

# 18-0474-CV

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## United States Court of Appeals *for the* Second Circuit

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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.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK, CASE NO. 1:17-CV-00458,  
U.S. DISTRICT JUDGE GEORGE B. DANIELS

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### **BRIEF OF SCHOLAR SETH BARRETT TILLMAN AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* SUPPORTING APPELLEE AND AFFIRMANCE**

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JOSH BLACKMAN, ESQ.  
(*Admission pending*)  
1303 San Jacinto Street  
Houston, Texas 77002  
(202) 294-9003

*Counsel for Amicus Curiae Scholar  
Seth Barrett Tillman*

ROBERT W. RAY, ESQ.  
THOMPSON & KNIGHT LLP  
900 Third Avenue, 20<sup>th</sup> Floor  
New York, New York 10022  
(212) 751-3347

*Co-Counsel for Amicus Curiae Scholar  
Seth Barrett Tillman*

CARRIE SEVERINO, ESQ.  
(*Admission pending*)  
JUDICIAL EDUCATION PROJECT  
722 12th St., N.W., 4<sup>th</sup> Floor  
Washington, DC 20005  
(571) 357-3134

*Counsel for Amicus Curiae  
Judicial Education Project*

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### **Disclosure Statement**

The Judicial Education Project has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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### **Interest of Amici**

Scholar Seth Barrett Tillman, an American national, is a member of the regular full time faculty in the Maynooth University Department of Law, Ireland.<sup>1</sup> Tillman is one of a very small handful of academics who has written extensively on the Constitution’s “office”-language, including the Foreign Emoluments Clause. Since 2008, Tillman has consistently written that the Constitution’s “Office . . . under” the United States language, the language in the Foreign Emoluments Clause, does not encompass the presidency. Tillman was also the first scholar to write that Emoluments Clauses claims could not be brought against President Trump in his official capacity.<sup>2</sup>

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary’s role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation.

The Appellants and Appellee consented to the filing of this brief.

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<sup>1</sup> No party’s counsel authored this brief in whole or in part, and no person other than the *Amici* and their counsel—including any party or party’s counsel—contributed money that was intended to fund the preparation or submission of this brief.

<sup>2</sup> Seth Barrett Tillman, *The Emoluments Clauses Lawsuits’s Weak Link: The Official Capacity Issue*, Yale J. of Reg. Notice & Comment Blog (Aug. 15, 2017), [perma.cc/759Y-CC2R](https://perma.cc/759Y-CC2R).



## Introduction

The Plaintiffs in this case sued President Trump only in his official capacity. However, the President in his official capacity did not cause, and therefore cannot redress, their alleged injuries. Rather, Plaintiffs have only complained of quintessentially private conduct taken by Donald J. Trump. The Plaintiffs should not have sued the President in his official capacity, because the sovereign—that is the United States—did not cause the purported constitutional tort. Moreover, the United States has no control over Donald J. Trump’s private business transactions. Therefore, the Plaintiffs have failed to demonstrate that their purported injuries could be redressed by a favorable decision. Indeed, based on the facts alleged in the Second Amended Complaint, it would be *impossible* for the Plaintiffs’ purported injuries to be redressed by a favorable decision. Because Plaintiffs cannot satisfy the causation and redressability elements of Article III standing, the decision below can be affirmed on alternate grounds.

Alternatively, if this Court finds that the Plaintiffs have standing, and that the case is justiciable, the decision below can be affirmed for two reasons. First, the Foreign Emoluments Clause does not encompass the Presidency, so Count I must be dismissed. Second, the term “emoluments” as used in the Foreign and Domestic Emoluments Clause does not extend to business transactions for value, so Count II must also be dismissed.

## Argument

### **I. The Plaintiffs lack standing because the Defendant in his official capacity did not cause, and cannot redress, Plaintiffs’ alleged injuries**

The district court found that the “Plaintiffs have failed to properly allege that Defendant’s actions *caused* Plaintiffs competitive injury and that such an injury is *redressable* by this Court.”<sup>3</sup> These two holdings are correct for a reason that the District Court did not address: there are no allegations that the Defendant, in his *official capacity*, caused, or could possibly redress Plaintiffs’ purported injuries.<sup>4</sup> Stated differently, the purported injuries could only have been caused by Donald J. Trump, as a private citizen, and only a judgment against Donald J. Trump, as a private citizen, could redress those injuries. This is not a mere technical pleading error: Plaintiffs have sued the wrong Defendant. Given that the proper Defendant was not served with process and never had any opportunity to participate in the proceedings below, the Plaintiffs do not have Article III standing with respect to causation and redressability. The district court’s judgment can be affirmed on these alternate grounds.

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<sup>3</sup> JA-335 (emphasis added).

<sup>4</sup> *Amici* raised the capacity issue in the lower court proceedings. See Brief for Scholar Seth Barrett Tillman as *Amicus Curiae* in Support of Defendant at 30 n.122, ECF No. 37-1, 2017 WL 2692500 (“Plaintiffs’ Complaint is brought against the President in his ‘official capacity.’ *Id.* at caption, 1, ¶¶ 31, 33. Given that the case could not continue against the President’s successor, this cannot be an ‘official capacity’ suit. See *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017).”).

**A. The Foreign and Domestic Emoluments Clauses regulate both official and private conduct**

The Foreign Emoluments Clause provides that those holding “office . . . under the [United States]” cannot “*accept* of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State” “without the Consent of the Congress.”<sup>5</sup> This provision is somewhat unique in that can be violated in an office-holder’s official capacity or through his private conduct.<sup>6</sup> For example, the Secretary of State violates the Foreign Emoluments Clause in his official capacity if he publicly “accept[s]” emoluments from a foreign state pursuant to a federal government policy, even if the policy were unlawful. He likewise violates the Foreign Emoluments Clause in his official capacity if the Secretary uses federal government property to commit the constitutional tort: *i.e.*, the act of *accepting* the emoluments.

On the other hand, if the Secretary privately “accept[s]” emoluments from a foreign state without regard to any government policy, and without using federal government property in order to accept the emoluments, then he still violates the Foreign Emoluments Clause, but through his private conduct. Indeed, the Office of

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<sup>5</sup> U.S. Const. art. I, § 9, cl. 8 (emphasis added). Because, in *Amici*’s view, the President is not covered by this clause and its operative *Office*-language, *see infra* Part II, the foregoing analysis will consider the Secretary of State, who, all agree, is bound by this constitutional provision.

<sup>6</sup> *See* Motion for Leave of Amici Curiae Scholar Seth Barrett Tillman and the Judicial Education Project to be Heard at Oral Argument at 4–12, *Blumenthal v. Trump*, Civ. A. No. 1:17-cv-01154-EGS (D.D.C. May 21, 2018) (Sullivan, J.), ECF No. 52, 2018 WL 2321735, <http://bit.ly/2IW6dvo>.

Legal Counsel has recognized this facet of the Foreign Emoluments Clause, albeit not in the context of litigation.<sup>7</sup>

Imagine if the Secretary of State opens up a lemonade stand outside of his home. A foreign diplomat pays the Secretary to make him a glass of lemonade at a cost of \$1,000,000.<sup>8</sup> Because the Secretary's *acceptance* of the payment did not make use of any government property, nor was it *accepted* pursuant to a federal government policy, it could not be challenged as an official-capacity action. The purported constitutional tort that violates the Foreign Emoluments Clause is the Secretary's *accepting* the purported emoluments, not his making lemonade or delivering it to a foreign diplomat. If such a case were justiciable—for example, if Congress created a statutory cause of action—a court could order the Secretary in his private capacity to disgorge the \$1,000,000 as a remedy. In such a case, the United States as sovereign could not provide any remedy, because it had no role in

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<sup>7</sup> See, e.g., *Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 (1987) (explaining that “the Emoluments Clause is plainly applicable where an official is offered the gift, title or office in his *private capacity*” (emphasis added)); Mem. from Samuel A. Alito, Jr., Deputy Assistant Attorney General, O.L.C., *Re: Emoluments Clause Questions raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* at 2–3, 5 (May 23, 1986), <http://politi.co/2us47bu> (concluding that the Foreign Emoluments Clause applies to a NASA scientist who was offered a “consulting fee from a foreign government” in exchange for performing work on the employee's “*own time*” (emphasis added)).

<sup>8</sup> *Amici* do not concede that such a commercial transaction would create “emoluments” for purposes of the Emoluments Clauses. See *infra* Part III.

the constitutional violation. Indeed, the United States could have no role in this remedy because it would not control the account in which the funds were deposited.

The same analysis applies to the Domestic Emoluments Clause, which provides that the President “shall not *receive* . . . any other Emolument from the United States, or any of” the states.<sup>9</sup> The President can violate this provision in his official capacity or through his private conduct. For example, if the President publicly “receive[s]” proscribed emoluments from a state pursuant to a federal government policy, or if the President uses federal government property in order to receive the emolument, he violates the Domestic Emoluments Clause in his official capacity.

On the other hand, if the President, privately “receive[s]” proscribed emoluments from a state without regard to any federal government policy, and without using federal government property, then he violates the Domestic Emoluments Clause through his private conduct. Consider another hypothetical in which the President opens up a lemonade stand outside of his private residence in Manhattan. A state legislature pays the President to make lemonade for its members at a cost of \$10,000,000.<sup>10</sup> In this scenario, the purported constitutional tort that

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<sup>9</sup> U.S. Const. art. II, § 1, cl. 7 (emphasis added).

<sup>10</sup> *Amici* do not concede that such a commercial transaction would create “emoluments” for purposes of the Emoluments Clauses. *See infra* Part III.

violates the Domestic Emoluments Clause is the President's *receiving* the emoluments, and not his making lemonade or delivering it to the members. The capacity determination does not hinge on whether the payment is made on the sidewalk outside his private residence, by electronic wire transfer, or even by a check mailed to the White House. If the President's act of *receiving* these profits was not facilitated by any federal government policy or property, then payment for the lemonade could not be challenged in court as an official-capacity action. If such a case were justiciable—for example, if Congress created a private cause of action—a court could order the President to disgorge the \$10,000,000 as a remedy from his private account, even for payments not yet received. The United States as sovereign could not provide any remedy, because its policies and property had no role in the constitutional violation. Indeed, the United States could have no role in this remedy because it would not control the accounts in which the funds were deposited.

**B. The Plaintiffs' Second Amended Complaint only concerns quintessentially private conduct, so it cannot be litigated by means of an official-capacity claim against the President**

While the President may “occup[y] a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties,”<sup>11</sup> the Chief Executive's duties

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<sup>11</sup> *Clinton v. Jones*, 520 U.S. 681, 697–98 (1997).

“are not entirely ‘unremitting.’”<sup>12</sup> Not everything the President does during his tenure is, *ipso facto*, an “official act[.]”<sup>13</sup> A line does exist between the President’s official conduct and his private, “unofficial conduct.”<sup>14</sup> Recently the Southern District of New York recognized this distinction in a related context: President Trump’s use of his personal Twitter account falls on the *official conduct* side of the line.<sup>15</sup> Why? Because the account’s “*present* use” by the President and his assistant (a federal employee) was “governmental in nature,” even though @realDonaldTrump, was created by “private citizen Donald Trump” before the inauguration.<sup>16</sup> However, consider a hypothetical where the President did not use the personal account for any “governmental functions,” and no one in his administration had access to it. In such a case, the Twitter account would fall on the *private conduct* side of the line, even if the President tweeted while sitting in the Oval Office. The distinction turns on the manner in which the Twitter account is being used.

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<sup>12</sup> *Id.* at 699 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)).

<sup>13</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). *Nixon v. Fitzgerald*’s identification of the “‘outer perimeter’ of [the President’s] official responsibility,” *id.* at 756, concerns the availability of the defense of absolute immunity; it is not determinative of the line between an official-capacity and an individual-capacity claim.

<sup>14</sup> See *Jones*, 520 U.S. at 705. Though *Jones* concerned “unofficial conduct” from before the President’s term in office, the Court’s analysis was not so limited.

<sup>15</sup> See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17 CIV. 5205 (NRB), 2018 WL 2327290, at \*16 (S.D.N.Y. May 23, 2018).

<sup>16</sup> *Id.*

A similar analysis applies to the Emoluments Clauses. The mere fact that the President accepted purported emoluments during his term in office, does not make those acts, *ipso facto*, official conduct. In no sense is Donald J. Trump’s acceptance of purported emoluments “governmental in nature.” And in no sense are the transfers made under the *color of law*.<sup>17</sup> Indeed, the facts alleged in the Plaintiffs’ Second Amended Complaint only concern quintessentially private conduct taken by Donald J. Trump.<sup>18</sup> It does make any allegations concerning the President’s official conduct. The alleged constitutional torts—accepting prescribed emoluments—can only occur through commercial transfers to the President’s personal accounts. These purported torts were not committed (if committed at all) pursuant to any formal or informal government policy, nor did the torts utilize any governmental property. These acts must fall on the *private conduct* side of the line.

Before the district court, twenty-one law professors filed an *amicus* brief in support of the Plaintiffs, in which they explained that “a judicial remedy that

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<sup>17</sup> See *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 308 (1941)).

<sup>18</sup> JA-78 at ¶ 252 (“Defendant is and will be *accepting* ‘present[s]’ or ‘Emolument[s]’ directly from—or from agents or instrumentalities of . . . ‘foreign State[s],’ without seeking or obtaining ‘the Consent of the Congress.’” (emphasis added)); JA-81 at ¶ 264 (“Defendant has *accepted* and will accept ‘Emolument[s]’ from the GSA and the National Park Service, instrumentalities of the United States.” (emphasis added)). Plaintiffs did not file suit against any entity in the federal government, including the General Services Administration, which manages the lease to the Trump International Hotel. As a result, the District Court lacks jurisdiction to issue a judgment against those agencies.



redresses the plaintiffs’ injuries would not require the President to take any action or decline to take any action in his official capacity.”<sup>19</sup> With respect to the Domestic Emoluments Clause, they wrote, “however the case is captioned,” the President would only need to “cease accepting emoluments from government clients,” which “are not official acts.”<sup>20</sup> They were absolutely correct. Any court-ordered relief would fall within Mr. Trump’s *personal* responsibilities. No bank check would (or could) be issued by the Treasury Department because the purported funds are not in the Treasury’s accounts. Likewise, because no action by the sovereign was taken to create the private commercial trust that currently controls Mr. Trump’s assets,<sup>21</sup> no sovereign action would be needed to, or could modify that trust in response to any court order. Yet, in a brief filed before this Court, a mostly-overlapping cohort of the same law professors made *no mention whatsoever* of the capacity question.<sup>22</sup> The Professors now likely recognize what the District of Columbia and Maryland<sup>23</sup> have

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<sup>19</sup> Brief of Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction as *Amici Curiae* in Support of the Plaintiffs at 13–14, ECF. No. 64-1, 2017 WL 7795996, <http://bit.ly/2LMg2Ld>.

<sup>20</sup> *Id.*

<sup>21</sup> Sheri Dillon et al., Morgan Lewis LLP White Paper, Conflicts of Interest and the President 2 (Jan. 11, 2017), <https://perma.cc/B8BU-X4U3> (describing creation and organization of President-Elect Trump’s trust).

<sup>22</sup> Brief for *Amici Curiae* Scholars of Administrative Law, Constitutional Law and Federal Jurisdiction in Support of Appellants and Urging Reversal, Appellate Docket, *CREW v. Trump*, No. 18-0474 (2d Cir. May 1, 2018), App. ECF No. 40, 2018 WL 2045604.

<sup>23</sup> During oral arguments, the District of Maryland referenced Tillman and JEP’s argument concerning the appropriateness of the official-capacity suit. Subsequently, the District of Columbia and Maryland filed an Amended Complaint to include a claim against the President in his individual capacity. *See* Brief for Scholar Seth Barrett Tillman and the Judicial Education Project

already realized in parallel Emoluments Clause litigation: “a public official could violate [the Emoluments Clauses] in *both* ‘official’ contexts, such as an ambassador accepting a formal gift from a foreign sovereign, *and* ‘unofficial’ ones, such as an officeholder performing a service [and accepting emoluments] for reimbursement in his or her spare time.”<sup>24</sup> The resolution of this capacity question depends on the manner in which the emoluments are accepted. Five of the attorneys who are counsel of record in *CREW v. Trump* also represent the District of Columbia and Maryland.<sup>25</sup> It is unclear whether these attorneys will take the same position before this Court, with respect to the capacity issue, as they took before the District of Maryland.

**C. President Trump in his official capacity did not cause, and therefore cannot redress, Plaintiffs’ alleged injuries**

The Plaintiffs’ decision to only bring suit against the President in his official capacity denies them standing for two reasons. Assuming that there is an “injury in fact,” Plaintiffs have failed to show that there is a “causal connection between the

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as *Amici Curiae* in Support of Neither Party with Respect to Motion to Dismiss on Behalf of Defendant in his Individual Capacity at 1, *DC & MD v. Donald J. Trump*, Civ. A. No. 8:17-cv-01596-PJM (D. Md. May 8, 2018) (Messitte, J.), ECF No. 114, 2018 WL 2159867, <http://bit.ly/2sb58Wn>.

<sup>24</sup> See Memorandum of Law in Support of Plaintiffs’ Opposition to Motion to Dismiss of Defendant in His Individual Capacity at 33, *DC & MD v. Donald J. Trump*, Civ. A. No. 8:17-cv-01596-PJM (D. Md. May 18, 2018) (Messitte, J.), ECF. No. 117, 2018 WL 2417891 (emphasis added); *id.* at 3 (“But the President’s acceptance of foreign and domestic emoluments via his hotel is not an official function of his office.”).

<sup>25</sup> *Id.* at 36 (including Norman L. Eisen, Deepak Gupta, Stuart C. McPhail, Daniel Townsend, and Joseph Sellers).

injury and the conduct complained of.”<sup>26</sup> Specifically, the “[P]laintiffs have never suggested that any act of” President Trump in his *official* capacity—the only named Defendant in this case—“has caused, will cause, or could possibly cause any injury to them.”<sup>27</sup> They have only alleged actions that related to quintessentially private conduct taken by Donald J. Trump, and only those actions could cause Plaintiffs’ purported injuries.

Second, the Plaintiffs have failed to demonstrate that their injuries could be “redressed by a favorable decision.”<sup>28</sup> Indeed, based on the facts alleged in the Second Amended Complaint, it will be *impossible* for the Plaintiffs’ purported injuries to be “redressed by a favorable decision.” Why? The consequence of the Plaintiffs choosing to only sue the President in his official capacity is that the District Court lacks the power to issue a judgment against the defendant in his private capacity.<sup>29</sup> A plaintiff lacks standing where the district court cannot “order [the defendant] to do anything in her *official capacity to redress* [the plaintiff’s] alleged injuries.”<sup>30</sup>

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<sup>26</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>27</sup> *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc).

<sup>28</sup> *Lujan*, 504 U.S. at 561.

<sup>29</sup> *See also Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (explaining that “a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity”).

<sup>30</sup> *Bishop v. Smith*, 760 F.3d 1070, 1089 (10th Cir. 2014) (quoting *Cressman v. Thompson*, 719 F.3d 1139, 1147 (10th Cir. 2013)) (emphasis added).

In this case, because the only named defendant is the President in his official capacity—that is, the United States as sovereign—the district court would only have jurisdiction to issue a judgment against the government, its policies, and its property. However, based on the factual allegations in the Second Amended Complaint, any relief that might redress Plaintiffs’ claims, should it be granted, must run against Trump *qua* the individual, and *his* personal property. Indeed, in this litigation, it would violate Donald J. Trump’s due process rights to issue a judgment against him in his private capacity, because Trump *qua* the individual was not served, not represented by personal counsel of his choice, and not able to mount any defense in that capacity.<sup>31</sup>

Often, *pro se* prisoners make an understandable pleading error, and neglect to sue a prison official in both capacities. But here, highly sophisticated Plaintiffs made a deliberate choice. The trial court record is now closed. Having chosen to sue the wrong party, Plaintiffs cannot establish the causation and redressability prongs of Article III standing: thus, the decision below may be affirmed on alternate grounds.<sup>32</sup>

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<sup>31</sup> See *Graham*, 473 U.S. at 168 (“Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense.”).

<sup>32</sup> In parallel Emoluments Clauses litigation, the Department of Justice has maintained that claims brought under the Foreign Emoluments Clause can *only* be litigated against an officer in his official capacity. Because there is no apparent adversity between the parties on this issue, *Amici* will seek leave to participate in oral arguments before this Court. See Motion for Leave, *supra* note 6, at 3–4.

**D. If Plaintiffs Eric Goode and ROC United are only partial owners of their businesses, they are not the real parties in interest**

In addition to legal questions concerning causation and redressability, there are also factual questions about whether the Plaintiffs have shown an “injury in fact.” Specifically, there is good reason to believe that two of the three remaining Plaintiffs—Eric Goode and Restaurants Opportunities Centers (ROC) United—are not the real parties in interest, and thus have not suffered any constitutionally cognizable injuries. In the Second Amended Complaint, counsel stated that Eric Goode is “the owner” of several hotels, and “owns” several restaurants.<sup>33</sup> In his Declaration, Mr. Goode stated he was “the owner of several hotels and restaurants in New York City, including the Bowery Hotel.”<sup>34</sup> However, in response to questions about his ownership stake, Mr. Goode admitted to the press that in fact, the Bowery Hotel “has 6 partners altogether and 4 managing partners which I am one of.”<sup>35</sup> In a subsequent letter to the district court, counsel stated that Mr. Goode only “has an ownership interest” in the Bowery Hotel.<sup>36</sup> Now, on appeal, counsel state that “Eric Goode *co-owns* several celebrated hotels in New York. . . .”<sup>37</sup> It

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<sup>33</sup> JA-26 at ¶ 18; JA-73–74 at ¶ 228.

<sup>34</sup> JA-294 at ¶ 1.

<sup>35</sup> Theodore Kupfer, *Watchdog Group Appears to Exaggerate Standing Claims in Trump Suit*, *National Review* (Nov. 10, 2017), <https://perma.cc/PUN2-CY6Q>.

<sup>36</sup> Letter addressed to Judge George B. Daniels from Deepak Gupta, ECF No. 102, at 1 (Dec. 1, 2017).

<sup>37</sup> See Brief of Plaintiffs-Appellants at 13, *CREW v. Trump*, No. 18-474 (2d Cir. Apr. 24, 2018), App. ECF No. 21, 2018 WL 1965685 (emphasis added).

appears that Mr. Goode is only a co-owner with equity interests in certain commercial entities, such as corporations or LLCs. If that is the case, only those entities—which suffered the purported injuries—can be the real parties in interest for the purposes of Fed. R. Civ. P. 17.<sup>38</sup>

Likewise, in the Second Amended Complaint, counsel stated that Restaurants Opportunities Centers (ROC) United “owns and operates the restaurant Colors in New York City.”<sup>39</sup> Based on a search of public records, Colors appears to have several principals other than ROC.<sup>40</sup> Now, on appeal, Appellants make no reference to ROC’s ownership of Colors, instead, apparently, relying solely on associational standing.<sup>41</sup>

This Court should not waste precious judicial resources by remanding the case to the district court for time consuming jurisdictional discovery with respect to these two plaintiffs. Instead, counsel for Plaintiffs should be asked to represent to this Court the precise ownership interests that Mr. Goode and ROC have in their respective businesses, and whether they were duly authorized to bring this suit on

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<sup>38</sup> See *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008) (explaining that “a shareholder generally cannot sue for indirect harm he suffers as a result of an injury to the corporation”).

<sup>39</sup> JA-29 at ¶ 28. See also JA-65 at ¶ 191; JA-71 at ¶ 213.

<sup>40</sup> *Public Query – Results*, New York State Liquor Authority, <https://perma.cc/5FDK-43HP> (last accessed May 31, 2018). See Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 5—Problems with the Complaints in CREW v. Trump*, Wash. Post (Oct. 1, 2017), <https://wapo.st/2LEpmjR>.

<sup>41</sup> Brief of Plaintiffs-Appellants, *supra* note 37, at 45 n.10.

behalf of the commercial entities when the case was filed. If they are not the actual real parties in interest, they should be dismissed from the case.

However, jurisdictional discovery may be appropriate for the third remaining plaintiff, Jill Phaneuf. During oral arguments on the motion to dismiss in the district court, counsel for Plaintiffs stated that Phaneuf’s “*only* job is booking events at these hotels in Embassy Row in Washington, D.C.”<sup>42</sup> Yet, Ms. Phaneuf told the press that she is a full-time employee of Friedman Capital, a private-equity firm, and attends law school at night.<sup>43</sup> She added that “[e]vent planning is a very large aspect of what I do and who I am,” but admitted it was not “a full- or part-time job.”<sup>44</sup> One month after counsel presented oral arguments, Ms. Phaneuf conceded that she still had not yet actually planned a diplomatic event.<sup>45</sup>

## **II. The Foreign Emoluments Clause does not encompass the Presidency**

The Foreign Emoluments Clause provides that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>46</sup> Plaintiffs asked the district court to find

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<sup>42</sup> Transcript of Proceedings, ECF No. 99 at 62 (Oct. 18, 2017) (emphasis added).

<sup>43</sup> *Exaggerate Standing*, *supra* note 35. See Jill Phaneuf – Associate, *Friedman Capital*, <https://perma.cc/PZ34-G3TF> (last accessed May 31, 2018).

<sup>44</sup> *Exaggerate Standing*, *supra* note 35.

<sup>45</sup> *Id.*

<sup>46</sup> U.S. Const. art. I, § 9, cl. 8.

that the “Defendant is a ‘Person holding any Office of Profit or Trust’ under the Foreign Emoluments Clause.”<sup>47</sup> Their argument has an intuitive appeal: How could the presidency not qualify as an *Office of Profit or Trust under the United States* for purposes of this anti-corruption provision? But an intuition is not a fully fleshed out argument, and it is not evidence. Plaintiffs, who bear the burden of persuasion, cannot point to a single judicial decision holding that this language in the Foreign Emoluments Clause, or the similar phrase “Office . . . under the United States” in other constitutional provisions, applies to the President. Rather, the text and history of the Constitution, and post-ratification practice during the Early Republic, strongly support the counter-intuitive view: The President does not hold an “Office . . . under the United States.” The weight of evidence—spanning from the colonial period to the American Revolution, then through the Constitutional Convention, to the First Congress, the Washington Administration, and finally into the Early Republic—

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<sup>47</sup> JA-83. The district court declined to make any finding with respect to whether the President holds such an office. JA-329 at n.2 (“That clause provides that certain federal government officials shall not receive any form of gift or compensation from a foreign government without Congress’s approval. . . . For purposes of this motion, Defendant *has conceded* that he is subject to the Foreign Emoluments Clause.” (emphasis added)). In fact, the government’s letter stated just the exact opposite: “the government *has not conceded* that the President is subject to the Foreign Emoluments Clause.” Letter from Department of Justice Counsel to Judge Daniels at 1, *CREW v. Trump*, Civ. A. No. 1:17-cv-00458-GBD (S.D.N.Y. Oct. 25, 2017), ECF No. 98 (emphasis added). DOJ’s representation is in conflict with the Office of Legal Counsel’s 2009 conclusion that the Foreign Emoluments Clause “surely” applies to the President. *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 O.L.C., 2009 WL 6365082, at \*4 (Dec. 7, 2009). See Motion for Leave, *supra* note 6, at 6–7 (explaining that “the Civil Division has, subtly, cast doubt on the Office of Legal Counsel’s opinion”).



demonstrates that elected federal officials, such as the President, do not hold an Office of Profit or Trust *under* the United States.

**A. The President does not hold an “office of Profit or Trust under” the United States**

The Framers of the Constitution, making use of the progenitor British drafting convention of “Office under the Crown,” used the phrase “Office . . . under the United States” to refer to *appointed* officers in all three branches of government.<sup>48</sup> That category did not include *elected* officials, such as the President and members of Congress.<sup>49</sup> This understanding, which thoroughly accounts for the Constitution’s divergent *Office*-language, is also consistent with the position advanced by prominent authorities, such Justice Story in his celebrated *Commentaries on the Constitution*.<sup>50</sup>

The Legal Historians as *amici curiae* contend that the President is subject to the Foreign Emoluments Clause. They explain that the Framers were concerned that the President could be bribed by foreign states, much like King Charles II was bribed by King Louis XIV as part of the so-called *Treaty of Dover of 1670*.<sup>51</sup> However, this

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<sup>48</sup> Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1—The Constitution’s Taxonomy of Officers and Offices*, Wash. Post (Sep. 25, 2017), <https://wapo.st/2ku11T3>.

<sup>49</sup> *Id.*

<sup>50</sup> See Motion for Leave, *supra* note 6, at 11–14 (discussing writings of Justice Story and David McKnight, who contended that the President did not hold an “Office . . . under” the United States).

<sup>51</sup> Brief of *Amici Curiae* Legal Historians in Support of Appellants at 4, *CREW v. Trump*, No. 18-474 (2d Cir. May 1, 2018), App. ECF No. 49, 2018 WL 2045608.

evidence undermines the Legal Historians’ position. The discussion of the Treaty of Dover at the Federal Convention arose during a colloquy over the Impeachment Clause, which *expressly* applies to the President.<sup>52</sup> During this important exchange at the Federal Convention, there was no mention of the Foreign Emoluments Clause. In contrast to the Impeachment Clause, the Foreign Emoluments Clause does not expressly encompass the President. The inference to be had from debates over corruption and the Treaty of Dover is that when the Framers wanted a clause to reach the presidency—they included express language to do so.

**B. During the Early Republic, Washington and his successors openly accepted gifts from foreign governments without seeking congressional consent**

President Washington and other founders who were his successors during the Early Republic openly *received, accepted, and kept* diplomatic gifts and other gifts from foreign government officials without seeking or receiving congressional consent. For example, in 1791, Washington received, accepted, and kept a diplomatic gift—a framed full-length portrait of King Louis XVI from the French ambassador to the United States.<sup>53</sup> In addition to the portrait, Washington also received the main key to the Bastille accompanied with a picture of that fortress,

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<sup>52</sup> U.S. Const. art. II, § 4 (“The *President*, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” (emphasis added)).

<sup>53</sup> *Amicus Brief*, *supra* note 4, at 14–15.

from the Marquis de Lafayette, who at the time was a French government official.<sup>54</sup> There is no evidence that Washington ever sought or received congressional consent to keep these valuable gifts. Moreover, Washington was not the only early President to accept and keep such gifts.<sup>55</sup>

What all these presents from foreign states had in common was that the presidential recipients believed (as best as we can tell) that keeping the presents had no constitutional implications under the Foreign Emoluments Clause. If Plaintiffs were correct, these presidents and others central to the founding of the United States of America openly committed impeachable offenses or were ignorant of the Constitution they helped draft and define. Washington's practice, and the practices of his successors during the Early Republic, of publicly *accepting* and *keeping* such gifts absent congressional consent, confirm that they understood that the President was not subject to the Foreign Emoluments Clause and its "Office . . . under the United States" language. The drafting practices of the First Congress and the official

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<sup>54</sup> *Id.* Lest anyone mistakenly believe that the key was a private gift from LaFayette to his friend President Washington, this gift was discussed in diplomatic communications from the French government's representative in the United States to his superiors in the French ministry of foreign affairs. See Letter from Louis Guillaume Otto to Armand Marc de Montmorin (Aug. 3, 1790), available in Centre des Archives Diplomatiques du Ministere des Affaires Etrangeres, Correspondances Politiques, 39CP, Volume 35, Microfilm P5982, pages 147–149.

<sup>55</sup> *Amicus Brief*, *supra* note 4, at 14–17 (discussing practices of Presidents Washington, Jefferson, Madison, and Monroe).

communications of Secretary Alexander Hamilton to Congress further support this position.<sup>56</sup>

**C. The Washington-Era precedents are superior to Post-Jackson evidence**

Counsel for Appellants and their *Amici* have written that the actions of Presidents Jackson, Van Buren, and Tyler suggest that they acted under the assumption that they were bound by the Foreign Emoluments Clause.<sup>57</sup> However, none of these Presidents personally accepted foreign gifts, or asked Congress for consent to do so.<sup>58</sup> In any event, such practices would have represented a sharp break from the traditions of President Washington and other founders who were his successors during the Early Republic. There is no indication that any of these later presidents were aware of the earlier precedents established by their predecessors—actors who took an active hand in framing the Constitution, ratifying it, and putting it into practice. Moreover, the first known instance when Congress consented to a President’s accepting a foreign gift occurred more than a century after the Federal

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<sup>56</sup> *Amicus Brief*, *supra* note 4, at 18–22. See Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 2—The Practices of the Early Presidents, the First Congress and Alexander Hamilton*, Wash. Post (Sep. 26, 2017), <https://wapo.st/2LBKI1q>.

<sup>57</sup> *Amicus Brief*, *supra* note 4, at 26 n.102.

<sup>58</sup> Josh Blackman, *Defiance and Surrender*, 59 So. Texas L. Rev. 157 (2018), <http://bit.ly/2kCx6XB> (“Presidents Jackson, Tyler, Van Buren, and Lincoln each received foreign gifts. However, none of these presidents sought congressional consent to accept these gifts—the precise action that would be required were the President subject to the Foreign Emoluments Clause. Rather, each president simply asked Congress to dispose of the gifts.”).

Convention: In 1896, *former*-President Benjamin Harrison sought permission to accept medals that were given to him by foreign governments during his term in office.<sup>59</sup> These later-in-time practices fail to establish anything close to “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”<sup>60</sup>

The Court might take the intuitive position that because they are all Presidents, and all Presidents have equal authority, then the latter Presidents ought to be preferred. However, the Supreme Court has taken just the opposite approach when it has been confronted with competing lines of historical precedent. *McPherson v. Blacker*, a seminal separation-of-powers decision, demonstrates that later historical practices (even if widespread) do not undercut the practices established by the political branches during the Early Republic.<sup>61</sup> This 1892 case considered whether Michigan voters could choose presidential electors based on their congressional district instead of on a statewide basis (the so-called “general ticket” approach). Because the text of the Constitution was, as Justice Thomas subsequently observed,

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<sup>59</sup> See Corrected Response of Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of the Defendant at 17–18, *DC & MD v. Trump*, Civ. A. No. 8:17-cv-01596-PJM (D. Md. May 18, 2018) (Messitte, J.), ECF No. 77, 2017 WL 6880026, <http://bit.ly/2ITpTRf>.

<sup>60</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

<sup>61</sup> 146 U.S. 1 (1892). In his string citation of canonical separation of powers decisions, Justice Breyer’s majority opinion in *NLRB v. Noel Canning* listed *McPherson* third chronologically, following *Stuart v. Laird* and *McCulloch v. Maryland*. See 134 S. Ct. 2550, 2560 (2014).

“ambiguous on this score,”<sup>62</sup> the *McPherson* Court resolved the case on the basis of practice. But not based on the majority practice that prevailed in 1892.

During President Washington’s elections in 1788 and 1792, and President Adams’s election in 1796, the “district” and “general ticket” approaches were utilized in a minority of the states, without any objection.<sup>63</sup> At that time, most state legislatures selected electors.<sup>64</sup> However, over the following three decades, the practice shifted in the United States. By the time Andrew Jackson was elected President, “most of the states [had] adopted the general ticket system.”<sup>65</sup> In 1892, only a handful of states still used the “district” approach, including Michigan.<sup>66</sup>

In *McPherson*, the Supreme Court rejected the challenge to Michigan’s law.<sup>67</sup> “While public opinion had gradually brought all the states” to “popular election by general ticket,” the Court acknowledged, “that fact does not tend to weaken the force of contemporaneous and long-continued previous practice when and as *different views of expediency prevailed*.”<sup>68</sup> The Court found “decisive” the practices of only a slim minority of states that, during the early years of the Republic, bucked the

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<sup>62</sup> See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 864, 904 (1995) (Thomas, J., dissenting) (quoting U.S. Const. art. I, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct....”)).

<sup>63</sup> *McPherson*, 146 U.S. at 29–31.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 42.

<sup>67</sup> *Id.*

<sup>68</sup> *McPherson*, 146 U.S. at 36 (emphasis added).

national trend and asserted the authority to select electors by district.<sup>69</sup> In the event that “there is ambiguity or doubt,” the Court noted, “or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight.”<sup>70</sup>

*McPherson* illustrates with precision why the gifts accepted by President Washington and founders who were his successors during the Early Republic are *far more* probative than gifts given to President Jackson and his successors. Indeed, while the “district” approach was a minority practice, President Washington *established* the very first precedents in regard to diplomatic gifts received by Presidents: this is akin to the majority practice. He *accepted* and *kept* diplomatic and other gifts from a foreign government and its officials without seeking congressional consent. Subsequent Jackson-era precedents cannot resolve the question of whether Presidents are subject to the Foreign Emoluments Clause. Rather, the uncontested practices of Presidents, including Washington, during the Early Republic resolve that issue.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 27.

**D. Purported defiance by Washington is more probative than voluntary surrender by Jackson**

The actions taken by Jackson, Van Buren, and Tyler, do not resolve whether they individually considered themselves bound by the Foreign Emoluments Clause: they never sought consent to personally accept and keep foreign gifts. But let's assume the facts were different. What if Jackson, Van Buren, and Tyler had sought congressional consent in order to personally accept foreign gifts? That is, they submitted to congressional oversight in regard to keeping gifts from foreign governments when their predecessors during the Early Republic did not. Among these two streams of authority, pre-Jackson and post-Jackson, the Washington-era precedents are more probative, because courts favor purported defiance over voluntary surrender of contested constitutional powers.<sup>71</sup>

**III. The term “emoluments” as used in the Emoluments Clauses does not extend to business transactions for value**

The President is not subject to the Foreign Emoluments Clause. He is, however, subject to the Domestic Emoluments Clause, which bars the President from receiving an “emolument” from the United States or any state in the Union.<sup>72</sup> Although the term “emolument” is now somewhat archaic, at the time of the

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<sup>71</sup> See *Amicus Brief*, *supra* note 4, at 28–29; William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 Const. Comment. 515, 533–34 (2004); *Defiance and Surrender*, *supra* note 58.

<sup>72</sup> U.S. Const. art. II, § 1, cl. 7.



Framing, it was widely used, and it had a settled meaning. As the Supreme Court explained in *Hoyt v. United States*, the term “emoluments” “embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office.”<sup>73</sup> Plaintiffs, however, read the Emoluments Clauses to prohibit the President from receiving “anything of value” through business transactions with the federal or state governments. Their position squarely conflicts with the precedent set by George Washington: he personally bought land in a *public* auction in the nation’s new capital while he was President.<sup>74</sup> Transactions are not emoluments. Mr. Trump’s business transactions for value do not constitute “emoluments.”

### Conclusion

Plaintiffs have sued the wrong defendant. Given that the proper Defendant has never participated in the proceedings below, Plaintiffs cannot satisfy the causation and redressability elements of Article III standing. Therefore, the district court’s judgment can be affirmed on alternate grounds. Alternatively, if this Court finds that the Plaintiffs have standing, and that the case is justiciable, the decision below can be affirmed for two reasons. First, the Foreign Emoluments Clause does not

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<sup>73</sup> *Hoyt v. United States*, 51 U.S. (10 How.) 109, 135 (1850). See *Amicus Brief*, *supra* note 4, at 4–9.

<sup>74</sup> *Id.* at 9–13. See generally Seth Barrett Tillman, *Business Transactions and President Trump’s “Emoluments” Problem*, 40 Harv. J.L. & Pub. Pol’y 759 (2017).

encompass the Presidency. Second, the term “emoluments” as used in the Emoluments Clauses does not extend to business transactions for value.

President Trump’s business activities may raise ethical conflicts under modern good governance standards, but they raise no constitutional conflicts under the Emoluments Clauses.

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Respectfully submitted,

By: /s/ Robert W. Ray  
Robert W. Ray, Esq.  
THOMPSON & KNIGHT LLP  
900 Third Avenue, 20<sup>th</sup> Floor  
New York, New York 10022  
Telephone: (212) 751-3347  
Email: [robert.ray@tklaw.com](mailto:robert.ray@tklaw.com)  
*Co-Counsel for Amicus Curiae Scholar  
Seth Barrett Tillman*

Josh Blackman, Esq.  
*Admission Pending*  
1303 San Jacinto Street  
Houston, Texas 77002  
Telephone: (202) 294-9003  
Email: [Josh@JoshBlackman.com](mailto:Josh@JoshBlackman.com)  
*Counsel of Record for Amicus Curiae  
Scholar Seth Barrett Tillman*

Carrie Severino, Esq.

*Admission Pending*

Judicial Education Project

722 12th St., N.W., Fourth Floor

Washington, D.C. 20005

Telephone: (571) 357-3134

Email: [carrie@judicialnetwork.com](mailto:carrie@judicialnetwork.com)

*Counsel for Amicus Curiae*

*Judicial Education Project*

### **Certificate of Compliance**

I hereby certify that this brief complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) because it contains 6,944 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

DATED: June 5, 2018

By: /s/ Robert W. Ray  
Robert W. Ray

**Certificate of Service**

I hereby certify that on June 5, 2018, I caused the foregoing brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the CM/ECF system, to be served on all counsel of record via ECF.

DATED: June 5, 2018

By: /s/ Robert W. Ray  
Robert W. Ray