

WHO HAS STANDING TO SUE THE PRESIDENT OVER ALLEGEDLY UNCONSTITUTIONAL EMOLUMENTS?

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INTRODUCTION

Two provisions of the U.S. Constitution that have received comparatively little public attention over the past 227 years are suddenly all over the news, having provided the basis for three pending lawsuits against the president of the United States. The Foreign and Domestic Emoluments Clauses arose out of the Founders' concern with corruption – in particular with the corrupting effects of gifts, payments, or benefits conferred on federal office holders either by foreign governments or their agents, or by any of the states constituting the United States.¹ The founders viewed the risk of corruption stemming from such payments as so serious that they included in the text of the Constitution itself two clauses prohibiting the receipt of such benefits. The Foreign Emoluments Clause prohibits the receipt of gifts or other benefits from any foreign power, by any officer of the United States, without Congress's express consent.² The Domestic Emoluments Clause provides that the president's salary shall remain fixed during his term, and that the president cannot receive any emolument other than his statutory salary, from any state government or any part of the federal government, during his term of office.³

The question the three new lawsuits raise is whether President Trump's continued ownership of a business empire that receives significant—and growing—payments from foreign government entities violates the Foreign

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1. For an extensive discussion of the history of the emoluments clauses, including the Founders' concern with meddling by foreign powers in the domestic affairs of the United States, see NORMAN EISEN ET AL., *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 3–4 (2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf. See also ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

2. U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them [i.e., 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.”).

3. U.S. CONST. art. II, § 1, cl. 7.

Emoluments Clause.⁴ Each of the pending lawsuits asks a federal court to declare that the president's continued ownership of his businesses— together with the receipt of foreign government funds by those businesses without Congress's consent—violates the Foreign Emoluments Clause.⁵ They thus ask the courts either to order the president to divest ownership of his businesses, or to enjoin those businesses from accepting foreign emoluments without Congress's consent, so long as the president retains his ownership stake. Two of the pending actions also assert that the president is unlawfully receiving *domestic* emoluments through his businesses, in the form of direct payments to, and waiver of zoning, environmental, or other legal requirements for, Trump Organization enterprises, and ask the courts to enjoin the president from accepting those emoluments as well.

The pending actions raise interesting and important merits questions in a little-discussed area of constitutional law.⁶ But before a federal court can

4. Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel Is Place To Be*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.3871136334d4 (quoting foreign diplomats announcing intention to shift business to Trump International Hotel); Jackie Northam, *Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions*, NPR (Feb. 25, 2017, 6:33 AM), <http://www.npr.org/sections/parallels/2017/02/25/517039323/kuwait-celebration-at-trump-hotel-raises-conflict-of-interest-questions>. In the first four months of 2017, profits at the Trump International D.C. were over \$4 million higher than the Trump Organization's projections, owing in part to room rates that averaged \$652 per night—fifty-seven percent higher than projected. See Jonathan O'Connell, *Trump D.C. Hotel Turns \$2 Million Profit in Four Months*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed_story.html?utm_term=.6331cf71901a (noting that the Trump Organization projected a \$2 million loss for first four months of 2017, but instead “is already turning a hefty profit,” driven by “the extraordinary prices guests have been willing to pay for rooms . . .”).

5. The first lawsuit was filed in January 2017 by Citizens for Ethics and Responsibility in Washington (“CREW”), and subsequently amended to include three additional plaintiffs—two individuals and a restaurant industry association, all of whom allege that they compete with Trump Organization properties for diplomatic and other foreign government business. See Second Amended Complaint, *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 17-cv-00458-RA (S.D.N.Y. filed May 10, 2017) [hereinafter “CREW Complaint”]. The second lawsuit was filed June 12, 2017 by the State of Maryland and the District of Columbia. Complaint, *D.C. v. Trump*, No. 17-cv-01596-PJM at 1–4 (D. Md. filed June 12, 2017) [hereinafter “State Complaint”]. The third lawsuit was filed on June 14, 2017, by 196 Democratic members of Congress. Complaint, *Blumenthal v. Trump*, No. 17-cv-01154 (D.D.C. filed June 14, 2017) [hereinafter “Blumenthal Complaint”].

6. The merits questions have been well-addressed by Michael Dorf, Marty Lederman, and others. See, e.g., Michael C. Dorf, *Trump Emoluments Argument Mirrors His “Just a Hope” Comey Defense*, TAKE CARE (June 14, 2017), <https://takecareblog.com/blog/trump-emoluments-argument-mirrors-his-just-a-hope-comey-defense>; Marty Lederman, *How the DOJ Brief in CREW v. Trump Reveals that Donald Trump Is Violating the Foreign Emoluments Clause*, TAKE CARE (June 12, 2017), <https://takecareblog.com/blog/how-the-doj-brief-in-crew-v-trump-reveals-that-donald-trump-is-violating-the-foreign-emoluments-clause>; EISEN ET AL., *supra* note 1. For arguments that the Foreign Emoluments Clause should be interpreted narrowly, see, e.g., Andy Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. (forthcoming 2017); Seth Barrett Tillman,

reach those questions, it must first address the threshold question of whether the plaintiffs that initiated these lawsuits are proper parties to raise these claims—whether, that is, they have Article III standing. The Supreme Court has never had occasion to address the question of who may enforce the emoluments clauses.⁷ It has not come up, because most presidents have had relatively simple asset portfolios, and, in recent decades, because all presidents have employed blind trusts or other mechanisms to ensure that their decisions as president could not be influenced by the possible impact on their own investments.⁸ But President Trump has departed from those practices, and the standing questions now require resolution. The plaintiffs' claims and personal stakes in these matters differ in significant ways, but the Court's jurisprudence on competitor standing, state standing, and legislative standing dictates that the plaintiffs in each action have alleged sufficient facts to establish Article III standing.

I. COMPETITOR STANDING IN CREW V. TRUMP

The first of the three pending emoluments actions was filed on President Trump's first full day in office, January 24, 2017, by the nonprofit organization Citizens for Responsibility and Ethics in Washington (CREW). It was later amended to add claims by two individual plaintiffs—Eric Goode and Jill Phaneuf—and a restaurant

Business Transactions and President Trump's "Emoluments" Problem, 40 HARV. J. L. & PUB. POL'Y 759 (2017).

7. For recent scholarly work on the justiciability of Emoluments Clause claims, see, e.g., Brianna J. Gorod, *Congressional Standing Is Not an All-or-Nothing Proposition*, TAKE CARE (June 19, 2017), <https://takecareblog.com/blog/congressional-standing-is-not-an-all-or-nothing-proposition>; Zachary Clopton, *Emoluments And Justiciability*, TAKE CARE (June 26, 2017) <https://takecareblog.com/blog/emoluments-and-justiciability>; Eric Segall, *Members of Congress Have Standing In The Emoluments Suit*, TAKE CARE (June 24, 2017), <https://takecareblog.com/blog/members-of-congress-have-standing-in-the-emoluments-suit>; Laurence H. Tribe & Joshua Matz, *Maryland and DC Have Standing to Sue Trump for Emoluments Violations*, TAKE CARE (June 12, 2017), <https://takecareblog.com/blog/maryland-and-dc-have-standing-to-sue-trump-for-emoluments-violations>; G. Michael Parsons, *Raines Check: Legislator Standing and the Separation of Powers*, TAKE CARE (July 10, 2017), <https://takecareblog.com/blog/raines-check-legislator-standing-and-the-separation-of-powers>.

8. See Cynthia Brown & L. Paige Whitaker, CONG. RESEARCH SERV., CONFLICTS OF INTEREST AND THE PRESIDENCY 2 (2016) ("Historical practice illustrates a relatively longstanding precedent of Presidents—including Lyndon Johnson, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush—who have voluntarily 'divested' their assets."); Editorial, *Donald Trump's Tangled Web*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/opinion/what-trump-can-do-to-eliminate-his-conflicts-of-interest.html> ("When Jimmy Carter became president, he put his relatively simple businesses—a peanut farm and warehouse—into a trust that gave an independent trustee the discretion to sell the warehouse and to rent out the farm without Mr. Carter's approval."); Ronald Reagan, *Announcement of the Formation of a Blind Trust To Manage the President's Personal Assets* (Jan. 30, 1981), <http://www.presidency.ucsb.edu/ws/?pid=44168>.

industry organization, Restaurant Opportunities Council, Inc. (ROC). Plaintiffs in the CREW action allege that the president has violated the Foreign Emoluments Clause by accepting, without the consent of Congress, various emoluments—in particular, profits from the use of Trump Organization hotels and restaurants by foreign officials. Plaintiffs seek two forms of relief: a declaratory judgment that President Trump’s acceptance of these benefits without congressional consent “violates or will violate the Foreign Emoluments Clause,” and an injunction ordering Trump to refrain “from violating the Foreign and Domestic Emoluments Clauses.”⁹

Plaintiffs allege that the Founders saw the Foreign Emoluments Clause as necessary to protect every American’s interest in avoiding official corruption. But that widely-shared interest alone would not support Article III standing, because it is a “generalized grievance” that afflicts the plaintiffs no more than every other American.¹⁰ Mere allegations that the defendant has violated the law do not suffice to establish standing to sue. Rather, in seeking to establish Article III standing, the plaintiffs must allege that they “personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,” and that the requested relief would likely redress their injuries.¹¹

The two individual plaintiffs and ROC allege standing under a “competitor standing” theory, and rely on a long line of Supreme Court cases holding that market participants have standing to challenge government action that gives their competitors an advantage in the marketplace. The Court “routinely recognizes probable economic injury resulting from [defendants’ actions] that alter competitive conditions as sufficient to satisfy the [Article III ‘injury-in-fact’ requirement].”¹² And where the altered competitive conditions were caused by the defendant’s conduct, and could be eliminated by a favorable court decision, the

9. CREW Complaint, *supra* note 5, ¶¶ 269 et seq.

10. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (noting that a plaintiff’s alleged injury that involves nothing more than “harm to his and every citizen’s interest in proper application of the Constitution and laws” generally is insufficient to support standing); *id.* at 577 (noting that if the Court were to “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts . . . [it would] transfer from the [p]resident to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’”).

11. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979)).

12. *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998) (quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* 13–14 (3d ed. 1994); *see also* *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (“[t]here can be no doubt but that petitioners have satisfied [Article III’s injury-in-fact requirement]” where they allege potential loss of profits and loss of customers to competitor).

causation and redressability elements of standing are satisfied as well.¹³ Thus, a plaintiff's business that faces a more difficult competitive environment due to the defendant's allegedly unlawful actions has standing to challenge those actions.¹⁴

The individual plaintiffs and ROC easily satisfy the requirements for standing under this line of Supreme Court cases. Plaintiff Eric Goode alleges that he owns and operates several high-end hotels and restaurants in New York City, and that he competes with Trump properties for diplomatic and other foreign government business.¹⁵ Plaintiff Jill Phaneuf alleges that she works as a hospitality booker for two luxury hotels in Washington D.C., and that her job includes booking "embassy functions and political functions involving foreign governments" and "functions for organizations that are connected to foreign governments."¹⁶ She also alleges that her compensation is directly related to the number and size of bookings that she makes, such that if her hotels lose business to Trump hotels her compensation will be reduced.¹⁷ Plaintiff ROC alleges that it operates several restaurants in Washington, D.C. that compete with Trump properties for foreign government business.¹⁸

In sum, the plaintiffs each allege all the requisites of a competitor standing theory: that they compete with President Trump's hotels and restaurants for diplomatic and other foreign government business "by providing the same or similar service in the same marketplace,"¹⁹ and that his unlawful acceptance of foreign government business has altered the competitive landscape by creating an incentive for foreign governments and their agents to shift business to Trump Organization properties, thereby depriving plaintiffs of the opportunity to compete for that business on a level playing field. The Plaintiffs' allegations are not merely speculative: they allege facts showing that foreign states have *already*

13. Wittman v. Personhuballah, 136 S. Ct. 1732, 1736–37 (2016); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–50 (2016); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386–88 (2014).

14. See, e.g., Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 482 n.4 (1998); Investment Co. Inst. v. Camp, 401 U.S. 617, 621 (1971) (noting that "[t]here can be no real question" of petitioner's standing to challenge a government action that exposed them to increased competition); Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 280 n.14 (1978) (in a different context, finding Article III injury because of a bar to compete on a level playing field and finding causation and redressability satisfied where Court order could level the playing field).

15. See CREW Complaint, *supra* note 5, ¶¶ 15, 221, 228–34.

16. *Id.* ¶ 15.

17. *Id.* ¶¶ 16–17, 221–227 Phaneuf also alleges that the Trump International Hotel hired an employee with responsibilities similar to hers after the election—an employee, that is, whose very job is to secure bookings with foreign states and officers thereof.

18. *Id.* ¶¶ 192, 198, 212, 220.

19. *Id.* ¶¶ 196, 223, 231. See also *id.* ¶¶ 15–17, 61, 221–227.

shifted business to President Trump's hotels and restaurants from competing hotels and restaurants, including those owned and operated by the plaintiffs.²⁰ Plaintiffs' allegations are sufficient to satisfy Article III standing.

The Department of Justice (DOJ), on behalf of President Trump, moved to dismiss CREW's Complaint on June 9, 2017, arguing that the plaintiffs lack standing. The DOJ brief argues that Goode and Phaneuf's asserted competitive injuries depend on speculation about how third parties not before the Court—namely, foreign governments and their agents—will allocate their hotel and restaurant spending.²¹ But this misreads the competitor standing case law. The Court has held that the intervening cause of potential customers' choices is no bar to standing in competitor standing cases.²² The altered competitive landscape *alone* is a sufficient injury to support standing because when the competitive environment is altered to favor a particular business, that conduct “almost surely injures” competing businesses “in one form or another.”²³

Discovery and perhaps summary judgment practice will reveal the extent to which the individual plaintiffs can back up their various allegations with evidence. However, at the motion to dismiss stage, plaintiffs' allegations must be taken as true,²⁴ and plaintiffs have sufficiently alleged facts that, if proved, would establish injury, causation,

20. *Id.* ¶¶ 15–19, 192 (alleging that “[a]s a direct result of [President Trump’s] refusal to avoid . . . violations of the Emoluments Clauses,” plaintiffs have suffered and will continue to suffer injury to their business due to loss of revenue from foreign government business, unless the court grants the relief sought).

21. See Memorandum of Law in Support of Defendant’s Motion to Dismiss at 19, Citizens for Responsibility & Ethics in Wash. v. Trump, No. 17-cv-00458-RA (S.D.N.Y. filed June 9, 2017) [hereinafter “DOJ Motion To Dismiss”] (arguing that the alleged injuries are “conjectural” because “[u]ncontrollable and unpredictable decisions by third parties are . . . a necessary part of any claim that Phaneuf and Goode will suffer any injuries in their hotel or hotel-events businesses”).

22. See, e.g., Nat’l Credit Union Admin. v. First Nat’l Bank & Tr. Co., 522 U.S. 479, 482–83; see also Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 280–81 (finding plaintiffs’ competitive injury redressable where the Court could eliminate plaintiff’s competitive disadvantage).

23. See *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

The form of [alleged competitive] injury may vary; for example, a seller facing increased competition may lose sales to rivals, or be forced to lower its price or to expend more resources to achieve the same sales, all to the detriment of its bottom line. Because increased competition almost surely injures a seller in one form or another, he need not wait until “allegedly illegal transactions . . . hurt [him] competitively” before challenging the regulatory (or, for that matter, the deregulatory) governmental decision that increases competition.

Id.

24. Defendant’s motion to dismiss contests whether Plaintiffs’ properties in fact compete with the Defendant’s properties, in part because his hotels and restaurants are allegedly better than theirs. See DOJ Motion To Dismiss, *supra* note 21, at 17. But such factual disputes cannot be resolved at the 12(b)(1) stage, and in light of plaintiffs’ expert declarations, they are unlikely to be resolved in Defendant’s favor at the summary judgment stage.

and redressability with respect to the president's acceptance of bookings by foreign governments and their agents at Trump Organization hotels and restaurants.²⁵

II. STATE STANDING

Maryland and the District of Columbia sued President Trump on June 12, 2017, alleging that he is violating both the Foreign and Domestic Emoluments Clauses, and seeking a judicial declaration to that effect, as well as an order enjoining further violations. The state plaintiffs' complaint presents several independent bases for standing, all but one of which would appear to be sufficient under Supreme Court precedent.

A. *Foreign Emoluments Clause*

The state plaintiffs allege that they have been, and will continue to be, injured by the president's violations of the Foreign Emoluments Clause, both in their sovereign capacities and their proprietary capacities. The doctrine regarding state standing to sue in federal court follows broadly similar lines to individual standing: states must show an injury, as well as causation and redressability.²⁶ But the Court has long "recognized that States are not normal litigants for the purposes of invoking federal jurisdiction"²⁷ and are "entitled to special solicitude in our standing analysis."²⁸ States may sue to protect either their sovereign interests, such as their interest in enforcing a state law or collecting tax revenue, or their proprietary interests, such as their interest in property or their contract rights.²⁹ The state plaintiffs in *D.C. v. Trump* assert injuries to both their sovereign and proprietary interests.

25. The other plaintiff in the CREW action—CREW itself—alleges standing on the theory that the president's conduct impairs its ability to accomplish its mission by diverting its limited resources into monitoring and counteracting the president's emoluments violations. CREW Complaint, *supra* note 5, ¶ 153. Michael Dorf has argued persuasively that CREW does have organizational standing. See Michael Dorf, *The Injury in the Emoluments Clause Case*, DORF ON LAW (Jan. 24, 2017), <http://www.dorfonlaw.org/2017/01/the-injury-in-emoluments-clause-case.html>. As a practical matter, however, CREW's standing may not matter so long as at least one plaintiff in the case has standing to seek each form of relief sought. See *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (reaffirming that Article III is satisfied so long as "[a]t least one plaintiff [has] standing to seek each form of relief requested in the complaint"); see also *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (holding that where at least one plaintiff has standing, court may proceed to merits and need not determine whether other plaintiffs independently have standing).

26. *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

27. *Id.* at 518.

28. *Id.* at 520.

29. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (holding that Puerto Rico had standing to challenge private discrimination against its citizens that violated federal law).

1. *Injury to State Sovereign Interests*

Plaintiffs allege that the president's violations of the Foreign Emoluments Clause have injured their sovereign interests in multiple ways. The clearest case for standing pertains to Maryland's allegations that the president's acceptance of foreign emoluments reduces business at competing hotels and other businesses in Maryland and thereby injures Maryland's sovereign interest in protecting its tax revenues.³⁰ Maryland's allegations of injury parallel the competitor standing allegations of the CREW complaint, with the added wrinkle that Maryland's injury derives from competitive harm suffered by any hotels or restaurants within Maryland, not only those in which Maryland has an ownership interest.

Plaintiffs allege that the Trump International Hotel in Washington D.C. is a direct competitor of hotels in the state of Maryland, and that those Maryland hotels "generate significant tax revenue for state and local governments" on the order of hundreds of millions of dollars each year.³¹ Plaintiffs further allege that the president's violations of the Foreign Emoluments Clause cause "competitive harm" to Maryland hotels by "tilt[ing] the competitive playing field toward [Trump's] businesses; caus[ing] competing companies and their employees to lose business, wages, and tips; and generat[ing] a range of market distortions that restrict and curtail opportunity, diminish revenues and earnings, and hamper competition."³² This incentive for foreign governments to shift business to Trump hotels, in turn, diminishes Maryland's tax revenues.³³

A 1992 Supreme Court case called *Wyoming v. Oklahoma* clearly establishes Maryland's standing under this theory.³⁴ In that case, the Supreme Court held that Wyoming had standing to challenge an Oklahoma law that allegedly reduced demand for Wyoming coal, and thus reduced the state's tax revenue.³⁵ Oklahoma's law required Oklahoma utilities to purchase ten percent of their coal from Oklahoma mines. Previously, Oklahoma utilities had purchased nearly all of their coal from Wyoming. The State of Wyoming challenged the law on dormant Commerce Clause grounds, arguing that it was injured because the law caused a reduction in demand for Wyoming coal and thereby reduced the

30. See State Complaint, *supra* note 5, ¶¶ 14, 103–09, 116–118.

31. State Complaint, *supra* note 5, ¶ 116. This basis for standing is asserted only by Maryland, of course. The District of Columbia does not claim injury to its tax revenue from the increased business at the Trump hotel in the District.

32. *Id.* ¶¶ 118, 114.

33. *Id.* ¶¶ 117–118.

34. 502 U.S. 437 (1992).

35. *Id.* at 448.

state's severance tax revenue. The Supreme Court held that this injury was sufficient to give Wyoming standing.³⁶

Maryland's claim against Trump is not meaningfully distinguishable from the claims in *Wyoming v. Oklahoma*. Like Wyoming, Maryland seeks to challenge, on constitutional grounds, the action of another government entity whose wrongdoing allegedly changed the competitive environment to the plaintiff's detriment. And like Wyoming, Maryland seeks to establish the requisite personal stake by alleging a loss of tax revenue resulting from a reduction in business for taxpaying entities within the plaintiff state. If such a loss of tax revenue gave Wyoming standing in that case, it should suffice to give Maryland standing here.

2. *Injury to State Proprietary Interests*

The state plaintiffs also allege injury to their proprietary interests as owners and operators of hospitality facilities in the Washington D.C. area that compete with Trump properties. Both Maryland and the District of Columbia allege that they own and operate multiple event venues that “serve[] the diplomatic community and foreign and state governments by providing services that compete with those owned or controlled by the defendant or the Trump Organization.”³⁷ Plaintiffs also allege detailed facts concerning: (1) an increase since the presidential election in events held by foreign governments at the Trump International Hotel in Washington D.C. and (2) public statements by multiple foreign officials that, “since the defendant was elected president, they are more likely to pay for goods and services at the defendant's properties” instead of his competitors' properties.³⁸ The plaintiffs allege therefore that President Trump's “receipt or acceptance of presents or emoluments,” through his hotel properties, “has resulted in a competitive injury” to the plaintiffs' competing properties.³⁹

The plaintiffs' standing allegations here are nearly identical to the competitor standing arguments made by the individual plaintiffs in the CREW case, discussed above, and they suffice to establish standing for the same reasons. The Supreme Court's competitive injury cases establish that, as proprietors of hospitality businesses that allegedly compete with Trump Organization properties, the state plaintiffs have standing on a competitor standing theory to challenge any unconstitutional conduct that

36. *Id.*

37. State Complaint, *supra* note 5, ¶¶ 121, 130–32.

38. *Id.* ¶ 127.

39. *Id.* ¶ 128.

injures them by forcing them to compete on a non-level playing field.⁴⁰

B. Domestic Emoluments Clause

The state plaintiffs also assert a claim under the Domestic Emoluments Clause, which prohibits the president from receiving “any other Emolument [beyond his salary] from the United States, or any of them” during his term of office.⁴¹ The clause was included in the Constitution to guarantee that no part of the federal government, nor any state, could either “weaken [the president’s] fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.”⁴² Unlike the Foreign Emoluments Clause, the Domestic Emoluments Clause is absolute—it does not permit Congress to consent to the president’s receipt of any domestic emolument. The clause is designed to “[shield] the states and the District of Columbia from undue pressure to provide emoluments to the [p]resident, and [protect] them from reprisal for any refusal to do so . . . [while safeguarding] the states and the District from unfair advantages” that other states may enjoy from “opportunities to curry favor from the [p]resident by providing emoluments.”⁴³

The plaintiffs allege that the president has already received emoluments from the federal government and from other states, including: payments from state governments and subdivisions thereof for the use of Trump facilities, investments by state pension funds in Trump Organization projects, and governmental benefits including tax credits, and waivers and other concessions with respect to environmental, zoning and land use protections.⁴⁴ Plaintiffs allege that these payments and benefits constitute prohibited emoluments, and that as a “direct result of these violations of the Domestic Emoluments Clause,” the plaintiffs have suffered, and will suffer, significant injury.⁴⁵ In particular, the president’s Domestic Emoluments Clause violations allegedly present Maryland and the District of Columbia with an intolerable dilemma:

[E]ither (1) grant the [Trump] Organization’s requests for concessions, exemptions, waivers, variances, and the like and suffer

40. See *supra* note 14 and accompanying text.

41. U.S. CONST. art. II, § 1, cl. 7.

42. THE FEDERALIST, NO. 73 (Alexander Hamilton).

43. State Complaint, *supra* note 5, ¶¶ 8, 107 (noting Founders’ concern that states or the federal government “might seek to buy off the [p]resident so that he would exercise power to their advantage and to the detriment of other states, thereby disrupting the balance of power in the federalist system”); see also EISEN ET AL., *supra* note 1, at 3–5.

44. State Complaint, *supra* note 5, ¶¶ 98–99, 107–09.

45. *Id.* ¶ 142.

the consequences . . . including lost revenue and compromised enforcement of environmental protection, zoning and land use regulations, or (2) deny such requests and be placed at a disadvantage vis-à-vis states and other government entities that have granted or will agree to such concessions.⁴⁶

This Hobson's choice leaves plaintiffs and other states "feeling compelled (or being compelled) to confer private financial benefits on the president in order to compete for influence and favor"—precisely the sort of injury that the Founders sought to prevent when they included the Domestic Emoluments Clause in the Constitution.⁴⁷

The state plaintiffs' case for standing is at its weakest on this claim. Standing requires that the plaintiffs' injury be "actual or imminent, not 'conjectural' or 'hypothetical.'"⁴⁸ Their alleged "governmental interest in not being compelled to compete improperly for influence or favor" is not supported by any allegation that the Trump Organization has actually asked them for any concessions of any kind.⁴⁹ Thus, they have not (yet) been pressured to "compete" with other states for the president's favor. Their assertions of injury appear to depend on future events that may or may not occur. Absent allegations of actual or imminent injury, the court will likely either deny standing as to the Domestic Emoluments Clause claim, or dismiss this claim as unripe.⁵⁰ If plaintiffs are able to allege, now or in the future, facts suggesting that they have actually been asked for emoluments, or that there is a substantial risk that they will be, their claim of injury would be sufficiently concrete to satisfy Article III standing requirements, but the initial Complaint contains no such allegation.

III. LEGISLATIVE STANDING

The third Emoluments Clause lawsuit was filed on June 14, 2017 by thirty United States Senators and 166 members of the House of Representatives.⁵¹ The congressional plaintiffs allege similar facts concerning President Trump's acceptance of emoluments as the plaintiffs

46. *Id.* ¶ 110.

47. *Id.* ¶ 107; *see also* EISEN ET AL., *supra* note 1 at 3–5.

48. *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

49. State Complaint, *supra* note 5, ¶ 107.

50. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013); *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.>").

51. *See* Blumenthal Complaint, *supra* note 5. The Blumenthal plaintiffs filed an amended complaint on August 15, 2017, adding five additional members of Congress as plaintiffs. *See* First Amended Complaint, Blumenthal v. Trump, No. 17-cv-01154 (D.D.C. filed Aug. 15, 2017).

in the other pending cases, but they allege a unique injury premised on Congress's constitutionally-prescribed role in reviewing and consenting (or not) to federal officers' receipt of foreign emoluments. In brief, the congressional plaintiffs assert that President Trump has injured them by nullifying their constitutional role in voting to grant or withhold consent to his receipt of foreign emoluments. Under the Supreme Court's legislative standing case law, these allegations provide a compelling basis for standing.

To establish legislative standing to assert an institutional injury, a litigant typically must allege the deprivation of a legislative prerogative, such as nullification of a vote or deprivation of the opportunity to vote on legislative business.⁵² In *Coleman v. Miller*, for instance, individual legislators alleged a deprivation of their right to have their votes on a proposed constitutional amendment counted in accordance with law.⁵³ The Court held that such nullification of the plaintiffs' votes injured them and that their "interest in maintaining the effectiveness of their votes" was sufficient to support Article III standing.⁵⁴

Similarly, the Court held just two years ago, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, that a state legislature had standing to challenge a state constitutional amendment that shifted authority for drawing congressional districts from the legislature to an independent commission. The challenged amendment "strip[ped] the Legislature of its alleged prerogative to initiate redistricting," which, the Court held, constituted a judicially cognizable institutional injury sufficient to give the legislature standing.⁵⁵

52. For a comprehensive discussion of legislative standing doctrine, see generally Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1 (2016). For other recent scholarship on legislative standing, see Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253 (2017) (arguing that legislative standing is inappropriate when Congress possesses legislative means of remedying its alleged injury); Tara Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014) (arguing that federal legislative standing is appropriate only in narrow circumstances); Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012) (arguing for greater participation by Congress in litigation over federal laws).

53. *Coleman v. Miller*, 307 U.S. 433, 435–40 (1939).

54. *Id.* at 438; see also *Raines v. Byrd*, 521 U.S. 811, 824–30 (1997) (rejecting legislative standing where no legislative prerogative had been eliminated).

55. 135 S. Ct. 2652, 2663 (2015). See also *id.* at 2665 (recognizing standing to challenge elimination of legislature's "prerogative to initiate redistricting" where challenged constitutional amendment "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future'"); *Coleman*, 307 U.S. at 433 (finding standing where legislators' votes allegedly had been unlawfully disregarded); *INS v. Chadha*, 462 U.S. 919 (1983) (recognizing Congress' standing to defend a legislative prerogative); *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979) (finding standing where president's unilateral action "deprived each individual Senator of his alleged right to cast a vote" on whether to terminate a treaty) (emphasis added).

The injuries alleged in *Blumenthal v. Trump* closely resemble those that supported legislative standing in *Coleman* and *Arizona State Legislature*. The congressional plaintiffs allege that, by failing to present proposed emoluments to Congress for consent, the president has deprived them of an individual legislative prerogative: the right to cast a vote on whether President Trump may accept a particular emolument before he accepts it.⁵⁶ Under the plain text of the Foreign Emoluments Clause, any federal officer wishing to accept a foreign emolument must first petition Congress for consent, and each member of Congress is entitled to cast a vote on whether to grant consent.⁵⁷ As in *Coleman*, where each member of the state Senate was entitled to have his or her vote properly counted, here, each plaintiff member of Congress alleges an individual right to receive information concerning proposed emoluments, and to deliberate, debate, and vote on whether to permit the president to accept them.⁵⁸ The president's failure to disclose his proposed emoluments to Congress, together with his acceptance of them without Congress's consent, completely eliminates that prerogative. Moreover, it effectively transfers to the president Congress's role as initial decision maker with respect to proposed emoluments. Such a transfer of legislative authority to another governmental actor is the one circumstance in which the Court has repeatedly permitted legislative standing.⁵⁹

This elimination of Congress's power, and of the individual members' power to consider and vote on proposed emoluments, make the claims in *Blumenthal* appear far closer to *Coleman* and *Arizona State Legislature* than to cases in which the Court has denied legislative standing, such as *Raines v. Byrd*.⁶⁰ In *Raines*, individual members of Congress challenged the Line Item Veto Act on the ground that it impermissibly transferred legislative power to the president. The Court first discussed *Coleman*, and reaffirmed its holding that individual legislators have standing to sue executive officials if their votes "have been completely nullified."⁶¹ The Court then held that plaintiffs lacked legislative standing because they had

56. Blumenthal Complaint, *supra* note 5, ¶¶ 71–77.

57. Members of the House and Senate have an individual right to vote on matters coming before those bodies. *See* U.S. Const. art I, § 3, cl. 1 ("each Senator shall have one Vote"); *id.* art I, § 5, cl. 3 (requiring the House and Senate to record "the Yeas and Nays of the Members" upon request of one-fifth of those present).

58. *Cf.* *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (noting that the power to legislate entails the power to gather necessary information from those who possess it).

59. *See Arizona State Legislature*, 135 S. Ct. at 2663 (finding legislative standing to challenge transfer of legislative power to another governmental actor); *Coleman*, 307 U.S. at 433 (finding legislative standing to challenge exercise by the executive of a power allegedly reserved to legislators).

60. 521 U.S. 811 (1997).

61. *Id.* at 823.

not been deprived of their opportunity to vote, now or in the future. Their votes against the Line Item Veto Act had been given full effect; the plaintiffs simply were outvoted by their colleagues when the Line Item Veto Act was enacted. Furthermore, the Court noted that the plaintiffs retained all of their legislative authority: Congress could simply exempt future laws from the Line Item Veto Act's coverage, and thereby redress its own alleged injury using the ordinary tools of the legislative process. The Court acknowledged that ignoring past votes and denying the opportunity to vote are both cognizable injuries, but held that neither harm had befallen the *Raines* plaintiffs. No vote had been nullified, nor any legislative power eliminated.⁶²

Here, in contrast, the plaintiffs allege that the president's failure to come to Congress seeking consent, or even to disclose the emoluments he accepts, has denied them any opportunity to vote on whether or not to consent. These allegations fall squarely within Supreme Court and D.C. Circuit precedent holding that legislators have a legally cognizable interest in preserving the effectiveness of their votes that is injured when they are deprived of the opportunity to vote.⁶³

Unlike *Raines*, there is no effective legislative remedy for this alleged injury. First, the president has allegedly failed to disclose his foreign emoluments to Congress—and the plaintiffs cannot vote on emoluments they do not know about.⁶⁴ And second, even if the plaintiffs were aware of a particular emolument, the president's alleged practice of accepting emoluments without consent has eliminated entirely Congress' power to decline consent by simple *inaction*. By requiring congressional consent *before* the president may accept an emolument, the Constitution gives Congress a robust power to reject a proposed emolument *without mustering any particular number of votes*; if either chamber simply fails to act on a proposed emolument, consent is denied. Thus, the Clause gives Congress a unilateral power to reject emoluments that it can exercise merely by *not acting*. The president's actions, as alleged in the *Blumenthal* complaint, have entirely eliminated that power. As things stand now, the only legislative power that Congress retains with respect to emoluments that have already been accepted by the president, is to affirmatively enact a law expressly denying consent—presumably by a veto-proof, two-thirds

62. *Id.* at 824, 830 n.11; *see also* Segall, *supra* note 7.

63. *See* Arizona State Legislature, 135 S. Ct. at 2663; *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir 1979), *vacated on other grounds*, 444 U.S. 996 (1979).

64. *Blumenthal* Complaint, *supra* note 5, ¶ 77 (alleging that the president's refusal "to seek Plaintiffs' consent as constitutionally required" has completely deprived the plaintiffs of the "opportunity to cast a binding vote . . . in the sense that they have no legislative power to exercise an equivalent voting opportunity").

majority in each chamber—or else to impeach. Either course of action requires a supermajority, and neither would give the plaintiffs what the Constitution entitles them to: the right to decide whether defendant may accept an emolument *before* he does so, and the power to deny such consent without taking any affirmative legislative action.

Thus, the president's conduct has injured the plaintiff members of Congress in three distinct ways. First, the plaintiffs have been deprived entirely of the opportunity to cast effective votes on whether to consent to proposed emoluments before those emoluments are accepted.⁶⁵ Unlike the “abstract dilution of legislative power” at issue in *Raines*, the injury alleged here concerns a specific legislative prerogative belonging to each individual member. Second, the president's alleged conduct has altered the significance of votes that the plaintiff members of Congress may cast in the future concerning emoluments.⁶⁶ By allegedly accepting emoluments without congressional consent, the president has made it impossible for Congress to block an emolument without a two-thirds vote of each chamber, and thereby reduced the effectiveness of each individual member's vote. And third, by accepting emoluments without congressional consent, the president has eliminated the power of individual members of Congress to delay or defeat bills that would grant consent. In both the House and the Senate, individual members have substantial power to delay proposed legislation, which is why it is—as President Kennedy famously noted—much more difficult to pass a bill in Congress than to defeat one.⁶⁷ Moreover, Senate rules give each individual Senator the power to filibuster proposed legislation. Thus, a single Senator, if sufficiently determined, can prevent a matter from coming to a vote at all.⁶⁸

In sum, the president's conduct has eliminated not only Congress' role as first mover in the emoluments process, but also the individual plaintiffs'

65. See *Arizona State Legislature*, 135 S. Ct. at 2663–65; *Coleman*, 307 U.S. at 435–40.

66. See *Arizona State Legislature*, 135 S. Ct. at 2665.

67. See Interview by William H. Lawrence et al. with John F. Kennedy, President of the U.S. (Dec. 17, 1962), <http://www.presidency.ucsb.edu/ws/?pid=9060>.

It is very easy to defeat a bill in the Congress. It is much more difficult to pass one. To go through a . . . subcommittee and get a majority vote, the full committee and get a majority vote, go to the Rules Committee and get a rule, go to the Floor of the House and get a majority, start over again in the Senate, subcommittee and full committee, and in the Senate there is unlimited debate, so you can never bring a matter to a vote if there is enough determination on the part of the opponents, even if they are a minority, to go through the Senate with the bill . . . [T]hat is an extremely difficult task.”

Id.

68. See *id.* (“[I]n the Senate there is unlimited debate, so you can never bring a matter to a vote if there is enough determination on the part of the opponents, even if they are a minority.”).

authority to cast binding votes on proposed emoluments before they are accepted. It has also, in the case of the plaintiff senators, nullified their power to filibuster bills that would grant consent to particular emoluments.⁶⁹

Some scholars have recently argued that the claims asserted by the congressional plaintiffs belong to Congress, not to individual members, and thus that only a majority vote by the full House and Senate could invoke legislative standing to assert these claims.⁷⁰ This view is based on a misunderstanding of the case law. First, the Court has never held that legislative standing requires the entire chamber to authorize a suit, and indeed, *Coleman* forecloses such a holding with respect to a claim that a legislator's right to cast a binding vote has been denied.⁷¹

Second, this argument misunderstands *Raines v. Byrd*. The *Raines* court said that it placed "some importance" on the fact that neither House of Congress had authorized the lawsuit – and indeed, that both chambers opposed the suit.⁷² That mattered in *Raines*, because the Court characterized the injury alleged as the "abstract dilution of [Congress's] legislative power" and not as a particularized harm to any individual

69. See, e.g., *Senate Legislative Process*, SENATE.GOV (last visited Sept. 16, 2017), https://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (noting that by Senate tradition, any Senator can place a hold on any piece of legislation and prevent it from coming to a vote and also has the right of filibuster on any proposed legislation); see also Grove & Devins, *supra* note 52 at 606–07 ("there is no question that individual Senators have considerable power to obstruct action within the chamber").

70. Professor Andy Grewal, for instance, has argued that the plaintiffs in Blumenthal are "individual legislators who don't have any individual injuries, [so] it will be hard for them to get standing" but that "Congress [could perhaps] sue as a body." Tom Hamburger & Karen Tumulty, *Congressional Democrats To File Emoluments Lawsuit Against Trump*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c_story.html?utm_term=.7f138739eca9 (quoting Professor Grewal); cf. Grove & Devins, *supra* note 52, at 574, 603–08 (arguing, in a different context, that congressional lawsuits generally require authorization from both chambers, except with respect to litigation concerning internal procedures of Senate or House).

71. To be sure, some legislative prerogatives can only be exercised by a particular institution—the Senate, for instance, or Congress as a whole. Legislative standing to assert such institutional prerogatives may well require participation of the relevant institution. See Hall, *supra* note 52, at 26. But no such requirement has ever been held to exist for individual prerogatives, such as the right to cast an effective vote. Moreover, as Eric Segall has argued, recognizing legislative standing here poses no "floodgates" risk. It would not entail allowing Congress to sue whenever they believed the president was acting illegally.

The claim that [Congress's] consent is necessary because the text requires it is different than a generalized claim that the [p]resident is acting illegally by failing to properly implement a congressional law or even that the law he is executing is itself unconstitutional (the case in *Raines*). In both of those cases, Congress could hold votes to cure the alleged illegality. That remedy is simply not possible in the emoluments lawsuit.

Segall, *supra* note 7.

72. *Raines*, 521 U.S. at 829.

legislators.⁷³ In contrast, the injury alleged in *Blumenthal v. Trump* is an injury to individual legislators, not to Congress itself. As in *Coleman* and *Arizona State Legislature*, the injury alleged is the deprivation of the right to vote on a legislative matter and to have one's vote counted. The power that is allegedly nullified is not the power to deny consent to any particular emolument; it is *the opportunity to vote on the question at all*, which is a right belonging to each individual member of Congress.⁷⁴ The plaintiff members have been injured because their constitutionally-granted right to vote on emoluments prior to their acceptance has been “completely nullified.”⁷⁵

Even if the Court were inclined to hold that legislative standing requires plaintiffs to show that they have sufficient votes to achieve a particular outcome in the legislative process, an outright majority would not necessarily be required to assert a Foreign Emoluments Clause claim. Any one of the thirty senator plaintiffs could satisfy such a requirement here, due to the Senate's rules and norms that give individual senators significant authority to prevent a bill from coming to a vote.⁷⁶ Recall that congressional consent to an emolument requires passage of a bill or resolution by a majority vote of both chambers. In the Senate, longstanding tradition permits a single senator to issue a “hold” on legislation, which effectively prevents it from coming to a vote, and Senate rules permit any senator to filibuster any proposed legislation.⁷⁷ Thus, President Trump's circumvention of Congress's role in consenting to his receipt of foreign emoluments has nullified an individual prerogative belonging to each and every senator: the power to filibuster any bill or resolution that would grant such consent.

In sum, the claims asserted in *Blumenthal* closely resemble those in *Coleman* and *Arizona State Legislature* in the most critical respect for establishing legislative standing: defendant's conduct has deprived the individual plaintiffs of specific legislative prerogatives. The Court has

73. *Id.* at 826.

74. The D.C. Circuit has held that lawmakers alleging injury by deprivation of a vote need not show how that vote would have turned out in order to establish standing. *See Goldwater v. Carter*, 617 F.2d 697, 703 (D.C. Cir. 1979) (“courts consistently vindicate the right to vote without first demanding that the votes when cast will achieve their intended end”), *vacated on other grounds*, 444 U.S. 996 (1979). Although the plaintiff in *Arizona State Legislature* was the legislature, the Court did not suggest that participation by the institution, rather than individual members, was necessary to establish legislative standing. 135 S. Ct. 2652 (2015)

75. *Coleman v. Miller*, 307 U.S. 433, 435 (1939); *see also Segall*, *supra* note 7.

76. *Cf. Jonathan Remy Nash, A Functional Theory Of Congressional Standing*, 114 MICH. L. REV. 339, 378–79 (2015) (arguing that congressional standing should require participation of a sufficient number of members to exercise the power allegedly nullified).

77. *See supra* note 63 and accompanying text.

never denied legislative standing in such a case.

CONCLUSION

Under a straightforward application of existing case law, plaintiffs' allegations in each of the three pending emoluments cases likely suffice to establish standing at the motion to dismiss stage, with the exception of the Domestic Emoluments Clause claim in *D.C. v. Trump*. If the plaintiffs are able to support these allegations with evidence sufficient to survive the inevitable summary judgment motions, the courts will be able to address the important substantive questions raised by plaintiffs' Emoluments Clause claims.