact Clause); *Hill v. Wallace*, 259 U.S. 44 (1922) (Commerce Clause). In fact, these kinds of suits

"have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond*, 564 U.S. at 222 (collecting cases).[12]

There is a reason that none of these cases has ever been thought to pose a zone-of-interests problem. The "structural principles secured" by the Constitution are not just ends in themselves; they exist to "protect the individual as well." *Id.* Federalism, for example, protects "all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Separation-of-powers principles, too, serve more than systematic or architectural goals: "separation of powers can serve to safeguard individual liberty." *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498–501 (2010). Recognizing this fact does not mean that *anyone* may sue to vindicate these interests. Article III's requirements root

[12] It is doubtful that the zone-of-interests test applies to such cases at all. Only once has the Court applied the test to a constitutional claim—40 years ago, in a footnote permitting a dormant Commerce Clause claim to proceed. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320–321, n.3 (1977). It is unclear whether "that decision was simply anomalous" or if there is actually a "prudential" test "in the constitutional context." *Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 676 n.3 (D.C. Cir. 2013) (Silberman, J., concurring); *see also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). On those rare occasions that courts have applied the test in constitutional litigation (involving rights-conferring provisions or interstate-commerce protections), the approach has closely resembled third-party standing analysis. *See Ctr. for Reprod. Law & Policy*, 304 F.3d at 196 ("Plaintiffs cannot make their First Amendment claims actionable merely by attaching them to a third party's due process interests."); *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 105, 108–09 (3d Cir. 2015) (dismissing Tonnage Clause claim because a plaintiff "cannot assert the rights of third-party vessels"). Here, the plaintiffs seek to vindicate *their own* interests—not those of third parties.

out abstract claims and generalized grievances. But the Court has made clear that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object," and courts may "adjudicate [the] claim." *Bond*, 564 U.S at 220, 223.

This case is no exception. The Emoluments Clauses are structural provisions that define how federal officeholders may (and may not) interact with foreign powers, states, and other institutions of the national government. The Foreign Emoluments Clause broadly forbids federal officials from accepting any "emolument" "of any kind whatever" from any foreign state, while giving Congress the power to consent. And the Domestic Emoluments Clause forbids the president from accepting any profit or gain from states or the federal government, beyond a fixed salary and benefits. Together, these Clauses guard against "every kind of influence by foreign governments," 24 Op. Att'y Gen. 116, 117 (1902), and prevent the president from being exposed to any "pecuniary inducement" to betray "the independence intended for him by the Constitution," *The Federalist* No. 73 (Hamilton). In other words, they ensure that the president will not seek to profit from his office by accepting governmental payments. Like other structural provisions, the Emoluments Clauses seek to achieve systematic goals (preventing corruption, tempering foreign influence, respecting federalism)—and thereby to protect individuals from the personal harms that inevitably result when these principles of our constitutional

order are violated. *See* Shugerman & Rao, *Emoluments, Zones of Interests, and Political Questions*, 45 Hastings Const'l L. Quarterly 651, 657–663 (2018) (tracing history of the Clauses' anti-corruption purposes for zone-of-interests analysis).

The interests asserted by the plaintiffs are directly tied to these concerns. The plaintiffs allege that President Trump is using his tenure in office as an opportunity to enrich himself by accepting financial benefits from foreign and domestic governments at his properties. The plaintiffs further allege that the President's gain has been their loss. Accordingly, their interests in preventing his unlawful profiteering—which has come at their direct expense—are not "marginally related to or inconsistent with the purposes" of the Emoluments Clauses. *Patchak*, 567 U.S. at 225. To the contrary, they evoke the very *core* of these provisions. If a non-citizen may enforce the requirements of bicameralism and presentment (as in *Chadha*), and a vengeful, spurned lover may enforce the Tenth Amendment (as in *Bond*), then a business that suffers direct competitive harm from the President's unlawful acceptance of emoluments may assert a claim under the Emoluments Clauses.

The district court's holding to the contrary is based on a fundamental misunderstanding of the zone-of-interests test and the nature of the plaintiffs' interests. As to the former, the district court seemed to the think that the operative framework is supplied by *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). But the district court cited only Justice Scalia's dissent in that case, not the majority opinion. JA-338.

And even that dissent explained that the test's purpose is to limit *damages*—a purpose that isn't implicated here. *See Wyoming*, 502 U.S. at 473.

As to the plaintiffs' interests, the district court reasoned that the Clauses cannot protect against "increased competition in the market for government business" because they "offer no protection from increased competition in the market for *non-government* business," and because Congress may consent. JA-340. As with the court's Article III analysis, this reasoning is mistaken. Just because the Clauses allow the President to accept *some* emoluments (from non-government actors and from foreign governments if Congress consents) does not mean that he may accept *any* emoluments. In fact, the opposite is true. And here, the harm that the plaintiffs seek to remedy—and the interests they seek to vindicate—are directly tied to his acceptance of those prohibited emoluments. Nothing more is needed. *See Patchak*, 567 U.S. at 225; *Clarke*, 479 U.S. at 399.

III. There are no prudential barriers to standing.

Despite concluding that the plaintiffs lack standing—and thus that it lacks jurisdiction—the district court reached out to decide two issues not raised by the President: the political-question doctrine and ripeness. Its advisory opinion on these issues was not only unnecessary but incorrect.

A. The political-question doctrine does not bar this suit.

In recent years, the Supreme Court has repeatedly emphasized that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Driehaus*, 134 S. Ct. at 2347 (2014). "[C]ourts cannot avoid their responsibility merely because the issues have political implications." *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). This command extends even to politically sensitive disputes that the judiciary "would gladly avoid." *Id.* at 194.

The political-question doctrine creates a "narrow exception" to that rule. *Id.* at 195. Courts lack the authority to decide disputes "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Id.*; *see also Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying four additional factors, none of which played any role in *Zivotofsky*, the Court's most recent decision in this field).

Here, the district court concluded that the plaintiffs' case must be dismissed on political-question grounds. JA-349. It reasoned that "the explicit language of the Foreign Emoluments Clause" makes clear that "this is an issue committed exclusively to Congress." *Id.* In the district court's view, "as the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Con-

gress is the appropriate body to determine whether, and to what extent, Defendant's conduct unlawfully infringes on that power." *Id.*

This analysis is inapplicable to the plaintiffs' claims under the Domestic Emoluments Clause. That Clause includes no congressional-consent provision. As for the Foreign Emoluments Clause, the district court's reasoning is at odds with constitutional text and structure. Giving the Clause its plain meaning, the "consent of Congress" provision simply makes clear that *without* congressional approval, it is illegal for certain federal officers to accept any foreign emoluments. The placement of this power in Article I makes perfect sense on the premise that the Foreign Emoluments Clause is judicially enforceable: Congress is explicitly empowered to exempt federal officials from potential liability in court.

But the "Consent of Congress" provision makes little sense if the Foreign Emoluments Clause can be enforced solely by Congress. In that case, legislators do not need to "consent" to an official's receipt of foreign emoluments in order to validate them; rather, all they need do is *nothing*. As a practical matter, there would be no requirement of formal congressional action to approve particular foreign emoluments. Nor would the president be obliged to affirmatively submit foreign emoluments to Congress for approval; instead, Congress would be forced to aggressively and proactively monitor the president's private dealings, forbidding or approving emoluments as it found them (assuming he did not conceal his records).

This interpretation would invert the structure and anti-corruption purpose of the Foreign Emoluments Clause, which makes clear that all foreign emoluments are illegal until Congress explicitly says that they are not.

The result of that interpretation is a major re-writing of the clause:

> ~~[N]o~~ **Any** Person holding any Office of Profit or Trust under [the United States], ~~shall, without the Consent of the Congress,~~ **may** accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State, **unless Congress subsequently denies Consent.**

Ultimately, in this case as in so many others, Congress's raw authority to act and authorize does not mean that its inaction precludes a judicial accounting of illegal conduct. So long as Congress remains silent, the President is breaking the law by accepting emoluments, and injured parties may seek redress in federal court.

That conclusion is confirmed by precedent addressing other provisions that provide for congressional consent. Consider Article I, Section 10, Clauses 2 and 3:

> Cl. 2: No State shall, ***without the Consent of the Congress***, lay any Imposts or Duties on Imports or Exports . . .
>
> Cl. 3: No State shall, ***without the Consent of Congress***, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

(emphasis added). Here, too, the Constitution prohibits a particular governmental actor from engaging in specific conduct—unless Congress consents. But no court has ever held that these clauses create political questions. To the contrary, federal courts have long adjudicated cases arising under these constitutional provisions. *See, e.g.*, *Polar Tankers*, 557 U.S. at 6; *Cuyler*, 449 U.S. at 439; *James B. Beam Distilling Co.*, 377 U.S. at 344. Similarly, courts have adjudicated cases under the Dormant Commerce Clause, even though congressional consent could cure any violation by a state government. *See C&A Carbone, Inc.*, 511 U.S. at 408.

Precedent is also instructive in another respect: it shows what an *actual* textual commitment to the political branches looks like. And the answer is: not like the Foreign Emoluments Clause. *Nixon v. United States* is instructive. There, the Supreme Court found a textual commitment because the Impeachment Clause vests the "*sole Power* to try all Impeachments" in the Senate, allowing no role for the Judiciary. 506 U.S. 224, 229–231 (1993). *That* is what it means for the Constitution to give only one branch power over an issue. The consent provision in the Foreign Emoluments Clause has a fundamentally different purpose. Rather than preclude judicial adjudication of violations, it specifies circumstances in which Congress can create exceptions to the underlying rule.

Accordingly, as a matter of text, structure, and precedent, the district court erred in holding that the plaintiffs' claims pose non-justiciable political questions.

B. The plaintiffs' claims are ripe.

Finally, the district court concluded that the plaintiffs' Foreign Emoluments Clause claims are "not ripe." JA-350. It thus held that these claims must be dismissed *even if* they do not present a political question and *even if* the plaintiffs have Article III standing. The court reached this surprising conclusion—which the President did not urge below—on the theory that the claims cannot be ripe "unless and until" Congress decides "to confront the defendant over a perceived violation of the Foreign Emoluments Clause." JA-351. At no point did the court explain how this analysis even arguably applies to the plaintiffs' claims under the Domestic Emoluments Clause, which does not contemplate congressional consent.

More important, the district court fundamentally mischaracterized how the Foreign Emoluments Clause works. As we have explained, the Clause prohibits federal officeholders from accepting emoluments from foreign governments *unless* Congress grants consent. Congress has not given its consent here. Ergo, the President is violating the Clause.

On a correct understanding of the Constitution, the timeliness of the plaintiffs' claims does not turn on any "contingent future events." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). The plaintiffs have a claim *now*. And they will continue to have a claim irrespective of whether Congress chooses to "confront" the President and express disapproval of his acceptance of emoluments.

Only if Congress affirmatively authorizes his receipt of foreign emoluments—and does so going forward—would our claims be affected. But in that event, dismissal would be warranted because the violations would have been cured and the allegations rendered moot; it would *still* be improper to conclude that the plaintiffs' claims are not ripe.

Far from being premature, the plaintiffs' claims present an issue in urgent need of judicial review. Faced with flagrant, ongoing violations of the Constitution—violations causing them personal, economic injury—the plaintiffs are not required to wait and see if Congress takes action. Indeed, it would be especially unfair to impose that requirement where the President has actively thwarted congressional review by concealing the full scope of his unlawful conduct. Simply put, the plaintiffs' claims have been ripe since the President's first days in office. They remain ripe today. And this Court should therefore remand and instruct the district court to decide them on the merits.

CONCLUSION

The judgment of the district court should be reversed.

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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 13,617 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.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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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