18-0474-cv

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

BRIEF FOR *AMICI CURIAE* SCHOLARS OF ADMINISTRATIVE LAW, CONSTITUTIONAL LAW AND FEDERAL JURISDICTION IN SUPPORT OF APPELLANTS AND URGING REVERSAL

ANDREA LIKWORNIK WEISS
LEVI LUBARSKY FEIGENBAUM & WEISS LLP
Attorneys for Amici Curiae Scholars of Administrative Law, Constitutional Law and Federal Jurisdiction
655 Third Avenue, 27th Floor
New York, New York 10017
(212) 308-6100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes & Rules

Other Authorities

INTEREST OF *AMICI*

Amici are scholars of administrative law, constitutional law, and federal jurisdiction who teach these and related subjects to students at law schools across the country.[1] They take a professional interest in the proper construction of constitutional and prudential limits on justiciability in federal courts. They bring a perspective informed by more than 440 combined years of teaching, research, and writing focused on questions related to those posed by this case. A list of *amici* appears in an Addendum.

Amici file this brief urging reversal because they are concerned that the district court's decision dismissing the plaintiffs' claims misconstrues Supreme Court and Second Circuit precedent regarding competitor standing, the zone-of-interests test, the political question doctrine, and ripeness, and unduly curtails access to the federal courts for plaintiffs seeking to enforce the Constitution's guarantees.[2] While the parties' submissions naturally focus on the immediate implications of this Court's decision for the claims asserted here, *amici* seek to

---

[1] Pursuant to Rule 29.1 of this Court's Local Rules, *amici* certify that (1) this brief was authored solely by *amici* and their counsel, and not by counsel for any party, in whole or in part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting the brief; and (3) apart from *amici* and their counsel, no other person contributed money intended to fund preparing or submitting the brief.

[2] The parties have consented to the filing of this *amicus* brief. Accordingly, this brief may be filed without leave of court, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

shed light on the ramifications of the Court's decision for other potentially affected litigants. With this brief, they seek to alert the Court to relevant legal arguments and precedents that bear on threshold questions of justiciability.

SUMMARY OF THE ARGUMENT

Donald J. Trump is not your typical business competitor. Unlike every other market participant, President Trump enjoys all the advantages of holding the most powerful office in the world. But notwithstanding the atypical identity of the competitor in question, this case *is* a typical competitor standing case. And under well-settled federal law doctrines, plaintiffs Jill Phaneuf, Eric Goode, and the members of ROC United have asserted justiciable competitor standing claims.

In a typical competitor standing case, a plaintiff claims that she has suffered or will soon suffer economic injury because another market participant enjoys an illegal advantage. *See, e.g.*, *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co. ("NCUA")*, 522 U.S. 479, 482–87 (1998) (claim by commercial banks that credit union has enrolled certain customers illegally); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 390–94 (1987) (claim by securities brokers, underwriters, and investment bankers that national banks are illegally offering certain brokerage services at branch offices). To proceed on such a claim, the plaintiff must show that she "personally competes in the same arena" as the party who enjoys the "assertedly illegal benefit." *In re U.S. Catholic Conf.*, 885 F.2d 1020, 1029 (2d Cir.

1989). Once a plaintiff satisfies that requirement, she can rely on "basic economic logic" to establish the other elements of Article III standing: causation and redressability. *See United Transp. Union v. ICC*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989).

Phaneuf, Goode, and the members of ROC United satisfy all of the competitor standing criteria. They assert that the defendant's hotels and restaurants enjoy an illegal advantage in the competition for diplomatic clients and other governmental customers—namely, the fact that the hotels and restaurants are owned by President Trump. That advantage is *illegal*, the plaintiffs say, because the Foreign and Domestic Emoluments Clauses prohibit the President from engaging in commercial transactions with foreign, federal, and state governments. And it is an *advantage*, according to the plaintiffs, because diplomatic and other governmental customers are attracted by the opportunity to patronize the President's hotels and restaurants—and, potentially, to curry favor with the leader of the free world. The plaintiffs compete in the same arena—and indeed, often within the same several-block radius—as enterprises owned by the defendant that enjoy this assertedly illegal advantage. Basic economic logic, bolstered by affidavits and expert reports, supports the plaintiffs' argument that this illegal competition causes them an "actual, here-and-now injury" that declaratory and

injunctive relief would redress. *See Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010).

The plaintiffs' claims also fall within the "zone of interests" that the Emoluments Clauses secure. The Emoluments Clauses safeguard against corruption, and one of the many costs of corruption is that it places enterprises without government connections at a competitive disadvantage vis-à-vis firms with close ties to political leaders. *See* Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. Econ. 599, 616 (1993). The plaintiffs are economic actors who suffer pecuniary harm as a result of these market distortions, and they are thus among "those who in practice can be expected to police the interests" that the Emoluments Clauses protect. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998). Moreover, the Emoluments Clauses serve structural purposes: their restrictions on the President's receipt of emoluments from foreign, federal, and state governments undergird both the separation of powers and our system of federalism. Plaintiffs who suffer cognizable harms caused by violations of the Constitution's structural provisions may enforce those provisions in court. *See Bond v. United States*, 564 U.S. 211, 223 (2011).

The political question doctrine does not pose an obstacle to plaintiffs' claims. That doctrine directs courts to step aside "when there is a textually demonstrable constitutional commitment of the issue to a coordinate political

department." *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Neither the Foreign nor the Domestic Emoluments Clause manifests such a commitment. The Foreign Emoluments Clause provides that federal officeholders cannot accept emoluments from foreign governments "without the Consent of Congress." U.S. Const. art. I, § 9, cl. 8. That linguistic formulation is familiar from other constitutional provisions. *See* U.S. Const. art. I, § 10, cl. 2 (Import-Export Clause); *id.* art. I, § 10, cl. 3 (Tonnage and Compact Clauses). The Supreme Court has long considered claims under these clauses to be justiciable. *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827) (Import-Export Clause); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 313–14 (1852) (Tonnage Clause); *Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 185, 209–10 (1837) (Compact Clause). To hold that the phrase "without the consent of Congress" in the Foreign Emoluments Clause amounts to a "textually demonstrable constitutional commitment of the issue to a coordinate political department" would be to throw away nearly two centuries of jurisprudence.

Finally, the plaintiffs' claims are ripe for adjudication. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). But there is nothing "abstract" about the disagreement between the plaintiffs and the defendant here. The plaintiffs maintain

that the Emoluments Clauses prohibit the defendant from competing for government clients; the defendant does so anyway—and on a daily basis. Fifteen months have elapsed since President Trump's inauguration. To quote an ancient sage, "If not now, when?" *Pirkei Avot* 1:14 (Rabbi Hillel the Elder), *in Ethics of the Sages: An Interfaith Commentary on Pirkei Avot* 39 (Ronald W. Pies, trans. 2000).

Both the Supreme Court and this Court have repeatedly recognized their "virtually unflagging obligation" to resolve cases that fall within their jurisdiction. *Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006). Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Here, the plaintiffs have met all the relevant constitutional and prudential criteria for judicial review. They deserve to have their case resolved on the merits.

ARGUMENT

I. PLAINTIFFS HAVE ESTABLISHED CONSTITUTIONAL STANDING

All plaintiffs in federal court must meet the familiar requirements of injury in fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At the motion-to-dismiss stage, plaintiffs can pass this test on

the basis of their pleadings. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint."). Here, the plaintiffs have gone above and beyond the minimum pleading requirements and supplemented their allegations with affidavits and expert reports substantiating their economic injuries. As explained below, the plaintiffs' submissions leave little doubt that they compete with the defendant's enterprises for diplomatic and other governmental customers.

The reviewing court also must assume for purposes of its standing analysis that the plaintiffs' claims are valid on the merits. *See Warth,* 422 U.S. at 500; *see also Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007) ("[W]hen considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."). This Court has warned district courts against "erroneously conflat[ing] the requirement for an injury-in-fact with the constitutional validity of [the plaintiff]'s claim." *Dean v. Blumenthal*, 577 F.3d 60, 66 n.4 (2d Cir. 2009). The only question at the standing stage is whether the plaintiffs have (1) suffered an injury in fact that (2) is traceable to the

defendant's conduct and that (3) is redressable by the court. The plaintiffs satisfy all three requirements.[3]

A. Plaintiffs Have Suffered an Injury in Fact

The competitor standing doctrine offers one "well-established" route by which plaintiffs can satisfy the first constitutional standing requirement of "injury in fact." *See Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994); *see also Sherley*, 610 F.3d at 72 ("The doctrine of competitor standing addresses the first requirement by recognizing that economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." (alteration and internal quotation marks omitted)). To make such a showing, a plaintiff must demonstrate that she "personally competes in the same arena" as the party who has received an assertedly illegal benefit or whose presence in the market is allegedly unlawful. *See Ctr. for Reprod. Law v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002); *In re U.S. Catholic Conf.*, 885 F.2d at 1029. Phaneuf, Goode, and the members of ROC United all satisfy this requirement because they personally compete against the defendant's hotels and restaurants for diplomatic and other governmental clients.

[3] *Amici* focus only on the justiciability of claims brought by Phaneuf, Goode, and ROC United, because Citizens for Responsibility and Ethics in Washington is no longer pursuing its appeal.

A plaintiff seeking to establish competitor standing need not show that she has lost a specific customer or sale on account of the assertedly illegal competition. *See La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) ("[P]etitioners establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate *potential* to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively." (emphasis in original; internal quotation marks omitted)); *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996) (injury in competitor standing cases "is not lost sales, per se," but "exposure to competition" that the plaintiff alleges to be illegal). For example, in *NCUA*, the Supreme Court noted that the plaintiff banks "have suffered an injury in fact" because a regulatory agency's interpretation of the Federal Credit Union Act "allows persons who *might* otherwise be their customers" to become customers of a credit union instead. *NCUA*, 522 U.S. at 488 n.4 (emphasis added). The Court did not demand that the plaintiffs point to a particular customer who switched from a commercial bank to a credit union in response to the regulator's action; instead it relied on the general principle that "competitors of financial institutions have standing to challenge agency action relaxing statutory restrictions on the activities of those institutions." *Id.* at 488. And what is good for competitors of financial institutions is good for competitors of

hotels and restaurants as well: when the action of a government agency or official allows hotels and restaurants to enter markets from which they otherwise would be barred or confers upon them an assertedly illegal advantage, competitors suffer an injury in fact.

There are, to be sure, circumstances in which the allegedly illegal competition occurs in a market so far removed from the plaintiff's that the potential for economic injury is too remote to support standing. For example, a sister circuit has held that a natural gas seller in northern California lacks standing to challenge an agency action affecting transactions "several hundreds of miles" away in northern Oregon. *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001). "More is needed to move an injury from 'conjectural' to 'imminent,'" according to the court, than "some vague probability that any gas will actually reach [the plaintiff's] market and a still lower probability that its arrival will cause [the plaintiff] to lose business or drop its prices." *Id.* But Phaneuf, Goode, and the members of ROC United need not rely on "some vague probability" that the defendant will reach their markets. He is already there.

Start with Jill Phaneuf. She has alleged—and her accompanying affidavit further avers—that she "specifically seeks to book embassy functions and political functions involving foreign governments" at the Kimpton Carlyle Hotel Dupont Circle and the Kimpton Glover Park Hotel in Washington, D.C. JA-72 ¶ 221; *see*

also JA-269 ¶ 1 ("I aim to book embassy functions, political functions involving foreign governments, and functions that are associated with foreign governments at the Carlyle Hotel and the Glover Park Hotel. My compensation is determined as a percentage of the gross receipts of the events that I book for these hotels."). Her statements are amply supported. The Carlyle Hotel is within five blocks of more than a dozen embassies,[4] while the Glover Park Hotel is across the street from the Embassy of the Russian Federation. JA-273 ¶ 22. Indeed, the diplomatic press in Washington, D.C., has noted efforts by the Carlyle and Glover Park Hotels to cater to embassy clients. *See* Stephanie Kanowitz, *Hotels Step Up Their Game To Attract Embassy Business*, Wash. Diplomat (Mar. 31, 2016), perma.cc/J976-QF89. These hotels compete in the same arena as the Trump International Hotel in Washington, D.C., which specifically markets itself to diplomatic customers. *See* JA-37–41 ¶¶ 60–87.

Eric Goode also owns several hotels and restaurants that compete with the defendant's. Among other properties, Goode owns the Bowery Hotel on Manhattan's Lowest East Side, which is about a twenty-minute drive "with traffic" to the Trump International Hotel and Tower New York. JA-295 ¶ 4. The President has contended that his properties do not directly compete with Goode's hotels because "the Trump-named Hotels are AAA five-diamond hotels, whereas

[4] *See* Google Maps, bit.ly/2snWEK3 (last visited Apr. 22, 2018).

Goode's hotels are not." *See* Mem. of Law in Supp. of Def.'s Mot. to Dismiss at 17, ECF No. 35 ("Def.'s Mem."). But no court has ever suggested that constitutional standing hinges upon how the American Automobile Association rates hotels.[5] In any case, if for some reason rankings were relevant to the constitutional standing inquiry, the Bowery Hotel is ranked three places above President Trump's flagship New York hotel on the *Condé Nast Traveler Readers' Choice Awards 2017* list of top hotels in New York City. *See Top Hotels in New York City: Readers' Choice Awards 2018*, Condé Nast Traveler (Oct. 17, 2017), bit.ly/2yvPPfb (ranking the Bowery Hotel seventh and the Trump International tenth). Goode's hotel and the President's are competing in the same league.

Finally, ROC United satisfies the injury-in-fact requirement based on the competitive harm to its member restaurants and restaurant employees, who directly compete with restaurants owned by or otherwise affiliated with the defendant.[6] ROC United's members include, among others, The Modern in midtown Manhattan. JA-291 ¶ 23, JA-292 ¶ 26. The Modern is located three-and-a-half blocks from Trump Tower, the site of Trump Grill, and ten blocks away from

[5] The Bowery Hotel is an AAA Four Diamond Hotel. *See* AAA, AAA Four Diamond Hotels (Jan. 31, 2018), perma.cc/U5EH-A8W9.

[6] Courts have long allowed trade associations to litigate on their members' behalf when the members can demonstrate competitive injury and the relief they seek is an injunction preventing illegal competition from continuing. *See, e.g.*, *NCUA*, 552 U.S. at 483; *Clarke*, 479 U.S. at 392.

Trump International Hotel, the site of the restaurant Jean-Georges.[7] At the motion-to-dismiss stage, the defendant noted that the Trump Grill is not open for dinner and that Jean-Georges has three Michelin stars. *See* Def.'s Mem. at 17. But The Modern also maintains a significant lunch business, and it now has the same number of Michelin stars as Jean-Georges.[8]

The fact that Washington, D.C., and New York City are home to hundreds of hotels and thousands of restaurants does not undermine the plaintiffs' competitive injury claims. So too were there thousands of banks at the time of *NCUA*, and thousands of securities brokers at the time of *Clarke*. In any event, the plaintiffs' enterprises—like the defendant's businesses—are among a rarefied group of hotels and restaurants competing for a limited set of diplomatic and other governmental clients. Heightened competition from Trump properties is more than sufficient to establish the plaintiffs' injury in fact. *See Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 738 (5th Cir. 2016) ("It is a basic law of economics that

[7] *See* Google Maps, bit.ly/2F87ABh (last visited Apr. 30, 2018). Trump Tower, at 725 Fifth Avenue in New York, is the headquarters of the Trump Organization. *See* Trump Tower N.Y., perma.cc/RK37-JXFF (last visited Apr. 30, 2018). Trump International Hotel and Tower New York, at 1 Central Park West, is the site of the defendant's flagship New York hotel. *See* Trump Int'l Hotel & Tower N.Y., perma.cc/5YZA-96SD (last visited Apr. 30, 2018).

[8] *See* Ryan Sutton, *Midtown's Priciest Power Restaurants Are Getting Even Pricier*, Eater N.Y. (Apr. 13, 2016), perma.cc/W8CB-GU3A; Ryan Sutton, *Jean-Georges Is No Longer a Three-Michelin-Starred Restaurant*, Eater N.Y. (Oct. 30, 2017), perma.cc/576W-LG4V; Ryan Sutton, *New York City's Michelin Stars Announced for 2018*, Eater N.Y. (Oct. 30, 2017), perma.cc/JCT5-ZAYW.

increased competition leads to actual economic injury."); *Sherley*, 610 F.3d at 72 ("increased competition almost surely injures a seller in one form or another"). This is especially true where, as here, the competitor enjoys an advantage available to no other market participant: access to the most powerful office in the world.

B. Plaintiffs' Injuries Are Fairly Traceable to Defendant's Conduct

Once a plaintiff establishes that she personally competes in the same arena as the party that enjoys an allegedly illegal advantage, it is a small step to show that her injury is caused by the challenged conduct. *See Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (causation requirement is "easily satisfied" where, absent the challenged conduct, plaintiffs "would not be subject to increased competition"). In "'garden variety competitor standing cases,'" plaintiffs can rely on "a chain of causation 'firmly rooted in the basic law of economics.'" *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (quoting *United Transp. Union*, 891 F.2d at 913). And though President Trump is no "garden variety" defendant, this is—at least as far as causation is concerned—a "garden variety" competitor standing case: the defendant's assertedly illegal advantage causes the plaintiffs to face increased competition.

The district court concluded otherwise, saying that it is "wholly speculative" whether the plaintiffs' loss of business is "fairly traceable" to the desire of diplomatic and other governmental customers to curry favor with the President or

"instead results from government officials' independent desire to patronize Defendant's businesses." JA-336. But that conclusion misses the heart of the plaintiffs' case. The plaintiffs' argument on the merits is that *any* transaction between the President and a governmental client—foreign, federal, or state—qualifies as an "Emolument" for purposes of the Foreign and Domestic Emoluments Clauses. *See* JA-78 ¶ 249, JA-261 ¶ 80. Assuming (as we must at this stage) that the plaintiffs are correct on the merits, then any increased competition from—or loss of business to—the defendant's enterprises is fairly traceable to the illegality alleged.

Moreover, the district court acknowledged that "[i]t is only natural that interest in [the defendant's] properties has generally increased since he became President." JA-336. President Trump has said so himself. *See Donald Trump's New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), perma.cc/YP35-MBP8 (noting that "because I'm president," the Trump brand "is certainly a hotter brand than it was before"). That concession confirms the plaintiffs' causal claim. The plaintiffs contend, the defendant admits, and the district court did not dispute that the plaintiffs face increased competition and that they have lost and will lose business because of the assertedly illegal presence of the President's hotels and restaurants in the market for diplomatic and other governmental clients. That is all they need to show to satisfy Article III's causation

requirement. *See, e.g.*, *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 705 (D.C. Cir. 1994) (petitioner's competitive injury is traceable to respondent's assertedly unlawful action when, but for respondent's action, petitioner would not face competition from enterprises that enjoy allegedly illegal advantage).

C. Plaintiffs' Injuries Are Redressable by Court Order

Just as the plaintiffs' injuries are caused by the defendant's illegal conduct, so too can they be redressed by a court order directed at the defendant. *See United States v. Carroll*, 667 F.3d 742, 745 (6th Cir. 2012) (causation and redressability elements of constitutional standing "often go hand in hand"). In addition to declaratory relief, the plaintiffs seek a court order enjoining the defendant from violating the Emoluments Clauses in the future. Because the relevant harm is illegal competition, an injunction stopping the defendant from continuing that illegal competition would straightforwardly redress the plaintiffs' injuries.

The district court's contrary conclusion rested on two grounds. First, it said that "there is no remedy this Court can fashion to level the playing field for the Plaintiffs" with respect to "non-government customers." JA-337. Second, it observed that "notwithstanding an injunction from this Court, Congress could still consent and allow Defendant to continue to accept payments from foreign governments in competition with Plaintiffs." *Id*. Both of those statements are true as far as they go. Neither, however, undermines the plaintiffs' standing.

Start with the first. The plaintiffs are not challenging the defendant's conduct with respect to nongovernmental customers, and thus the fact that the defendant could continue to do business with those customers does not defeat the plaintiffs' claim that they are disadvantaged in their pursuit of governmental clients. The plaintiffs seek redress for a discrete injury: increased competition for governmental customers on account of the defendant's assertedly illegal acceptance of emoluments. A court order could remedy that injury, whether or not it would level the playing field between the plaintiffs and the defendant in other respects. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (plaintiff "need not show that a favorable decision will relieve his *every* injury" (emphasis in original)); *see also Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (finding standing where injury "would be reduced to some extent if petitioners received the relief they seek").

As for the possibility of congressional consent, no act of Congress can erase a violation of the Domestic Emoluments Clause. *See* U.S. Const. art. II, § 1, cl. 7 ("The President shall . . . receive for his Services, a Compensation . . . and he shall not receive within that Period any other Emolument from the United States, or any of them."). And while Congress can cure what otherwise would be a Foreign Emoluments Clause violation, this same possibility exists any time any plaintiff seeks to enjoin any action of any Executive Branch agency or official on grounds

that the action exceeds the agency's or official's statutory authority. *See, e.g.*, *Lawrence + Mem'l Hosp. v. Burwell*, 812 F.3d 257 (2d Cir. 2016). Congress always can—at least in theory—pass new legislation that endows the agency with the statutory authority that the plaintiffs say it lacks. But if the possibility of congressional consent were enough to prevent plaintiffs from satisfying the redressability requirement, then virtually all nonconstitutional claims would fail on those grounds. Followed to its logical conclusion, the district court's rationale would bring about a sea change in the law of standing and would insulate a broad swath of Executive Branch actions from judicial review.

II. PLAINTIFFS' CLAIMS SATISFY THE ZONE-OF-INTERESTS TEST

The plaintiffs also have established that their claims come within the zone of interests that the Emoluments Clauses secure. The prudential zone-of-interests test requires plaintiffs in federal court to show that their grievances "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The zone-of-interests test "is not meant to be especially demanding," *see Clarke*, 479 U.S. at 399, and the plaintiffs comfortably pass it here.

Significantly, the zone-of-interests analysis focuses "not only on those who [the framers of the provision] intended to benefit," but also "on those who in practice can be expected to police the interests that the [provision] protects." *Mova*

Pharm. Corp., 140 F.3d at 1075; *see also Clarke*, 479 U.S. at 399–400 (noting that "there need be no indication" of a "purpose to benefit the would-be plaintiff"). For example, in *NCUA*, the Court found that § 109 of the Federal Credit Union Act—which limits credit union membership to groups having common occupational, associational, or community ties—was intended "to reinforce the cooperative nature of credit unions" and thus "to promote their safety and soundness." *NCUA*, 522 U.S. at 493 n.6. The Court concluded that "even if it cannot be said that Congress had the specific purpose of benefiting commercial banks, one of the interests arguably to be protected by § 109 is an interest in limiting the markets that federal credit unions can serve." *Id.* at 492–93 (ellipsis and internal quotation marks omitted). Commercial banks, who "certainly have an interest in limiting the markets that federal credit unions can serve," therefore satisfied the zone-of-interests test. *Id.* at 493.

A similar line of reasoning supports the plaintiffs' claims here. The Foreign and Domestic Emoluments Clauses, as the district court correctly noted, "arose from the Framers' concern with protecting the new government from corruption." JA-338; *see* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465 (Jonathan Elliot ed., 1888) (statement of Edmund Randolph) (Foreign Emoluments Clause "is provided to prevent corruption"); *The Federalist Papers* 358 (Jim Miller ed., Dover Publications 2014) (1788)

(Hamilton) (Domestic Emoluments Clause ensures that "[n]either the Union, nor any of its members," can "corrupt [the President's] integrity by appealing to his avarice"). One of the many costs of corruption is that it places firms without government connections at a competitive disadvantage vis-à-vis firms that enjoy close ties to the occupants of high offices. That, in turn, produces market distortions. *See* Shleifer & Vishny, *supra*, at 616 (noting that corrupt leaders may "maintain monopolies," "prevent entry," and "discourage innovation by outsiders," and that "distortions from corruption can discourage useful investment and growth"). And that is the crux of the plaintiffs' complaint. The plaintiffs claim that they are harmed when they have to compete in a market skewed by the presence of firms owned by the President of the United States—firms that can attract diplomatic and other governmental customers on the basis of the owner's political power instead of quality and price. Just as the commercial banks in *NCUA* had an interest in preventing credit unions from entering new markets, the plaintiffs here have an interest in preventing the President from distorting their markets through illegal competition.

To be sure, as the district court observed, "[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition." JA-338. But the plaintiffs are not complaining about competition in general; they are complaining about competition for

diplomatic and other governmental clients from firms that are owned by and thus inextricably associated with the President. Framed that way, the plaintiffs' interest in preventing the President from using his position of power to profit from commercial transactions with foreign, federal, and state government counterparties is very much within the zone of interests that the Emoluments Clauses are intended to protect, and the plaintiffs are fully capable of performing the policing function that the zone-of-interests test contemplates.

The Emoluments Clauses also serve structural purposes. The Foreign Emoluments Clause is a separation-of-powers provision in addition to an anti-corruption one. It allocates to Congress the power to decide whether and when federal officeholders may receive emoluments from foreign governments. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 361 (2009) (Foreign Emoluments Clause reflects Framers' view that "[i]f foreigners were to attempt to buy influence or access, or use small gifts to shift the sympathies of American agents, they need[] the full consent of Congress"). So too, the Domestic Emoluments Clause protects the separation of powers: it ensures that Congress, through its control over the President's statutory compensation, is "the sole master" whom the President will serve. *See* Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 Colum. L. Rev. 501, 510 (2002). The prohibition on state-granted emoluments likewise preserves our system of

federalism, as it "helps to ensure presidential impartiality among particular members or regions of the Union." Robert Delahunty, *Compensation*, *in* The Heritage Guide to the Constitution 251, 251 (2d ed., David F. Forte & Matthew Spalding eds., 2014).

Because the Emoluments Clauses serve structural purposes, individuals whose interests are impaired by the violation of these provisions come within the zone of interests that the clauses protect. "[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond*, 564 U.S. at 223. Individuals likewise may sue for violations of provisions that safeguard our system of federalism. After all, "federalism protects the liberty of the individual from arbitrary power." *Id.* at 222; *see also United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016) ("[B]oth federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints 'when government acts in excess of its lawful powers.'" (quoting *Bond*, 564 U.S. at 222) (alteration omitted)). And the Supreme Court has not distinguished between individuals and organizations in this regard: nonprofit and for-profit organizations that meet the constitutional standing requirements may sue to vindicate structural guarantees to the same extent as individuals. *See Free Enter. Fund v. Pub. Co.*

Accounting Oversight Bd., 561 U.S. 477 (2010); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In sum, the Supreme Court has defined the relevant "zone of interests" broadly with respect to provisions that protect the horizontal separation of powers (i.e., the separation among the branches) as well as the vertical separation of powers (i.e., federalism). It has said that "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Bond*, 564 U.S. at 223. The plaintiffs satisfy the justiciability requirements of Article III and seek to enforce the Constitution's structural guarantees. The prudential zone-of-interests test presents no obstacle to judicial review of their claims.

III. THE POLITICAL QUESTION DOCTRINE DOES NOT PRECLUDE REVIEW

The plaintiffs' claims raise "an issue of great importance to the political branches." *Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). Their allegations implicate the personal financial interests of the President as well as the allocation of authority between the Executive and the Legislature. But those facts alone do not warrant dismissal under the political question doctrine. As this Court has explained, "not every case with political overtones is non-justiciable," and the Judiciary "can no more usurp executive and legislative prerogatives than it can

decline to decide matters within its jurisdiction simply because such matters may have political ramifications." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332 (2d Cir. 2009) (citation omitted), *aff'd by an equally divided Court in part and rev'd on other grounds*, 564 U.S. 410 (2011). The political question doctrine carves out a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 195 (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404).

This case falls well outside that narrow exception. The Supreme Court has held that "a controversy involves a political question where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Zivotofsky*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). The district court concluded that the Foreign Emoluments Clause demonstrates such a commitment: "As the explicit language of the Foreign Emoluments Clause makes clear," the court said, "this is an issue committed exclusively to Congress." JA-349. But the explicit language of the clause says nothing of the sort. The Foreign Emoluments Clause clearly *prohibits* federal officeholders from accepting foreign emoluments unless Congress affirmatively grants an exception. The district court's interpretation, by contrast, would *allow* federal officeholders to accept foreign emoluments—without fear of legal consequences—unless Congress affirmatively enacts a prohibition. Rather than

heeding a textually demonstrable commitment, the district court's interpretation would turn the clause's text on its head.

The district court's conclusion also cannot be squared with Supreme Court precedent. The critical language in the Foreign Emoluments Clause—"without the Consent of Congress"—appears twice more in the Constitution: once in the Import-Export Clause and again in the Tonnage and Compact Clauses. *See* U.S. Const. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ."); *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . [or] enter into any Agreement or Compact with another State . . . ."). The Supreme Court has resolved numerous cases implicating those provisions without ever suggesting that the words "without the Consent of Congress" in those clauses amount to a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76-78 (1993) (resolving Import-Export Clause challenge on the merits and collecting Import-Export Clause cases); *Brown*, 25 U.S. (12 Wheat.) at 437 (same); *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6–16 (2009) (reaching merits of Tonnage Clause challenge); *Cooley*, 53 U.S. (12 How.) at 313–14 (same); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 454–78 (1978) (Compact Clause); *Poole*, 36 U.S. (11 Pet.) at 209–10 (same). To hold that the phrase

"without the Consent of Congress" triggers the application of the political question doctrine would be to jettison more than a century of case law construing constitutional provisions with identical text.[9]

IV. PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

Ripeness, like standing, is "a constitutional prerequisite to exercise of jurisdiction by federal courts." *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2d Cir. 1998). And like standing, it is a prerequisite that the plaintiffs satisfy. A case is "ripe within the constitutional sense" if it "presents a 'concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III.'" *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 546 (2d Cir. 2007) (quoting *Simmonds v. Immig. & Naturalization Serv.*, 326 F.3d 351, 357 (2d Cir. 2003)). By contrast, a case is "constitutionally unripe" if the plaintiffs' injury "is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Lujan*, 504 U.S. at 560). For Phaneuf, Goode, and the members of ROC United, who must compete every day against enterprises owned by and affiliated with the President, there is nothing conjectural or hypothetical about the injury they face. Their concerns could not be more current.

[9] And even if the political question doctrine were stretched to that extreme, it would not defeat the plaintiffs' claims under the Domestic Emoluments Clause, which admits of no exception in cases of legislative license.

One can imagine circumstances in which constitutional ripeness might be relevant to Foreign and Domestic Emoluments Clause claims, but this case does not present such circumstances. For example, if the plaintiffs had filed their complaint before President Trump took office, then their claims likely would have been unripe. At that moment, it would have been "conjectural" and "hypothetical" to suppose that the defendant would retain ownership of his various name-brand properties and would continue to conduct business with governmental clients notwithstanding his pledge to "scrupulously abide by" constitutional limitations on the receipt of emoluments and to "avoid[] even the appearance of a conflict of interest." *See* Morgan, Lewis & Bockius LP, *White Paper: Conflicts of Interest and the President* 2-3 (Jan. 11, 2017), perma.cc/EX6G-4MUX. Yet that moment has long since passed. The constitutional ripeness doctrine "assumes that the relationship between the parties might at some point ripen into an injury sufficiently direct and realized to satisfy the requirements of Article III standing." *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 111 (2d Cir. 2007) (Leval, J., concurring). But if the plaintiffs' claims are not yet ripe, they never will be.

This Court also has recognized a "prudential ripeness" doctrine, *see Nat'l Org. for Marriage*, 714 F.3d at 691, but the district court's decision cannot be sustained on that basis either. Before abstaining from a case on prudential ripeness grounds, a court must conduct a "two-step inquiry," evaluating "both the fitness of

the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Here, the district court dismissed the plaintiffs' Foreign Emoluments Clause claims on ripeness grounds without ever considering the hardship to Phaneuf, Goode, and the members of ROC United, who will continue to suffer competitive injury while the court stays its hand. Insofar as the district court's decision rested on prudential ripeness, the court's failure to consider one of the two requirements for prudential ripeness would be a fatal flaw. *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (noting doubt about the "continuing vitality of the prudential ripeness doctrine").

The two cases cited by the district court in support of its ripeness holding—*Goldwater v. Carter*, 444 U.S. 996 (1979), and *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990)—cannot bear the weight that the district court has placed on them. *Goldwater* and *Dellums* both involved suits by a handful of federal lawmakers who sought to enjoin the President from taking certain foreign policy actions. In *Goldwater*, Justice Powell said the Court should withhold judgment so as not to "encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." *Goldwater*, 444 U.S. at 997 (Powell, J., concurring). In *Dellums*, the district court similarly concluded that "unless the Congress as a whole, or by a majority, is heard from, the controversy cannot be deemed ripe."

Dellums, 752 F. Supp. at 1151. Both decisions address the narrow question of when so-called "legislative standing" claims are ripe for adjudication, and that is the only proposition for which this Court has ever cited Justice Powell's concurrence. *See Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985) ("So far as the allegations made by the congressional plaintiffs are concerned, we believe the claims they raise are not ripe for decision . . . ." (citing *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring))). That proposition has little relevance to a case brought by private parties.

The district court read *Goldwater* and *Dellums* to stand for a much broader proposition: that when the Executive takes an action for which congressional consent is required, the Judiciary "should not interfere unless and until Congress has asserted its authority and taken some sort of action with respect to [the President's] alleged constitutional violations." JA-351. As with its redressability analysis, the district court's ripeness holding—if sustained—would implicate virtually all cases in which plaintiffs assert that Executive Branch agencies or officials have exceeded the bounds of their statutory authority. Almost everyone who challenges executive action on nonconstitutional grounds would concede that the action in question is one that the Executive Branch *could* take if Congress consented. But because Congress has *not* consented, the action—according to the challengers—is illegal. According to the district court's reasoning, the challenge

would also be unripe. The district court articulates no limiting principle that would prevent its novel ripeness holding from swallowing up much of federal administrative law.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the judgment of the district court.

Dated: May 1, 2018

Respectfully submitted,

LEVI LUBARSKY FEIGENBAUM & WEISS LLP

By: /s/ Andrea Likwornik Weiss
Andrea Likwornik Weiss
655 Third Avenue, 27th Floor
New York, NY 10017
(212) 308-6100
aweiss@llfwlaw.com
Counsel of Record for Amici Curiae Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,954 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the addendum identifying *amici*.

2. 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). It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14-point Times New Roman font.

Dated: May 1, 2018

LEVI LUBARSKY FEIGENBAUM & WEISS LLP

By: /s/ Andrea Likwornik Weiss
Andrea Likwornik Weiss
655 Third Avenue, 27th Floor
New York, NY 10017
(212) 308-6100
aweiss@llfwlaw.com
Counsel of Record for Amici Curiae Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction

CERTIFICATE OF FILING AND SERVICE

I hereby certify, pursuant to Federal R. App. P. 25(c) and Second Circuit Rule 25.1, that on May 1, 2018 I caused a copy of the foregoing Brief for *Amici Curiae* Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction in Support of Appellants and Urging Reversal to be electronically filed with the Clerk of Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in this appeal are registered CM/ECF users and will be served by the appellate CM/ECF system. I further certify, pursuant to Second Circuit Local Rule 31.1, that I caused six paper copies of the foregoing brief to be filed with the Clerk of Court by hand delivery.

Dated: May 1, 2018

LEVI LUBARSKY FEIGENBAUM & WEISS LLP

By: /s/ Andrea Likwornik Weiss
Andrea Likwornik Weiss
655 Third Avenue, 27th Floor
New York, NY 10017
(212) 308-6100
aweiss@llfwlaw.com
Counsel of Record for Amici Curiae Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction

ADDENDUM

ADDENDUM

Amici are scholars of administrative law, constitutional law, and federal jurisdiction. Their titles and institutional affiliations are listed for identification purposes only.

Bruce Ackerman
Sterling Professor of Law and Political Science
Yale University

Matthew Adler
Richard A. Horvitz Professor of Law and Professor of Economics, Philosophy and Public Policy
Duke Law School

Zachary Clopton
Assistant Professor of Law
Cornell Law School

Seth Davis
Assistant Professor of Law
University of California, Irvine School of Law

Frank Deale
Professor of Law
City University of New York School of Law

Michael Dorf
Robert S. Stevens Professor of Law
Cornell Law School

Daniel Farber
Sho Sato Professor of Law
University of California, Berkeley, School of Law

Martha Field
Langdell Professor of Law
Harvard Law School

Daniel Hemel
Assistant Professor of Law
University of Chicago Law School

Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
University of Chicago Law School

Leah Litman
Assistant Professor of Law
University of California, Irvine School of Law

Jenny Martinez
Professor of Law and Warren Christopher Professor in the Practice of International Law and Diplomacy
Stanford Law School

Jerry Mashaw
Sterling Professor Emeritus of Law and Professorial Lecturer in Law
Yale Law School

Jonathan Masur
John P. Wilson Professor of Law and David and Celia Hilliard Research Scholar
University of Chicago Law School

Jon Michaels
Professor of Law
University of California, Los Angeles, School of Law

Richard Primus
Theodore J. St. Antoine Collegiate Professor
University of Michigan Law School

Eli Savit
Adjunct Professor
University of Michigan Law School

Joshua Schwartz
E.K. Gubin Professor of Government Contracts Law
The George Washington University Law School

Joan Steinman
University Distinguished Professor of Law
Chicago-Kent College of Law

David Vladeck
A.B. Chettle Chair in Civil Procedure
Georgetown University Law Center

Brian Wolfman
Associate Professor of Law and Director, Appellate Courts Immersion Clinic
Georgetown University Law Center

Christopher Yukins
Lynn David Research Professor in Government Procurement Law
The George Washington University Law School