No. 18-2486

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the District of Maryland
(Peter J. Messitte, District Judge)

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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February 6, 2019

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INTRODUCTION

President Trump's brief characterizes the District of Columbia and Maryland's lawsuit against his unconstitutional conduct as "extraordinary." Two aspects of this litigation are exceptional, but both are a result of President Trump's decisions. First, President Trump's disregard for the Constitution's strict prohibition against receiving emoluments from foreign and domestic governments is indeed unprecedented. Generations of officeholders have respected the Constitution's requirements and complied with them, but President Trump has not. Instead, he continues to violate the Constitution daily, causing damage to plaintiffs and their residents.

Second, the President's request that this Court use a writ of mandamus to short-circuit the basic rules of appellate procedure is as extraordinary as it is unwarranted. In demanding that this Court compel the district court to certify its decisions under 28 U.S.C. § 1292(b), he seeks relief that courts time and again have refused. Even if this Court were to depart from that unbroken line of authority, President Trump's request should still be denied because he cannot demonstrate a "clear and indisputable" error constituting a "usurpation of power" in the district court's thoroughly considered certification decision. Nor can he make the necessary showing that relief would otherwise be unavailable, as is required to justify the

exceptional remedy of mandamus. Like every other litigant, President Trump may pursue an appeal after the district court enters final judgment.

This Court should also reject as unfounded President Trump's alternative contention that he is simply exempt from routine judicial processes and entitled to immediate peremptory dismissal of the complaint. The President is neither above the law nor exempt from litigation, and nothing in this suit impinges on his public duties. Rather, this suit seeks declaratory and injunctive relief to safeguard the President's lawful execution of his duties by preventing him from being influenced by unconstitutional emoluments received through his private business. As sovereigns and proprietors of businesses affected by President Trump's decision to accept emoluments while holding office, plaintiffs are proper parties to request that relief.

President Trump's petition for a writ of mandamus should be denied.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider the President's mandamus petition pursuant to 28 U.S.C. § 1651. The district court properly exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331.

ISSUES PRESENTED FOR REVIEW

1. Given that Congress made a district court's certification of an interlocutory order under 28 U.S.C. § 1292(b) a prerequisite to this Court's

consideration of whether to certify an appeal, and the district court issued a thoughtful opinion declining to certify in this case, should the Court issue a writ of mandamus compelling the district court to certify its orders denying dismissal of the complaint?

2. Should the Court issue a writ of mandamus directing the district court to dismiss the complaint where the President has not been asked to submit to discovery, and where the legal issues raised will be reviewable in a future appeal from final judgment?

3. Should the Court revisit the district court's well-reasoned decision that the District and Maryland have standing based on injuries to their quasi-sovereign interests, as *parens patriae*, and to protect their proprietary interests?

STATEMENT OF THE CASE

A. The Foreign and Domestic Emoluments Clauses

The U.S. Constitution includes two clauses that expressly prohibit the President from receiving any "Emolument" from foreign or domestic officials. *See* U.S. Const. art. I, § 9, cl. 8.; *id.*, art. II, § 1, cl. 7. The Foreign Emoluments Clause bars anyone holding an "Office of Profit or Trust under [the United States]" from "accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" unless Congress consents. *Id.* art. I, § 9, cl.

8.[1] This broad language recognizes that if benefits from foreign states "were allowed to be received without number, and privately, they might produce an improper effect, by seducing men from an honest attachment for their country, in favor of that which was loading them with favors." 5 Annals of Cong. 1583 (1798) (Rep. James Bayard). The Domestic Emoluments Clause entitles the President to receive a salary and benefits fixed in advance by Congress, but prohibits him from receiving "any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7. This restriction ensures that the President will "have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution," and prevents domestic officials from seeking to "weaken his fortitude by operating on his necessities [or] corrupt his integrity by appealing to his avarice." *The Federalist* No. 73 (Alexander Hamilton).[2]

The Framers' broad vision for the Emoluments Clauses is reflected in the language they employed. Although the word "emolument" has fallen out of the vernacular, its original public meaning was "general and inclusive." Cunningham

[1] The President does not dispute that he holds an "Office of Profit or Trust" within the meaning of the Foreign Emoluments Clause. *See* Pet. Add. 59-64; Dkt. 21-1 at 33 (Mot. to Dismiss). *But see* Dkt. 27-1 (Tillman Amicus Br.).

[2] In contrast to the Foreign Emoluments Clause, the Domestic Emoluments Clause contains no congressional exemption.

Amicus Br. 3 (Doc. 27).[3] Founding-era dictionaries indicate that its meaning encompassed "profit," "advantage," and "gain." John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523-1806* (July 12, 2017), https://ssrn.com/abstract=2995693. Founding-era cases likewise confirm that "emolument" was roughly synonymous with "benefit." *See, e.g.*, *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 318-19 (1809) ("profits and advantages"); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 688 (1819) ("benefit").

The "settled practice" of the Executive branch, reflected in a body of opinions from the Justice Department's Office of Legal Counsel ("OLC") and the Comptroller General, supports this basic understanding of the Clauses. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2564 (2014) (noting that a settled practice of Senate procedure is entitled to great weight in constitutional interpretation). As those offices have recognized, the Foreign Emoluments Clause is "a prophylactic provision," Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, 10 Op. O.L.C. 96, 98 (1986), that was intended "to have the broadest possible scope and applicability," B-169035, 49 Comp. Gen. 819, 821 (1970). Its domestic counterpart has likewise been read to prevent "Congress or any of the states from attempting to influence the President through financial awards

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

or penalties." President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 189 (1981).

The word "emolument," as used in the Clauses, accordingly covers "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). That is true even where 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.*, Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, OLC, to H. Gerald Staub, Office of Chief Counsel, NASA, 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 (applying the Foreign Emoluments Clause to the acceptance of a $150 stipend, but ultimately concluding that the clause was not violated because the issuing university was not a "foreign state").

B. President Trump's Violations of the Emoluments Clauses

Over time, presidents have taken great care to comply with their constitutional obligations under the Emoluments Clauses. President Carter, for example, put his peanut farm into an independent trust to guarantee that "the Carter family [would] not be affected financially from profits or losses of any of the farm operations."

Texts of Carter Statement on Conflicts of Interest and Ethics; *Appointees' Guidelines*, N.Y. Times, Jan. 5, 1977, http://nyti.ms/2fV5Pwz. President Reagan exercised similar care, requesting a formal OLC opinion on whether the Domestic Emoluments Clause permitted him to accept the pension he earned as Governor of California. *See* 5 Op. O.L.C. 187, 187, 192. And President Obama accepted the Nobel Peace Prize only after securing an OLC opinion on whether he could do so consistent with the Foreign Emoluments Clause. *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 2009 WL 6365082 (O.L.C. Dec. 7, 2009).

President Trump, in contrast, retained an ownership interest in a multitude of companies loosely organized under an umbrella known as the "Trump Organization" when he entered office. *See* Pet. Add. 149-50 (Am. Compl. ¶¶ 29-33). As relevant here, he receives payments made to the Trump International Hotel Washington, D.C. ("the Hotel") by guests who stay in the hotel and patrons who dine in or use the Hotel's event spaces or amenities. Pet. Add. 150-51 (*id.* ¶¶ 34-35). Foreign officials have hosted major celebrations at the Hotel, transferring their patronage from other hotels and restaurants in the area. Pet. Add. 152-54 (*id.* ¶¶ 40-43). Diplomats have told reporters that they intend to stay at the Hotel in order to tell the President that they have done so. Pet. Add. 151-52 (*id.* ¶ 39). The Hotel itself hired a "director of diplomatic sales" to facilitate business with foreign states and their agents, Pet. Add.

151 (*id.* ¶ 37), and that business has been lucrative. The Royal Embassy of the Kingdom of Saudi Arabia, for instance, filed a report under the Foreign Agents Registration Act stating that it paid the Hotel $190,272 for lodging, $78,204 for catering, and $1,568 for parking in the months leading up to the inauguration. Pet. Add. 152-53 (*id.* ¶ 41).

The President has also benefitted financially from the actions of domestic government officials. The then-Governor of Maine spent up to $35,000 in state funds on trips to Washington in 2017, during which time the Governor and other state officials stayed at the Hotel and ate at its restaurant. Kevin Miller & Scott Thistle, *Luxury hotels, fine dining for LePage on taxpayers' dime*, Portland Press Herald, July 24, 2017, https://perma.cc/YM2V-HKHF. On one of those trips, the Governor appeared with the President as he publicly announced plans to revisit federal policies on public lands in Maine that the Governor had previously opposed. *Id.*; *see also* Pet. Add. 18-19 (Dkt. 101 at 18-19); Pet. Add. 97 (Dkt. 123 at 48 n.45).

The Hotel has also received a substantial benefit from the General Services Administration ("GSA"), a federal agency. The Hotel's lease with the GSA expressly forbids any elected federal official from benefiting from it. Pet. Add. 164 (Am. Compl. ¶ 82). In January 2019, the GSA's Office of Inspector General released a report concluding that, in allowing the Hotel to continue operating under the lease after the President took office, the GSA had "improperly ignored" potential

Emoluments Clause problems with leasing property to the Hotel. Office of Inspector General, GSA, JE19-002, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, at 23 (Jan. 16, 2019), https://bit.ly/2RAV9ct ("GSA Report").

C. This Litigation

On June 12, 2017, the District of Columbia and Maryland filed this suit 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. Dkt. 1. The President moved to dismiss, arguing, among other things, that plaintiffs lack standing and that the President's actions, as alleged, do not violate the Emoluments Clauses. Dkt. 21.

After holding two days of oral argument, the district court issued two thoroughly reasoned opinions rejecting the President's arguments. Pet. Add. 1-47, 50-101 (Dkt. 101, 123).[4] The court found "good reason" to recognize plaintiffs' standing to challenge the President's receipt of emoluments in connection with his ownership of the Hotel. Pet. Add. 38 (Dkt. 101 at 38). First, the President's actions

[4] While the President's motion to dismiss was pending, plaintiffs amended their complaint to add the President in his individual capacity as a defendant. Pet. Add. 146 (Am. Compl. ¶ 20). They have since voluntarily dismissed the President in his individual capacity (Dkt. 154) and moved to dismiss his collateral appeal as moot and improper. *See* Mot. to Dismiss, *District of Columbia v. Trump*, No. 18-2488 (Doc. 16).

undermine the ability of the District and Maryland to pursue their governmental interests free of pressure to gain the President's favor by patronizing his Hotel or granting him tax-based or other concessions. Pet. Add. 15-19 (*id.* at 15-19). Next, his actions injure the economic welfare of plaintiffs' residents, whose businesses suffer a competitive disadvantage. Pet. Add. 25-29 (*id.* at 25-29). Finally, "the President's ownership interest in the Hotel has had and almost certainly will continue to have an unlawful effect on competition," injuring plaintiffs directly through comparable properties in which they have proprietary interests. Pet. Add. 20-25 (*id.* at 20-25). The court further concluded that these interests are protected by the Emoluments Clauses, and that plaintiffs have an equitable cause of action under them. Pet. Add. 39-42 (*id.* at 39-42).

The court also found that the District and Maryland stated a claim for relief because the text and purpose of the Emoluments Clauses, along with "[t]he clear weight of" common understanding and historical materials, as well as "overwhelmingly consistent" executive branch precedent and practice, support plaintiffs' definition of "emolument" as referring to any "profit," "gain," or "advantage" of a more than *de minimis* nature. Pet. Add. 67-96 (Dkt. 123 at 18-47). Accordingly, the President's alleged actions—receiving profits from foreign and domestic government officials through his ownership interest in the Hotel—provide a valid basis for plaintiffs' claims. Pet. Add. 97-100 (*id.* at 48-51).

The President sought leave from the district court to file an interlocutory appeal under 28 U.S.C. § 1292(b) and moved to stay the proceedings. Dkt. 127. The court denied that motion in a 30-page opinion on November 2, 2018. Pet. Add. 104-34 (Dkt. 135). The court determined that, although the meaning of "emolument" was a question of first impression for the judiciary, the President was not entitled to immediate interlocutory appeal because the President's definition is "exceedingly strained" and "not necessarily one as to which fair minded jurists might reach contrary conclusions." Pet. Add. 114-19 (*id.* at 11-16). In addition, the court found no substantial ground for a difference of opinion on whether there is equitable jurisdiction under which to issue declaratory and injunctive relief against the President. Pet. Add. 127-28 (*id.* at 24-25). Instead, the court found "ample authority" to conclude that the President could be the subject of equitable relief where there was no suitable subordinate executive official to enjoin from violating "discrete constitutional prohibitions." Pet. Add. 128 (*id.* at 25).

Meanwhile, the parties began consultation regarding discovery and, following the district court's entry of a scheduling order, plaintiffs began issuing subpoenas to third parties on December 5, 2018. On December 17, 2018, the President filed a petition for a writ of mandamus, along with a motion to stay the district court proceedings. Dkt. 151. This Court granted the President's request for a stay. Order (Dec. 20, 2018) (Doc. 9). It also ordered the parties, in addressing the President's

mandamus petition, to brief whether plaintiffs have a cause of action and whether they have standing. *Id*.

SUMMARY OF ARGUMENT

The President is not entitled to an order requiring the district court to certify for interlocutory review its denial of his motion to dismiss. No court has ever awarded such relief; indeed, courts that have considered the issue have determined that they either cannot or will not use mandamus to control a district court's discretion under Section 1292. This common-sense result is compelled by the statutory text and structure of Section 1292, which requires both the district court and the court of appeals to agree that interlocutory review is warranted.

Even if this Court were to depart from that uniform consensus, this case does not warrant mandamus relief. The district court issued a detailed opinion that correctly stated the legal standard for Section 1292 and reasonably applied it to the facts. The district court's conclusions that the District and Maryland have a cause of action and that they plausibly claim constitutional violations are well reasoned and supported by substantial legal precedent. There is no basis to conclude that the court's decision amounted to a "usurpation of the judicial power" such that immediate reversal through mandamus is appropriate. Moreover, the President plainly has other adequate means to attain the relief he desires. Specifically, like all other litigants, the President may defend this case to final judgment in the district

court and then appeal that judgment as a matter of right. Accordingly, mandamus is inappropriate.

This Court should also reject the President's alternative request for immediate dismissal of the complaint through a writ of mandamus. The President seeks to justify that extraordinary remedy on the ground that he is completely immune from judicial process. But Supreme Court precedent contradicts the notion that the President is categorically exempt from court proceedings, and the cases on which the President relies are inapplicable.

In addition, as the district court concluded, the District and Maryland have plausibly alleged facts sufficient to support standing to obtain relief against the President. The President's petition does not seek review of the standing determination, and appellate courts generally avoid interfering with a district court's interlocutory ruling on standing where, as here, the ruling can be reviewed on appeal from final judgment. If this Court does address the issue, the complaint's allegations provide ample bases to conclude that plaintiffs have plausibly alleged standing.

ARGUMENT

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976). A party seeking mandamus must show not only a "'clear and indisputable right'" to relief, but also that there is "'no other adequate means to attain [it].'" *In re Ralston Purina*

Co., 726 F.2d 1002, 1004 (4th Cir. 1984) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980)). Moreover, even when these "prerequisites" have been met, "the issuing court . . . must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381 (2004). The error at issue thus must be "considerably more strained . . . [than] a mere abuse of discretion," *In re Ralston Purina Co.*, 726 F.2d at 1005; it must constitute a "'judicial usurpation of power,'" *id.* (quoting *Allied Chem.*, 449 U.S. at 35). Otherwise, mandamus "would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Allied Chem.*, 449 U.S. at 35 (quoting *Will v. United States*, 389 U.S. 90, 98 n.6 (1967)).

The standard is generally not satisfied where a petitioner seeks a writ of mandamus "to compel an act involving the exercise of judgment and discretion." *Cent. S.C. Chapter, Soc'y of Prof'l Journalists, Sigma Delta Chi v. U.S. Dist. Ct.*, 551 F.2d 559, 562 (4th Cir. 1977). That is because this Court has interpreted the requirement of "clear and indisputable" error to refer to situations "where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined." *Id.*

Despite this high bar, President Trump argues that he is entitled to mandamus relief to either (1) require the district court to certify for interlocutory appeal its decisions denying his motion to dismiss, or (2) dismiss the complaint outright. This

Court should deny those extraordinary requests because they are unprecedented and have no basis in the law.

I. A DISTRICT COURT'S CERTIFICATION DECISION IS NOT REVIEWABLE THROUGH MANDAMUS AND SUCH A WRIT SHOULD NOT ISSUE HERE.

Mandamus is not an appropriate mechanism for obtaining review of a district court's decision to deny certification under Section 1292(b). Permitting mandamus would conflict with the plain language of the statutory scheme and a uniform body of appellate authority. Indeed, no appellate court appears to have ever issued a writ of mandamus to command Section 1292(b) certification after the district court has declined to certify. Even if mandamus to compel certification were permissible, such relief is not warranted here.

A. Permitting Mandamus to Compel Certification Would Conflict with the Plain Language of Section 1292(b).

Appellate review is generally available only after a final judgment has been entered by a district court. 28 U.S.C. § 1291. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b), provides a limited exception to that requirement: "When a district judge . . . shall be of the opinion that [certification is warranted] . . . he shall so state in writing . . . [and t]he Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken." This language "serves the dual purpose of ensuring that [interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals." *Coopers &*

Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978), *superseded on other grounds by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708-09 (2017); *see also id.* at 474-75 nn.24 & 25 (citing H.R. Rep. No. 1667 at 4-6 (1958)). As Judge Friendly observed decades ago, "Congress plainly intended that an appeal under § 1292(b) should lie only when the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge." *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 256-57 (2010). Accordingly, Section 1292(b) "create[s] a dual gatekeeper system for interlocutory appeals: both the district court *and* the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden." *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003) (emphasis added).

Appellate courts thus have routinely held that they cannot or will not review a Section 1292(b) certification decision through a mandamus petition. *See, e.g.*, *In re Phillips Petroleum Co.*, 943 F.2d 63, 67 (Temp. Emer. Ct. App. 1991) ("'[E]fforts to persuade a court of appeals to issue mandamus to compel certification by the district judge have uniformly proved unsuccessful.' Such efforts should be and are similarly of no avail now." (quoting 16 Charles Alan Wright et al., *Federal Practice*

& Procedure § 3929 (1st ed. 1977))); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) ("mandamus to direct [certification]" is not an "appropriate remedy"); *In re District of Columbia*, No. 99-5273, 1999 WL 825415, at *1 (D.C. Cir. Sept. 1, 1999) (per curiam) (same); *In re Maritime Serv. Corp.*, 515 F.2d 91, 92-93 (1st Cir. 1975) (noting that, "absent more," it would have "little difficulty in denying the [mandamus] petition as wholly inappropriate" given the language of Section 1292(b)); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 n.4 (8th Cir. 1975) ("This court is without jurisdiction to review an exercise of the district court's discretion in refusing [a Section 1292(b)] certification."); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 755 n.1 (3d Cir. 1973) ("forcing the district court to make a certification under 28 U.S.C. § 1292(b) does not seem appropriate").[5]

This consensus follows logically from the established principle that "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable." *Allied Chem.*, 449 U.S. at 36 (internal

[5] Commentators agree. *See* 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3929 (3d ed. 2018) ("Although a court of appeals may be tempted to assert mandamus power to compel certification, the temptation should be resisted. The district judge is given authority by the statute to defeat any opportunity for appeal by certification." (footnote omitted)); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 616-17 (1975) ("The courts of appeals have so far been unanimous in refusing to grant mandamus either to reverse the trial court's decision on certification or to review the underlying order on its merits. The statutory history of section 1292(b) plainly indicates that this is the correct result." (footnote omitted)).

quotation marks omitted); *see also In re Ralston Purina Co.*, 726 F.2d at 1004-05 (same). "If someone disappointed in the district court's refusal to certify a case under § 1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper, and the statutory system will not operate as designed." *In re Ford Motor Co.*, 344 F.3d at 654. A district court's refusal to certify is thus the end of the matter.

Tacitly acknowledging the absence of case law supporting his position, the President instead relies (Pet. 14) almost exclusively on a case that did not involve a district court's Section 1292(b) certification decision, *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982). In that case, the district court had granted a temporary restraining order without deciding a threshold jurisdictional defense the government tried to assert. *Id.* at 428-31. In order to ensure that a hearing on the court's subject-matter jurisdiction was "promptly conducted," the Eleventh Circuit invoked its mandamus authority to order the district court to conduct such a hearing and to certify its ruling to facilitate review. *Id.* at 431-32.

Thus, in *Fernandez-Roque*, the district court had never ruled on the government's arguments, nor had it ruled on—or even been presented with—a request for certification under Section 1292(b). Here, in contrast, the district court issued two thoughtful and detailed opinions addressing the President's motion to dismiss, and then issued *another* detailed opinion denying Section 1292(b)

certification. The President's claim that he is entitled to mandamus relief to force the certification of an interlocutory appeal is entirely without support.[6]

B. The President Lacks a Clear and Indisputable Right to an Order Directing Certification, and He Cannot Meet the Other Requirements for Mandamus.

Even if this Court were to engage in unprecedented mandamus review of the district court's Section 1292(b) order, President Trump has not met his burden of showing that mandamus relief is appropriate. He cannot show a clear and indisputable right to certification, an absence of any other adequate means of relief, or that such relief is otherwise appropriate. The President fails to satisfy those factors regarding *either* question he has identified for certification: (1) whether plaintiffs have a cause of action; or (2) whether they have stated a claim under the Emoluments Clauses.

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[6] The President wrongly relies (Pet. 14-15) on a case involving a mandamus petition that neither the Supreme Court nor the Ninth Circuit granted. As he acknowledges, the Supreme Court simply observed that, on its view of the record, the justiciability of those plaintiffs' claims "present[] substantial grounds for difference of opinion." *United States v. U.S. Dist. Ct.*, 139 S. Ct. 1 (2018). The Ninth Circuit, in turn, did no more than "request[]" the district court take further action on already pending motions. Order at 2, *In re United States*, No. 18-73014 (9th Cir. Nov. 8, 2018). That the district court ultimately took action on the motions and found interlocutory appeal warranted (Pet. 15) does not support the President's attempt here to work an end-run around the district court.

1. There Is No Clear Right to Certification Based on Whether Plaintiffs Have a Cause of Action.

The President contends that he is entitled to mandamus relief because the District and Maryland lack an "implied cause of action in equity" to enjoin him from violating the Constitution. Pet. 17. But the district court concluded that certification is unwarranted on this issue, and the President has failed to identify any clear and indisputable error in the court's analysis.

a. Federal Courts Have Equity Jurisdiction to Restrain Unconstitutional Conduct by a Federal Official.

Equitable actions 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). Because such actions seek simply "to halt or prevent [a] constitutional violation rather than the award of money damages," they do "not ask the Court to imply a new kind of cause of action." *United States v. Stanley*, 483 U.S. 669, 683 (1987) (internal quotation marks omitted). To the contrary, "[t]he 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, 1384 (2015); *see also Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."); *Gilman v. City of*

Philadelphia, 70 U.S. (3 Wall.) 713, 722, 724 (1865) (recognizing that "a court of equity will interpose by injunction" to prevent "specific injury to an individual" caused by an act that is "repugnant to the Constitution"); *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845) (expressing "no doubt" that a court in equity may "prevent an injurious act by a public officer"). Congress can change that default rule if it chooses, but it has not done so with respect to the Emoluments Clauses.

b. There Is No Basis for an Exception to Equity Jurisdiction Here.

The President does not dispute this general rule providing for equitable causes of action under the Constitution. Nor does he deny that Congress has left the rule intact here or cite an example of any court recognizing such an exception. His position accordingly amounts to a request that this Court do what neither Congress nor any previous court has done: "displace the equitable relief that is traditionally available." *Armstrong*, 135 S. Ct. at 1385. None of his arguments justifies the relief he seeks.

First, the President suggests that because courts have often exercised equitable jurisdiction in cases "where a party seeks *preemptively to assert a defense*," the rule should apply only in that scenario. Pet. 18 (italics in original). But as the district court explained, "there is no reason" and the President "cites no support" for this artificial limitation. Pet. Add. 41, 42 (Dkt. 101 at 41, 42); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) ("*PCAOB*")

(rejecting similar argument by the government). In fact, the Supreme Court has repeatedly permitted plaintiffs to bring equitable actions even when they were not subject to enforcement actions, and courts in equity traditionally did the same. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 4-5, 20 (2013); *Arizona v. United States*, 567 U.S. 387, 415 (2012); *Foster v. Love*, 522 U.S. 67, 68-70, 74 (1997); *Gilman*, 70 U.S. (3 Wall.) at 721-22; *see also, e.g.*, *Belknap v. Belknap*, 2 Johns. Ch. Rep. 463 (N.Y. Ch. 1817) (injunction against diversion of stream); *Gardner v. Trs. of the Vill. of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (similar).

Second, the President asserts that an exception preventing equitable relief is warranted because, under separation-of-powers principles, he is not a "proper defendant." Pet. 18 (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866)). That claim contradicts the Supreme Court's insistence that "long held" separation-of-powers principles ensure that federal courts "ha[ve] the authority to determine whether [the President] has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). As part of this authority, courts may restrain unconstitutional presidential action, either through injunctive relief, *see, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952), or declaratory relief, *see, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992).

It may be true that "[i]n most cases" courts issue such relief "against subordinate officials," thereby obviating the need for relief against the President

himself. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996).[7] But this case presents "one of those rare instances" where—by express constitutional design—only equitable relief "against the President himself will redress [plaintiffs'] injury." *Id.* at 979. The President cites no case in which a court held that it was unable to issue equitable relief against the President, for separation-of-powers reasons, when subordinate officials could not be sued and such relief was necessary to prevent a violation of the Constitution. Courts have instead rejected such a distinction as "exalting form over substance." *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974). It is therefore "settled law" that courts are not barred from "exercis[ing] . . . jurisdiction over the President." *Nixon v. Fitzgerald*, 457 U.S. 753-54 (1982) (listing examples); *see, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (habeas corpus); *Clinton v. City of New York*, 524 U.S. 417 (1998) (declaratory relief); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena); *United States v. Burr*, 25 F. Cas. 187 (Va. Cir. Ct. 1807) (Marshall, C.J.) (subpoena); *see generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997).

[7] That happened in *Youngstown*, for example. "Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order," *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.36 (1982), and thus "understood its [opinion] effectively to restrain the president," *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974).

The President's contrary position rests on an untenably broad reading of *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, a post-Civil War case in which Mississippi sought to restrain enforcement of the Reconstruction Acts, which required the President to put former confederate states under military control. *Id.* at 497. There, the Court made the "general" pronouncement that courts may not "enjoin the President in the performance of his official duties." *Id.* at 500-01. That proscription, however, is inapplicable here. Unlike in *Mississippi v. Johnson*, which addressed only the exercise of a President's "purely executive and political" powers—specifically his duties to "assign generals" and "detail sufficient military force," *id.* at 499—this case involves conduct that the Court in *Mississippi v. Johnson* expressly distinguished: that involving "a simple, definite duty" that is "imposed by law" and as "to which nothing is left to discretion," *id.* at 498. The Foreign and Domestic Emoluments Clauses flatly prohibit the President from "accept[ing]" or "receiv[ing]" "any" "[e]molument," U.S. Const. art. I, § 9, cl. 8; *id.*, art. II, § 1, cl. 7, and the obligation to comply is therefore "ministerial and not discretionary," *Swan*, 100 F.3d at 977.[8]

[8] Moreover, a judicial decree recognizing the Clauses' imperative would not require the Court "to perform any function that might in some way be described as 'executive,'" *Clinton*, 520 U.S. at 701, and plaintiffs are not seeking "an injunction requiring the President to take specified executive acts," *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and in the judgment).

Third, the President asserts that even if there might be equitable jurisdiction for a suit arising under the Emoluments Clauses, the District and Maryland are not "proper plaintiff[s]" to bring it because their claims fall outside the Clauses' zones of interests. Pet. 18; *see id.* at 18-21. That is incorrect. The applicability of the zone-of-interests test to constitutional provisions is presently a matter of some doubt under Supreme Court precedent.[9] And even if applicable, the zone-of-interests test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the [legal provision]'" that the claim is impermissible, and "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)).[10] Nothing

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[9] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 & nn.3-4 (2014) (clarifying that, although the test had previously been "classified as an aspect of prudential standing," it is a question of "statutory interpretation" that "does not implicate subject-matter jurisdiction" (internal quotation marks omitted)); *cf. Wyoming v. Oklahoma*, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting) (criticizing the Court for "abandoning the zone-of-interests test" in a Commerce Clause case); *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 676 n.3 (D.C. Cir. 2013) (Silberman, J., concurring) (questioning whether the Supreme Court's application of the zone-of-interests test to a non-statutory cause of action was "anomalous").

[10] Arguing that the test is "more strictly" applied in constitutional cases than in statutory ones (Pet. 19), the President paraphrases Justice Scalia's *dissent* in *Wyoming v. Oklahoma*, 502 U.S. at 469. But the footnote in *Clarke* on which both Justice Scalia and the President rely observes only that the "generous" standard under the Administrative Procedure Act does not necessarily apply to "whatever

about the district court's conclusion that the "Governmental Plaintiffs in this case lie fully within the zones of interests of the Emoluments Clauses" (Pet. Add. 123) is so indisputably wrong as to warrant immediate and forced certification through mandamus.

Indeed, the zone-of-interests test poses no barrier to equitable claims brought by parties, like the District and Maryland, who are plainly injured by structural constitutional violations. In *PCAOB*, for example, an accounting firm invoked an equitable cause of action to enforce separation-of-powers principles. Notwithstanding a dispute over the firm's prerogative to maintain its claim, no Justice even hinted that the zone-of-interests test might pose a barrier to relief. Instead, the Court recognized a "private right of action directly under the Constitution to challenge governmental action" violating structural provisions for any party suffering concrete injury. 561 U.S. at 491 n.2. Similarly, in *Bond v. United States*, 564 U.S. 211 (2011), the Court recognized that the "structural principles secured" by the Constitution are not just ends in themselves; they exist to "protect the individual as well," *id.* at 222. For that reason, the Court held that when the

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constitutional or statutory provision a plaintiff asserts." 479 U.S. at 400 n.16. That is hardly authority demonstrating a clear and indisputable right to relief. In any event, for the reasons that follow, even if such a "strict" standard were applied, plaintiffs satisfy it.

Constitution's structure "is compromised," courts may "adjudicate [the] claim." *Id.* at 220, 223.

That principle applies with even greater force when the injured parties are states. *See id.* at 224 (recognizing that a "State's constitutional interests" may also be "implicated"). The Emoluments Clauses are undoubtedly structural because they define how federal officeholders may (and may not) interact with foreign powers, states, and other institutions of the national government. *See* U.S. Const. art. I, § 9, cl. 8; *id.*, art. II, § 1, cl. 7. Like other structural provisions, these Clauses seek to achieve systematic goals—preventing corruption, tempering foreign influence, respecting federalism—and thereby protect against the harms, including an unfair economic playing field, that inevitably result when these principles of our constitutional order are violated.[11]

The interests asserted by plaintiffs arise directly from the concerns animating the Emoluments Clauses and are clearly within their zones of interests. The District and Maryland allege that the President is using his tenure in office to enrich himself by accepting patronage from foreign and domestic governments at the Hotel. That

[11] *See The Heritage Guide to the Constitution* 251 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) (Domestic Emoluments Clause "helps to ensure presidential impartiality among particular members or regions of the Union"); Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions: A Cautionary Tale*, 45 Hastings Const. L. Q. 651, 657-63 (2018) (tracing history of the Clauses' anti-corruption purposes for zone-of-interests analysis).

conduct is actionable because it puts direct and undue pressure on plaintiffs—who are among "the United States, or any of them," U.S. Const. art. II, § 1, cl. 7—to also provide such benefits, or risk disadvantage or reprisal for failing to do so. The Emoluments Clauses grant the District and Maryland the freedom to make budgetary, political, and policy decisions without concern that other governments—foreign or domestic—will gain an unfair advantage by ingratiating themselves with the President via money or other benefits. Moreover, the President's financial gain has been at the expense of competitors, including plaintiffs' own enterprises, and has caused distortions in plaintiffs' economies.[12] Accordingly, plaintiffs' interests in preventing his unlawful profiteering—which has injured their quasi-sovereign, *parens patriae*, and proprietary interests—are not "marginally related to or inconsistent with the purposes" of the Emoluments Clauses. *Patchak*, 567 U.S. at 225.

[12] The President argues that the reasoning by the district court in *Citizens for Ethics and Responsibility in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) ("*CREW*"), establishes a substantial difference of opinion among courts sufficient to entitle him to mandamus relief regarding certification. But even read for all it is worth (*cf.* Pet. 24-25), that decision was limited to the interests asserted by private hospitality competitors who, as the President recognizes, were only "in 'the market for government business.'" Pet. 19 (quoting *CREW*, 276 F. Supp. 3d at 187-88). Here, the District and Maryland are injured not only as proprietors, but also as protectors of their state economies and good-governance interests. *See* Pet. Add. 120-21 (Dkt. 135 at 17-18).

Nor do plaintiffs' interests amount to some "generally available grievance." Pet. 25. To the contrary, they evoke the very core of these provisions in a manner specific and immediate to plaintiffs. The District, for example, routinely interacts with the President's Hotel on a range of legal and regulatory matters, all of which have become loaded with constitutional significance. *See* Pet. Add. 17 (Dkt. 101 at 17). The District and Maryland are also susceptible to injury from impermissible influence on the President because of their disproportionate economic stake in federal budgetary allocations. *See* Pet. Add. 173-74 (Am. Compl. ¶ 111).

If the Emoluments Clauses provide no protection to the District and Maryland in this case, it is hard to imagine who would fall within the Clauses' zones of interest. Imposing an eligibility test that no plaintiff could satisfy makes no sense as an equitable matter and finds no support in law.

2. There Is No Clear Right to Certification Based on Whether Plaintiffs Have Stated a Claim for Relief Under the Foreign and Domestic Emoluments Clauses.

The President argues that the district court "clearly erred" in determining that plaintiffs have alleged a violation of the Emoluments Clauses. Pet. 21-23. According to the President, the term "[e]molument" applies only to "profit arising from office or employ." *Id.* at 21. But as the district court explained, the President's interpretation, the provenance of which "remains unclear," Pet. Add. 114 (Dkt. 135 at 11), contradicts the "broad" and "expansive" language of the Clauses, Pet. Add.

64-71 (Dkt. 123 at 15-22). It ignores the original public meaning of "emolument," which was defined in every Founding-era dictionary to mean "profit," "gain," or "advantage." Pet. Add. 71-79 (*id.* at 22-30); *see also* Dkt. 69 (Legal Historians Amicus Br.). And it is at odds with other modes of constitutional interpretation, including two centuries of historical practice, the Clauses' purposes, and a robust body of precedent from OLC and the Comptroller General. Pet. Add. 80-95 (Dkt. 123 at 31-46); *see also* Dkt. 65 at 7 (Former Ethics Officers Amicus Br.) (explaining that "the [federal] government applies a totality-of-the-circumstances approach to Emoluments Clause questions, with a bias in favor of breadth, and a keen eye to the anti-corruption purposes of the clauses").[13] If accepted, the President's novel reading would allow foreign and domestic officials to confer payments or benefits of any scope to the President in his "private" capacity, or by remitting them to him through his businesses. *See* Dkt. 68 (Former National Security Officials Amicus Br.). Given the text, history, and purpose of the Clauses, the President's reading is

[13] The President counters (Pet. 22-23) that "Founding-era history and context" support his view, but the two anecdotes he cites fall far short of demonstrating his proposition. His assertions that there is "no evidence that [the Founders] took steps to ensure that foreign governments were not among their customers" for their exports and that "[n]o concern was raised" about a purported sale of "several lots of federal land" to George Washington simply read meaning into silence. Moreover, the recent GSA report relied on historical materials in finding that the land then-President Washington purchased was privately owned and that the "sales did not provide a benefit from the United States." GSA Report, App. A at 2.

untenable. As relevant here, that disposes of his claim that he has a clear and indisputable entitlement to mandamus relief regarding certification (or otherwise).[14]

The President's fallback argument—that he is entitled to immediate certification because plaintiffs have not stated a claim under his definition of emolument—also falls far short of establishing clear and indisputable error. Even *if* emolument means "profit arising from office or employ" (*e.g.*, Pet. 21), plaintiffs' complaint alleges that foreign diplomats have stated that "all the delegations will go" to the President's Hotel and its restaurant as a way of currying favor with him now that he is President. Pet. Add. 151 (Am. Compl. ¶ 39); *see* Pet. Add. 150-54 (*id.* ¶¶ 34-43). These benefits plausibly "arise from" the President's office and his status as President. They also arise out of the President's "employ," or business, as a hotel owner. The same is true with respect to the GSA's decision to forgive a clear breach of the Old Post Office building's lease, thus allowing the Hotel to continue in operation. That concession could *only* arise from the President's position as President. Other benefits that the President has received (or will soon receive) from

[14] The President suggests in passing that the district court erred by interpreting a "substantial ground for difference of opinion," as requiring a "pre-existing judicial disagreement." Pet. 23 (citing Pet. Add. 116). The district court, however, imposed no such requirement. *See* Pet. Add. 116-19 (Dkt. 135 at 13-16). To the contrary, the court determined that the President's definition of emolument was so "strained" that it was "not necessarily one as to which fair minded jurists *might* reach contradictory conclusions." Pet. Add. 115 (*id.* at 12) (emphasis added).

federal agencies or state governments are similarly situated. *See, e.g.*, Pet. Add. 97 (Dkt. 123 at 48 n.45).[15]

3. The President Cannot Satisfy Either of the Other Mandamus Requirements.

In addition to showing a "clear and indisputable" right to relief, a petitioner seeking mandamus must also demonstrate that there is "no other adequate means to attain the relief he desires" and that "the issuing court, in the exercise of its discretion, [is] satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (internal quotation marks omitted). Neither factor is met here. First, as this Court has emphasized, "[m]andamus should not be used as a substitute for appeal." *In re Ralston Purina Co.*, 726 F.2d at 1004. Here, the availability of other adequate relief is plain: the President may seek review of the district court's interpretation of the Emoluments Clauses and the concomitant equitable cause of action "on direct appeal after a final judgment has been entered." *Allied Chem.*, 449 U.S. at 36. The President's claim (Pet. 11) that such review would

[15] As these examples demonstrate, nothing turns on the "subjective hope" of the official providing the emolument (Pet. 27). The Emoluments Clauses prohibit the President from receiving or accepting emoluments from foreign or domestic officials because he will always be in a position to offer public-policy remuneration by virtue of his office.

not provide him with "the relief of immediate appeal" misses the point that *he* must prove an entitlement to immediate relief.

Second, a grant of extraordinary relief would not be appropriate under the circumstances of this case. The district court's denial of certification is not the sort of "really extraordinary" circumstance warranting mandamus relief. *Cheney*, 542 U.S. at 380 (listing examples). President Trump has chosen to maintain ownership of his private business empire while holding the Nation's highest public office. That decision prompts a common question that arises in applying the Constitution, one that has frequently been asked of and answered by OLC and other government ethics officials over the decades: whether the Emoluments Clauses permit an officeholder to accept payments or other benefits from foreign and domestic governments during his tenure. "Proceeding to discovery" in the service of answering that question—with the balance of discovery tracing payments from third parties to the President's ownership stake in the Trump Organization—does not present exceptional circumstances warranting this Court's immediate intervention and does nothing to "threaten the separation of powers" (Pet. 11). Indeed, while litigation may be

"vexing . . . [it] do[es] not ordinarily implicate constitutional separation-of-powers concerns." *Clinton*, 520 U.S. at 705 n.40; *see also infra* Part II.

II. THE PRESIDENT IS NOT ENTITLED TO A WRIT OF MANDAMUS DIRECTING THE DISTRICT COURT TO DISMISS PLAINTIFFS' COMPLAINT.

The President argues in the alternative that even if he is not entitled to certification under Section 1292(b), this Court should grant mandamus directing the district court to dismiss plaintiffs' complaint. That drastic end-run around the appellate process is entirely unwarranted.

The nub of the President's argument is that, although "mandamus generally may not be used as a substitute for the regular appeals process," the circumstances here are so "rare" that the ordinary litigation process is not an "adequate means" to obtain relief. Pet. 28-29 (internal quotation marks omitted); *cf. Cheney*, 542 U.S. at 380-81 ("[T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." (internal quotation marks omitted)); *see also United States v. Moussaoui*, 333 F.3d 509, 517 (4th Cir. 2003).

The "rare" circumstance on which the President relies, however, is the claim that presidents should enjoy blanket "immunity from judicial process." Pet. 28-29 (quoting *Franklin*, 505 U.S. at 826 (Scalia, J., concurring in part and in the

judgment)). Neither this Court nor the Supreme Court has ever adopted such a view. To the contrary, the Supreme Court has "long held" that federal courts "ha[ve] the authority to determine whether [the President] has acted within the law." *Clinton*, 520 U.S. at 703. Thus, lower courts "permit[] plaintiffs to proceed against the President by nonstatutory review." Siegel, *supra*, at 1678; *see, e.g.*, *Juliana v. United States*, 339 F. Supp. 3d 1062, 1077 (D. Or. 2018) ("[T]here is no absolute bar on issuance of declaratory and injunctive relief against a sitting president." (citing *Franklin*, 505 U.S. at 802-03)); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 418 (D. Mass. 2018) ("Injunctive relief against the President is an 'extraordinary' remedy, but one that may be available in limited circumstances." (quoting *Franklin*, 505 U.S. at 802)). The rule that the President asks this Court to embrace—that he cannot be made "to defend his executive actions before a court" and can skip the regular appeals process if a district court decides otherwise (Pet. 29 (internal quotation marks omitted))—fails to recognize that there is no "[p]residential privilege of immunity from judicial process under all circumstances," *Clinton*, 520 U.S. at 704 (quoting *Nixon*, 418 U.S. at 706).

Nor are there special "separation of powers" concerns in permitting this litigation to proceed. No relief sought by plaintiffs acts as a "bill to enjoin the President in the performance of his official duties." Pet. 30 (quoting *Franklin*, 505 U.S. at 802-03). Nor will the process of determining whether plaintiffs are entitled

to relief through ordinary litigation "distract [the Executive] from the energetic performance of [his] constitutional duties." Pet. 29 (quoting *Cheney*, 542 U.S. at 382). Although the President cites the Supreme Court's *Cheney* decision throughout his petition, litigating this case raises precisely none of the separation-of-powers issues that animated that decision.

In *Cheney*, discovery was sought directly against the Vice President and other senior government officials as to the process by which they "give advice and make recommendations to the President." 542 U.S. at 385. Those requests implicated "the Executive Branch's interests in maintaining the autonomy of its office" by asking to examine the inner workings of "[t]he Executive Branch, at its highest level." *Id.* at 385, 387. That is not true here. To date, discovery has been sought only from third parties, many of which are private businesses. And no separation-of-powers principles are threatened by requesting business records of hotel stays or restaurant dining from private companies. There are also no significant constitutional interests or privileges implicated by targeted requests to the GSA for communications about its leases, or by requests to the Commerce Department about where it booked event spaces. *Cf. In re Cheney*, 544 F.3d 311, 313-14 (D.C. Cir. 2008) (permitting discovery to proceed against the Office of the Vice President where the requests were "far more limited" than the discovery requested in *Cheney v. U.S. District Court*). Even discovery to establish "the President's financial interest

in his businesses and [his] receipt of funds," (Pet. 9 (internal quotation marks omitted)), would implicate no Executive Branch concerns.

Finally, even if some *Cheney*-type injury could be imagined in response to plaintiffs' complaint, the answer is not categorical immunity of the President from "litigating this case through discovery to final judgment." Pet. 29. As the Supreme Court has recognized, "[t]he guard, furnished to the President to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a district court after those subpoenas have issued; not in any circumstance which is to precede their being issued." *Nixon*, 418 U.S. at 714 (internal quotation marks omitted). Indeed, as the district court recognized, there are multiple avenues for tailoring discovery. Pet. Add. 132 (Dkt. 135 at 29) ("[T]he [c]ourt is always available to limit given discovery to minimize an unusual impact."). Among other procedures, the President can seek a protective order or challenge any specific discovery request. *See also In re United States*, 895 F.3d 1101, 1104 (9th Cir. 2018) (petitioner has other means to obtain relief where "the government retains the ability to challenge any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers").[16]

[16] Nor is this Court's decision in *In re Sewell*, 690 F.2d 403 (4th Cir. 1982), on point. That case involved a "jurisdictional conflict" between a district court and an administrative agency where "review of Sewell's preemption claim on appeal after entry of a final order w[ould] not afford him or the [agency] adequate relief." *Id*. at 407. No such conflict is present here.

For the reasons explained above, the President has no basis in law for his assertion that he is "immun[e] from judicial process"—or that this case involves "separation-of-powers considerations." Pet. 29 (internal quotation marks omitted). The Court should deny his request for mandamus directing the district court to dismiss plaintiffs' complaint.

III. THE DISTRICT OF COLUMBIA AND MARYLAND HAVE STANDING.

Although not presented as an issue for review in the President's petition, the Court has asked the parties to address whether plaintiffs have alleged legally cognizable injuries sufficient to support 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 . . . [and] [t]hose 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." Pet. Add. 37 (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). This Court need not—and should not—revisit the district court's conclusion that plaintiffs have adequately alleged facts to support standing. This is true whether conceived as directing the district

court to certify an interlocutory appeal or seeking to dismiss plaintiffs' complaint outright.

However, if this Court does choose to address standing, it can be assured that plaintiffs have alleged injury sufficient to support standing to obtain relief against the President. Here, the District and Maryland have adequately alleged standing based on their interest in (1) governing free of competition-for-influence with other states or sovereigns who are willing to patronize the President's Hotel or grant him other emoluments; (2) protecting the large segment of their commercial residents and hospitality employees who are disadvantaged through competition with the Hotel; and (3) avoiding competitive disadvantage to their own proprietary business ventures. *See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982).

A. This Court Need Not Revisit the District Court's Standing Determination.

The President's petition twice states that he does *not* seek mandamus relief on the ground that the District and Maryland lack standing, an issue that he describes as "fact-intensive." Pet. 16 n.3; *see also* Pet. 28 n.6 (stating that the petition seeks "dismissal via mandamus solely on . . . two grounds," which the Court may reach "without first having to resolve all aspects of plaintiffs' allegations of Article III standing"); *cf.* Pet. Add. 119-21 (Dkt. 135 at 16-18); *Holub Indus., Inc. v. Wyche*, 290 F.2d 852, 855 (4th Cir. 1961) ("If a rational and substantial legal argument can

be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error.").

The President's hesitance to pursue the question of standing on mandamus review is a sentiment shared by courts generally. Although appellate courts must assure themselves of Article III jurisdiction, *see generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998), where a district court has decided "jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal," appellate courts are understandably "reluctant to interfere," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *see also Virginia v. Reinhard*, 568 F.3d 110, 123 n.3 (4th Cir. 2009) (declining to address standing in appeal of denial of sovereign immunity), *rev'd on other grounds sub nom. Va. Office of Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011); *Griswold v. Coventry First LLC*, 762 F.3d 264, 268-70 (3d Cir. 2014) (declining to exercise pendent appellate jurisdiction over district court's denial of motion to dismiss for lack of standing because it was not "intextricably intertwined" with the denial of a motion to compel arbitration); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 974 n.1 (10th Cir. 2001) ("As several of our sister circuits have recognized, the issue of standing does not meet all the elements of the collateral order doctrine because it is not effectively unreviewable on appeal from a final judgment."); *Summit Med.*

Assoc. v. Pryor, 180 F.3d 1326, 1334 (11th Cir. 1999) (collecting cases). Were it otherwise, mandamus could "be resorted to as a mode of review where a statutory method of appeal has been prescribed." *Roche*, 319 U.S. at 27-28; *cf.* Pet. 16 n.3 ("an interlocutory appeal on the motion-to-dismiss denial will necessarily present th[e] jurisdictional question").

Where, as here, the district court has concluded that plaintiffs have standing in a thorough opinion and appellate jurisdictional thresholds otherwise dispose of this mandamus petition, there is no reason to depart from that practice. In any event, even if this Court were to consider the question of standing in evaluating the President's mandamus petition, plaintiffs have standing—and the President cannot demonstrate a "clear and indisputable" right to dismissal at this early stage of the litigation.

B. The District and Maryland Have Standing Based on Injury to Their Quasi-Sovereign Interests.

The District and Maryland have cognizable quasi-sovereign interests in "securing observance of the terms under which [they] participate[] in the federal system" and protecting themselves against being "discriminatorily denied" their "rightful status." *Snapp*, 458 U.S. at 607-08; *see generally Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (recognizing the "fundamental principle of *equal* sovereignty among the States" (emphasis added) (internal quotation marks omitted)). The Domestic Emoluments Clause is a provision that protects the equal

sovereignty of the States by ensuring that the President cannot be "tempt[ed] . . . by largesses, to surrender . . . his judgment to their inclinations." *The Federalist* No. 73 (Alexander Hamilton); *see* Akhil Reed Amar, *America's Constitution: A Biography* 182 (2005) (explaining that the Domestic Emoluments Clause "prohibit[s] individual states from greasing a president's palm"). The Foreign Emoluments Clause similarly protects States and others from having the balance of power tilted unlawfully in favor of foreign interests. 3 *The Records of the Federal Convention of 1787*, at 327 (Max Farrand ed., 1911); Pet. Add. 82-84 (Dkt. 123 at 33-35).

The President's conduct has directly harmed the District and Maryland's legally protected interests in equal sovereignty. Through his continued ownership of the Hotel, the President has created and promoted an opportunity for domestic and foreign officials to bestow emoluments on him. The District and Maryland seek to remove this unconstitutional opportunity and to participate in policy processes on equal, lawful terms.

The President has attempted to minimize plaintiffs' quasi-sovereign interests as hypothetical or speculative because there is no evidence that the District or Maryland have themselves sought to curry favor with the President by patronizing the Hotel, succumbed to pressure to grant him concessions, or even been asked to do so. Such arguments, however, mischaracterize plaintiffs' injuries. The harm alleged by plaintiffs is not the cost of granting waivers or exemptions, nor are

plaintiffs asserting that they will necessarily be retaliated against in some way if they do not. Instead, their injury is the violation of their constitutionally protected interest in avoiding entirely pressure to compete with others for the President's favor by giving him money or other valuable dispensations. Indeed, it is the *opportunity* for favoritism that disrupts the balance of power in the federal system and injures the District and Maryland; that injury is not restricted to those governments from whom the President solicits favors. The Domestic Emoluments Clause protects plaintiffs' "rightful status within the federal system," *Snapp*, 458 U.S. at 607, by forbidding any State or the federal government from using money or other benefits to influence the President. Governments are denied that rightful status whenever the President accepts forbidden payments. So too are governments injured under the Foreign Emoluments Clause when forbidden payments are made by other sovereigns.

The President also contends that any injury caused by granting an exemption, such as the tax concession granted to the Hotel by the District, is "self-inflicted" and therefore not cognizable. But that again mischaracterizes plaintiffs' injury. The operative question is not whether plaintiffs have incurred a cost, but whether the President unconstitutionally puts them in a position to incur that cost in the first place. The President ignores the many other concrete ways in which plaintiffs interact with the federal government, thus implicating their quasi-sovereign interests. Both the District and Maryland receive federal funding, have

disproportionate economic stakes in federal budgetary allocations, and are home to federal executive agencies. *See* Pet. Add. 173-74 (Am. Compl. ¶ 111). The district court correctly concluded that the District and Maryland have standing to protect their status as independent, equal participants in the federal system, and this Court should not disturb that conclusion.

C. The District and Maryland Have *Parens Patriae* Standing.

The District and Maryland also have standing as *parens patriae* to protect the welfare of their citizens, *Snapp*, 458 U.S. at 607, and the President has not clearly or indisputably shown otherwise. Although a *parens patriae* suit may not be brought against the federal government to protect "citizens from the operation of federal statutes," state governments do have standing to "assert [their] rights under federal law." *Massachusetts*, 549 U.S. at 520 n.17 (internal quotation marks omitted). State governments may assert *parens patriae* standing "not only in cases involving boundaries and jurisdiction over lands," *id.* (internal quotation marks omitted), but also to safeguard the "prosperity and welfare" of their residents by challenging actions that put them "at a decided disadvantage in competitive markets," *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945).

Here, the district court concluded that the District and Maryland can invoke *parens patriae* standing because they challenge conduct by the President outside of his "official duties" and thus comply with *Massachusetts v. Mellon*, 262 U.S. 447

(1923). *See* Pet. Add. 26-27 (Dkt. 101 at 26-27) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign.")). The district court also concluded that plaintiffs "are more than nominal parties" because they "allege competitive injuries affecting a large segment of their populations." Pet. Add. 28 (*id.* at 28). Finally, the court concluded that *parens patriae* standing is proper because plaintiffs "are, quite plausibly, trying to protect a large segment of their commercial residents and hospitality industry employees from economic harm." Pet. Add. 29 (*id.* at 29).

The ruling that plaintiffs' interests affect a substantial segment of their populations and are sufficient to support *parens patriae* standing is correct. In *Snapp*, the Supreme Court reversed a lower court's determination that "the relatively small number of individuals" involved—787 people applying for temporary farm work—was insufficient to create *parens patriae* standing for the Commonwealth of Puerto Rico. 458 U.S. at 599. The Court held that "a State has a substantial interest in assuring its residents that it will act to protect them from" the unlawful acts alleged, "[r]egardless of the possibly limited effect of the alleged financial loss." *Id.* at 609; *see also Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 98-101 (D. Mass. 1998) (reasoning that violations affecting approximately 50 people affected a sufficiently "substantial segment" of the population); *New York v. Brown*,

721 F. Supp. 629, 636 (D.N.J. 1989) (determining that standing existed based on economic harm to New York's dairy industry).

Here, the District and Maryland demonstrated that many high-end restaurants and hotels in their jurisdictions compete with the Hotel and that those businesses' bottom lines are impacted because none of them can offer the opportunity to patronize the President's business. Pet. Add. 28-29 (Dkt. 101 at 28-29). The district court properly relied on both the facts alleged and uncontroverted expert testimony put forth by plaintiffs in concluding that the interests at stake are substantial enough to support *parens patriae* standing. Pet. Add. 25-29 (*id.* at 25-29). There is no basis for this Court to reach a different conclusion.

D. The District and Maryland Have Standing to Protect Their Proprietary Interests.

Finally, as proprietors of hotel and event spaces, the District and Maryland have standing based on injuries to their interests as competitors in the market for foreign and domestic government business, and the President cannot demonstrate a clear and indisputable case to the contrary. Courts have long recognized that a plaintiff has a legally cognizable interest in challenging unlawful conduct that undermines his ability to participate in a competitive market on equal terms. *See Price v. City of Charlotte*, 93 F.3d 1241, 1248 (4th Cir. 1996) (recognizing standing where plaintiffs "were not competing on a level playing field" due to the challenged unconstitutional conduct); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d

621, 626 (2d Cir. 1989) (recognizing an injury-in-fact based on a candidate's exclusion from a televised debate because "the loss of competitive advantage flowing from" the exclusion "palpably impaired [plaintiff's] ability to compete on an equal footing"); *see also Phila. Taxi Ass'n v. Uber Techs., Inc.*, 886 F.3d 332, 346 (3d Cir. 2018) (antitrust violations); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825-26 (9th Cir. 2011) (unfair competition by website); *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008) (government's subsidization of U.S. lumber). To allege an injury sufficient to support competitor standing, a plaintiff need only show that it (1) actually participates in a market, and (2) is likely to be specifically disadvantaged by the competitor's allegedly unlawful behavior. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99-100 (2013).

Here, the district court first concluded that the District and Maryland own or otherwise have proprietary interests in facilities—including the Walter E. Washington Convention Center and the Bethesda Marriott Conference Center—that directly compete in the same arena with the Hotel. Pet. Add. 20-24 (Dkt. 101 at 20-24). The complaint's detailed allegations and plaintiffs' uncontroverted expert declarations established that these facilities operate in the same defined market as the Hotel. In particular, plaintiffs' facilities offer "overlapping services," have almost identically sized event space, are of "similar class and image," and are within "close proximity" to the Hotel or are "essentially equidistant to many foreign

embassies." Pet. Add. 23 (*id.* at 23). Next, the district court determined that plaintiffs are specifically disadvantaged by the President skewing the market in his favor by diverting patrons in the same market to his Hotel. Pet. Add. 24 (*id.* at 24).

These conclusions are not refuted by claims that any such disadvantage is speculative because guests may choose to patronize the Hotel for any number of reasons. First, while it is true that guests may visit the Hotel for a range of reasons, the President does not dispute—nor can he—that one such reason may be to gain his favor. The Emoluments Clauses seek to preclude the very existence of that one problematic reason, irrespective of other reasons why a person may visit the Hotel.

Second, that problematic reason—seeking to influence the President—is not hypothetical. Instead, the district court properly credited plaintiffs' well-pleaded allegations that officials from Bahrain, Maine, Kuwait, and Saudi Arabia stayed or otherwise spent money at the Hotel either on the heels of a policy decision or generally to advance their standing in the President's eyes. Pet. Add. 32 (*id.* at 32). Moreover, several diplomats have explained the attraction: "spending money at Trump's hotel is an easy, friendly gesture to the new president." Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel is Place to Be*, Wash. Post, Nov. 18, 2016, https://perma.cc/3559-7P5H.

Third, demonstrating competitive injury does not require empirical evidence, especially at the stage of a motion to dismiss. The competitive effect of the Hotel

on plaintiffs' facilities need not be proven with a balance sheet with "lost sales data" that they can link directly to the President. *TrafficSchool.com*, 653 F.3d at 825. Rather, courts have recognized that it is appropriate to rely on "economic logic to conclude that a plaintiff will likely suffer an injury-in-fact" when the defendant's unlawful conduct hurts the plaintiff's relative competitive position. *Canadian Lumber Trade All.*, 517 F.3d at 1332; *id.* at 1334 ("[I]t is presumed (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors."); *see also TrafficSchool.com*, 653 F.3d at 825 (explaining that a plaintiff can show injury by describing "probable market behavior" and "creating a chain of inferences showing how defendant's [illegal acts] could harm plaintiff's business" (internal quotation marks omitted)); *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010) (holding that a plaintiff need only "show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact").

Without third-party discovery, it is impossible to say which officials, specifically, have moved or will move their business from the establishments in which plaintiffs have a proprietary interest to the Hotel. But as the district court's opinion properly recognized, such a showing is unnecessary to allege a competitive injury sufficient to overcome a motion to dismiss. The district court cited undisputed allegations that foreign officials decided to shift their plans from another facility in

the District to the Hotel, and employed basic logic to conclude that prospective patrons in the same market would, for similar reasons, select the Hotel over plaintiffs' facilities. *See* Pet. Add. 32 (Dkt. 101 at 32). The district court correctly concluded that those allegations were sufficient to allege competitive injury.

* * * * *

The standing inquiry "is not Mount Everest." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (Alito, J.). The District and Maryland have more than met their burden at the pleading stage. The circumstances here do not warrant the extreme step of using mandamus as a vehicle to order dismissal of the complaint, particularly on an issue the President expressly declined to raise.

CONCLUSION

For the foregoing reasons, the President's petition for a writ of mandamus should be denied.

Respectfully submitted,

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February 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,163 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Leah J. Tulin
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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 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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