No. 18-2488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISTRICT OF COLUMBIA AND STATE OF MARYLAND,
Plaintiffs-Appellees,
v.
DONALD J. TRUMP, in his individual capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
(Peter J. Messitte, District Judge)

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INTRODUCTION

President Trump, in his individual capacity, seeks a ruling from the Court that he is absolutely immune from any proceedings in this case, which sought declaratory and injunctive relief to remedy the harms that his ongoing violations of the Constitution's Foreign and Domestic Emoluments Clauses have caused to the District of Columbia and Maryland. But the individual-capacity suit from which President Trump seeks immunity no longer exists. Undeterred, the President invites this Court to issue a sweeping advisory opinion addressing not only an immunity defense that the district court never ruled on, but also matters wholly unrelated to it. That request defies foundational principles of federal jurisdiction. The appeal should be dismissed as moot and improper.

If the Court concludes that this controversy is live, it should follow well-established principles of pendent appellate jurisdiction and rule only on the President's claim of absolute immunity—the sole basis proffered for this collateral appeal. That claim should be rejected because, in receiving emoluments through his private business interests, President Trump acts well outside his executive authority. The President's remaining arguments are beyond the scope of this interlocutory appeal and lack merit. This appeal should be dismissed, or denied in relevant part.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. This Court lacks appellate jurisdiction both because the appeal is moot based on plaintiffs' voluntary dismissal of their individual-capacity claims, and because the district court issued no decision over which this Court can exercise jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. If the Court determines that this controversy is live and denies the pending motion to dismiss the appeal, should the Court conclude that the President has absolute immunity from this suit, which seeks only to remedy harms caused by the President's act of accepting prohibited emoluments through his private businesses?

2. Should the Court exercise pendent appellate jurisdiction over any other issue in the case, none of which is inextricably intertwined with the President's claim to absolute immunity?

STATEMENT OF THE CASE

This case concerns President Trump's refusal to comply with the Foreign and Domestic Emoluments Clauses, which the Framers included in the Constitution to guard against the risk that officeholders' private interests would improperly influence their exercise of public power. Because the facts relevant to this appeal overlap almost entirely with those at issue in the President's official-capacity

mandamus action, the District of Columbia and Maryland refer the Court to the Statement of the Case set forth in their brief in that matter, which is incorporated herein by reference. *See In re Donald J. Trump*, No. 18-2486, Doc. 35 at 3-12.[1]

On June 12, 2017, the District and Maryland filed suit against the President in his official capacity, challenging the President's violations of the Emoluments Clauses and seeking to remedy the ongoing harm to them and their residents caused by the President's unlawful behavior. The President in his official capacity moved to dismiss. While the President's motion to dismiss was pending, plaintiffs amended their complaint to add the President in his individual capacity as a defendant. J.A. 34 (Am. Compl. ¶ 20). On May 1, 2018, the President in his individual capacity moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. 112.)

In orders on March 28 and July 25, the district court denied the motion to dismiss the official-capacity claims. J.A. 122-70 (Dkt. 101), 172-225 (Dkt. 123). In issuing the latter order, the district court stated that it would "address the individual capacity claims and the arguments to dismiss them in a separate Opinion." J.A. 172 (Dkt. 123 at 1 n.2); *see also* J.A. 222 (Dkt. 123 at 51). On December 3, the district court issued a scheduling order with respect to the suit against the President "in his

[1] "Doc." refers to documents filed in this Court. "Dkt." refers to the ECF docket numbers of filings in the district court.

official capacity as President of the United States of America," which authorized the commencement of discovery solely into the official-capacity claims. J.A. 270 (Dkt. 145 at 1).

On December 14, without awaiting a ruling on his motion to dismiss, the President in his individual capacity filed a notice of appeal, asserting that the district court had "effectively denied" his absolute immunity defense. J.A. 274-75 (Dkt. 147 at 1-2). On December 19, plaintiffs voluntarily dismissed their individual-capacity claims against the President pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). J.A. 277-78 (Dkt. 154 at 1-2). Shortly thereafter, plaintiffs moved to dismiss this appeal, both because it is moot in light of plaintiffs' notice of voluntary dismissal, and because the Court lacks appellate jurisdiction in the absence of an order from the district court denying the President's immunity claim. (Doc. 16.)

Meanwhile, on December 17, following an unsuccessful motion for interlocutory appeal under 28 U.S.C. § 1292(b), the President in his official capacity sought a writ of mandamus from this Court. The President in his individual capacity moved to consolidate the appeals. The Court denied that motion but ordered that the two cases be heard seriatim. (Doc. 20.) The Court has deferred consideration of plaintiffs' motion to dismiss this appeal pending oral argument. (Doc. 20.)

SUMMARY OF ARGUMENT

This appeal should be dismissed outright because it is moot. If it is not, the Court should limit its consideration to President Trump's immunity defense, which the President concedes is his toehold for an interlocutory appeal.

President Trump has no valid claim to absolute immunity in this case. Precedent establishes that the President's immunity does not extend to violations of the law that arise from his private actions in managing his personal finances and business. The immunity doctrine on which the President relies is designed to safeguard public officials' ability to carry out their official functions. But the crux of plaintiffs' individual-capacity claims is that the President's acceptance of foreign and domestic emoluments through, as relevant here, the Trump International Hotel in Washington D.C. (the "Hotel") is conduct that expressly violates the terms of his office. No official function of his office is involved.

The other issues that the President seeks to raise—whether plaintiffs have standing, whether they have an equitable cause of action to enforce the Emoluments Clauses against the President in his individual capacity, and whether they have adequately stated a claim under the Clauses—are not properly before the Court because they are not intertwined with the President's immunity defense and could be reviewed on appeal from a final judgment. Even if the Court were to reach those issues, however, it should reject the President's arguments. As the district court

correctly concluded in the official-capacity case, plaintiffs have plausibly alleged standing based on their quasi-sovereign, *parens patriae*, and proprietary interests. Plaintiffs have an equitable cause of action against the President in his individual capacity to seek relief for his ongoing constitutional violations, and they are well within the Emoluments Clauses' zones of interests. The District and Maryland have also stated a claim because the Emoluments Clauses' text, purpose, and historical application support an understanding of "emolument" that encompasses the "profits," "gains," or "advantages" that plaintiffs have alleged the President is accepting through the businesses that he owns.

ARGUMENT

This Court reviews "denials of absolute immunity de novo," although in an interlocutory appeal the Court has jurisdiction to conduct such review only if the district court has issued an order that "conclusively determines the disputed question" and otherwise satisfies the requirements of the collateral order doctrine. *Nero v. Mosby*, 890 F.3d 106, 117, 121 (4th Cir.), *cert. denied*, 139 S. Ct. 490 (2018). Here, the district court has issued no order that "conclusively determines" the question of absolute immunity with respect to President Trump in his individual capacity, and the question cannot be conclusively determined now because plaintiffs have voluntarily dismissed their action against President Trump in his individual capacity.

If this Court nonetheless concludes that it has jurisdiction to review the question of absolute immunity, it should not review any additional issue unless the Court determines either that it is "inextricably intertwined" with the absolute immunity question or that review of that issue is "necessary to ensure meaningful review" of the absolute immunity question. *Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC*, 887 F.3d 610, 622 (4th Cir. 2018) (internal quotation marks omitted). If the Court reaches any such issue, de novo review would apply. *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) ("We review legal questions regarding standing de novo" and when, as here, "standing is challenged on the pleadings, we accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." (internal quotation marks omitted)); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011) ("We review de novo a district court's decision to dismiss for failure to state a claim, assuming all well-pleaded, nonconclusory factual allegations in the complaint to be true.").

I. THE PRESIDENT IS NOT IMMUNE FROM THIS SUIT.

The Supreme Court has made clear that absolute immunity does not apply to "unofficial conduct," and that even for "acts clearly taken within an official capacity," the availability of immunity depends on '"the nature of the function performed, not the identity of the actor who performed it.'" *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997) (emphases omitted) (quoting *Forrester v. White*, 484 U.S.

219, 229 (1988)). This Court, too, has explained that "[t]he grant of absolute immunity to any federal official is not tantamount to granting absolute license to act as he chooses." *George v. Kay*, 632 F.2d 1103, 1105 (4th Cir. 1980). Disregarding these holdings, President Trump chooses to rely almost exclusively on a substantially overbroad interpretation of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).[2] Contrary to President Trump's assertion, *Nixon* does not hold that absolute immunity "foreclose[s] civil suits against the President in his individual capacity for official actions taken while in office." Br. 20 (citing *Nixon*, 457 U.S. at 748-56).

In *Nixon*, the alleged misconduct was the President's involvement in a reorganization of the Air Force that eliminated the plaintiff's job, and the Court concluded that absolute immunity applied because the President's "alleged wrongful acts lay well within the outer perimeter of his authority." 457 U.S. at 757. That conduct fell squarely within the President's "supervisory and policy responsibilities," *id.* at 750, both with respect to his control over the Air Force as

[2] The President relegates to a footnote any reference to *Clinton*, 520 U.S. 681, and attempts to discount it on the basis that the Supreme Court was addressing only a claim of "temporary presidential immunity." Br. 22 n.5. Although it is true that the immunity sought by President Clinton would have lasted only while he was in office, the basis for his claim was premised on precisely the same considerations that the Court addressed in *Nixon*. *See Clinton*, 520 U.S. at 697 (noting that the President's "argument is grounded in the character of the office that was created by Article II of the Constitution and relies on separation-of-powers principles that have structured our constitutional arrangement since the founding"); *id.* at 689-709 & nn.8-43 (citing *Nixon* 14 times).

Commander-in-Chief and his responsibility for government personnel decisions writ large, *see*, *e.g.*, *Loving v. United States*, 517 U.S. 748, 772 (1996) ("The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military.").

The allegations in this case are nothing like those in *Nixon*. The cornerstone of this suit is the President's receipt of emoluments through a variety of sources, including foreign and domestic government officials renting rooms and event space at the Hotel and eating at its restaurant, and by a federal agency waiving a requirement on its lease of property to the Hotel. J.A. 38-43, 51-54 (Am. Compl. ¶¶ 34-46, 80-88). The President's receipt of these financial benefits through his private businesses is not an action "within the outer perimeter of the President's official responsibilities." *Clinton*, 520 U.S. at 686. Indeed, unlike in *Nixon*, where the President's action, even if a violation of a federal statute, fell within the outer bounds of his executive authority to direct the business of the Air Force, in this case plaintiffs' claim that the President's actions violate constitutional provisions that expressly preclude him from having any authority to receive prohibited emoluments.[3]

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[3] President Trump's reliance on *Nixon* in support of his claim of absolute immunity is all the more inapposite given that, unlike in *Nixon*, plaintiffs do not seek damages. *See Nixon*, 457 U.S. at 749 ("This Court consistently has recognized that government officials are entitled to some form of immunity from suits for *civil*

To be sure, "the President's liability arises precisely because he became, and remains, the President of the United States." Br. 22. But *Clinton* squarely rejected the idea that serving as President renders the officeholder entirely immune from suit. *See* 520 U.S. at 695 (rejecting the President's "effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office"). Here, "the identity of [the President's] office," *id.* at 695, imposes upon him a constitutional obligation not to "accept" or "receive" emoluments from foreign or domestic governments, U.S. Const. art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7. His violation of that obligation is either *ultra vires* conduct that gives rise to plaintiffs' official-capacity suit, *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949),

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damages." (emphasis added)); *id.* at 754 (describing the case as a "merely private suit for damages"); *see also Clinton*, 520 U.S. at 684 (addressing immunity claim in the context of a private suit for damages). The President tacitly acknowledges the novelty of his immunity claim, but offers the Court a red herring by pointing to the purported novelty of plaintiffs' theories. *See* Br. 23 n.6. As explained below, plaintiffs' cause of action has a long pedigree. *See infra* Part II.B.2. Equally well recognized, moreover, is that the absolute immunity grounded in common law does not necessarily shield a public official from prospective relief. *See, e.g.*, *Pulliam v. Allen*, 466 U.S. 522, 536 (1984) ("Our own experience is fully consistent with the common law's rejection of a rule of judicial immunity from prospective relief."), *superseded by statute as recognized in Donato Malave v. Abrams*, 547 F. App'x 346, 347 (4th Cir. 2013); *Livingston v. Guice*, No. 94-1915, 1995 WL 610355, at *4 (4th Cir. Oct. 18, 1995) (recognizing the general "principle that judges are not absolutely immune from suits for prospective injunctive relief," and noting that "[a]bsolute immunity, therefore, is only absolute insofar as it limits claims for damages brought against judges" (citing *Pulliam*, 466 U.S. at 536-43)).

unofficial conduct that is not immunized by his status as President in an individual-capacity suit, *Clinton*, 520 U.S. at 694, or both.

Contrary to the President's contention, *see* Br. 22-23, the purposes underlying absolute immunity would not be served by granting immunity in this case. Absolute immunity is a set of rules created by the courts to protect government officials' ability to deal "impartially with the public at large." *Clinton*, 520 U.S. at 693 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). "The point of [such] immunity" is to prevent lawsuits "that would conflict with their resolve to perform their designated functions in a principled fashion." *Id.* By shielding officials from litigation, absolute immunity prevents an officeholder from being "unduly cautious in the discharge of his official duties." *Nixon*, 457 U.S. at 752 n.32. Thus, absolute immunity's essence is protecting officeholders' ability to carry out their official duties.

The President is simply incorrect in asserting that this case "implicates the same concerns that warranted absolute presidential immunity in *Nixon*." Br. 22. The conduct at issue here does not involve the President's discretion as chief executive, and the inquiry into the President's actions requires none of the "highly intrusive" examination of motive that concerned the Court in *Nixon*, 457 U.S. at 756, nor does it implicate any "supervisory and policy responsibilities of utmost discretion and sensitivity," *id.* at 750. Moreover, because the obligations imposed by the Foreign

and Domestic Emoluments Clauses do not involve the discretionary exercise of the President's executive or political powers, enforcing the duty to refrain from accepting emoluments does not raise any separation-of-powers concerns or require the Court "to perform any function that might in some way be described as 'executive.'" *Clinton*, 520 U.S. at 701. Thus, the animating principles behind immunity are not implicated, and immunity does not apply. *See Nixon*, 457 U.S. at 755.

Unable to claim that the conduct at issue involves any official action, the President changes tack and argues that distraction, unpleasantness, and "the tribulation and expense of defending the suit" justify immunity.[4] Br. 20 (quoting *Chang v. United States*, 246 F.R.D. 372, 374 (D.D.C. 2007)). But the Supreme Court has already observed that "[t]he burden on the President's time and energy" from the review of his "unofficial conduct. . . . cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions." *Clinton*, 520 U.S. at 705. "Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive branches can scarcely be

[4] The President's suggestion that this case may be time consuming and distracting is substantially undermined by his own conduct in this case and others. Indeed, plaintiffs have already *dismissed* the claims that the President now persists in litigating through a broad-ranging and entirely unnecessary appeal.

thought a novelty." *Id.* at 704. As in *Clinton*, "the potential burdens on the President posed by this litigation are appropriate matters for [the district court] to evaluate in its management of the case." *Id.* at 683.

In sum, the District and Maryland have alleged that the President's actions are driven by a "personal motive not connected with the public good," *Ferri*, 444 U.S. at 203 n.20, and thereby violate the Emoluments Clauses, *see* J.A. 38-43, 51-54 (Am. Compl. ¶¶ 34-46, 80-88). The President's alleged misconduct is unrelated to the "particular functions of his office," and absolute immunity therefore does not apply. *Clinton*, 520 U.S. at 694 (quoting *Nixon*, 457 U.S. at 755).

II. THE PRESIDENT'S OTHER ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, LACK MERIT.

A. There Is No Basis for this Court to Exercise Pendent Appellate Jurisdiction Over Issues Beyond Immunity.

The President's interlocutory appeal is moot and improper for the reasons plaintiffs have argued in their motion to dismiss the appeal. (Doc. 16.) But even if this Court declined to dismiss it, the Court would not have plenary jurisdiction over every issue the President seeks to raise. Rather, under the collateral order doctrine, jurisdiction would extend only to the immediately appealable denial of immunity,

see Nixon, 457 U.S. at 742, not the various other issues the President strains to pursue.

"Pendent appellate jurisdiction is an exception of limited and narrow application driven by considerations of need, rather than of efficiency." *Rux v. Rep. of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006); *see Tobey v. Jones*, 706 F.3d 379, 390 n.4 (4th Cir. 2013) ("[O]ur pendent jurisdiction is limited, and should only be used in extraordinary circumstances."). "It is available only (1) when an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of an immediately appealable issue." *Rainbow Sch., Inc.*, 887 F.3d at 622 (quoting *Rux*, 461 F.3d at 475); *see also Evans v. Chalmers*, 703 F.3d 636, 654 n.11, 658-59 (4th Cir. 2012).

The President acknowledges the standard for pendent appellate jurisdiction, *see* Br. 11, but he insists that the Court has plenary jurisdiction over the issue of Article III standing, *id.* at 10. That is incorrect. Appellate jurisdiction over a denial of immunity "is not sufficient to confer . . . jurisdiction to review other claims presented to the district court"—including "standing"—because "[o]therwise nonappealable issues [could] be bootstrapped to an appealable question." *Triad Assocs. v. Robinson*, 10 F.3d 492, 496 n.2 (7th Cir. 1993); *see id.* ("[A] denial of a motion to dismiss for lack of standing does not qualify as a final judgment and thus

is not eligible for [interlocutory] review[.]"). To review such issues in an interlocutory appeal, the Court must invoke its pendent appellate jurisdiction, and it has declined to do so in analogous circumstances. *See Antrican v. Odom*, 290 F.3d 178, 182, 184 (4th Cir. 2002) (affirming the district court's denial of sovereign immunity and "declin[ing] to exercise pendent appellate jurisdiction over the other grounds on which the State officials relied to support their motion to dismiss the complaint," including "a lack of standing"); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) (declining to consider Article III standing in an immunity-based appeal, because "standing does not fit within the collateral order doctrine," and finding no basis for pendent appellate jurisdiction because immunity and standing were neither 'inextricably intertwined' nor 'necessary to ensure meaningful review' of one another"); *accord Griswold v. Coventry First LLC*, 762 F.3d 264, 269 (3d Cir. 2014); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 974 n.1 (10th Cir. 2001); *Triad Assocs.*, 10 F.3d at 496 n.2.[5]

[5] Contrary to the President's assertion, Br. 11, the Court in *Williams v. Hansen*, 326 F.3d 569 (4th Cir. 2003), did not hold otherwise. There, in an interlocutory appeal of an order denying qualified immunity, the Court "summarily" rejected, in a footnote, the defendant's arguments that plaintiffs failed to state a claim and lacked standing, *id.* at 574 n.1, but ultimately held that the claims should be dismissed on immunity grounds, *id.* at 581. Although the Court noted that it "would be obliged to take notice if plaintiffs lacked standing as the absence of standing would be a jurisdictional defect," *id.* at 574 n.1, that observation was dicta because it was unnecessary to the court's holding. Further, the parties did not dispute, nor did the *Williams* Court evaluate, the specific issue presented here—whether Article

Here, none of the President's various other arguments are "inextricably intertwined" with his immunity claim, nor is it "necessary" to resolve them to "ensure" that it receives "meaningful review." The Court will, of course, need to determine the scope of the President's immunity if it determines that this case is not moot. *See supra* Part I. It will also look to whether plaintiffs' claims challenge the type of acts within the "outer perimeter" of executive authority protected by absolute immunity. *See id.* That analysis, however, is wholly distinct from the questions of whether plaintiffs (1) have Article III standing based on their quasi-sovereign, *parens patriae*, and proprietary interests; (2) have an equitable cause of action under the Constitution against the President in his individual capacity; or (3) have sufficiently alleged violations of the Emoluments Clauses. None of these questions "underlie both" the immunity and non-immunity issues. *Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 507 (4th Cir. 2018) (internal quotation marks omitted). Rather, "[e]ach issue involves a distinct legal concept that does not affect analysis of the other," so there is "no basis to exercise pendent appellate jurisdiction." *Rux*, 461 F.3d at 476.[6] If these grounds for dismissal were truly "inextricably intertwined"

III standing is within the scope of appellate jurisdiction in an interlocutory appeal under the collateral order doctrine. *See* Brief for Appellees, *Williams v. Hansen*, No. 02-1573, 2002 WL 32737375 (4th Cir. Sept. 3, 2002) (issue not raised).

[6] The President suggests that pendent appellate jurisdiction is appropriate because resolution of whether plaintiffs have a cause of action may obviate the need to reach the immunity question. Br. 11-12. But such "efficiency considerations" are

with President Trump's immunity defense, presumably the President would have briefed them below. But he did not. (Dkt. 112.)

In asserting that his immunity defense is intertwined with the sufficiency of plaintiffs' allegations, the President relies heavily on case law concerning qualified, rather than absolute, immunity. *See* Br. 12. But those cases are inapposite, because qualified immunity demands an analysis of the plaintiff's allegations that absolute immunity does not. In evaluating qualified immunity, "a court must decide whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right," and, if so, "whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal quotation marks omitted). On appeal of an interlocutory order denying qualified immunity, appellate jurisdiction extends to both the questions "whether the legal wrong asserted was a violation of clearly established law" and "whether the facts pleaded establish such a violation." *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009). In determining qualified immunity, "whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in

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no basis for exercising pendent appellate jurisdiction, which "this court has consistently limited . . . to the two circumstances" outlined above. *Rux*, 461 F.3d at 475; *see also Ealy v. Pinkerton Gov't Servs.*, 514 F. App'x 299, 310 & n.12 (4th Cir. 2013) (refusing "to invoke pendent appellate jurisdiction even though a determination of the pendent issue had the *possibility* to foreclose the underlying suit," because resolution of pendent issue was "not *necessary*" to resolve appealable issue (emphasis in original)).

isolation from the facts pleaded"; rather, "the sufficiency of the pleadings is both inextricably intertwined with, and directly implicated by, the qualified-immunity defense." *Id.* (brackets and internal quotation marks omitted); *see also Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006); *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007).[7]

The same is not true for absolute immunity. Unlike qualified immunity, a defense asserting absolute immunity necessitates no assessment of whether the plaintiff has adequately alleged a constitutional violation; it instead focuses on whether the plaintiff seeks to hold the official liable for official acts that fall within the scope of his or her duties. It is unsurprising, then, that the President cites no case deeming an *absolute* immunity defense to be "inextricably intertwined with" the questions of whether the plaintiff had a cause of action or adequately pleaded constitutional violations. That is because there is no such inextricable link.[8]

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[7] In quoting this language from *Iqbal*, the President conspicuously omits the word "qualified," Br. 12, leaving the incorrect impression that the quotation concerns immunity generally rather than qualified immunity specifically.

[8] The President cites just one absolute immunity case, *V.S. v. Muhammad*, 595 F.3d 426 (2d Cir. 2010), but the court there expressed no opinion on whether it had jurisdiction over any pendent issues relating to absolute immunity; it simply sustained the immunity claim without further analysis. *See id.* at 432-33.

In short, this is not one of the "limited" and "extraordinary circumstances" warranting pendent appellate jurisdiction. *Tobey*, 706 F.3d at 390 n.4. This Court's jurisdiction is limited solely to the President's immunity claim.

B. The President's Arguments Lack Merit.

1. Plaintiffs Have Standing.

The district court addressed plaintiffs' standing arguments at length and concluded that the District and Maryland have "alleged injuries-in-fact to their quasi-sovereign, proprietary, and *parens patriae* interests that are concrete and particularized, actual and imminent. Those injuries are fairly traceable to the President's purported conduct and are likely to be redressed by the Court through appropriate injunctive and declaratory relief if [p]laintiffs succeed on the merits." J.A. 158 (Dkt. 101 at 37); *see also Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007) (explaining that "States are not normal litigants for the purposes of invoking federal jurisdiction" and are given "special solicitude" in the standing analysis). For the reasons explained above, *see supra* Part II.A., this Court need not—and should not—revisit the district court's conclusion that plaintiffs have adequately alleged facts to support standing. However, if this Court does choose to address standing, plaintiffs' opposition to the President's mandamus petition sets forth why the district court correctly concluded that plaintiffs have alleged injury sufficient to support their standing to obtain relief against the President. *See In re Donald J. Trump*, No.

18-2486, Doc. 35 at 38-50. Rather than repeat those arguments, plaintiffs incorporate them herein by reference.[9]

2. Plaintiffs Have a Cause of Action to Sue President Trump in Both His Official and Individual Capacities.

"The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015); *see also In re Donald J. Trump*, No. 18-2486, Doc. 35 at 20-21. Indeed, actions for equitable relief have "long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *see Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *see also Free Enter. Fund v. Pub. Co.*

[9] The President does not separately ask the Court to exercise pendent appellate jurisdiction over the zone-of-interests issue, and instead appears to assume that it fits under the rubric of Article III standing. He is wrong. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 & n.4 (2014) (noting that the "zone-of-interests analysis" concerns whether the plaintiff "has a cause of action" and "does not implicate subject-matter jurisdiction"). In any event, there is no ground for exercising pendent appellate jurisdiction over the President's zone-of-interests argument, because it is wholly unrelated to his immunity claim. Moreover, as explained in plaintiffs' opposition to the President's mandamus petition, it is not clear whether the zone-of-interests requirement even applies to constitutional claims, but if it does, the District and Maryland fall well within the Emoluments Clauses' zones of interest. *See In re Donald J. Trump*, No. 18-2486, Doc. 35 at 25-29.

Accounting Oversight Bd., 561 U.S. 477, 491 n.2 (2010); *Ex Parte Young*, 209 U.S. 123 (1908).

President Trump ignores this "long history," *Armstrong*, 135 S. Ct. at 1384, and instead tries to change the subject by arguing that plaintiffs "have no cause of action to sue the President in his individual capacity for alleged violations of the Emoluments Clauses," Br. 25, because no *Bivens* action has ever been allowed under the Emoluments Clauses. As the District and Maryland made clear in the district court, however, plaintiffs have never relied on the implied cause of action established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Rather, as in their official-capacity suit, the District and Maryland have alleged a cause of action based on the long-recognized "ability to sue to enjoin unconstitutional actions by state and federal officers." *Armstrong*, 135 S. Ct. at 1384 (citing *Ex Parte Young*, 209 U.S. at 150-51). This cause of action, which is perhaps most familiar from *Ex Parte Young*, exists "not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials." *Armstrong*, 135 S. Ct. at 1384. Unlike the *Bivens* remedy, this cause of action provides for prospective relief, including an injunction. *Id.*

This case therefore presents no need to engage in the kind of "special factors" analysis required in *Bivens* actions. *See* Br. 30-34; *cf. Ziglar v. Abbasi*, 137 S. Ct.

1843, 1857-58 (2017). It is an equitable cause of action, where the Supreme Court has emphasized that when a constitutional clause presents "a new situation not yet encountered by the Court," the novelty of the occasion does not mean that claims arising under the provision "should be treated differently than every other constitutional claim," in which "it is established practice . . . to sustain the jurisdiction of federal courts to issue injunctions." *Free Enter. Fund*, 561 U.S. at 483 & 491 n.2 (quoting *Bell*, 327 U.S. at 684). Thus, that courts have not previously had occasion to enjoin violations of the Emoluments Clauses does not warrant any deviation from this "established practice." *See id.*

Moreover, plaintiffs may invoke an equitable cause of action to sue the President in both his official *and* his individual capacity. *See, e.g.*, *Schneider v. Smith*, 390 U.S. 17, 19, 21-22 (1968) (allowing a suit for declaratory and injunctive relief against the Commandant of the Coast Guard based on allegations that the Commandant's exercise of authority, which had been delegated to him by the President, violated the First Amendment); *Land v. Dollar*, 330 U.S. 731, 738-39 (1947) (allowing injunctive relief against federal officials by a plaintiff seeking to collect wrongfully withheld property); *Phila. Co. v. Stimson*, 223 U.S. 605, 620 (1912) (allowing a suit for injunctive relief against the Secretary of War); *United States v. Lee*, 106 U.S. 196, 219-21 (1882) (allowing a suit to recover land from federal officers because the officers' continued possession of the land implicated the

plaintiff's rights under the Takings Clause); *see also* Richard H. Fallon, Jr., et al., *Hart & Wechsler's Federal Courts & the Federal System* 892 (7th ed.) (noting that "[t]he principle that the Constitution creates a cause of action against governmental officials for injunctive relief . . . has also come to apply" in suits against federal officials); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 67 & n.8 (1999) (explaining that the "individual-liability rule" adopted in *Ex Parte Young* that permits a court "to grant injunctive relief against state officials notwithstanding state sovereign immunity" has also been "assimilated to allow injunctive relief against federal officials" (citing *Schneider*, 390 U.S. 17, and *Phila. Co.*, 223 U.S. 605)).

As a practical matter, suits against federal officials in their individual capacities tend not to arise, because the sovereign-immunity waiver contained in the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (waiving sovereign immunity from suits "seeking relief other than money damages" against "an agency or an officer or employee thereof"), has made it less necessary to resort to the legal fiction of the individual-capacity suit, Fallon, et al., *supra*, at 892 (noting that this cause of action is of "limited current practical significance" when it comes to challenging federal action). But that relative scarcity does not mean that such a suit would be inappropriate where, as here, the APA is inapplicable. Before the APA was enacted, the Supreme Court explicitly instructed that an *Ex Parte Young*-style

suit against a federal official "is not a suit against the United States." *Phila. Co.*, 223 U.S. at 620. Such a suit can therefore be considered a suit against a federal official in his or her individual capacity, just as analogous suits against state officials are often considered to be against those officials in their individual capacities.

The Supreme Court's repeated recognition of an equitable constitutional cause of action in multiple cases, which together stand for the proposition that "courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell*, 327 U.S. at 684, supports this conclusion. *See generally Ex Parte Young*, 209 U.S. at 150 (holding that, despite the Court's obligation to "give to the 11th Amendment all the effect it naturally would have," "individuals who, as officers of the state, are clothed with some duty . . . may be enjoined by a Federal court of equity from" unconstitutional actions); *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177, 183 (1938) ("Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted."); *Free Enter. Fund*, 561 U.S. at 491 n.2; *Suits Against Municipalities for Equitable Relief Under Section 1983*, 87 Harv. L. Rev. 252, 259 (1973) ("[D]istinctions between . . . officers sued as individuals and those sued in their official capacities . . . are essentially fictions developed in the context of sovereign immunity doctrine, and have often been ignored by courts when relief can be granted without intolerably burdening the administration of government."). As *Ex Parte Young* itself demonstrates, the legal fiction of the distinction between

individual- and official-capacity suits was created to *facilitate* relief against official misconduct. 209 U.S. at 150. That distinction should not be permitted to *shield* an official's misconduct or to deny a cause of action that has been established for more than a century.

3. The District and Maryland Have Plausibly Alleged Violations of the Foreign and Domestic Emoluments Clauses.

The District and Maryland assert that President Trump is violating the Emoluments Clauses by accepting profits and other benefits from foreign and domestic governments through the Trump Hotel. These allegations state a claim under both Clauses, which expressly prohibit the President from accepting any "Emolument" from a foreign or domestic government. U.S. Const. art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7. As the district court explained, the Clauses' text and purpose, historical application and practice, and administrative precedent support an understanding of "emolument" that encompasses the "profit," "gain," or "advantage" that the President accepts through the businesses he owns.

a. The Clauses' Text and Structure Confirm That "Emolument" Means "Profit," "Gain," or "Advantage."

In interpreting the Emoluments Clauses, this Court should "begin with [the] text." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Its analysis should be "guided by the principle that '[t]he Constitution was written to be understood by the

voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

At the Founding, the word "emolument" had a common-use definition: "profit," "gain," or "advantage." *See, e.g.*, 1 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785), https://goo.gl/K83Mze ("Profit; advantage."); Nathan Bailey, *Universal Etymological English Dictionary* (20th ed. 1763), https://goo.gl/n2oB7r ("Advantage, Profit."); *cf.* Br. 35 (acknowledging that "emolument" had this "broad meaning[] [when] the Constitution was drafted and ratified"). Indeed, "over 92% of dictionaries define 'emolument' *exclusively*" in terms of "profit," "advantage," "gain," or "benefit," including the four dictionaries identified by Justice Scalia and Bryan A. Garner as "the most useful and authoritative" of the period. John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523-1806*, at 1-2, 8, 18 (2017), https://ssrn.com/abstract=2995693 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 (2012));[10] *see also NLRB v.*

[10] The President quibbles with Professor Mikhail's assertion that "*every* English dictionary definition of 'emolument' from 1604 to 1806 relies on one or more of the elements [of the broader definition]," claiming that 3 of the 40 dictionaries surveyed do in fact contain a narrower definition of the term. Br. 40 n.11 (emphasis added). However, the President recognizes that even that definition is not the same as the definition he has set forth. *Id.* Moreover, the President appears

Noel Canning, 134 S. Ct. 2550, 2561 (2014) (assessing the meaning of the word "recess" in the Recess Appointments Clause by referring to Founding-era dictionaries). Even beyond this convincing "tally," *cf.* Br. 39, a "substantial body of evidence"—including the term's use by the drafters of state constitutions, Blackstone, Supreme Court justices, and the Framers themselves—"suggest[s] that the founding generation used the word 'emolument' in ways reaching well beyond payment tied to official duties." J.A. 199-201 (Dkt. 123 at 28-30) (listing examples); *see also* Mikhail, *supra*, at 19-20 & n.117; Cunningham Amicus Br., *In re Donald J. Trump*, No. 18-2486, Doc. 27 at 3 (original public meaning was "general and inclusive"). The broader meaning of emolument is thus the "ordinary" one. *Heller*, 554 U.S. at 576.

The President nevertheless insists that a "narrow[er]" definition of emolument applies because "emolument" takes on a "different meaning[]" in the Emoluments Clauses themselves. Br. 36 (quoting *Torres v. Lynch*, 136 S. Ct. 1619, 1625-26 (2016)).[11] In his view, "emoluments" means only a "profit arising from an office or

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to concede that the majority of contemporaneous dictionaries did *not* contain the narrower definition, underscoring that defining emolument to mean *only* "profit arising from an office or employ" is largely an artificial exercise.

[11] The President's sole support for his suggestion that this meaning is the ordinary one is a study that found that "when the recipient of the emolument is an officer . . . the narrower sense of 'emolument' is the one overwhelmingly used." James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from*

employ," Br. 35,[12] which he further limits to "payment in compensation for personal services performed through official acts or in employment-type relationships," Br. 10. That is wrong, for two reasons.

First, the President's proposed interpretation, which encompasses only "personal services performed," is inconsistent with the definition of "profit arising from office or employ" because the historic meaning of "employ" was "a person's trade, [or] business." Nathan Barclay, *Complete and Universal English Dictionary on a New Plan* (1774). Nothing in the definition specifies that such profit must be in exchange for personal services. Thus, the President's reading of "emolument" to exclude, for example, the President as hotelier—a clear form of "employ"—loses its footing as original public meaning. It can be rejected for this reason alone.

1760-1799, 59 S. Tex. L. Rev. 181, 224 (2017). Even if accurate—and that study's methodology has been the subject of criticism, *see* Cunningham Amicus Br. 7 n.12; Neal Goldberg, *Corpus Linguistics in Legal Interpretation: When Is It (In)appropriate?* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333512—that is still not the word's "normal and ordinary" meaning, *Heller*, 554 U.S. at 576.

[12] This definition makes sporadic appearances in founding era dictionaries. *See* Mikhail, *supra*, at 1-2; Cunningham Amicus Br., *In re Donald J. Trump*, No. 18-2486, Doc. 27 at 28 (concluding that "scientific investigation of common usage during the Founding Era"—including over 95,000 texts in the Corpus of Founding Era American English, and over 2,500 uses of the term "emolument"—"does not support the theory that the word *emolument* had a distinct, narrow meaning limited to 'profit arising from an office or employ'").

Second, the expansive language used in the Foreign and Domestic Emoluments Clauses refutes any argument that the Clauses are self-limiting to "personal services performed." The Foreign Emoluments Clause bars the President from "accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" unless Congress consents. U.S. Const. art. I, § 9, cl. 8.[13] The double use of the expansive modifier "any," as in "any present, Emolument, Office, or Title, of any kind whatever," makes plain the breadth of the Clause's prohibition. The President's contrary argument—that these modifiers merely "clarify that all instances of each category are included, without exception," Br. 37—misses the mark because it would make no sense for the Clause to *broadly* prohibit "any" *narrow* subset of "emoluments" (i.e., personal-service or employment-type relationships). "[T]he more logical conclusion is . . . [that the] use of 'any kind whatever' was intended to ensure the broader meaning of the term.'" J.A. 190 (Dkt. 123 at 19). Indeed, "the 'drafters . . . intended the prohibition to have the broadest possible scope and applicability.'" Application of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 17 & n.9 (1994) (quoting B-169035, 49 Comp. Gen. 819, 821 (1970)); *see also* Matter of Major Stephen M. Hartnett, B-220860, 65 Comp. Gen. 382, 386

[13] The President does not dispute that he holds an "Office of Profit or Trust" within the meaning of the Foreign Emoluments Clause. *See* Dkt. 21 at 33 (Mot. to Dismiss); J.A. 181-84 (Dkt. 123 at 10-13). *But see* Dkt. 27 (Tillman Amicus Br.).

(1986) (the Foreign Emoluments Clause "requires the broadest possible scope and application"); Matter of Retired Marine Corps Officers, B-217096, Comp. Gen., 1985 WL 52377, at *1 (Mar. 11, 1985) ("[I]n view of the wording of the provision in prohibiting the acceptance of emoluments, etc. 'of any kind whatever', is to be given the broadest possible scope and application.").[14]

The Domestic Emoluments Clause similarly entitles the President to receive a salary and benefits fixed in advance by Congress, but prohibits him from "receiv[ing] within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7. Again, the Clause's language makes no exceptions to its prohibition, nor does it indicate that the Framers were referring only to "personal services performed," as opposed to all "profits" or "advantages" included in the term's ordinary meaning.

The President's reliance on the Constitution's Ineligibility Clause actually undermines his argument. *See* Br. 38-39. That clause prohibits members of

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[14] Applying the ordinary definition of "emolument" does not create "redundan[cies]" with the Clause's separate prohibition on "presents," Br. 37. This word was likely included to ensure that the Clause would cover the acceptance of unreciprocated, possibly unsolicited "gifts" commonly given as a matter of European custom. Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* 1-5 (2014). The drafters' decision to use broad and potentially overlapping categories—with expansive modifiers—demonstrates their desire to make certain that the Clause would prohibit *all* profits, benefits, and gifts (monetary or otherwise). Understanding the Clause this way does not render any part of it "surplusage." Br. 37 (quoting *Marbury v. Madison*, 5 (1 Cranch) 137, 174 (1803)).

Congress from being appointed to an office "which shall have been created, or the *Emoluments whereof* shall have been increased during such time." U.S. Const. art. I, § 6, cl. 2 (emphasis added). The President argues that the text of this clause shows that an "emolument" is "plainly an aspect of official employment." Br. 39. That is true, however, only to the extent that the surrounding language in that specific clause makes clear that "[e]moluments whereof" refers to an expressly referenced office. If the term "'emolument' were always to be read as a synonym for salary or payment for official services rendered, the modifier whereof in the Ineligibility Clause would have been unnecessary." J.A. 191 (Dkt. 123 at 20).

b. The Purpose of the Clauses Supports the Ordinary Meaning of "Emolument."

Even if President Trump's interpretation were plausible as a textual matter, it would be foreclosed by considerations of the Clauses' purpose.

The Foreign Emoluments Clause was intended by the Framers to guard against "corruption and foreign influence." 3 *Records of the Federal Convention of 1787*, at 405 (Max Farrand ed. 1911) (remarks of Edmund Randolph at the Virginia Convention). The Framers understood that "the great powers of Europe" would "be interested in having a friend in the President of the United States," and it would be "difficult to know whether [the President] receives emoluments from foreign powers or not." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 484 (Jonathan Elliot 2d ed. 1876) (remarks of George Mason at the

Virginia Convention). The Clause therefore seeks to prohibit even the *possibility* of "undue influence and corruption by foreign governments—a danger of which the Framers were acutely aware," 18 Op. O.L.C. at 15, through a "prophylactic provision," Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, 10 Op. O.L.C. 96, 98 (1986). As Supreme Court Justice Joseph Story explained, the Foreign Emoluments Clause was thus adopted to protect against "foreign influence of *every sort*." Joseph Story, 3 *Commentaries on the Constitution of the United States* 215-16 (1833) (emphasis added); *accord* Memorandum for Andrew F. Gehmann, Exec. Assistant, Office of the Att'y Gen., from Norbert A. Schlei, Assistant Att'y Gen., OLC, Re: Invitation by Italian Government to Officials of the Immigration and Naturalization Service and a Member of the White House Staff, and Their Wives, to be Guests of the Italian Government, All Expenses, Included Travel, to be Born by that Government (1962), https://www.justice.gov/olc/page/file/935741/download (emphasizing that the Clause is "directed against *every possible kind* of influence by foreign governments" (emphasis added)); 10 Op. O.L.C. at 98 (noting that the Clause's "expansive language and underlying purpose . . . strongly suggest that it be given broad scope"); Authority of Law Enforcement Agents to Carry Weapons in the United States, 12 Op. O.L.C. 67, 68 (1988) (stating that Foreign Emoluments Clause "was intended by the Framers to preserve the independence of officers of the United States from

corruption and foreign influence. The Emoluments Clause must be read broadly in order to fulfill that purpose."); Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., OLC, Re: Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales (May 23, 1986), https://www.justice.gov/olc/page/file/936146/download ("Alito Memo") (explaining that the Foreign Emoluments Clause's purpose is "to exclude corruption and foreign influence").

The Domestic Emoluments Clause is similarly intended to preclude undue influence from state or federal entities. As Alexander Hamilton explained, the Framers sought to eliminate any "pecuniary inducement" the President might have to betray his exclusive constitutional duty: serving the people of the United States. *The Federalist* No. 73 (Alexander Hamilton). The Framers were concerned that giving any official the ability to affect the President's financial circumstances could "tempt him by largesses" and cause him "to surrender" his "judgment to their inclinations," while forcing domestic officials to compete with each other in an effort to "appeal[] to his avarice." *Id.* The Clause's broad sweep thus "prevent[s] Congress or any of the states from attempting to influence the President through financial awards or penalties." President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 189 (1981).

President Trump does not dispute that the Emoluments Clauses were intended to serve these purposes, acknowledging that the Framers included the Clauses to prevent "undue influence" or "pecuniary inducement" from affecting the President. Br. 41. The President's interpretation of them, however, would restrict the constitutional prophylaxis to "divided loyalties arising from dual employment or other compensation tied to personal services." Br. 41. That limitation—which is of "unclear" provenance, J.A. 244 (Dkt. 135 at 11)—makes little sense and is in tension with the broader purposes that the President himself acknowledges. As the district court noted, it would essentially limit the reach of the Emoluments Clauses to instances of bribery. J.A. 207 (Dkt. 123 at 36). Not only is bribery difficult to establish (and separately dealt with by the Constitution, *see* U.S. Const. art. II, § 4); a personal services requirement is easy to circumvent, *see McDonnell v. United States*, 136 S. Ct. 2355, 2368-73 (2016) (illustrating difficulties of proof in the bribery context).[15] The President, unsurprisingly, offers no reasoned argument that

[15] Moreover, because Congress may consent to the receipt of foreign emoluments, it is exceedingly unlikely that the Framers would have both made bribery an impeachable offense and given Congress the power to consent to such activity when a foreign government is involved. J.A. 192 (Dkt. 123 at 21).

the benefits he receives from foreign and domestic entities, as alleged, are outside of the concerns of corruption and influence that he otherwise recognizes.[16]

c. Historical Practice and Governmental Precedent Are Consistent with the Ordinary Definition of "Emolument."

With no justification that is rooted in the text or purpose, President Trump retreats to history and practice. Br. 43-46. "Historical practice," is, of course, entitled to "significant weight" in this context. Br. 43 (quoting *Noel Canning*, 134 S. Ct. at 2559). But the President's arguments rely exclusively on (1) inferences drawn from a lack of positive evidence showing that the Framers were concerned about presidents doing business with governments; and (2) the erroneous contention that interpreting the Emoluments Clauses to extend beyond a personal-service or "employment-type" relationship will have "absurd and ahistorical results." Br. 43-46. Those arguments are wrong on their own terms, but they also ignore the "settled practice" of federal officials and the understanding of both the executive and legislative branches of the federal government, as memorialized in numerous legal opinions from OLC and the Comptroller General.

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[16] Instead, he rests on an assertion that there is "no evidence . . . that the Clauses were a response to concerns over ordinary commercial transactions." Br. 41-42. Even if accurate, that silence cannot overcome the broad, ordinary meaning of "Emolument," the expansive language of the Emoluments Clauses, or their plain anti-corruption purpose.

Presidents have long acknowledged their constitutional duty to reject benefits from foreign governments absent congressional dispensation. For example, when the Sultan of Morocco offered President Martin Van Buren pearls, textiles, and other valuable gifts, the President explained that the "fundamental law of the Republic . . . forbids its servants from accepting presents from foreign States or Princes." 14 *Abridgment of the Debates of Congress from 1789 to 1856*, at 141 (Thomas Hart Benton ed., 1860). Similarly, when the Republic of Colombia offered President Andrew Jackson a medal, the President allowed Congress to dispose of it, noting that the Constitution "forbids the acceptance of presents" from a foreign government. Message of President Andrew Jackson to the Senate and House of Representatives, dated January 19, 1830, *in* 3 *Compilation of the Messages and Papers of the Presidents* 1029, 1030 (James D. Richardson ed., 1897). And when the King of Siam sought to bestow various gifts on President Abraham Lincoln, he explained that "our laws forbid the President from receiving these rich presents as personal treasures," and promptly notified Congress. Letter from Abraham Lincoln, President of the United States of America, to the King of Siam (Feb. 3, 1862), http://quod.lib.umich.edu/l/lincoln/lincoln5/1:269.1?rgn=div2;view=fulltext. Congress, in turn, directed the Department of the Interior to keep and preserve the gifts. *See* Joint Resolution No. 20, A Resolution Providing for the Custody of the Letter and Gifts from the King of Siam, Res. 20, 37th Cong., 12 Stat. 616 (1862).

Additionally, although not binding on courts, OLC opinions are entitled to considerable weight because they "reflect[] the legal position of the executive branch." *United States v. Arizona*, 641 F.3d 339, 385 n.16 (9th Cir. 2011), *aff'd in part, rev'd in part*, *Arizona v. United States*, 567 U.S. 387 (2012); *see also Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010); *cf. Noel Canning*, 134 S. Ct. at 2559 (citing the Court's own precedent in interpreting "historical practice"). OLC and the Comptroller General, which is part of the Government Accountability Office, have consistently interpreted the term "emolument" to cover "any profits" accepted from a foreign or domestic government. Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 119 (1993); *cf.* 5 Op. O.L.C. at 187-88 (assuming that "any other Emolument" in the Domestic Emoluments Clause includes financial benefits not received as compensation for being president, but excepting pension rights that fully vested prior to winning office). They have reached this conclusion even when the recipient had no "direct personal contact or relationship" with "a foreign government," *id.*, and even when the amount accepted was small, *see, e.g.*, Alito Memo, *supra*, at 4 (applying the Foreign Emoluments Clause to the acceptance of a $150 stipend, but ultimately concluding that the clause was not violated because it was not clear that the issuing university was a "foreign state").

Contrary to the President's claim, "numerous accepted practices," Br. 46, would not be found unconstitutional under the interpretation of the Emoluments Clauses that plaintiffs put forth and the district court adopted in its well-reasoned opinion. Receipt of vested state pensions, Br. 46, which OLC has sanctioned in the past, could continue, 5 Op. O.L.C. at 187-88. Royalties from the sale of a book to a foreign public university, Br. 45, would also likely not constitute a prohibited emolument by that officeholder because the royalties would not be from a "foreign state," *see* Alito Memo, at 3-5; *cf.* J.A. 210 (Dkt. 123 at 39 n.36) (noting that speculating about such hypotheticals would be impossible without additional facts).[17] Finally, perhaps as telling, no opinion from either OLC or the Comptroller General has ever concluded that the President (or any other officeholder) may receive the kind of profits or advantages that President Trump is alleged to be accepting in this case. Sometimes "the most telling indication of [a] severe constitutional problem" with a novel assertion of authority by the Executive "is the

[17] Contrary to the President's suggestion, Br. 46, the district court's recognition of the potential for "*de minimis* situations," J.A. 209 (Dkt. 123 at 38), does not counsel in favor of the President's atextual definition. Moreover, a *de minimis* exception clearly has no bearing on *this* case, which involves the "sole or substantial ownership of a business that receives hundreds of thousands or millions of dollars a year in revenue . . . [and] where foreign and domestic governments are known to stay (often with the express purpose of cultivating the President's good graces)." J.A. 209 (Dkt. 123 at 38).

lack of historical precedent." *Free Enter. Fund*, 561 U.S. at 505 (internal quotation marks omitted). That is true here.

Ignoring this practice and precedent, the President emphasizes the supposed "historical practice" of early presidents and cites as his "most telling" example the account that President Washington purchased federal land at auction. Br. 43-44. According to a recent report by the General Services Administration's Office of the Inspector General, however, the land that then-President Washington purchased was privately owned and the "sales did not provide a benefit from the United States." Office of Inspector General, GSA, JE19-002, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, at 15-16 (summary), App'x A at 2-4 (historical background and documentation) (Jan. 16, 2019), https://bit.ly/2RAV9ct. Even if the details of the sales were a matter of debate, however, a singular historical event—even one involving George Washington—cannot overcome the unified force of the Clauses' text and other interpretative indicia.

Next, the President points to the possibility that early farmer-presidents may have sold their agricultural products to foreign or domestic governments while in office. However, the President "has provided no evidence—none—that any trading partners of the early Presidents actually were either foreign or domestic *governments*." J.A. 216 (Dkt. 123 at 45) (emphasis in original); *see* Br. 44 (asserting

without citation that "such transactions were common at the time"). Without more, the President's arguments about "historical practice" dissolve into speculation.

* * * * *

In light of the Clauses' text, structure, purpose, and practice, the ordinary definition of "emolument" applies and the Clauses encompass profits and benefits accepted by the President from foreign or domestic governments through his businesses—as relevant here, the Hotel. *See* J.A. 219-22 (Dkt. 123 at 48-51). President Trump does not deny that, on this reading of the Clauses, the amended complaint plausibly alleges ongoing violations. Plaintiffs' amended complaint also plausibly states a claim under the Clauses even under the President's definition of "emolument," because plaintiffs have alleged facts that, if proven, would demonstrate that the profits, gains, and advantages the President is receiving through the Hotel arise out of his office or employ and constitute "payment in compensation for personal services through official acts." Br. 10; *cf.* J.A. 190-91 (Dkt. 123 at 19-20), J.A. 248 (Dkt. 135 at 15). Thus, even if the Court reaches this definitional question, his appeal should be denied on that basis as well.

CONCLUSION

This appeal should be dismissed; if not, the President's request for relief should be denied.

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/s/ Leah J. Tulin
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I hereby certify that on February 14, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth 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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