No. 18-2486

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Petitioner.

On Petition for a Writ of Mandamus to the United States District Court for the District of Maryland

SUPPLEMENTAL BRIEF FOR PETITIONER

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ARGUMENT

In an October 24, 2019 Order, this Court directed the parties to "address[] any developments in these cases not covered in the original briefs." Doc. 82, at 2-3. The government respectfully submits this supplemental brief in response. Although there have been no factual developments that bear on the resolution of plaintiffs' complaint in this case, significant legal developments have transpired in two parallel cases brought against the President alleging violations of the Constitution's Emoluments Clauses.

I. D.C. CIRCUIT PROCEEDINGS

A. Two days after plaintiffs filed their complaint in this case, Members of Congress sued the President in the United States District Court for the District of Columbia, alleging violations of the Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8. In April 2019, that district court denied the government's motion to dismiss, concluding that the Members had standing, had a cause of action, and stated a claim under the Foreign Emoluments Clause. The government moved to certify an interlocutory appeal of that order under 28 U.S.C. § 1292(b).

On June 25, the district court denied certification of its two orders. The court stated that, because the issues in this case could "be resolved on cross motions for summary judgment" after expeditious discovery and summary-judgment briefing, the government did not satisfy the requirement in section 1292(b) that interlocutory

appeal "materially advance the ultimate termination of the litigation." *Blumenthal v. Trump*, 382 F. Supp. 3d 77, 80-81 (D.D.C. 2019).

B. The government filed a petition for a writ of mandamus in the United States Court of Appeals for the D.C. Circuit. Like the mandamus petition on review in this case, the government requested that the D.C. Circuit direct the district court to dismiss this case or, in the alternative, to certify its orders for interlocutory appeal.

The D.C. Circuit denied the petition without prejudice. *In re Trump*, No. 19-5196, 2019 WL 3285234, at *1 (D.C. Cir. July 19, 2019) (per curiam). The court explained that the standing and cause-of-action questions raised by the President's petition were "substantial" and demonstrate that the district court's orders "squarely meet the criteria for certification under Section 1292(b)." *Id.* The court concluded that the district court's contrary ruling disregarded the "separation of powers issues present in a lawsuit brought by members of the Legislative Branch against the President of the United States," particularly where discovery is contemplated. *Id.* Accordingly, the court "remand[ed] the matter to the district court for immediate reconsideration of the motion to certify." *Id.*

The D.C. Circuit's approach confirms that the panel acted correctly in granting mandamus here. In seeking rehearing, plaintiffs in this case did not dispute that the D.C. Circuit's order was procedurally proper. *See* Reh'g Pet. 8 n.3. If a court of appeals may *indirectly* reverse the district court's certification denial by denying mandamus "without prejudice" while ordering reconsideration after identifying the

district court's errors, a court of appeals has the power to accomplish the same result *directly* by granting mandamus. And all of the substantive reasons that the D.C. Circuit gave for requiring certification—including the "substantial" question presented and the "separation of powers" issues that inhere in subjecting the President to discovery—apply with equal force here. *In re Trump*, 2019 WL 3285234, at *1.

C. After the D.C. Circuit's mandamus ruling, the district court promptly certified its motion-to-dismiss orders for interlocutory review. The D.C. Circuit ordered expedited briefing and scheduled oral argument for December 9, 2019. Although the D.C. Circuit case presents different standing issues (because it is brought by Members of Congress rather than by States or alleged economic competitors), the issues in that case concerning the existence of a cause of action (especially against the President) and concerning the merits are largely similar. And the government's arguments largely accord with the arguments presented here, with one additional elaboration that space limitations in this case did not permit.[1]

The government's mandamus petition in this case observed that judicially creating a cause of action is improper because, among other reasons, the President is

[1] The government's mandamus petition was limited to 7800 words. *See* Fed. R. App. P. 21(d). After the petition was filed, this Court issued a briefing order requiring full briefing. Doc. 10, at 1. Due to the lapse in appropriations that was ongoing at the time, the government moved to stay that briefing until funding was restored; this Court instead responded by "accept[ing] the petitioner's mandamus petition and addendum as petitioner's opening brief and appendix." Doc. 17, at 1. As a result, plaintiffs filed a 12,163 word response brief to a significantly shorter mandamus petition, which exacerbated the ordinary space constraints in the reply brief.

generally not constitutionally subject to suit in his official capacity. Pet. 18. The elaboration is that, even assuming Congress may subject the President to suit in these circumstances, it must at the very least say so expressly. As the Supreme Court has repeatedly held, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," a generally available cause of action may not be extended to his office without an "explicit statement" by Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). That is why, in *Franklin*, the Court declined to permit an Administrative Procedure Act (APA) action against the President even though his office, unlike others in the federal government, is "not explicitly excluded from the APA's purview." *Id.* at 800. And it is why, in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court declined to "assume" that the cause of action there—an implied claim for monetary relief—"runs against the President of the United States." *Id.* at 748 n.27. That principle of constitutional avoidance is dispositive here, where neither Congress nor the Constitution expressly has subjected the President to this suit. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466-67 (1989). And the same principle demonstrates that mandamus is warranted here, given that "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 382 (2004); *see also In re Sewell*, 690 F.2d 403, 406-07 (4th Cir. 1982) (granting mandamus where district court's refusal to dismiss a case was a "judicial usurpation of power" merely because it intruded on an administrative agency's authority).

II. SECOND CIRCUIT PROCEEDINGS

A. Also contemporaneous to the filing of this complaint, hospitality-industry participants (joined by other plaintiffs no longer relevant to that case) sued the President in his official capacity alleging that the President violates the Foreign Emoluments Clause and the Domestic Emoluments Clause, U.S. Const. art. II, § 1, cl. 7, on account of his business interests. The plaintiffs in that case advanced a competitor-standing theory similar to that advanced by plaintiffs here, and the district court had dismissed the suit prior to the argument before this Court. *See CREW v. Trump*, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017); *see* Pet. 8-9, 19-20.

On September 13, 2019, a divided panel of the Second Circuit reversed. *CREW v. Trump*, 939 F.3d 131 (2d Cir. 2019). As to Article III standing, the panel held that plaintiffs adequately alleged injury by claiming that, "because of unlawful conduct, their rivals enjoy a competitive advantage in the marketplace." *Id.* at 143. And, the panel concluded, plaintiffs adequately pled causation and redressability by asserting that "the President's receipt (and invitation) of allegedly illegal emoluments actually influences at least some government customers' purchasing decisions." *Id.* at 147. Finally, the panel ruled that the "zone of interests test does not require the plaintiff to be an intended beneficiary of the law in question," and that any competing "[p]laintiffs who are injured by the defendant's alleged violation of a limiting law" may sue to enforce that limitation. *Id.* at 158.

The panel acknowledged that its standing holding conflicted with the panel's holding in this case. 939 F.3d at 148-52. The Second Circuit panel ruled that plaintiffs' complaint "establish[ed] a substantial likelihood that the President's receipt of emoluments … has … some unfavorable effect on [government customers'] demand for Plaintiffs' competing properties." *Id.* at 151.

Judge Walker dissented, contending that the panel of this Court "correctly" held that "the plaintiffs could not invoke the competitor standing doctrine to achieve Article III standing." 939 F.3d at 163. In his view, plaintiffs' pleadings "do not particularize any direct injury actually caused by violations of the Emoluments Clauses." *Id.* Judge Walker noted that "it cannot be the case that, every time a competitor achieves some benefit through allegedly unlawful conduct that has no direct relationship to competition, competing businesses have standing to challenge that unlawful action simply by virtue of their status as a direct competitor." *Id.* at 166. And, he explained, plaintiffs' allegations "fall short of plausibly alleging (or permitting a reasonably plausible inference) that increased competition is caused by the President's acceptance of emoluments." *Id.* at 169.

B. The government has filed a petition for rehearing en banc in the Second Circuit, urging that the court reverse the panel's standing and zone-of-interest holdings. The government's standing arguments largely overlap with those made before this Court. *See* Reply Br. 11-15. Because competitor standing requires, at a minimum, a plaintiff to show that it will "almost surely" lose business from the

defendant's activities, *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995), the panel of the Second Circuit erred in allowing those plaintiffs to proceed, given that a challenge to conduct of limited scope by a single defendant competing with a handful of plaintiffs in a diffuse hospitality market over a small set of customers is not almost certain to cause those plaintiffs any harm. *See Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008) (competitor standing only when "economic logic" dictates "that a plaintiff"—not some other party—"will likely suffer an injury-in-fact"). The same is true in this case.

As to the zone of interests, the government has argued that the Second Circuit panel failed to consider the purposes protected by the Emoluments Clauses. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987) (requiring courts to dismiss a case under the APA's zone-of-interests standard if the plaintiff's interests "are so marginally related to or inconsistent with the purposes implicit in" the legal provision invoked that "it cannot reasonably be assumed" that the provision was intended to permit the suit); Reply Br. 7 (noting that this standard should be heightened here, where no express cause of action permits this suit). Instead, the panel held that any "[p]laintiffs who are injured by the defendant's alleged violation of a limiting law may sue to enforce the limitation under the longstanding zone of interests test." 939 F.3d at 158. Several other circuits have held, in cases presenting statutory claims, that plaintiffs that assert purely economic injuries fall outside the zone of interests of statutes that aim to protect non-economic interests. *See, e.g.*, *Delta Constr. Co. v. EPA*,

783 F.3d 1291, 1300 (D.C. Cir. 2015); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 435 (D.C. Cir. 1989) (R.B. Ginsburg, J.). The same is true here, where the Framers enacted the Emoluments Clauses to protect the public at large from the corruption of official action, not to protect business competitors of establishments in which public officials hold a financial interest. In seeking to have the Clauses protect against economic injuries wholly unconnected to corrupted governmental actions, plaintiffs here (like those in the Second Circuit) are not invoking any interests protected by the Clauses for which judicial relief is available.

The Second Circuit's error exemplifies the fundamental flaw in plaintiffs' assertion that they may assert an implied cause of action in equity to enforce the Emoluments Clauses against the President: namely, that implied causes of action must be based on "traditional equity practice" and that "Congress is in a much better position than [the courts] to . . . design the appropriate remedy" for "departure[s]" from that practice. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322, 327 (1999). Here, where untested constitutional provisions are invoked by a novel type of plaintiff to enforce such provisions, an implied equitable remedy is unwarranted—just as was true in *Grupo Mexicano*, where *pre-judgment* creditors were not entitled to a type of judicial remedy traditionally available to *post-judgment* creditors. *Id.* at 322.

In sum, the panel of the Second Circuit, in creating a conflict with the panel of this Court, misapplied the law of Article III and of the zone-of-interests requirement. Regardless of whether the Second Circuit grants rehearing en banc, that court's holding provides no reasoned basis to allow plaintiffs' suit to proceed in this case.

CONCLUSION

The petition for a writ of mandamus should be granted, and the district court should be ordered to dismiss the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's October 24, 2019 briefing order because it does not exceed 15 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Martin Totaro
Martin Totaro

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Martin Totaro
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