No. 18-2488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISTRICT OF COLUMBIA; STATE OF MARYLAND,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The briefing in this case, as well as the related mandamus petition, demonstrates that this Court can, should, and must (with respect to Article III standing) reach issues other than absolute immunity. Indeed, Plaintiffs' briefing only confirms the importance of conclusively resolving the important legal issues raised by this appeal. That is because it is now clear that each of the President's arguments, including absolute immunity, provides a compelling basis for dismissing the complaint with prejudice. The President respectfully asks the Court to grant that relief.

ARGUMENT

I. The Court's Appellate Jurisdiction Is Not Confined To Absolute Immunity.

This Court has appellate jurisdiction to decide whether Plaintiffs have Article III standing, a cause of action against the President in his individual capacity, and a claim under the Emoluments Clauses. Defendant-Appellant's Brief ("Br.") 10-12. Plaintiffs' contrary arguments all miss the mark.

As for standing, the Court not only may reach the issue; it *must*—and it must do so before reaching the other issues. Br. 10-11. Plaintiffs counter (at 15) that "the Court must invoke its pendent appellate jurisdiction" to reach the Article III issue, "and it has declined to do so in analogous circumstances." That is not so. Absolute immunity is a "a defense on the merits, not a limit on the Court's jurisdiction." *Kumar v. George Washington Univ.*, 174 F. Supp. 3d 172, 176 n.1 (D.D.C. 2016). It defeats "liability." *King v. Myers*, 973 F.2d 354, 356 (4th Cir. 1992).

Hence, there is nothing "pendent" about deciding subject-matter jurisdiction before reaching absolute immunity. "'On every … appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts." *Id.* at 95 (cleaned up). A "defect in original jurisdiction would be dispositive here because, if the district court lacked jurisdiction," this Court "would have 'jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 268 (2d Cir. 1999) (quoting *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986)).

But the obligation to decide Article III standing fits comfortably within pendent appellate jurisdiction even assuming that doctrine applies. Br. 11. The Court may decide an issue beyond the one supplying appellate jurisdiction if it is "inextricably intertwined with the decision of the lower court" or "necessary to ensure meaningful review." *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996). Deciding Article III standing first does not exceed "the boundaries of [pendent] appellate jurisdiction"; rather, it "is 'necessary to ensure meaningful review of the district court's order'" because "existence of subject matter jurisdiction goes to the very power of the district court to issue the rulings now under consideration." *Merritt*, 187 F.3d at 268-69; *accord Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770-71 & n.2 (2000); *Smith v. Arthur Andersen LLP*, 421 F.3d

989, 997-98 (9th Cir 2005); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1200-01 (10th Cir. 2002).

Williams v. Hansen, 326 F.3d 569 (4th Cir. 2003), follows that rule. Br. 11. The basis for appellate jurisdiction in *Williams* was the denial of qualified immunity. 326 F.3d at 574. But before reaching that issue, the Court examined whether the plaintiffs were without "standing to pursues [their] claims," found the defendant's "arguments to be without merit, and rejected them summarily." *Id.* at 574 n.4. Plaintiffs (at 15 n.5) incorrectly characterize this as "dicta." The Court *held* that it had "pendent appellate jurisdiction" to first decide Article III standing because it "would be obligated to take notice if plaintiffs lacked standing as the absence of standing would be a jurisdictional defect." *Id.* *Williams* is controlling precedent.

Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002), is not to the contrary. There, appellate jurisdiction was itself supplied by a *jurisdictional* dispute—namely, whether the Eleventh Amendment barred the suit. *Id.* at 184. The defendants sought to raise "other jurisdictional questions," including standing. *Id.* at 191. But since Eleventh Amendment immunity was the basis for appeal, the Court decided it first. *Id.* at 184-91. That is because "nothing in *Steel Co.* establishes an order of priority as between alternative jurisdictional grounds for disposing of a case." *Kaplan v. Central Bank of Iran*, 896 F.3d 501, 514 (D.C. Cir. 2018). Having disposed of the issue generating the appeal, the Court "declined to consider the other jurisdictional questions raised by the defendants at this stage of the proceeding." *Antrican*, 290 F.3d at 191. Unlike Eleventh Amendment

immunity, however, absolute immunity is not jurisdictional. *Supra* 1. Article III standing, consequently, must be addressed first.[1]

The Court likewise can decide the merits because, contrary to Plaintiffs' argument (at 16-18), they are intertwined with absolute immunity. Br. 11-12. Plaintiffs argue that the President's claim of absolute immunity fails because this is an equitable action that does not seek damages. But whether that argument can even be heard depends, in the first place, on whether they may bring an equitable action against the President in his individual capacity. Thus, contrary to Plaintiffs' suggestion (at 16), the question whether they can bring an equitable action does in fact "'underlie both'" the immunity and non-immunity issues. *Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 507 (4th Cir. 2018). The Court has the discretion to decide whether Plaintiffs have a cause of action.[2]

The Court equally has discretion to decide whether Plaintiffs state a claim under the Emoluments Clauses. As Plaintiffs recognize (at 16, 11), the President's absolute-immunity defense requires the Court to examine whether Plaintiffs "challenge the types

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[1] *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999), and *Lewis v. New Mexico Dept. of Health*, 261 F.3d 970 (10th Cir. 2001), were Eleventh Amendment appeals and are thus distinguishable for the same reason. *Griswold v. Coventry First LLC*, 762 F.3d 264 (3d Cir. 2014), and *Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993), are incorrect. Any case reaching a non-jurisdictional issue before Article III standing conflicts with Supreme Court and Fourth Circuit precedent.

[2] The Court also has appellate jurisdiction to decide the zone-of-interest issue. *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1239 (9th Cir. 2018).

of acts" that are "protected by absolute immunity" and whether allowing the litigation to proceed will interfere with the President's "ability to carry out [his] official duties." But these questions cannot be answered without knowing the scope of the Emoluments Clauses and what they require of the President. That determination will, in turn, bear directly on the extent to which this case interferes with "the effective functioning of government." *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982). Even under Plaintiffs' view, then, the immunity and merits claims are intertwined.

Last, Plaintiffs argue (at 16-17) that the President would have briefed the merits below if he believed "these grounds for dismissal were truly 'inextricably intertwined' with [his] immunity defense." This argument is unserious. The President extensively briefed the cause-of-action issue. Doc. 112 at 23-30. As Plaintiffs know, the President did not brief Article III standing because the district court had already decided the issue, and he did not brief the merits because the Department of Justice had comprehensively done so. *Id.* at 7 & n.1. Of course, it did not end up mattering. The President's motion to dismiss was never heard.

II. The President Is Entitled To Dismissal.

A. Plaintiffs lack Article III standing.

Plaintiffs do not address the President's challenges to their standing; they merely "incorporate … by reference" (at 19-20) the arguments from their opposition to the Government's mandamus petition. But those arguments focus on the higher standard for mandamus. Plaintiffs' Mandamus Opp. ("Opp.") 38-41, 44, 46, 50. No such

standard applies here. In this appeal, the Court must assess Plaintiffs' standing de novo. *E.g.*, *Smith*, 421 F.3d at 998; *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 372-73 (2d Cir. 2004). And because the President raises a "factual challenge" to Plaintiffs' standing, the court can "'go beyond the allegations of the complaint'" and should "'not apply" the "'presumption of truthfulness.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017).

On de novo review, Plaintiffs plainly lack standing. While States are sometimes "'entitled to special solicitude in [the] standing analysis,' [t]his special solicitude does *not* eliminate the[ir] obligation to establish a concrete injury." *Del. Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)); *accord Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1238 (10th Cir. 2012). Plaintiffs have not met that obligation. Their "quasi-sovereign" injuries are generalized grievances. Their "proprietary" injuries are far too speculative. And their "parens patriae" injuries are nonexistent, duplicative, and cannot be vindicated in a suit against the President.

Quasi-Sovereign Injuries: Plaintiffs contend that the President's alleged violations of the Emoluments Clauses offend their "quasi-sovereign interests." Opp. 41-44. The only quasi-sovereign interest they identify is "avoiding … pressure to compete with others for the President's favor." Opp. 43. Plaintiffs sum up their novel theory with this confusing sentence: "The operative question is not whether plaintiffs have incurred a cost, but whether the President unconstitutionally puts them in a

position to incur that cost in the first place." Opp. 43. Whatever that is supposed to mean, Plaintiffs' alleged "pressure" is clearly not a '"concrete and particularized"' injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Plaintiffs' "pressure" injury is not concrete. A plaintiff's "subjective" feelings of pressure or chill are "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). While Plaintiffs might "feel that" their "overall effectiveness has been impaired," "[s]uch feelings of injury are subjective in nature"; Article III requires "the alleged harm [to] be 'specific ... and objective.'" *Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977); *accord Beck*, 848 F.3d at 272; *Donohoe v. Duling*, 465 F.2d 196, 199-02 (4th Cir. 1972). Plaintiffs' alleged harm is not.

If Plaintiffs feel pressure to grant the President special favors, that pressure is subjective because Plaintiffs have a foolproof way to avoid injury—do not grant the President any special favors. If Plaintiffs' nevertheless *choose* to grant favors, their injury would be "self-inflicted" and "[n]o State can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). The D.C. Circuit's decision in *Delaware Department of Natural Resources* is on point. There, Delaware challenged the federal government's approval of a natural-gas project. 558 F.3d at 577. Although the project could not go forward unless Delaware *also* approved it, Delaware claimed it was injured because the federal government's approval created "intense political pressure" for Delaware to sign off as well. *Id.* at 578. The D.C. Circuit refused

to "recognize this conjectural political dynamic as representing a concrete injury or, indeed, any sort of legally-cognizable injury." *Id.* It remained Delaware's "own … decision" to approve or disapprove the project, and its interest in "avoid[ing]" "pressure" was not a concrete injury that could support standing. *Id.* So too here.

If Plaintiffs instead fear that the President might take some adverse action against them or not award them some benefit, that pressure is likewise subjective because the prospect of that happening is remote, unrealistic, and speculative. *See United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.) (rejecting standing because plaintiffs "have not adequately averred that any specific action is threatened or even contemplated against them"). A plaintiff cannot prove standing "'merely from [its] knowledge that a governmental agency was engaged in certain activities or from [its] concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to [it].'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (quoting *Laird*, 408 U.S. at 11). Article III requires an injury to "be 'certainly impending' to serve as the basis for … injunctive relief." *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019).

Here, Plaintiffs concede they have never "even been asked" to grant the President special concessions, and they deny he will imminently "retaliate[] against [them] in some way." Opp. 42-43. Nor do they dispute that the President would never retaliate against *local* officials for not staying at his five-star hotel. Br. 15. Even less plausible is the notion that Plaintiffs would receive less "federal funding" (which is

largely up to *Congress*) or receive unfair treatment from "federal executive agencies" (which are run by officials with zero stake in the Hotel). Opp. 43-44. Even if these wild scenarios were possible, Article III is "stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992).

Even it were concrete, Plaintiffs' "pressure" injury is not particularized. Plaintiffs admit that their injury occurs "*whenever* the President accepts forbidden payments." Opp. 43 (emphasis added). They concede that their theory of standing would automatically give "governments" standing to sue for every Emoluments Clause violation—state, local, and federal, "not restricted to those governments from whom the President solicits favors." Opp. 43. And there is no logical reason why their theory would not automatically give all *individuals* standing to sue as well. After all, individuals, associations, and businesses also "interact with the federal government" in "concrete ways" and "compete with others for the President's favor." Opp. 43. Yet an injury that Plaintiffs share with every citizen in the country (or even every government) is not the kind of "'distinct,'" "'personal,'" and "not 'undifferentiated'" harm that Article III requires. *Spokeo*, 136 S. Ct. at 1548.

Plaintiffs' "pressure" injury is a prototypical generalized grievance; everyone has it, anyone can vindicate it, and it stems from the mere fact that the Emoluments Clauses were violated. The Supreme Court has "consistently held" that a plaintiff "claiming only harm to his and every citizen's interest in proper application of the Constitution … and

seeking relief that no more directly and tangibly benefits him than it does the public at large" lacks Article III standing. *Lujan*, 504 U.S. at 573-74. For example, in *Ex parte Levitt*, the Court dismissed a challenge to Justice Black's compliance with Article I's Ineligibility Clause, which prohibits Senators from being appointed to an office if they previously increased its "Emoluments." Although the plaintiff in *Levitt* was "a citizen and a member of the bar of [the Supreme] Court," his only injury was "a general interest common to all members of the public." 302 U.S. 633, 636 (1937); *accord Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-27 (1974); *United States v. Richardson*, 418 U.S. 166, 177-80 (1974). This case is no different. While Plaintiffs' "pressure" injury is "cloaked in the nomenclature" of a personal right, *Diamond v. Charles*, 476 U.S. 54, 66 (1986), it is really just "a right to a particular kind of Government conduct, which the Government has violated by acting differently." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982). If the Court allows *that* kind of injury to satisfy Article III's strictures, it will "drain[] those requirements of meaning." *Id.*

Proprietary Injuries: Plaintiffs also assert "proprietary" injuries from the President's alleged violations of the Emoluments Clauses, relying heavily on the "competitor standing" line of cases. *See* Opp. 46-50. Importantly, the competitor cases are an *application* of Article III's standing requirements, not an exception to them. They do not stand for the "remarkable proposition" that "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly

unlawful." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). They simply recognize that courts can credit "allegations of future injury that are firmly rooted in the basic laws of economics." *United Transp. Union v. ICC*, 891 F.2d 908, 912-13 n.7 (D.C. Cir. 1989). Meanwhile, courts routinely reject allegations that are not so rooted, that rely on "speculation," or that depend on an overly long "chain of causation." *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002); *Am. Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150-51 & n.5 (D.C. Cir. 1977). Plaintiffs' allegations fall into this camp, for at least three reasons.

First, Plaintiffs' cannot disentangle the legitimate reasons officials might stay at the Hotel from the allegedly illegitimate ones. Plaintiffs cannot prove standing unless officials choose the Hotel over Plaintiffs' venues *because of* the President's alleged violations of the Emoluments Clauses—i.e., because the President receives some of the profits. *Price v. City of Charlotte*, 93 F.3d 1241, 1248 (4th Cir. 1996). While Plaintiffs insist that they only need to prove that the profits are "one … reason" why officials choose the Hotel, Opp. 48, Plaintiffs are wrong (which is why they cite nothing). Article III generally, and competitor standing specifically, require a tighter causal relationship. *See Finkelman v. NFL*, 810 F.3d 187, 198 (3d Cir. 2016) ("[Article III] requires, at a minimum, that the defendant's purported misconduct was a 'but for' cause of the plaintiff's injury."); *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001) ("[T]he 'competitive standing' doctrine [requires] that … allegedly illegal transactions … will *almost surely* cause petitioner to lose business"). If officials "might for a variety

of reasons continue to prefer" the Hotel, even after any illegal emoluments to the President are enjoined, then Plaintiffs lack standing. *Travel Agents*, 566 F.2d at 150.

Plaintiffs do lack standing, as their own experts attest. The Roginsky declaration identifies at least a dozen factors that consumers use to choose hotels and event spaces: "location, facilities, services, amenities, class and image," "price," "size and configuration of space; available dates; proximity to airports; ease of access to the facility; the reputation of the facility for hosting meetings; and the availability of experienced suppliers such as audiovisual firms and security." Doc. 47 ¶ 17. Tellingly, neither of Plaintiffs' experts was willing to state that customers are currently choosing the Hotel over Plaintiffs' venues—much less that they are choosing the Hotel because of the opportunity to provide allegedly illegal emoluments to the President, rather than some combination of the above factors. The experts were unwilling to engage in that level of speculation, yet that level of speculation is precisely what undergirds Plaintiffs' theory of standing.

Second, Plaintiffs do not present a "'garden variety competitor standing case[]'" that "require[s] a court to simply acknowledge a chain of causation 'firmly rooted in the basic law of economics.'" *New World*, 294 F.3d at 172. Plaintiffs do not invoke "the law of supply and demand," *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993), or contend that the Hotel enjoys a "deregulatory" advantage that allows it to charge lower prices, *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). Instead, Plaintiffs' theory turns on *noneconomic* decisionmaking by *noneconomic* actors—namely, government officials. These

officials, according to Plaintiffs, stay at the Hotel to "advance their standing in the President's eyes" and to "influence" him on "policy decision[s]." Opp. 48. But if that is their motive, there is no reason to think that ruling for Plaintiffs would cause them to stay somewhere else. Even if the President could not profit from the Hotel, officials who wanted to "advance their standing in [his] eyes" would still stay there because it may financially benefit the Trump family, financially benefit the Trump brand (and thus the President after he returns to private life), or simply flatter the President. These noneconomic advantages exist irrespective of any Emoluments Clause violations, and so Plaintiffs cannot prove that they "undoubtedly [will] face[] no further competition from [the Hotel]" if they win this case. *Travel Agents*, 566 F.2d at 151.[3]

Third, this is not a case where an entire industry sues to block a new form of competition, and thus it is safe to assume that the new competition will harm at least one member. *See, e.g.*, *Philadelphia Taxi Ass'n, Inc v. Uber Techs., Inc.*, 886 F.3d 332, 336 (3d Cir. 2018) (association of taxi drivers and 80 individual taxi companies suing to block Uber). Instead, Plaintiffs' theory of injury is limited to just two entities and one strand of competition. The district court held that only the Washington Convention Center and Bethesda Marriott Conference Center compete with the Hotel, not the

[3] Plaintiffs also do not account for individuals who oppose the President and cite his financial interest in the Hotel as a reason to *avoid* using that venue. *See United Transp.*, 891 F.2d at 914 (rejecting competitor standing where it was "wholly speculative whether [the challenged conduct] will harm rather than help" the plaintiffs).

MGM Casino. JA142 n.13. And it held that these centers compete only with the Hotel's event space, not with the hotel itself (the Washington center has no hotel and Maryland has no interest in the Bethesda center's hotel) or its restaurant (Plaintiffs' centers serve food only in connection with events). JA144-45. Plaintiffs do not contest either holding. *See Sherley*, 610 F.3d at 71 (treating the district court's rejection of certain standing theories "as conceded" when appellants "ma[d]e no argument to the contrary"). Accordingly, Plaintiffs must prove that the President's alleged violations of the Emoluments Clauses are causing *these two centers* to lose out on events, and that ending the violations would cause *these two centers* to gain the events (rather than the countless other nearby venues).

When a plaintiff's theory of competitive injury is so hyper-specific, courts do not allow it to prove standing by "vaguely assert[ing] only that it competes with [the defendant] and … serve[s] much of the same audience." *KERM, Inc. v. FCC*, 353 F.3d 57, 61 (D.C. Cir. 2004); *accord DEK*, 248 F.3d at 1194-96; *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (Kavanaugh, J.). Yet that is all Plaintiffs do. The Roginsky declaration concludes only that the Washington center "competes with the Trump Hotel to host meetings and special events." Doc. 47 ¶ 23. And the rest of Plaintiffs' evidence does not match their narrow theory of injury. No expert even analyzed whether the Bethesda center is a competitor with the Hotel. And Plaintiffs' anecdotes about officials choosing the Hotel for its hotel services (as opposed to its event services) or choosing the Hotel's event space over other venues (as opposed to

Plaintiffs' centers), Opp. 48, are irrelevant under their theory. Plaintiffs simply have not identified a nonspeculative proprietary injury.

Parens Patriae Injuries: Plaintiffs assert that they have "parens patriae" standing to vindicate the competitive injuries allegedly suffered by all "high-end restaurants and hotels" in D.C. and southern Maryland. Opp. 44-46. As just explained, however, those competitive injuries are far too speculative to satisfy Article III. Plaintiffs do not explain how they can assert parens patriae standing to represent an interest that is itself too speculative to support Article III standing. Br. 17.

Nor can Plaintiffs bring a parens patriae action against the President. The Government ably explains why Plaintiffs cannot assert this theory in an *official*-capacity suit against the President under the Emoluments Clauses, Gov't Mandamus Reply ("Reply") I.D.1, and Plaintiffs do not dispute that the rules are the same for *individual*-capacity suits, Br. 17. Wisely so. When a plaintiff invokes an implied cause of action and brings an individual-capacity suit against a federal officer for violations of the Constitution, that suit is still a suit against a federal officer; it has to be, since only government actors can violate most constitutional provisions. *Holly v. Scott*, 434 F.3d 287, 291-92 (4th Cir. 2006); *infra* II.C. The purpose behind the rule barring parens patriae actions against federal officials, "which reduces most basically to the avoidance

of state interference with the exercise of federal powers," fully applies to individual-capacity suits. *Penn. ex rel. Shapp v. Kleppe*, 533 F.2d 668, 678 (D.C. Cir. 1976).[4]

Last, Plaintiffs cannot bring a parens patriae action to vindicate the commercial interests of the "high-end restaurants and hotels" that compete with the Hotel. Opp. 46; *see* Br. 18. That subset of hotels and restaurants is tiny; Plaintiffs' expert stresses that "only a small fraction of the total restaurants in the metropolitan area compete with each other" and that the zone of competition is only a "3-10 mile radius." Doc. 48 ¶ 19. There is no way that a small increase in competition to this small subset of businesses would damage Plaintiffs' overall economies, or even their restaurant and hospitality industries. *Cf. Georgia v. Penn. R. Co.*, 324 U.S. 439, 450-51 (1945). But no matter how many restaurants and hotels Plaintiffs represents, Plaintiffs do not even attempt to articulate an injury to *themselves*—only economic injuries to the hotels' and restaurants' "bottom lines." Opp. 46. That is a fatal flaw. *See Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 602 (1982) (rejecting the possibility of parens patriae standing when "a State … attempt[s] to pursue the interests of a private party … only for the sake of the real party in interest" and thus "is no more than a nominal party"). Even large parens patriae actions fail when, as here, they represent "nothing more than a

[4] The Supreme Court did not find standing based on a parens patriae theory in *Massachusetts v. EPA*, so that case cannot help Plaintiffs. *See Citizens Against Ruining The Env't v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008); *Gov't of Province of Manitoba v. Zinke*, 273 F. Supp. 3d 145, 165-67 (D.D.C. 2017).

collectivity of private suits." *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (rejecting Pennsylvania's parens patriae action on behalf of all Pennsylvanians who work in New Jersey).[5]

B. The President has absolute immunity.

The President's absolute immunity follows directly from *Nixon v. Fitzgerald* and the lower-court decisions applying it. Br. 20-23. Plaintiffs' response is confused, self-contradictory, and misguided.

To begin, Plaintiffs argue (at 7-8) that presidential absolute immunity, like its common-law counterpart, requires a narrow functional analysis. But they ignore *Nixon*'s discussion of "the scope of [the President's] absolute privilege," which distinguished absolute *presidential* immunity from the absolute immunity extended to other officials. 457 U.S. at 755. While other officials' immunity "extend[s] only to acts in performance of particular functions of … office," the President's immunity extends further due to "the special nature of [his] constitutional office and functions." *Id.* at 755-56. It reaches "the 'outer perimeter of his official responsibility.'" *Id.* at 756.

Plaintiffs argue that this case is different because they do not seek to hold the President individually liable for official acts. According to them (at 7, 5, 10), their claims are for "'unofficial conduct." They cannot mean that. Plaintiffs' official and individual

[5] Even if Plaintiffs have Article III standing, their injuries fall outside the Emoluments Clauses' zone of interests. Br. 18-20. Plaintiffs' counterarguments are unpersuasive. Reply I.C.

claims *both* depend on an allegation that the illegality was "under color of law." *Infra* II.C. If Plaintiffs genuinely believe they are challenging private conduct, this case is over. Plaintiffs have no claim under the Emoluments Clauses unless they are suing the President for official actions. Br. 22. And even if the receipt of a prohibited emolument were not itself an official action, it would certainly come within the "outer perimeter" of the President's "official responsibility."

Plaintiffs wisely relent and concede (at 10) that "'the President's liability arises because he became, and remains, the President of the United States.'" But that concession negates their attempt to distinguish *Nixon*. To be sure, Plaintiffs' claims depend on their allegation (at 9) that "foreign and domestic governments officials" are "renting rooms and event space at the Hotel and eating at its restaurant." But their claims also depend on Mr. Trump holding the Office of President. Indeed, they accuse him of using that office to violate the Emoluments Clauses, including "allegations that officials from Bahrain, Maine, Kuwait, and Saudi Arabia stayed or otherwise spent money at the Hotel ... on the heels of a policy decision." Opp. 48. *Nixon* controls when, as here, individual liability depends upon the defendant being President. But if more is required, the President's dealings with foreign and domestic governments clearly fall within what Plaintiffs identify (at 8-9) as his "'policy responsibilities' ... as Commander-in-Chief." *Nixon*, 457 U.S. at 750.

Plaintiffs also try (at 9-10 n.9) to distinguish *Nixon* because, unlike in that case, they do not seek damages. But *Nixon* involved damages because damages are the *only*

relief available in an individual-capacity suit. Br. 23 n.6; *infra* II.C. Plaintiffs' insistence that the unprecedented nature of their individual-capacity equitable suit undermines the President's immunity instead of the suit itself is bewildering. Regardless, the idea that *Nixon* would have come out differently if the employee had sought equitable relief—such as backpay or reinstatement—is untenable. Just like damages suits against the President, "diversion of his energies by concern with private [equitable] lawsuits would raise unique risks to the effective functioning of government." *Nixon*, 457 U.S. at 751.[6] "The need to defend" against such "suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money, as many former public officials have learned to their sorrow." *Id.* at 763 (Burger, C.J., concurring).

Plaintiffs suggest (at 12 n.4) that the President's wounds are self-inflicted because he "persists in litigating through a broad-ranging and entirely unnecessary appeal." But this litigation proves just the opposite. Plaintiffs added the President in his individual capacity in a professed effort of "good faith" in order "to facilitate full review of their claims, both in this Court and in any future appeals." Doc. 90-1 at 2. The President thus

[6] This case is different, Plaintiffs insist (at 11), because the "inquiry into the President's actions requires none of the 'highly intrusive' examination of motive that concerned the Court in *Nixon*." Yet not two pages later, Plaintiffs accuse the President of being "driven by a personal motive not connected with the public good."

had to obtain (and pay for) separate counsel who filed a motion to dismiss. Yet that motion remained pending for months, even as the Court decided other motions and discovery commenced. Then, when the President appealed the effective denial of his immunity, Plaintiffs suddenly concluded that they no longer wished to "facilitate full review" in an "appeal." Because this appeal threatened their ability to "move forward expeditiously," Plaintiffs purported to dismiss the President *without* prejudice—keenly aware that, if successful, they could try to drag him back into the case after discovery closed or bring a new lawsuit against him. This is the type of harassing and manipulative litigation that absolute Presidential immunity is designed to prevent. The President has every right to pursue a preclusive judgment that ensures this does not happen again.

All these dynamics also show why this case is distinguishable from *Clinton v. Jones*, 520 U.S. 681 (1997). That suit was "unrelated to any of [Clinton's] official duties as President of the United States and, indeed, occurred before he was elected to that office." *Id.* at 686. But this suit depends on President Trump's official duties. That suit was about "unofficial conduct of the individual who happens to be the President," *id.* at 701, but this suit exists *because* Mr. Trump is President. President Clinton merely sought to be relieved of the "burdens of private litigation" and the "likelihood that a significant number of such cases [would] be filed [was] remote." *Id.* at 706, 709. That is not true here. Finally, subjecting President Clinton to ordinary civil litigation did not impair "the public interest in enabling" him "to perform [his] designated functions effectively without fear that a particular decision may give rise to personal liability." *Id.*

at 693. As the discovery Plaintiffs have already propounded demonstrates, this litigation is anything but ordinary.

C. Plaintiffs lack a cause of action.

Plaintiffs lack any equitable cause of action against the President for violations of the Emoluments Clause—let alone an equitable action against him in his individual capacity. Br. 23-34. In response, Plaintiffs abandon any request to expand *Bivens* to this setting. Plaintiffs instead argue (at 20-25) that *Ex Parte Young*, 209 U.S. 123 (1908), and *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), authorize "an equitable cause of action to sue the President in both his official *and* individual capacity." That argument is meritless.

Sovereign immunity does not foreclose equitable actions against state and federal officers to remedy constitutional violations where appropriate. *Id.* at 1384. But those are official-capacity lawsuits. Br. 27-29 (collecting cases). *Ex parte Young* authorizes an action against "individual [state officers] in their official capacities." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). The same goes for federal officers. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Dugan v. Rank*, 372 U.S. 609 (1963). Under this "*Larson-Dugan* exception" to sovereign immunity, *e.g.*, *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012), suits to enjoin unconstitutional government action must be brought against federal officers in their official capacities, *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989).

None of Plaintiffs' cases (at 22-23) are to the contrary. All of them, indeed every case that Plaintiffs have ever cited in support of this argument, are official-capacity suits. If Plaintiffs are suggesting that they are individual-capacity suits because an individual federal officer was the defendant and equitable relief was awarded, they are deeply confused. That is true of *every* successful official-capacity suit against a federal officer for violating the Constitution.

Nor are Plaintiffs correct (at 23-24) that the Administrative Procedure Act is to blame for their lack of caselaw support. Plaintiffs lack caselaw support because they misunderstand the relationship between official- and individual-capacity actions. Both actions depend on an allegation that the officer acted "under 'pretense' of law." *Screws v. United States*, 325 U.S. 91, 111 (1945). Absent an allegation that the officer acted under "color of law," there is no official or individual liability. *Hafer v. Melo*, 502 U.S. 21, 30 (1991); *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 459 n.1 (4th Cir. 2013); *DeLong v. IRS*, 1990 WL 101402, at *1 (4th Cir. July 10, 1990). The distinction between official- and individual-capacity suits is instead solely remedial. Official-capacity suits effectively enjoin the government (via its officials) from violating the Constitution; individual-capacity suits provide victims of those officials who personally violate the Constitution with damages. Br. 27-28. Plaintiffs cannot identify any cases supporting their position because no such case exists.

D. Plaintiffs fail to state a claim under the Emoluments Clauses.

The district court's reading of the Emoluments Clauses to prohibit "anything more than *de minimis* profit, gain, or advantage offered to a public official" by a foreign or domestic government is incorrect. Br. 34-46. As thoroughly explained, that reading lacks any foothold in the text, structure, and purpose of the Emoluments Clauses. Br. 36-43; Pet. 21-22, 26-27; Reply II. Properly interpreted, the Emoluments Clauses prohibit only the receipt of compensation for services rendered by an officer in either an official capacity or an employment-type relationship with a foreign or domestic government. Reply II.A-B. They "do not prohibit officials from engaging in private business transactions" with government customers. Br. 35. Plaintiffs do not state a claim under this sensible test, Reply II.C, and none of their contrary arguments (at 25-40) alters that conclusion.

But even if this were a close case interpretatively, history points decisively toward the President. When a longstanding practice suddenly comes under constitutional attack centuries after ratification, the Supreme Court places "*significant weight upon historical practice*." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). That is, "the longstanding practice of the government can"—and should—"inform [the Court's] determination of what the law is." *Id.* at 525 (cleaned up). "Any test the Court adopts," therefore, "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 572 U.S. 565, 577

(2014); *see Evenwel v. Abbott*, 136 S. Ct. 1120, 1132-33 (2016); *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

The district court ignored the Supreme Court's guidance by adopting a test that cannot be reconciled with historical practice. Br. 43-46; Reply II.A-B. It cannot be reconciled with the Founding-era practices, including those of George Washington. Br. 43-45; Tillman Am. Br. 3-13. Nor is it compatible with the commercial practices of more recent Presidents. Br. 45-46. Plaintiffs' attempts (at 35-40) to rebut this history fall short for the many reasons that have been extensively briefed. Notably, Plaintiffs' counterexamples all involve acceptance of "presents," which the Foreign Emoluments Clause independently prohibits absent consent of Congress. Br. 36-37.

More fundamentally, Plaintiffs misunderstand who bears the burden on this issue and why. In Plaintiffs' view (at 39-40), the President must point to a specific instance where a President engaged in a commercial transaction with a foreign or domestic government that was then blessed by a legal decision or memorandum interpreting the Emoluments Clauses. But that misses the point. Nearly every President has (or almost certainly has) engaged in commercial transactions that would have violated Plaintiffs' interpretation of the Emoluments Clauses. Yet Plaintiffs point to no evidence that any of those countless commercial activities were challenged, questioned, or structured in a way that would lend even a measure of historical support to their novel and expansive interpretation of the Constitution.

Plaintiffs are correct (at 39) that "a singular historical event—even one involving George Washington—cannot overcome the unified force of the Clauses' text and other interpretative indicia." But that is not the situation this Court confronts. Here, the constitutional "text and interpretative indicia" contradict Plaintiffs' interpretation of the Emoluments Clauses; at most, there is some support for each side's view. The absence of historical evidence substantiating Plaintiff's reading therefore counsels in favor of modesty. No court—before the decision below—had ever understood the Constitution to enjoin the President from engaging in ordinary commerce of this kind. This Court should not endorse such a sweeping and ahistorical interpretation of the Emoluments Clauses.

CONCLUSION

The claims against the President in his individual capacity should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because it contains 6,485 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface and typestyle requirements because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

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I certify that on February 21, 2019, this document was served on all parties or their counsel of record through the CM/ECF system.

/s/ William S. Consovoy