No. 18-474

United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York, No. 17-cv-458 (Hon. George B. Daniels)

BRIEF OF THE NISKANEN CENTER, REPUBLICAN WOMEN FOR PROGRESS, CHERI JACOBUS, AND EVAN MCMULLIN AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

M. Patrick Yingling
REED SMITH LLP
10 S. Wacker Dr.
40th Floor
Chicago, IL 60606
Tel: 312-207-2834

Colin E. Wrabley
Devin M. Misour
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-3131

Todd S. Kim
REED SMITH LLP
1301 K Street, N.W.
Suite 1000, East Tower
Washington, DC 20005
Tel: 202-414-9290

Counsel for Amici Curiae

DISCLOSURE STATEMENTS

Amicus Curiae The Niskanen Center is a 501(c)(3) entity that does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Republican Women for Progress is a grassroots policy organization that does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Emoluments Clauses Stand As An Increasingly Important Bulwark Against The Corrupt Use Of Presidential Power And The Distortion Of Our Free Market Economy 4

A. The Emoluments Clauses Are Vital Checks Against Corruption 4

B. The Modern Presidency Comes With Great And Growing Power 6

C. Ensuring That Presidential Power Is Exercised Only For Legitimate Purposes Has Become All The More Important Given Increases In Executive Power And In The Likelihood Of Presidents With Business Empires 9

II. This Court Should Reverse The District Court's Dismissal Of The Case And, If It Reaches The Merits, Reject The President's Unduly Narrow Interpretation Of The Emoluments Clauses 14

A. The District Court's Reasoning Would Create A Situation In Which Constitutional Violations—And Presidential Corruption—May Be Left Unchecked 15

1. The Political Branches Are Ill-Equipped To Police Violations Of The Emoluments Clauses 16

2. A President With Expansive Personal Business Interests Distorts The Free Market By Accepting Improper Foreign And Domestic Emoluments 20

B. Accepting The President's Cramped Reading Of The Emoluments Clauses Would Open The Door To A Wide Range Of Corruption And Abuses Of Executive Power 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Baker v. Carr,
369 U.S. 186 (1962) 19

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 7

Chi. & S. Air Lines v. Waterman S. S. Corp.,
333 U.S. 103 (1948) 7

Dist. of Columbia v. Trump,
--- F. Supp. 3d ---, No. 17-1596, 2018 WL 1516306 (D. Md. Mar. 28, 2018) 16

Marbury v. Madison,
5 U.S. 137 (1803) 19

Morton v. Ruiz,
415 U.S. 199 (1974) 7

Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville,
508 U.S. 656 (1993) 21

Price v. City of Charlotte, N.C.,
93 F.3d 1241 (4th Cir. 1996) 22

Sherley v. Sebelius,
610 F.3d 69 (D.C. Cir. 2010) 21

United States v. Curtiss-Wright Exp. Corp.,
299 U.S. 304 (1936) 6

Zivotofsky ex rel. Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015) 6

Constitutional Provisions and Statutes

19 U.S.C. § 1862 7

19 U.S.C. § 2483 7

50 U.S.C. § 1701 7

U.S. Const. art. I, § 7 7

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

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

U.S. Const. art. II, § 2 6

U.S. Const. art. II, § 3 ..... 6, 7

Books and Articles

Boot, Max, *Let's Count the Ways Donald Trump Has Gone Where no President Has Gone Before*, L.A. Times (Apr. 4, 2017), https://goo.gl/kvr3Ww 9

Branum, Tara L., *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. Legis. 1 (2002) 8

Cerrud, Ana & Fahrenthold, David A., *Warning of 'Repercussions,' Trump Company Lawyers Seek Panama President's Help*, Washington Post (Apr. 9, 2018), https://wapo.st/2HEM7Gf 10

Cooper, Philip J., BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (Univ. Press of Kansas 2014) 8

Crane, Joy & Tabor, Nick, *501 Days in Swampland*, New York Magazine (Apr. 1, 2018), https://goo.gl/CNAAyq 19

Fontevecchia, Agustino, *Forbes' 2016 Presidential Candidate Wealth List*, Forbes (Sept. 29, 2015), https://goo.gl/QdNemr 12

The Global Anticorruption Blog, *Tracking Corruption and Conflicts in the Trump Administration* (updated Apr. 4, 2018), https://goo.gl/FNtcH1 ..... 9, 20, 23

Kinetz, Erika, *China Approves 9 of Trump's Trademarks That They Had Previously Rejected*, Associated Press (June 14, 2017), https://goo.gl/XM2Y31 10

Kumar, Anita, *Foreign Governments Are Finding Ways to Do Favors For Trump's Business*, McClatchy (Jan. 2, 2018), https://goo.gl/3SvqS5 10

Letters of Sen. Charles Grassley, https://bit.ly/2HGOVzf 17, 18

Levitz, Eric, *Trump Won the Presidency, Then Approval on a Tax Subsidy for His Hotel*, New York Magazine (Nov. 30, 2016), https://goo.gl/FUjJ23 11

Lindert, Peter H., GROWING PUBLIC: SOCIAL SPENDING AND ECONOMIC GROWTH SINCE THE EIGHTEENTH CENTURY (Cambridge Univ. Press 2004) 7

Lu, Denise & Yourish, Karen, *Hired and Fired: The Unprecedented Turnover of the Trump Administration*, N.Y. Times (updated Apr. 26, 2018), https://goo.gl/TDkMVM 16

Miller, Kevin, *Luxury Hotels, Fine Dining for LePage on Taxpayers' Dime*, Portland Press Herald (July 23, 2017), https://goo.gl/HrQdMY 11

Narea, Nicole, *A Year in Trump Corruption*, Washington Monthly (Jan.-Mar. 2018), https://goo.gl/puCbui 9

Northam, Jackie, *Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions*, NPR (Feb. 25, 2017), https://goo.gl/juNTcT 10

Notes of James Madison (July 5, 1787), *The Records of the Federal Convention of 1787,* (Max Farrand ed., rev. ed. 1966) (1937) 4

Ornstein, Norm, *American Kakistocracy*, The Atlantic (Oct. 9, 2017), https://goo.gl/PkNYqf 9

Rubin, Jennifer, *A Responsible Congress Would Uncover Trump's Foreign Emoluments*, Washington Post (Feb. 27, 2018), https://wapo.st/2HpHhN6 19

Rubin, Jennifer, *Republicans in Congress Retreat in the Trump Era*, Kansas City Star (Apr. 24, 2017), https://bit.ly/2HUkcis 19

Scher, Bill, *The Serious Case for Oprah 2020*, Politico Magazine (Mar. 1, 2017), https://goo.gl/S9NJ9A 12

Smith, Allan, *Mark Cuban Says if He Runs for President He'd Probably Run as a Republican*, Business Insider (Oct. 23, 2017), https://goo.gl/mfUSRG 12

Stewart, James B., *Trump's Potential Conflicts Have a Precedent: Berlusconi's Italy*, N.Y. Times (Dec. 1, 2016), https://goo.gl/WfUdRc 12

Teachout, Zephyr, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009) 5

Transparency International, *Corruption in the USA: The Difference a Year Makes* (Dec. 12, 2017), https://goo.gl/wqM7eG 13

U.S. Anti-Corruption Efforts, U.S. Dep't of State, https://goo.gl/PsjjAG 13

Other Authorities

10 Annals of Cong. 613 (1800) 6

Exec. Order No. 13761, 82 FR 5331, 2017 WL 168857 (Jan. 13, 2017) 8

Exec. Order No. 13810, 82 FR 44705, 2017 WL 4223124 (Sept. 20, 2017) 8

The Federalist No. 68 4

The Federalist No. 73 6

Pres. Proc. No. 9704, 83 FR 11619, 2018 WL 1316710 (Mar. 8, 2018) 21

Pres. Proc. No. 9705, 83 FR 11625, 2018 WL 1316711 (Mar. 8, 2018) 21

Pres. Proc. Nos. 9710, 9711, 83 FR 13355, 13361, 2018 WL 1505922 (Mar. 22, 2018) 8

INTEREST OF *AMICI CURIAE*[1]

It is no wonder that, in this overheated political climate, President Trump's private business interests have sparked partisan battles. But hyper-partisan bickering must not obscure the fundamental importance of the legal questions presented. *Amici curiae* believe that the precedent this Court sets at this critical moment in our nation's history can either push us toward even graver problems, or confirm what had been a settled and shared understanding of how our government is supposed to work: for the people, not for profit.

Amici are right-of-center organizations and individuals[2] concerned about President Trump's violations of the Constitution's Emoluments

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *Amici* state that: (1) no counsel for a party authored this brief in whole or in part, (2) no party or counsel for a party contributed money intended to fund the preparation or submission of this brief; and (3) no persons or entities other than *Amici*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. Pursuant to Rule 29(a), the parties to this appeal have consented to the filing of this brief, and accordingly, this brief may be filed without leave of court.

[2] The Niskanen Center is a nonpartisan 501(c)(3) think tank that works to promote a society that is open to political, cultural, and social change, as well as a government that protects individual and societal freedoms. Republican Women for Progress is a grassroots policy organization for Republican women. Cheri Jacobus is a nationally-recognized political strategist, pundit, and writer who frequently offers political opinion and analysis from the Republican perspective. Evan McMullin is a former Central Intelligence Agency operations officer and

Continued on following page

Clauses, and even more concerned about the arguments the President has advanced in this action. His arguments on standing and the merits could, if endorsed by the courts, lead to dangerous abuses of already expansive executive branch powers, and the harmful consequences to the free market and the nation's broader interests likely to follow.

Amici urge the Court to reverse the district court's dismissal of the case and—if it elects to address whether Plaintiffs have adequately pleaded violations of the Emoluments Clauses—to conclude that Plaintiffs have done so, based on a proper construction of the Clauses.

SUMMARY OF ARGUMENT

1. The Emoluments Clauses stand as an essential bulwark against the corrupt use of the Presidency and the distortion of our free market economy. The executive power is vast—both in foreign affairs and domestic policymaking—and it keeps growing, year by year and decade by decade. As it has, the need to enforce the Emoluments Clauses as originally intended has taken on ever greater importance.

President Trump's refusal to relinquish his extensive business interests makes this a watershed moment for the Emoluments Clauses. The reported examples of governments attempting to curry favor by

---

Continued from previous page
chief policy director for the House Republican Conference who ran as an independent in the 2016 United States presidential election.

engaging in business transactions with his companies are, of course, concerning in themselves. But the specific arguments President Trump advances in this case would allow even more troubling conduct by a future President holding greater executive power in one hand and wider business interests in the other. The precedent this case sets thus will be critically important in ensuring the nation is not set on a path toward kleptocracy.

2. This Court should reverse the district court's dismissal of the case and, if it reaches the merits, reject the President's unduly narrow interpretation of the Emoluments Clauses.

The district court's rulings on standing would improperly hamstring enforcement of the Emoluments Clauses against an increasingly powerful executive branch. Neither the Department of Justice ("DOJ") nor Congress is well positioned as an institution to remedy the President's well-documented Emoluments Clause violations, and neither has shown any interest in doing so. The judiciary should fulfill its responsibility to redress a clear harm to those—such as Plaintiffs here—who would otherwise be forced to compete in an unfair and distorted market.

If the Court finds that Plaintiffs have standing and addresses the proper interpretation of the Clauses, it should reject the President's narrow construction. In the President's view, the Clauses proscribe payments overtly based on official position or framed as compensation

for services that he has personally rendered, but he makes no allowance for the more subtle—and arguably more insidious—corruption potentially at work right now. Accepting his cramped construction of the Clauses would allow Presidents through their businesses to elevate their interests over those of the nation, and encourage the proliferation of corruption. The Emoluments Clauses, however, serve more broadly to bar such monetization of the Presidency.

ARGUMENT

I. The Emoluments Clauses Stand As An Increasingly Important Bulwark Against The Corrupt Use Of Presidential Power And The Distortion Of Our Free Market Economy

The Framers intended the Emoluments Clauses to check presidential profiteering like that identified in this case. Especially given the vast nature of the executive power and the extensive business interests that this President has and future Presidents may have, the Emoluments Clauses should be properly interpreted and enforced.

A. The Emoluments Clauses Are Vital Checks Against Corruption

In constructing the new government, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." *The Federalist* No. 68 (Alexander Hamilton). In particular, the Framers were deeply concerned that foreign interests would try to use their wealth to tempt public servants and sway the

foreign policy decisions of the new government. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 361-62 (2009) (citing Notes of James Madison (July 5, 1787), in 1 *The Records of the Federal Convention of 1787*, at 526, 530 (Max Farrand ed., rev. ed. 1966) (1937)). The Foreign Emoluments Clause thus provides:

> [N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9. This deliberately capacious language bars the President and other federal officers from accepting any profits or gifts of any kind from any foreign state absent congressional consent. The rule holds whether the profits or gifts are handed directly to the officeholder by a representative of the foreign government, or funneled to the officeholder through affiliated businesses—most clearly, an entity that he owns and that bears his name. As Plaintiffs have demonstrated, this construction of the Foreign Emoluments Clause flows not only from its plain text but also from the Framers' purpose of avoiding corruption and improper foreign influence. (Appellants' Br. at 5-9.)

The Framers were also concerned with corruption from within. They worried that the nation's new, powerful chief executive would be tempted to use his office to enrich himself, and that other parts of the government could seek to "corrupt his integrity by appealing to his avarice." *The Federalist* No. 73 (Alexander Hamilton). To ensure that

the President would not put his own financial interest above the good of the nation, the Framers added the Domestic Emoluments Clause:

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

U.S. Const. art. II, § 1. The clause applies—just like the Foreign Emoluments Clause—when the President accepts profits directly and when he does so through an affiliated business.

B. The Modern Presidency Comes With Great And Growing Power

Institutional checks on the separated branches of government are essential features of our constitutional republic. But even with checks on the executive, the modern presidency comes with great power—both in foreign affairs and domestic policymaking. And that power has been growing, making the need to enforce the Constitution's constraints on the President all the more pressing.

Begin with foreign affairs. Settled law holds that "'[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'" *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613 (1800)). The Constitution gives the President power to recognize foreign governments and engage in diplomacy. *See* U.S. Const. art. II, §§ 2, 3; *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015). It

also makes the President "Commander in Chief of the Army and Navy of the United States," U.S. Const. art. II, § 2, investing him with war powers and giving him special access to "intelligence services whose reports neither are nor ought to be published to the world." *Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). And Congress has bolstered the President's constitutional authority over foreign affairs through, for example, the Trade Expansion Act of 1962, 19 U.S.C. § 1862, the Trade Act of 1974, 19 U.S.C. § 2483, and the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq*.

Of course, the President also enjoys broad domestic policymaking power. He holds the veto power, U.S. Const. art. I, § 7, and the powers to propose legislation and commission officers of the United States, U.S. Const. art. II, § 3. He also has authority over the enormous administrative state—executive agencies and departments with not only those powers expressly granted by their organic statutes but also the power to "formulat[e] … policy and … mak[e] … rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

These expansive powers are not static and have grown substantially over time. To tell an obvious truth, the government is *much* larger than it was when the Constitution was ratified. *See* Peter H. Lindert, GROWING PUBLIC: SOCIAL SPENDING AND ECONOMIC GROWTH

SINCE THE EIGHTEENTH CENTURY (Cambridge Univ. Press 2004). And, often due to a desire to fix the perceived errors of prior administrations, modern presidents—both Republicans and Democrats alike—have continued to push the bounds of their power by, among other things, issuing an increasing number of executive orders and presidential memoranda affecting both the foreign and domestic realms. *See* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. Legis. 1, 2 (2002); Philip J. Cooper, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (Univ. Press of Kansas 2014).[3] While there may be debate about whether the government has too much power over individual lives, it is clear that its growth is all the more reason to ensure that checks against abuse of that power are effective and enforced.

[3] The President frequently uses executive orders and proclamations to motivate foreign nations—both with carrots and with sticks. *E.g.*, Exec. Order No. 13810, 82 FR 44705, 2017 WL 4223124 (Sept. 20, 2017) (President Trump) (imposing additional sanctions against North Korea following recent intercontinental ballistic missile launches); Exec. Order No. 13761, 82 FR 5331, 2017 WL 168857 (Jan. 13, 2017) (President Obama) (revoking Sudan-related sanctions in recognition of positive actions by the government of Sudan); Pres. Proc. Nos. 9710, 9711, 83 FR 13355, 13361, 2018 WL 1505922 (Mar. 22, 2018) (President Trump) (exempting Australia, Argentina, South Korea, Brazil, and the European Union member countries from certain tariffs).

C. Ensuring That Presidential Power Is Exercised Only For Legitimate Purposes Has Become All The More Important Given Increases In Executive Power And In The Likelihood Of Presidents With Business Empires

Happily, there has been little need since 1787 to think about the Emoluments Clauses. But their time has come. This is the moment to determine, for now and for the future, whether they should be enforced as an essential safeguard for the people against corruption and kleptocracy, or instead should be consigned to near irrelevance.

Never before has the United States been required to confront—to this extent—a President with vast power who also has extensive private business interests, at home and abroad. As the complaint in this case details, foreign governments have been actively attempting to curry favor with President Trump by engaging in private business transactions with companies owned by or connected to the President, and granting favorable regulatory treatment to Trump business operations. *See* Norm Ornstein, *American Kakistocracy*, The Atlantic (Oct. 9, 2017), https://goo.gl/PkNYqf; Nicole Narea, *A Year in Trump Corruption*, Washington Monthly (Jan.-Mar. 2018), https://goo.gl/puCbui; The Global Anticorruption Blog, *Tracking Corruption and Conflicts in the Trump Administration* (updated Apr. 4, 2018), https://goo.gl/FNtcH1; Max Boot, *Let's Count the Ways Donald Trump Has Gone Where no President Has Gone Before*, L.A. Times (Apr. 4, 2017), https://goo.gl/kvr3Ww. And on the domestic side, his

businesses have had dealings with the federal government and state and local governments that likewise bespeak the appearance, at least, of improper attempts to enrich the President personally. *See id.* To illustrate with just a few examples on the foreign and domestic fronts:

- After President Trump's election, the Kuwaiti Embassy canceled a "save the date" for an independence celebration with the Four Seasons Hotel and moved the event to the Trump International Hotel. *See* Jackie Northam, *Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions*, NPR (Feb. 25, 2017), https://goo.gl/juNTcT.

- In June 2017, the Chinese government granted preliminary approval for nine Donald Trump trademarks it had previously rejected, in whole or in part. *See* Erika Kinetz, *China Approves 9 of Trump's Trademarks That They Had Previously Rejected*, Associated Press (June 14, 2017), https://goo.gl/XM2Y31.

- The Trump Organization is currently developing a luxury resort on the Indonesian island of Bali. The Bali local government provided public land for the project, granted numerous licenses and permits, and is planning to build (at government expense) a toll road extension that will substantially shorten the drive from the airport to the Trump resort. *See* Anita Kumar, *Foreign Governments Are Finding Ways to Do Favors For Trump's Business*, McClatchy (Jan. 2, 2018), https://goo.gl/3SvqS5.

- In March 2018, lawyers for one of President Trump's companies wrote the president of Panama asking him to intervene in a commercial dispute involving a Trump hotel in Panama. *See* Ana Cerrud & David A. Fahrenthold, *Warning of 'Repercussions,' Trump Company Lawyers Seek Panama President's Help*, Washington Post (Apr. 9, 2018), https://wapo.st/2HEM7Gf.

- Six days after the election, President Trump received all-but final approval from the National Park Service for a $32 million historic preservation tax credit for the Trump International Hotel. *See* Eric Levitz, *Trump Won the Presidency, Then Approval on a Tax Subsidy for His Hotel*, New York Magazine (Nov. 30, 2016), https://goo.gl/FUjJ23.

- Maine Governor Paul LePage, his staff, and security detail spent four nights and dined at the Trump International Hotel in the spring of 2017, at a time when the governor met with top administration officials and testified before Congress. *See* Kevin Miller, *Luxury Hotels, Fine Dining for LePage on Taxpayers' Dime*, Portland Press Herald (July 23, 2017), https://goo.gl/HrQdMY.

It takes little imagination to conceive of numerous other, and perhaps more egregious, examples of how this and future Presidents, and others holding "Office[s] of Profit or Trust" who also are subject to the Foreign Emoluments Clause's commands, could use the broad authority entrusted to them to enrich themselves through acceptance of improper benefits, at the expense of the American economy and political system as a whole. A future President could demand that a foreign government change its trade rules to favor a product her business manufactures over those of her domestic competitors. A President could order executive agencies to take (or not take) regulatory action on an entity he owns, or on a competitor. Or a President could pressure agencies she supervises to award government contracts to her businesses.

While our Presidents have not typically had far-reaching business interests, current events and the experiences of other countries show that this possibility is becoming more and more likely and cannot be discounted. *See, e.g.*, James B. Stewart, *Trump's Potential Conflicts Have a Precedent: Berlusconi's Italy*, N.Y. Times (Dec. 1, 2016), https://goo.gl/WfUdRc. Candidates from the two major political parties are increasingly drawn from the ranks of hyper-wealthy individuals who have ever larger and more complex personal business interests. *See* Agustino Fontevecchia, *Forbes' 2016 Presidential Candidate Wealth List*, Forbes (Sept. 29, 2015), https://goo.gl/QdNemr (reporting that, of the top 20 contenders in the 2016 presidential race, only 3 were not millionaires); *see also* Allan Smith, *Mark Cuban Says if He Runs for President He'd Probably Run as a Republican*, Business Insider (Oct. 23, 2017), https://goo.gl/mfUSRG; Bill Scher, *The Serious Case for Oprah 2020*, Politico Magazine (Mar. 1, 2017), https://goo.gl/S9NJ9A.

The possibility of Presidents and others holding "Office[s] of Profit or Trust" pursuing policies or making decisions that will personally enrich themselves and their private interests is thus no mere academic proposition. Rather, there is a palpable risk of corruption and a blurring of public and private interests, as what is beneficial to the President's financial portfolio may be detrimental to the commonwealth. And that risk grows proportionally with the power that a President has to abuse.

The specter of corruption threatens in particular to disrupt our free market economy. There is no question that corruption "saps economic growth, hinders development, destabilizes governments, undermines democracy, and provides openings for dangerous groups like criminals, traffickers, and terrorists." U.S. Anti-Corruption Efforts, U.S. Dep't of State, https://goo.gl/PsjjAG. Although the United States—with its separation of powers and checks and balances—has long avoided the type of corruption that drags down many of the world's economies, the perception of corruption in the United States is on the rise. According to Transparency International, 44 percent of Americans believe that corruption is pervasive in the White House, up from 36 percent in 2016, and almost 7 out of 10 people believe the government is failing to fight corruption, up from half in 2016. *See* Transparency International, *Corruption in the USA: The Difference a Year Makes* (Dec. 12, 2017), https://goo.gl/wqM7eG.

Given all this, ensuring that presidential power is exercised only for legitimate purposes has become even more critical for the well-being of the American political system and economy. The Emoluments Clauses thus must be properly enforced.

II. This Court Should Reverse The District Court's Dismissal Of The Case And, If It Reaches The Merits, Reject The President's Unduly Narrow Interpretation Of The Emoluments Clauses

The district court's ruling below—which rested on principles of standing and justiciability and dismissed Plaintiffs' Emoluments Clause challenges without addressing their arguments on the merits—took a short-sighted and damaging view of the potential harm that can come from overlooking corruption in the executive branch. The unfortunate consequences of its reasoning would be especially profound because neither the executive branch nor the legislative branch is equipped to police violations of the Clauses in a robust and conflict-free way.

This hands-off approach, in conjunction with a President who has significant (and largely opaque) private business interests, likely will result in the inappropriate use of ever-expanding executive authority to artificially benefit the President's business interests over those of other market participants. In that landscape, unchecked corrupt practices ultimately could impede the normal operation of the free market economy. This result is most certainly not what the Framers envisioned when they sought to ban the President's improper receipt of emoluments.

If this Court determines—as it should—that Plaintiffs have standing to advance their Emoluments Clause challenges and then proceeds to address the merits, this Court should also reject the

President's cramped construction of the Clauses. He proposes to limit their application to payments overtly based on official position or framed as compensation for services that he has personally rendered, and would exclude the provision of benefits through businesses in transactions like those Plaintiffs have detailed.

That interpretation is unmoored from the text of the Clauses, their original meaning, and more than two centuries of interpretation. Taken to its logical conclusion, the President's reading of the Emoluments Clauses would permit him and future Presidents to use their personal businesses as machines for generating personal profit and gain—a result that would render the Clauses a patently inadequate means to the Framers' end of addressing corruption. The President's interpretation and actions threaten to undermine our country's most deeply-held values and institutions.

A. The District Court's Reasoning Would Create A Situation In Which Constitutional Violations—And Presidential Corruption—May Be Left Unchecked

The district court found that Plaintiffs—competitors with the President's private restaurant and hotel businesses—lacked standing. We agree with Plaintiffs that this holding was reversible legal error. For our part, however, *Amici* seek to highlight the dangerous consequences that will follow if this Court affirms the district court's rulings on standing.

1. The Political Branches Are Ill-Equipped To Police Violations Of The Emoluments Clauses

The President's restrictive view of the standing doctrine would lead to unacceptable underenforcement of the Emoluments Clauses. The very individuals covered by the clauses—the President and any other "person holding any Office of Profit or Trust"—cannot be entrusted with enforcing their own compliance with the Clauses. Put simply, the foxes should not be guarding the henhouse when it comes to policing the receipt of personal profit or gain (particularly in the context of a closely-held business interest). It cannot be that the President can "receive unlimited 'emoluments' from foreign and state governments without the least oversight and with absolute impunity." *Dist. of Columbia v. Trump*, --- F. Supp. 3d ---, No. 17-1596, 2018 WL 1516306, at *22 n.18 (D. Md. Mar. 28, 2018).

Subordinate officials in the executive branch are obviously in no position to curb the President's violations of the Emoluments Clauses. Although DOJ's Office of Legal Counsel has articulated a view of the Clauses that is faithful to their text, history, and purpose—a view that supports Plaintiffs' position (*see* Appellants' Br. at 8 (recognizing the "rich body of practice and precedent from the [OLC] and the Comptroller General" enforcing the Emoluments Clauses "across the government every day"))—it has no authority to force the President to accept its view. And it is hard to believe that many executive branch

officials will be willing to risk their careers by turning against their leaders, especially one with a reputation for being quick to part ways with those he views as disloyal. *Cf.* Denise Lu & Karen Yourish, *Hired and Fired: The Unprecedented Turnover of the Trump Administration*, N.Y. Times (updated Apr. 26, 2018), https://goo.gl/TDkMVM.

Unsurprisingly, DOJ has historically eschewed enforcement of the Clauses in the courts against the President and other executive branch officials during both Democratic and Republican administrations. Indeed, DOJ has come to the President's defense in this case and taken a position that is particularly favorable to the person at the head of the executive branch, and that would drain the Emoluments Clauses of any meaningful effect.

Amici hasten to note that this reluctance to enforce the Clauses has been bipartisan. Beginning in 2016, Senate Judiciary Committee Chairman Senator Charles Grassley wrote a series of letters to DOJ and Department of State officials regarding conduct by then-Secretary of State Hillary Clinton. *See generally* Letters of Sen. Charles Grassley, available at https://bit.ly/2HGOVzf. Those letters detailed at length conduct by Secretary Clinton and her husband, former President Bill Clinton, that appears to have violated the Foreign Emoluments Clause, by virtue of the couple's receipt of speaking fees from numerous foreign governments. *Id.* at 1-5.

DOJ offered a lukewarm response to Senator Grassley's inquiries by indicating that "[a]t present, no statute provides a criminal penalty or civil remedy for receipt of emoluments from a foreign government without the consent of Congress," *id.* at 6 (May 2, 2016 Letter from Assistant Attorney General Peter J. Kadzik to Sen. Charles Grassley); and that "Congress has not given [DOJ] a law enforcement role in identifying or remedying alleged violations of the Emoluments Clause," *id.* at 16 (May 2, 2017 Letter from Acting Assistant Attorney General Samuel R. Ramer to Sen. Charles Grassley). When presented with the same evidence of violations by both Secretary Clinton and former President Clinton, the State Department similarly declined to refer the matter to the Inspector General, citing a "close[] review[]" of "each financial disclosure report [Sec. Clinton] submitted." *Id.* at 20-21 (June 19, 2017 Letter from Joseph E. Macmanus to Sen. Charles Grassley).

These communications are unsurprising given that both DOJ and the State Department fall within the ambit of the executive branch. Both are institutionally ill-suited to call into question the President's and other high executive branch officials' potential departure from the strictures of the Emoluments Clauses.

Enforcement by Congress also appears to be a non-starter. Gridlock or a political incentive to protect a President of the party that holds a majority of either house of Congress could prevent action even in the face of acknowledged violations of the Emoluments Clauses.

Congress could "h[o]ld hearings, require[] full disclosure of Trump's tax returns, consider[] everything Trump owed and owned and then determine[] which if any foreign emoluments would be acceptable," but appears unwilling or unable to do so. Jennifer Rubin, *A Responsible Congress Would Uncover Trump's Foreign Emoluments*, Washington Post (Feb. 27, 2018), https://wapo.st/2HpHhN6; *see also* Jennifer Rubin, *Republicans in Congress Retreat in the Trump Era*, Kansas City Star (Apr. 24, 2017), https://bit.ly/2HUkcis (noting that congressional Republicans have "entirely abandoned their constitutional obligations"). Whatever the cause, the fact remains that nothing has been done, and more harm to our core national beliefs promises to follow absent prompt action to check the President's actions.

That leaves the judicial branch as the proper branch to enforce the Constitution here. *See Marbury v. Madison*, 5 U.S. 137 (1803); *see also Baker v. Carr*, 369 U.S. 186, 211 (1962) (recognizing that the judicial branch is the "ultimate interpreter of the Constitution"). But the President's (and, by extension, the district court's) exceedingly narrow conception of standing in these circumstances, coupled with the political branches' institutional limitations, would threaten severe under-enforcement of the Clauses, further weakening their deterrent effect on the conduct of the President and against corruption.

2. A President With Expansive Personal Business Interests Distorts The Free Market By Accepting Improper Foreign And Domestic Emoluments

A lack of effective enforcement mechanisms for blatant violations of the Emoluments Clauses can and will lead to a substantial distortion of the free market economy. A president (like President Trump) with significant private business interests has the ability to use his title, power, and broad executive authority to artificially favor his business interests over those of others. Headlines on almost a daily basis reveal the extent to which the President's business interests create significant conflicts between his duty as President and his personal business interests. *See* Global Anticorruption Blog, *supra*; Joy Crane & Nick Tabor, *501 Days in Swampland*, New York Magazine (Apr. 1, 2018), https://goo.gl/CNAAyq (discussing examples of the President's "official corruption, from small-time graft and brazen influence peddling to full-blown raids on the federal Treasury"). And, as discussed, concerns about the distortive effect of presidential business interests promise to become more acute as even wealthier tycoons try to follow President Trump's lead.

The President's ability to affect the free market should not be underestimated. In March 2018, for instance, President Trump used the power to issue and retract tariffs under the Trade Expansion Act of 1962 and the Trade Act of 1974 to select particular countries on which to place steep tariffs on imported steel and aluminum. *See* Pres. Proc.

No. 9705, 83 FR 11625, 2018 WL 1316711 (Mar. 8, 2018); Pres. Proc. No. 9704, 83 FR 11619, 2018 WL 1316710 (Mar. 8, 2018). What if a president with a steel empire like Andrew Carnegie's had done this while, ostensibly wearing a "businessman" hat, he was negotiating with foreign countries to see which would provide favorable treatment of his products?

Given the stakes at issue, effective enforcement of the Clauses is vital. Fortunately, this Court can and should recognize Plaintiffs' standing to challenge the violations of the Clauses that threaten—at the very minimum—the market in the hotel and hospitality industry in both New York City and Washington, D.C., as Plaintiffs have discussed. (*See* Appellants' Br. at 25-36.) This result comports fully with settled competitor-standing precedent, which rests on the basic law of economics that an "increase in competition" in a market ordinarily adversely impacts the participants in that market. *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010) (Ginsburg, J.).

Indeed, recognizing standing under the competitor-standing doctrine is particularly appropriate in Emoluments-Clause cases given the powerful market-distorting effect a President's actions can have in light of his political title, access to power, and ability to influence world and domestic events. Market participants able to influence the President through his vast personal business interests are on an "unequal footing" with other market participants. *Cf. Ne. Fla. Chapter*

of Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 665 (1993) (Thomas, J.) (recognizing, in the context of an Equal Protection challenge to government "set-aside" programs, that "'injury-in-fact' is the inability to compete on an equal footing"); *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1248 (4th Cir. 1996) (Williams, J.) (finding standing where constitutional violation resulted in plaintiffs "not competing on a level playing field").

Where, as here, the Constitution provides a clear check on executive power that cannot be fully or meaningfully enforced by either the executive or the legislative branches, the judiciary should fulfill its responsibility to redress a clear harm to those who would otherwise be forced to compete in an unfair and distorted market.

B. Accepting The President's Cramped Reading Of The Emoluments Clauses Would Open The Door To A Wide Range Of Corruption And Abuses Of Executive Power

If this Court finds that Plaintiffs have standing and addresses the proper interpretation of the Clauses, it should reject the President's artificially narrow construction and adopt Plaintiffs' correct reading, which is consistent with not only the text itself, but also the underlying purpose of the Clauses, their history, and their interpretation. (*See* Appellants' Br. at 8-9.) To do otherwise would risk permitting a wide range of corruption and abuses of executive power, unchecked by

judicial oversight and disconnected from the national interest that should guide executive branch decisionmaking.

According to the President, the Foreign Emoluments Clause prohibits only "gifts given to an officeholder without consideration or benefits tendered in exchange for the officeholder's provision of service in his official capacity or in a capacity akin to an employee of the foreign government." (Def. Reply in Supp. of Mot. to Dismiss, Dkt. 94, at 15). And the Domestic Emoluments Clause, the President contends, prohibits only "benefits from a federal or state instrumentality [that] arise from the President's provision of services as president." *Id.* The President's view that the Clauses proscribe payments overtly based on official position or framed as compensation for services that he has personally rendered, but not transactions like those Plaintiffs have detailed, makes no allowance for more subtle—and potentially more destructive—forms of corruption.

Accepting the President's cramped construction of the Clauses would allow him and his successors to elevate their interests over those of the nation. On his reading, the Clauses would not apply to benefits resulting from private commercial transactions between a President's business and state or foreign governments. Foreign examples already abound, from diplomatic delegations that spend exorbitant amounts to stay at the President's hotels, to the Trump brand's receipt of trademark protection from China. *See* Global Anticorruption Blog,

supra. It strains credulity to believe that the Framers ignored this type of self-dealing when they conceived of and adopted the Clauses.

Going a step further, as the Attorneys General for the District of Columbia and Maryland rightly put it, if "the [Domestic Emoluments] Clause covered only bribery (an impeachable offense) and payments for personal services, it would allow States and the federal government to make large cash payments to the President so long as they were in exchange for nothing in particular." *D.C. v. Trump*, No. 17-1596, Dkt. No. 46 (Opp. to Mot. to Dismiss) at 43 (D. Md., Nov. 7, 2017). That cannot be right—but under the President's reading of the Clauses, it would be perfectly acceptable.

His interpretation would also permit states or the federal government to provide benefits to the President's businesses—some perhaps very lucrative—in the form of subsidies, tax incentives, or other favorable regulatory treatment. This practice already has become commonplace during the Trump presidency. *See* Crane & Tabor, *supra* (detailing, *inter alia*, the various ways in which the President's business interests have benefitted from government action). Under the President's reading, this too could be entirely legal—even if the President later takes some action favorable to the state or federal government agency that provided the benefit.

And these scenarios may be just the beginning. Federal executive agencies—ultimately answerable to the President—could, at the

President's behest or not, make regulatory determinations favorable to the President's business interests. For example, the President benefited after he ordered his treasury secretary to roll back regulation on banks, *id.*, and has retained a substantial subsidy from the Department of Housing and Urban Development for a New York City property in which he owns an interest, *id.* If left unchecked, the President can wield the vast administrative state as a tool to benefit himself and his personal business interests.

While some might think these particular actions insignificant in isolation, they represent a much greater risk to the effective functioning of our free market system, and our system of governance. If something is not done, widespread corruption may no longer be something that plagues far-flung countries. And if corruption proliferates and spreads, it will become increasingly difficult to walk back practices that will have become the new normal. By demurring and not recognizing Plaintiffs' standing to challenge the President's violation of the Emoluments Clauses, the district court missed an opportunity to close this path toward corruption. This Court should not repeat—and thereby compound—that error.

CONCLUSION

Amici respectfully submit that this Court should reverse the district court's dismissal of the case and remand for further proceedings.

Respectfully submitted,

/s/ Todd S. Kim

Todd S. Kim
REED SMITH LLP
1301 K Street, N.W.
Suite 1000, East Tower
Washington, DC 20005
Tel: 202-414-9290
tskim@reedsmith.com

Colin E. Wrabley
Devin M. Misour
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-3131
cwrabley@reedsmith.com
dmisour@reedsmith.com

M. Patrick Yingling
REED SMITH LLP
10 S. Wacker Dr.
40th Floor
Chicago, IL 60606
Tel: 312-207-2834
mpyingling@reedsmith.com

Counsel for Amici Curiae

Dated: May 1, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,711 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

/s/ Todd S. Kim

Dated: May 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed using the Court's CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished via CM/ECF system.

/s/ Todd S. Kim

Dated: May 1, 2018