

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

THE DISTRICT OF COLUMBIA, *et al.*,

Plaintiffs,

v.

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

Defendant.

No. 8:17-cv-1596-PJM

STATEMENT OF INTEREST

INTRODUCTION

Pursuant to 28 U.S.C. § 517, the President of the United States, sued in his official capacity, sets forth below the reasons that Plaintiffs' individual-capacity claim against the President should be dismissed.¹ The newly amended complaint alleges that the President, in both his individual and official capacities, violates the Foreign and Domestic Emoluments Clauses of the Constitution whenever his businesses receive any benefit from a foreign or domestic government instrumentality. Plaintiffs, the District of Columbia ("D.C.") and the State of Maryland, seek a declaration to that effect and an order enjoining the President from any further violations. Am. Compl. at 45–46 (Prayer for Relief), ECF No. 95.

Plaintiffs cannot state any individual-capacity claim against the President because the Emoluments Clauses do not apply to the President as a private individual, and because Plaintiffs have identified no cause of action against the President in his personal capacity. To the extent the Amended Complaint is construed to raise individual-capacity claims against the President for his actions under the color of federal law, such claims are improper. The Supreme Court has implied a cause of action directly under the Constitution against federal officials in their individual capacities only in very limited circumstances—in suits for damages arising out of violations of individual rights under the Fourth, Fifth, and Eighth Amendments. Plaintiffs seek only equitable relief and allege no deprivation of their constitutional rights, only injuries to their political power, tax revenues, and business competition. Their individual-capacity claims against the President, therefore, should be dismissed for failure to state a claim upon which relief can be granted.

¹ This Statement of Interest is filed only by the President in his official capacity and addresses only the individual-capacity claims newly asserted in the Amended Complaint. The Department of Justice does not represent the President in his individual capacity at this time. Pursuant to the Court's Order of March 12, 2018, the President, in his individual capacity, will respond to the claims asserted against him in the Amended Complaint within 60 days of service of the Amended Complaint. ECF No. 94. That same order stated that the Court will treat the President's motion to dismiss filed on September 21, 2018, ECF No. 21, as the operative motion to dismiss the official-capacity claims in the Amended Complaint.

BACKGROUND

Plaintiffs filed the original complaint against the President, in his official capacity, on June 12, 2017. The original complaint alleged that the President owns and controls hundreds of businesses, Compl. ¶ 29, ECF No. 1, and that he violates the Emoluments Clauses whenever such businesses receive “anything of value” from an instrumentality of a foreign, federal, state, or local government, *id.* ¶¶ 2, 9, 24–26, 134–36, 140–41. The original complaint identified a range of commercial and other transactions by businesses in which the President is alleged to have a financial interest as alleged violations. *Id.* ¶¶ 34–99. According to Plaintiffs, the President could not avoid violating the Emoluments Clauses unless he “relinquish[ed] *ownership* of his businesses or establish[ed] a blind trust.” *Id.* ¶ 30 (emphasis in original).

To try to establish standing to sue, Plaintiffs alleged injuries to various sovereign, quasi-sovereign, and proprietary interests. Those interests included Maryland’s interests in its tax revenues, *id.* ¶¶ 14, 116–18; its interest “in preserving its role as a separate sovereign and securing observance of the terms under which it participates in the federal system,” *id.* ¶ 14; D.C.’s and Maryland’s interests in avoiding harm arising from “perceived and/or actual pressure to grant special treatment” to the President’s businesses, *id.* ¶ 14; and their respective interests in protecting their own businesses and the businesses of their residents from competition from the President’s businesses, *id.* ¶¶ 113–14, 119–33.

On September 21, 2017, the President in his official capacity moved to dismiss the original complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. ECF No. 21. On January 25, 2018, this Court heard argument on the issue of standing, which included the issue of whether Plaintiffs fall within the zone of interests of the Emoluments Clauses. During the argument, the Court suggested that individual-capacity claims against the President may be appropriate because the President is personally profiting from the challenged conduct. *See, e.g.*, Tr. of Jan. 25, 2018 hearing at 5:5–15 (“[T]his is a suit against the President in his official capacity and yet, I understand the plaintiffs are also arguing that what he’s done here is really as an individual. He’s benefiting individually [I]f I’m correct in

understanding plaintiff[s'] position, it's because he's personally profiting, not because he is the President of the United States. Although, obviously, that is what triggers the case here."); *see also id.* at 96, 98, 102.

On February 23, 2018, Plaintiffs moved to amend the complaint to include individual-capacity claims against the President. They explained that they “continue to believe that suing the President for violating [the Emoluments] Clauses in his official capacity is proper and reflects the reality that the defendant’s conduct is illegal *by virtue of the fact that he is President.*” Pls.’ Mem. in Supp. of Mot. to Amend at 2, ECF No. 90-1 (quotations and citation omitted) (emphasis added). Nonetheless, they stated that they were moving to amend the complaint “[o]ut of an abundance of caution” due to “the Court’s questioning at oral argument” on January 25, 2018. *Id.* The Court granted the motion on March 12, 2018.

The Amended Complaint has added Donald J. Trump as a defendant in his individual capacity. *See* Am. Compl. ¶¶ 1, 20. “In all other respects,” however, the Amended Complaint is “identical to the original complaint.” Pls.’ Mem. in Supp. of Mot. to Amend at 1.

ARGUMENT

I. Plaintiffs Cannot State a Claim Against the President in His Individual Capacity Because He Is Not Governed by the Emoluments Clauses as a Private Person.

The newly asserted individual-capacity claims against the President are improper because the President cannot violate the Emoluments Clauses in his personal capacity. It is hornbook law that the availability of relief against an officer in his official capacity is separate and distinct from the availability of relief against that officer in his personal capacity. As the Fourth Circuit has held, under the “legal fiction” of a government official having “two separate identities”—official capacity and individual capacity—the two capacities “are not in privity.” *Brooks v. Arthur*, 626 F.3d 194, 201–02 (4th Cir. 2010). This is because “the litigation landscape is materially different in a personal-capacity suit—as opposed to an official-capacity-suit.” *Id.* “[D]ifferent legal theories of liability are required for the plaintiff, and different defenses are available to the defendant, in a personal-capacity action than in an official-capacity action.” *Id.*

(quoting *Andrew v. Daw*, 201 F.3d 521, 525 (4th Cir. 2000)). Indeed, sovereign immunity may be available to shield an official in his official capacity because “a judgment against a public servant in ‘his official capacity’ imposes liability on the entity that he represents,” *Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (quoting *Brandon v. Holt*, 469 U.S. 464, 471 (1985)), whereas an official sued in his personal capacity may be shielded by official immunity, *id.* at 166–67.

Here, Plaintiffs can state no individual-capacity claim because the Emoluments Clauses do not even apply to the President in his individual capacity. The Foreign Emoluments Clause governs only federal officials holding “Office[s] of Profit or Trust,” U.S. Const. art. I, § 9, cl. 8, and the Domestic Emoluments Clause applies only to “[t]he President,” U.S. Const. art. II, § 1, cl. 7. These constitutional proscriptions could only apply to the President in his capacity as an officeholder and as President.² That is, contrary to the Court’s prior suggestion,³ the President’s compliance with the Emoluments Clauses is part of his official duties, and any alleged noncompliance necessarily would be in the President’s official capacity. Even under Plaintiffs’ expansive interpretation of the Foreign Emoluments Clause, any individual’s personal gain from a foreign government could only violate the Clause if the individual holds an “Office of Profit or Trust” in the Federal Government. This is no different from, for example, a challenge to a Senator’s noncompliance with the constitutional requirement that he or she be “an Inhabitant of that State in which he shall be chosen,” U.S. Const. art. I, § 3, cl. 3. The real party in interest in that circumstance would be the Senator in his official capacity, even if the alleged injuries had stemmed from the Senator’s personal choice to have an out-of-state residence.

Plaintiffs themselves have insisted that the alleged constitutional violations here occurred because Donald J. Trump is the President. *See* Pls.’ Mem. in Supp. of Mot. to Amend at 2 (“the

² We assume for purposes of this Statement that the President is subject to the Foreign Emoluments Clause.

³ *See* Tr. of Jan. 25, 2018 hearing at 28:16–18 (Court: “[Plaintiffs are] talking about somebody who is personally benefiting as a private owner of a business. [That] [h]as nothing do to with his performance of his duties as president.”).

defendant's conduct is illegal *by virtue of the fact that he is President.*") (quotations and citation omitted) (emphasis added).⁴ During the January 25, 2018 hearing, Plaintiffs' counsel repeatedly acknowledged that Plaintiffs' injuries stemmed from the President's status *as President*. They also contended that the equitable relief they seek against the President in his official capacity is sufficient to remedy their alleged injuries.⁵ Although Plaintiffs have now added individual capacity claims against the President "out of an abundance of caution," Pls.' Mem. in Supp. of Mot. to Amend at 2, it is telling that they have identified no cause of action in the Amended Complaint against Donald J. Trump the private individual for their alleged injuries.⁶

Moreover, even if, contrary to Plaintiffs' assertions, the alleged constitutional violations could only be redressed by the President in his personal capacity, that would be no basis for allowing an individual-capacity claim to proceed where there is no legal liability. In *Kentucky v. Graham*, 473 U.S. 159, 168 (1985), for example, the plaintiffs prevailed in a personal-capacity suit under 28 U.S.C. § 1983 against a state official for depriving them of their constitutional

⁴ See also Tr. of Jan. 25, 2018 hearing at 44:13–16 ("[I]t's by virtue of him holding the office that he's trying to get that profit and by virtue of receiving these emoluments, he's seeking to enlarge his compensation beyond that which is set by Congress."); *id.* at 101:5–9 ("Because these clauses apply to him as president and because the founders wanted to prevent corruption . . . we think that this is a proper suit within his official capacity."); *id.* at 185:24–186:3 ("[I]nasmuch as he can't violate the emoluments clauses in a private capacity, but can only violate the emoluments clauses as president, which is why the fact he was a market competitor before he became president is irrelevant, we think that it is his duty as president to comply with those clauses").

⁵ See Tr. of Jan. 25, 2018 hearing at 45:22–46:1 ("[W]e brought this suit against the President in his official capacity because we do believe it's his status as president that both makes these clauses applicable and that befalls the harms to the states that comes from his acceptance of emoluments."); *id.* at 175:19–22 ("[T]hese injuries exist because he is president, that's what makes all his enterprises different now than they were on January 19, 2017, that this is most properly conceived of as an official capacity suit."); *id.* at 175:12–15 ("[B]ecause these clauses apply to him in his official capacity . . . we think an order directing him to comply with the clauses in his official capacity would redress and remedy this injury.").

⁶ The President has separately established that Plaintiffs have no cause of action under the Emoluments Clauses against the President in his official capacity. See Mem. in Supp. of Mot. to Dismiss, ECF No. 21-1, at 26–29; Def.'s Reply in Supp. of Mot. to Dismiss, ECF No. 70, at 14–16.

rights under the color of state law. They then sought attorneys' fees from the State, even though the State had been dismissed from the suit on Eleventh Amendment immunity grounds. The Supreme Court held that "a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity." *Id.* at 167. This is so because "[a] victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him," and "*unless a distinct cause of action is asserted against the entity*, the entity is not even a party to a personal-capacity lawsuit." *Id.* at 167–68 (emphasis added). The same is true where, as here, the requested relief involves only equitable relief. "The established rule . . . is that equity follows the law," *Hedges v. Dixon Cty.*, 150 U.S. 183, 192 (1893), and "wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation," *id.* (quotations and citation omitted); *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823 (4th Cir. 2004) (equity "may not be used to create new substantive rights"). Equity cannot create an individual-capacity claim under the Emoluments Clauses, where such Clauses apply only to officers acting in their official capacities.

Plaintiffs can obtain relief, if at all, only against the President in his official capacity. Although one amicus has argued that this case cannot be maintained as an official-capacity suit because the President's successor would not automatically be substituted as a defendant if he were to leave office during the pendency of the suit, *see* Corrected Resp. of Scholar Seth Barrett Tillman and the Judicial Education Project, ECF No. 77, at 5–7 (citing *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017)), that argument is mistaken. The reason that no substitution would be necessary is that the case would become moot due to the changed circumstances. That by no means suggests that Plaintiffs' challenge to the President's compliance with the Emoluments Clauses should be maintained as an individual-capacity suit when the Clauses do not otherwise bind the President as a private individual. And contrary to the amicus's suggestion, if Plaintiffs were to prevail on the merits, the requested injunctive relief would indeed "require action by the

sovereign,” assuming that separation-of-powers principles would not otherwise bar that relief.⁷ *Id.* at 5 (quoting *Lewis*, 137 S. Ct. at 1291). The President, as the holder of the Office of the President, would need to ensure compliance with the Emoluments Clauses, and his conduct as such would need to conform to any appropriate injunctive relief.

II. Plaintiffs Cannot Assert Individual-Capacity Claims Against Donald J. Trump as a Federal Official Acting Under the Color of Federal Law.

The Court intimated during the January 25, 2018 hearing that individual-capacity claims against the President may be proper because litigants routinely sue officials in both their official and individual capacity in suits brought under 42 U.S.C. § 1983.⁸ But that is the wrong analogy. Section 1983 entitles an injured person to money damages if a state official acting under the color of state law violated her constitutional rights. But there is no federal analogue to that statute, and the Supreme Court has implied a cause of action for damages arising out of violations of constitutional rights by federal officials only in the narrow circumstances identified in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854–55 (2017) (explaining that the Supreme Court decided *Bivens* against the background of 42 U.S.C. § 1983 and Congress’s failure to create an analogous statute for federal officials). The Amended Complaint does not, and could not, allege a cause of action under *Bivens* for two reasons.

⁷ The President has argued that under *Mississippi v. Johnson*, 71 U.S. 471 (1867), no injunction may be issued to enjoin him in his official capacity. *See* Mem. in Support of Mot. to Dismiss at 54–56; Def.’s Reply in Supp. of Mot. to Dismiss at 29–30.

⁸ *See* Tr. of Jan. 25, 2018 hearing at 96:2–4 (Court: “[I]n the 1983 cases, suit is always against the individual in their official and individual capacity. That’s the way you do it.”); Tr. at 98:19–23 (Court: “You sue police all the time because they’re police, but you sue them individually and in their official capacity And it’s a fiction, it’s a fiction, we know that, but you’re still after these folks because they are public officers.”); Tr. at 102:10–14 (“[T]he idea of a fiction when -- and which capacity you sue somebody has worked in other context whether it’s a different kind of case or not. I mean, we’re dealing with something pretty much on a clean slate here trying to craft a proper response.”).

First, because *Bivens* implied only a “damages remedy” to redress past injuries, *Ziglar*, 137 S. Ct. at 1854–55, it is “both inappropriate and unnecessary for claims,” like those presented here, “seeking solely equitable relief against actions by [a federal officer],” *see Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016). *Bivens* “fill[s] a gap in cases where sovereign immunity bars a damages action against the United States.” *Id.* Specifically, because “[a]n action against an officer, operating in his or her official capacity as a United States agent, operates as a claim against the United States,” *id.*, a damages claim against the officer in his official capacity would be barred by sovereign immunity, unless there is a statutory waiver of sovereign immunity, such as the Federal Tort Claims Act, 28 U.S.C. § 1346(b), *et seq.* *Bivens* permits an individual capacity claim against the official to provide a damages remedy to a person injured by the official. *See Bivens*, 403 U.S. at 409–10 (Harlan, J., concurring in judgment) (“However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.”).⁹

Courts repeatedly have held that “relief under *Bivens* does not encompass injunctive or declaratory relief” against an officer sued in his personal capacity to redress constitutional violations. *Solida*, 820 F.3d at 1093. Suits for such injunctive or declaratory relief must be brought against the officer in his official capacity. *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001) (“There is no such animal as a *Bivens* suit against a public official tortfeasor in his or her official capacity.”); *Kurzberg v. Ashcroft*, 619 F.3d 176, 179 n.2 (2d Cir. 2010) (“the Amended Complaint sought injunctive relief that would not be available in a *Bivens* action”); *Higazy v. Templeton*, 505 F.3d 161, 169 (2d Cir. 2007) (same); *Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 26 (D.D.C. 2007) (claims against federal officials in their personal capacities for injunctive relief dismissed for failure to state a claim because plaintiff “simply cannot seek that

⁹ Similarly, section 1983 claims are based on the “legal fiction” that the “state official who acts in violation of the federal Constitution is ‘stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.’” *Ameritech Corp. v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002).

redress from the individual defendants in their personal capacities”); *see also Rhode Island Dep’t of Envtl. Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002) (“[C]ourts have long recognized that federal officers may be sued in their official capacity for prospective injunctive relief to prevent ongoing or future infringement of federal rights.”).¹⁰ Indeed, “only by acting as a government official (not as an individual acting personally), can a public official’s compliance with a court decree remedy the governmental action . . . that is being challenged,” which, in this case, is the President’s alleged violations of the Emoluments Clauses. *Hatfill*, 519 F. Supp. 2d at 26; *cf. Ameritech Corp.*, 297 F.3d at 586 (in section 1983 action, “[t]he twin goals served by the *Young* exception to Eleventh Amendment immunity—vindicating federal rights and holding state officials responsible to federal law—cannot be achieved by a lawsuit against a state official in his or her individual capacity. The reason is that individual (or personal) capacity suits do not seek to conform the State’s conduct to federal law; rather, such suits seek recovery from the defendant personally.”).

Second, whereas a *Bivens* damages claim is premised on the deprivation of specific constitutional rights, *see Ziglar*, 137 S. Ct. at 1854; *Butz v. Economou*, 438 U.S. 478, 504 (1978), Plaintiffs do not allege any deprivation of their constitutional rights.¹¹ Instead, they allege that they are deprived of business profits, tax revenues, and political power. That is a far cry from

¹⁰ Similarly, a section 1983 claim against a state official in his or her individual capacity would not permit the Court to grant injunctive relief to conform the official’s conduct to federal law. *See Kirby v. City of Elizabeth*, 388 F.3d 440, 452 n.10 (4th Cir. 2004) (concluding that injunctive relief can only be awarded against a government employee in his or her official capacity); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) (“[T]he declaratory and injunctive relief Wolfe seeks is only available in an official capacity suit.”); *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993) (“[S]uch equitable relief [reinstatement] could be obtained against Relin only in his official, not his individual, capacity.”); *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990) (“[T]he injunctive relief sought and won by Scott can be obtained from the defendants only in their official capacity as commissioners.”); *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) (“[T]he equitable relief Feit requests . . . can be obtained only from the defendants in their official capacities, not as private individuals.”).

¹¹ This Statement, of course, does not address a situation where a private individual could be held liable for violating the Constitution (*see, e.g.*, U.S. Const. amend. XIII) and be subject to equitable relief as a private person.

the limited contexts in which the Supreme Court has implied a cause of action for damages under *Bivens*. See *Bivens*, 403 U.S. at 391 (deprivation of a plaintiff’s “Fourth Amendment protection against unreasonable searches and seizures”); *Davis v. Passman*, 442 U.S. 228 (1979) (gender discrimination under the Due Process Clause of the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (deprivation of the Eighth Amendment guarantee against cruel and unusual punishment by failing to provide adequate medical treatment). Indeed, since *Bivens*, *Davis*, and *Carlson*, the Supreme Court has “consistently refused to extend *Bivens* to any new context or new category of defendants,” *Ziglar*, 137 S. Ct. at 1857 (quoting *Correction Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)), because “it is a significant step under separation-of-powers principles” to imply such a cause of action. *Id.* at 1856.

In sum, *Bivens* cannot supply a cause of action against the President in his individual capacity in this case. Plaintiffs do not seek money damages, nor allege the deprivation of any constitutional right. And their claims are a far cry from the narrow circumstances in which the Supreme Court has implied a private cause of action recognized in *Bivens*. Because Plaintiffs have not identified a source of law that would supply a cause of action against the President in his individual capacity for an alleged violation of the Emoluments Clauses, the individual-capacity claims must be dismissed.

CONCLUSION

For the foregoing reasons, the individual-capacity claims asserted in the Amended Complaint against the President should be dismissed.

Dated: March 26, 2018

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ James Powers
JAMES POWERS