UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CITIZENS for RESPONSIBILITY and ETHICS in WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS (ROC) UNITED, INC., JILL PHANEUF, ERIC GOODE

Plaintiffs

v. 17 Civ. 00458 (GBD)
Motion

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

Plaintiff

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New York, N.Y.
October 18, 2017
10:30 a.m.

Before:

HON. GEORGE B. DANIELS
District Court Judge

APPEARANCES

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(In open court; case called)

THE DEPUTY CLERK: Would the parties please rise and state your appearances starting with the government.

MR. SHUMATE: Good morning, your Honor. Brett Shumate from the Department of Justice on behalf of the President.

THE COURT: Good morning, Mr. Shumate.

MS. LIN: Good morning, your Honor. Jean Lin from the Department of Justice on behalf of the President.

THE COURT: Good morning, Ms. Lin.

MR. GUPTA: Good morning, your Honor. Deepak Gupta for the plaintiffs. Sitting with me at counsel able are my colleagues Jonathan Taylor, Joshua Matz, Zephyr Teachout, Norm Eisen and Noah Bookbinder.

MR. SELLERS: Your Honor, good morning. Joseph Sellers also for the plaintiffs.

THE COURT: Good morning.

Let me start with the government. I will hear you, Mr. Shumate, with regard to your motion to dismiss.

MR. SHUMATE: Yes, your Honor. May I use the podium?

THE COURT: Yes, please use the podium.

MR. SHUMATE: May it please the Court, the Court should dismiss this case challenging the President's compliance with the Constitution Emoluments Clauses for three reasons:

First, these plaintiffs lack standing because their supposed injuries are nothing more than abstract disagreements

with the President and speculative fears about increased competition.

Second, the Court lacks jurisdiction to issue an injunction against a sitting President of the United States.

Third, these plaintiffs have not sufficiently alleged that a federal office holder violates the Emoluments Clauses by owning an interest in a company that does business with a foreign government.

Your Honor, the first question, as always, is whether any of the plaintiffs before the Court have standing. As we've explained in the briefs, none of these plaintiffs have standing because their alleged injuries are too abstract and are too speculative. If the Court were to find that any of these plaintiffs have standing, it is hard to imagine any plaintiff in the United States that would not have standing.

I'd like to walk the Court through our view of why these plaintiffs lack standing, starting with CREW and ending with the other three plaintiffs which we call the Hospitality plaintiffs.

First, starting with CREW, your Honor, they claim that they are concerned about the President's compliance with the Emoluments Clauses, that they are spending money to investigate that issue, and that they are diverting resources to bring this lawsuit. That is not a cognizable Article III harm for a couple of reasons.

First, it is an abstract harm. It is a generalized grievance shared in common with the entire public. And the case I would point the Court to is the *Schlesinger* case from 1974, a Supreme Court case, in which an organization dedicated to ending the war in Viet Nam brought suit alleging that members of Congress were violating the Constitution because they held memberships in the Armed Forces Reserve at the same time they were members of Congress. What these plaintiffs were concerned about is that these members of Congress were not faithfully discharging the duties of their office, and that they might be subject to undue influence by the Executive Branch. The Supreme Court said that this is an abstract harm. It is a generalized grievance shared in common with the entire public.

That's exactly what we have in this case with CREW: CREW is concerned about the President's compliance with the Emoluments Clause. And if you look at paragraph 154 of the Complaint, that's where CREW describes their alleged injuries. What they say is that they are concerned about the risk of foreign governments using money to improperly influence the President. They are concerned about the President's motives in making decisions and conflicts in violations that the public will have insufficient information to judge. That is an allegation that any member of the public could bring against the President and it cannot be sufficient to confer Article III

standing.

Now, CREW tries to get around this by claiming that they are spending money, and they are investigating the President's conduct, and they are diverting resources to focus on this particular issue; but that also is not enough because those are all voluntary decisions and self-inflicted harms.

The Supreme Court was quite clear in a case called *Clapper* in 2013 that a plaintiff cannot manufacture harm for Article III standing by inflicting harm on itself in the absence of a certainly impending injury.

That's exactly what we've got here. CREW is spending money. They are diverting resources to investigate the President's conduct. But those are all voluntary choices that this organization has made. To the extent they are suffering any injury at all, it is self-conflicted harm and that does not suffice under Article III standing principles. If we just walk through a couple allegations in the Complaint, we can see that these are all allegations that any member of the public could bring to allege Article III injury. Look at paragraph 155 of the Complaint. CREW alleges they are gathering information about the Emoluments Clause violations in responding to media inquires. Paragraph 156: Issuing press releases and statements. Paragraph 157: Doing legal research about the Emoluments clauses. And paragraph 159: Researching legal claims against the President and drafting the Complaint in this

lawsuit. These are all decisions that CREW has made to bring this lawsuit, and that is not a sufficient harm for purposes of Article III because any member of the public could do exactly what CREW is doing and manufacture Article III harm.

Now, CREW also tries to get around this by relying on a case called *Havens*. *Havens* standing is not available here because CREW puts the cart before the horse. Under *Havens*, a distinct injury must precede the diversion of resources. In *Havens*, what happened was there were racial steering practices at issue. What the Court said in that case is that the racial steering practices was causing a distinct harm to the organization. As a consequence of that distinct harm, the organization was diverting resources to counteract that harm, to avert the harm to the organization.

CREW has it exactly backwards because they claim that the diversion of resources itself is a distinct injury, but it is not. CREW is not taking that action to avert some harm to itself, to counteract some harm to the organization. They do not have members. They do not have clients, as the organization in *Havens* did. CREW is doing this on behalf of the entire public; and if CREW can do it, then any member of the public can do it. This case is just like *The Sierra Club* case in 1972 in which the Supreme Court said just a mere abstract interest in a problem is not enough to confer Article III standing. So, therefore, in our view, your Honor, CREW

does not have standing and should be dismissed.

Now, there are three other plaintiffs in the case, your Honor. We call them the Hospitality plaintiffs. What their allegations are, are that they are competing with the President's businesses. Their theory is that foreign governments are going to the Trump properties rather than their own, and that this is causing them some harm. They relied exclusively on the competitor standing doctrine, but this case would be a radical expansion of that doctrine far beyond anything the Second Circuit has ever recognized; and if these businesses who claim that they compete with the President's businesses have standing, it's hard to think of any business in Washington D.C. or New York City that would not have standing simply based on an allegation that they compete for the same pool of customers as the President's businesses. Here, again, all the plaintiffs allege is that they compete with the President's business, but that is not enough to confer Article III standing on an competitive standing doctrine theory because they can't show an increase in competition. This is not a case where the Court can infer a certainly impending Article III injury in the form of lost business really for two fundamental reasons:

First, is that the government is not taking any regulatory action in this case, that is skewing the competitive playing field. The classic use of the competitor standing

doctrine is a situation in which the government controls the market, and it is taking some regulatory action to skew the competitive playing field. For example, allowing a new market entrant or granting a tax subsidiary or granting a direct benefit to one competitor over another. But that is not happening in this case.

The President is not controlling access to the market. The President is a market participant, and it's not the type of case where the Court could easily infer an increase in competition or an imminent loss of business to any of these plaintiffs. Again, the President is competing in the market. He is not controlling access to the market. And this would be --

THE COURT: Why is that necessarily not consistent? One can be in the market and still control the market.

MR. SHUMATE: I don't think there is any allegation that the President is controlling the market, your Honor. In fact, it would be quite difficult for him to control the market. That is the other point I would make, is that the markets here are quite different than any other case that we have found in which competitor standing has been recognized.

These are highly excessive markets. There are thousands of restaurants in New York City, hundreds of hotels in Washington D.C. and New York City. And individuals make decisions about where to stay and where to eat for any number

of different reasons. It can be the location, the quality of the food, the quality of the hotel, the brand name. This is just not a case where you can easily infer that just because the President owns an interest in a business, that that is causing an imminent harm to any of these other competitors. Again, all they allege is that they compete in the same market, but these are highly diffuse markets with lots of different competitors. It's not the type of case where you've got two directly competing entities and the government is taking some direct action to allow a new market entrant or grant a subsidiary to one business over another.

THE COURT: Isn't the allegation a little bit more than they just compete in the same market. There are some specific allegations that they have lost business, business that they previously had; that that business has been lost to Trump entities. That is more than just being a competitor in business.

MR. SHUMATE: No, I don't think so, your Honor. I think they have not attempted to show an actual injury. They have exclusively relied on the competitor standing doctrine which necessarily requires the Court to make an inference, an inference of a certainly impending loss of business. And because of the nature of the market and the involvement of the government in the market, it's just not an easy case in which the Court can make that inference.

So let's take one of the plaintiffs, for example, Jill Phaneuf. She is an individual who lives in Washington D.C. and works for a company that books events at other hotels in Washington D.C. She does not own a property that competes with one of the President's businesses. She does not work for one of the properties that competes with the President's businesses. She works for a third-party company that seeks to book events at one of the properties in DuPont Circle. But she is asking the Court to make an inference that she is imminently going to lose commissions based on the mere fact that the President is involved in the market. That is quite a speculative leap. She is not alleging that she has actually lost commissions or she has actually lost business. In fact, she alleges that she has not booked an event for an embassy event at one of these properties, only that she desires to do so. So what she is asking the Court to infer is a certainly impending injury even though she does not own a business that competes with the President and she does not work for a business that competes with the President. She merely works for a booking company that seeks to compete in that same market. So, if Ms. Phaneuf has standing based on those allegations, it's hard to see how any individual who works in the hospitality industry in Washington and New York City would not have standing by making the same allegations.

Your Honor, even if you find that any of these

plaintiffs have standing, the Court should still dismiss the case for lack of jurisdiction for a second reason. That is because the Court lacks jurisdiction to issue an injunction against a sitting President of the United States. The Supreme Court held long ago in a case called *Mississippi v. Johnson* that a court lacks jurisdiction to enjoin the President in the performance of his official duties. That principle is still good law. The Supreme Court reaffirmed that in a case called *Franklin v. Massachusetts* in 1992. The Court said in that case, again, issuing an injunction against the President raises significant concerns under the separation of powers and the Court's involvement in Executive Branch functions. What Justice Scalia explained in his concurring opinion is that a court should hesitate before doing that because no court that we have found has actually issued a injunction against the President in a case where he is the only defendant, as he is in this case.

To be clear, this is not some ministerial action that the plaintiffs are asking the Court to could to enjoin the President. They are asking the Court to order the President to divest all of his businesses and for the Court to be in this court for many years supervising the President's businesses and reviewing the exercise of his judgment and discretion about how to divest those businesses. That endeavor is fraught with separation of powers concern for a court to be supervising be

the President's businesses, and is it is not something this Court should take lightly.

THE COURT: Why isn't that a question of remedy at this point? Injunctive relief is not the only remedy in a lawsuit. There's also declaratory relief. Those cases that deal with injunctions against the President don't control whether or not the Court should make a finding one way or the other but whether or not the President is violating the Emoluments Clause.

MR. SHUMATE: I respectfully disagree, your Honor. *Franklin v. Massachusetts* explains that declaratory relief raises same separation of powers concern as injunctive relief.

THE COURT: Not for the same rationale that you just gave. I don't have to monitor the President's conduct. Whether it is appropriate for this Court to take some action to prevent the President from being engaged in this activity is a different question. That could be Congress's role. That could be the Court's role. It may not be the Court's role. The President may voluntarily decide that he would comply. Why is that necessarily an issue that is one of whether or not this case should be initially brought as opposed to what would be the result of this case if in fact it were determined that the President was violating the Emoluments Clause.

MR. SHUMATE: Your Honor, you could look at this question in one of two ways: You could look at it as a

question of remedy or you could look at it as a question of redressability, which is an aspect of standing. If we are correct that the Court lacks jurisdiction to issue a junction or declaratory relief against the President, then the plaintiffs lack standing because the Court cannot remedy any of the supposed injuries that these plaintiffs have.

To your Honor's question about could the Court issue declaratory relief and not order the President to do anything, that sounds an awful lot like an advisory opinion that does not require the President to take any action. It is just a decision basically in the abstract. What the Supreme Court said in Franklin, or perhaps it was Justice Scalia in his concurring opinion, that that is still fraught with separation of powers concern because it pits two branches of government against themselves. Merely to issue declaratory relief raises the same concerns about injunctive relief.

Your Honor, even if the Court finds the plaintiffs have standing and it has jurisdiction, the Court should still dismiss the case because the plaintiffs have not sufficiently alleged that the President is in violation of the Emoluments Clause simply because he has an interest in a company that does business with foreign governments.

Now, the threshold question for the Court is what is the meaning of the word "emoluments." There are two interpretations before the Court. On the one hand, emolument

could mean profit arising from office or employ, as we argue. Or it could mean, as the plaintiffs argue, anything of value. Now, I'd like to first explain our interpretation of the word emolument and why it's rooted in the original public meaning of the word, a context in which the word appears in the Constitution, the historical understanding of that term. And I would also like to explain why it is a workable and common sense interpretation. Then I would like to explain why the plaintiff's interpretation, anything of value, is not a reasonable construction of the word emolument. But before I do, your Honor, I would like to just take a moment and identify the three uses of the word "emolument" in the Constitution.

First, there is the Foreign Emoluments Clause. I'll paraphrase here, but I'll do so accurately. It applies to a holder of any office of profit or trust, and it says that individual cannot accept any presents, emoluments, office or title of any kind whatever from any foreign government without Congress's consent.

Second, there's the Domestic Emoluments Clause, often also referred to as the Presidential compensation clause, and applies only to the President. It says that the President shall receive compensation for his services which can't be increased or decreased, and he cannot receive any other emolument from the United States, or any of them.

The third use of the word emolument is in what's

called the Incompatibility Clause which applies to only members of Congress. It says: No senator or representative can be appointed to any civil office if the emoluments have been increased during his or her time in Congress.

So, three uses of the word emolument.

What is our interpretation of that word? What does emolument mean? Well, in our view, it means profit arising from office or employ. Profit arising from office or employ. In the context of the Constitution what that means specifically is a benefit conferred in exchange for some personal service in an official or employment-like capacity. A benefit conferred in exchange for personal service in an official or employment-like capacity. That is the best reading of the word emolument for four reasons.

THE COURT: Why is it that complicated? If we start with the Domestic Emoluments Clause, it's clear that what it is addressing is the President's compensation. Why doesn't emolument mean compensation? Why isn't that the most direct, most accurate definition in its use in all three of these clauses? It's clear that in the Domestic Emoluments Clause they're addressing the salary compensation that the President should be able to obtain. That doesn't seem to be a complicated concept. It says that the President shall receive compensation for being President during his term which can't be reduced or increased during that term, and that he should

receive no other compensation from the federal government or any other state government.

Why do we need a more complicated definition of emoluments than that? It clearly means compensation. And in the context of the Domestic Emoluments Clause, it means the President's salary or any other compensation that he is provided for being President. Why is it more complicated than that?

MR. SHUMATE: Well, your Honor, compensation is certainly one type of emolument, but it is not the only type. At the time of the founding, there were many other types of emoluments that an officeholder might receive. It could be salary. It could be horses. It could be fines, forfeitures, penalties, any number of things. And so if you look at the Domestic Clause itself, it says, as you said, the President shall receive compensation for his services but not any other emolument.

If it only meant compensation, the founders presumably would have just said "no other compensation." But emolument can mean other things beyond compensation. And if you look at the Domestic Emoluments Clause, it says "of any kind whatever." What that clause means is that there are no exceptions to the types of emoluments that are excluded from the Foreign Emoluments Clause. So, again, emolument has a broader meaning than just compensation. It can be any benefit. But in our

view it has a specific context in which the benefit must be conferred, must be conferred in exchange for some personal service in an official or employment-like capacity.

THE COURT: When you say, "it must be conferred in exchange," it's unclear from the position that you take in the brief. Are you saying that that emolument must be paid with that intent or are you saying that it can't be an emolument unless it is paying the President for something he has actually done?

MR. SHUMATE: The latter, your Honor. The officeholder needs to be doing some personal service in his capacity as the officeholder or in an employment-like capacity.

THE COURT: Well, suppose the President doesn't follow through. Suppose a foreign nation says, "We'd like you to sign this treaty that's favorable to this nation. We will give you a million dollars if you sign the treaty." Can he accept a million dollars?

MR. SHUMATE: No, because that would be a present, your Honor.

THE COURT: You're saying that's not an emolument.

MR. SHUMATE: It would not be an emolument. That would be a gift given without consideration.

THE COURT: Clearly, from the foreign country's perspective, that is not giving without consideration. They are not giving him a gift. And obviously if he says, "No, I

will never do that," then it's not considered a gift to the President. It's difficult for me to understand that what the drafters of the Constitution meant is that it must be an executed bribe before it can become an emolument.

MR. SHUMATE: Our position is that there needs to be an exchange of some kind for it to be an emolument.

THE COURT: It can't just be a promise of some kind?

MR. SHUMATE: I think it would -- I would need to know the facts of the hypothetical, your Honor.

THE COURT: Well, there are only two sets of facts that I'm thinking about: One, the President would promise to do something in exchange for the money, or they would promise to give the President this money if he did what they asked him to do. So the question would be, on the day that they're proffering the money -- if they're proffering the money on Monday and the act that they want him to do doesn't happen until Friday, you're saying giving him the money on Monday is not an emolument?

MR. SHUMATE: I think if we look at the entire context in which the these --

THE COURT: That is the entire content.

MR. SHUMATE: If there is no personal service engaged in by the office holder, that would not be an emolument. There is no exchange involved. But if the office holder does carry through and take some personal service in an official capacity

or an employment-like capacity, in our view that would be an emolument.

THE COURT: That's why it's hard for me to understand that concept and where you get that concept from. If they say that we will give you a million dollars in January for you to do an act in September, you're saying that the President can take that million dollars in January because it's not an emolument?

MR. SHUMATE: Well, your Honor, in that situation it looks a lot like a present but that is far afield from any of the allegations --

THE COURT: It's not a present. They are not giving him this as a gift. They are giving this because they expect something in exchange, and that is clearly what the founding fathers intended to prevent. They didn't intend to punish the President for his taking bribes. They intended to have a prophylactic rule that would take away the potential conflict by the President taking titles and gifts and emoluments, payments from others.

I understand your argument that an emolument is not a gift. An emolument is some sort of payment for some act to be accomplished, but I don't understand your argument that unless and until the President does the act that they're paying him for, that he can take the money because it doesn't constitute an emolument.

MR. SHUMATE: Well, he couldn't take the money because it would be a present, your Honor. But to your larger point, the subjective intentions of the giver cannot matter. This is a bright-line test.

THE COURT: Well, what do you consider to be a present? You're keep saying it's a gift. If I say to you, if you come and work at the justice department, I will pay you, and I give you your first paycheck, and then you decide tomorrow, you change your mind and you want to work someplace else. Why is that a gift?

MR. SHUMATE: It's not a gift; that would be an emolument because the payment that you confer on me is an exchange for my services.

THE COURT: But you didn't start work yet, and you never did, and you changed your mind and you never worked there. That's what I'm saying, I don't understand the argument that somehow the President has to follow through; that what makes it an emolument is not the intent of the payment but whether or not the President satisfied the expectations of the giver of the emolument. I don't see anywhere where it is intended that a payment in exchange for a promised act does not constitute an emolument even under your definition.

If I say I'm going to give you something if you promise to do something for me. If I'm a foreign government, and I say I will give the President a million dollars if the

President will promise that he will sign this favorable treaty to us, your argument is, if he signs the treaty, later on it becomes an emolument. If he doesn't sign the treaty, then it's just a gift. I don't understand why that defines whether or not it's an emolument. Emolument should be the payment with the expectation that you're giving that payment in exchange for what you expect back, and whether or not that person breaches that agreement shouldn't define whether it's an emolument, should it?

MR. SHUMATE: Well, your Honor, I think it's helpful to go back to the original public meaning of the word emolument. Barclays defines emolument as profit arising from office or employ. Inherent in that definition is the concept of an exchange of some kind. Profit for one's labor.

THE COURT: I'm not sure I agree with that. What's inherent in there is an exchange of promises just like any other contract. That's not consistent with basic contract law. You can't say it's not a contract because one side didn't perform. It's still a contract.

So, if the President promises to do something, and they say, "If you do this, we will give you the money," hasn't he breached that contract if he doesn't do it, and isn't that money paid in exchange for the promise that he will follow through with the act that he promised to do? I don't understand why that's not an emolument.

MR. SHUMATE: I think what's missing in that hypothetical, your Honor, is some personal service provided in a official or employment-like capacity.

THE COURT: Provided rather than promised?

MR. SHUMATE: Correct.

THE COURT: So you say if the President says, "I promise to sign the treaty," that that's not an emolument.

MR. SHUMATE: Well, it would still be prohibited by the clause.

THE COURT: I know, but I'm putting aside the gift part of it because I am not even sure how that would fall into your definition of gift. As I say, if you say you're going to sell me your car for $10,000. I give you the $10,000 today, you say, "Show up tomorrow, I'll have the car." I show up tomorrow, and you don't have the car. How is what I gave you a gift?

MR. SHUMATE: It's certainly a situation -- still, if you keep the money, it is a gift given without consideration. There is no consideration exchanged in that circumstance.

THE COURT: Well, if you keep the money, how is that a gift? I'll go into court and sue you to get it back. I didn't gift it to you. As they say, everything that's logical is not reasonable. I understand the logic of what you're saying, but I don't understand the reasonableness of what you're saying that if I give you something in exchange for you agreeing to

commit an official act, why that is not an emolument; that you want to say that that's a gift if I decide that I'm not going to do it, or if I decide -- let me give you another example and see how far the limits are of what you say this argument is.

If a foreign government says to the President, "I will give you a million dollars to sign this favorable treaty," and the President says to his staff person, "You know what? I intend to sign that treaty anyway. Let's just take the money." Is that an emolument?

MR. SHUMATE: I would think it would be a gift, your Honor.

THE COURT: Which one of the parties believes that to be a gift?

MR. SHUMATE: Belief does not matter, your Honor.

THE COURT: Why do you believe that to be a gift?

MR. SHUMATE: Because it is something that is received without compensation. So either way --

THE COURT: Because I said, "Well, I only gave it to you because you said you were going to do something. If you didn't do it, I want it back." And the President says, "I'm not going to give it back." Does that still make it a gift?

MR. SHUMATE: It would follow it would either be a present or an emolument, your Honor.

THE COURT: It's not a present if I gave it to you -- as I said, if I said, "Sell me your car." It's not a present

if I give you $10,000 and you don't deliver the car, it's not a gift. There is no definition in logic or in law that defines that as a gift.

Now, if I said to you, "Oh, don't worry about it, I wanted to give you $10,000 as a present anyway. Keep the car." That's a gift. But if you promised to do something in exchange for that money, there is no definition in law that I know of that qualifies that as a gift.

MR. SHUMATE: Your Honor, all of your hypotheticals involve subjective intentions of the giver. This is a bright-line test. The clause says no presents and no emoluments. It's not a totality of circumstances test. It's not a subjective intentions of the giver. It's not an undue influence test. It's a bright-line rule. It is a present or emolument. Those words have to have different meanings. The plaintiffs give them the exact same meaning.

THE COURT: You give them a third meaning, that's what I'm saying. There's one meaning to say an emolument is a gift, and your argument makes sense that an emolument must be something other than a gift otherwise it wouldn't prohibit both emoluments and gifts. But your argument is that an emolument has to be given after the President has already done something that the emolument is compensating him for. I mean, if you go back to the Domestic Emoluments Clause, the reality is that's not even true of the Domestic Emoluments Clause.

If the President's salary is $400,000, if the President gets paid the first month, that doesn't mean it's not an emolument because he hasn't done the work for that month yet. If he says, "I'm taking next month off," that doesn't change the definition of whether or not it is compensation and is defined as an emolument. It's a little difficult to talk about it in the context of the presidency because who knows what is official or not official that the President does? Some would argue everything the President does is in an official capacity not because of the job he has but because of the status he has. Everything he says or does has an effect on world-wide events and on domestic and international events.

And then the other part of that, the logical question is, well, am I really supposed to go through that analysis? I mean, is anyone, even Congress supposed to go through that analysis of trying to figure out whether the President really did do something in exchange for the payment that he was given where it's clear as to what they expected of him? And if he did it, did he do it because of the money? If he didn't do it, does that transform it into a gift because they didn't get it back? What makes it a gift? If they demand it back or don't demand it back, does that change whether it's a gift or an emolument? Why should that analysis be gone through by anyone? The Emoluments Clause is basically prohibiting, as you say, both gifts and emoluments, so it doesn't matter, does it? He

can't take it. He can't take the money. And we know he can't take the money, and he can't take the money if it is a gift. He can't take the money if it is some compensation for something that they expect him to do.

This language is intended to be all inclusive. It basically says, look, you should not take anything of value from foreign governments unless Congress consents to it. Isn't that basically what the rule says? So what difference does it make? If you say that this is a gift instead of an emolument, it doesn't mean it's not still prohibited by the Emoluments Clause or at least by that provision of the Constitution, right?

MR. SHUMATE: But we have to find the original public meaning of the word emolument. It has to be different from the word present. At the time of the founding it's clear there are only two definitions: Ours, meaning profit arising from office or employ. Or theirs, anything of value. So the question is who's right?

THE COURT: I'm not sure that that is. We just talked about it. Under the Domestic Emoluments Clause, emolument seems to be compensation.

MR. SHUMATE: Well, compensation for his services which suggests both personal service in an exchange in the President's official capacity.

THE COURT: Well, compensation is always for services,

isn't it?

MR. SHUMATE: Which just proves our point; that the compensation or the emolument is an exchange for some service. The Domestic Emoluments Clause is an exchange for the President's services as President. Therefore, we would expect the word emolument --

THE COURT: So you say it is only compensation if in fact the President does what is expected of him.

MR. SHUMATE: No, because he holds the office. Because he holds the office, he gets compensation.

THE COURT: Right. So that is an emolument, whether he sleeps all day or whether he works all day, right?

MR. SHUMATE: That's correct.

THE COURT: It's still an emolument.

MR. SHUMATE: Because the emolument arises out of his office consistent with the original public meaning, profit arising from office or employ.

THE COURT: It doesn't arise out of his conduct, his doing something in exchange. It arises out of his office.

MR. SHUMATE: Correct. Let me give you another example of a situation where the President could not do something in an employment-like capacity, or any federal official.

So, for example, the classic case that would be covered by the Emoluments Clause would be the President agrees

to sign a treaty in exchange for compensation. Clearly, that would be a benefit, compensation, in exchange for some personal service in his official capacity, signing the treaty.

THE COURT: But that's inconsistent with what you already argued because you said he promised to do it. You didn't say he did it.

MR. SHUMATE: Well, he did it.

THE COURT: I'm trying to make sure I understand your argument. That's what I'm saying. It seems to me it does make sense what you just said. If he promised to do it in exchange for the money, he can't take the money because it constitutes an emolument, right? And you say no.

MR. SHUMATE: He could not take the money if he engages in some personal service in his official capacity.

THE COURT: As opposed to if he promised to engage in some official duty.

MR. SHUMATE: There would be some question whether that would be a present or an emolument, your Honor.

THE COURT: OK. we have to move past that, but I don't see the logic or the law in defining that as a present. I don't know of any situation that you could give me where one person promises to do something for a payment, and that is qualified as a gift if the person fails to do what they promised. I don't know any definition in law or logic that transforms that into a gift when you promise to do something in

exchange for the payment, I give you the payment, and you breach the agreement. That doesn't transform it into a gift.

You cannot walk into a courtroom and, say, "Oh, he can't sue me. He gave it to me as a gift." That doesn't work. There is no legal theory that supports the position that if there is an exchange of activity for payment of money, if the person pays the money with the expectation that the other person will engage in the conduct, and the other person fails to engage in the conduct, I don't know any legal theory or reasonable logic that says I gave you a gift. I just don't understand how you could make that argument.

MR. SHUMATE: Your Honor, maybe it would be helpful if I moved to history because the hypotheticals we're talking about are far afield from the allegations in the Complaint. The allegations in the Complaint are that the President is receiving emoluments because he holds an interest in a company that may do business with foreign governments.

But history is dispositively on our side because there is no discussion in the historical record that the framers had any concern about federal officials engaging in private business pursuits, much less any concern about a federal official holding an interest in a company that may do business with a foreign government.

Just to be clear, your Honor, the Domestic Emoluments Clause applies to any holder of an office of profit or trust

and likely would apply to any --

THE COURT: I'm not sure that's true. The Domestic Emoluments Clause deals with the President --

MR. SHUMATE: Correct.

THE COURT: -- and his compensation. There is a difference. Domestic Emoluments Clause is the activity of the President alone.

MR. SHUMATE: Correct.

THE COURT: The Foreign Emoluments Clause deals with other employees.

MR. SHUMATE: Correct. The Domestic -- excuse me, I'm sorry -- the Foreign Emoluments Clause says holders of an office of profit or trust, which would likely include judges, retired military officers, and members of Congress. So that whatever interpretation the Court reaches in this case would likely apply to every holder of an office of profit or trust, but there is no discussion in the historical record that the framers had any concern about private business pursuits.

In fact, it was common at the time of the founding for federal officials to be paid very low salaries or no salaries at all, and it was expected and commonplace to engage in a private business to supplement one's income. We know from the historical record that early presidents like Washington and Jefferson engaged in private business at the time they held the office.

THE COURT: But why should that necessarily be taken as the definition of emoluments? The way that it is written, particularly when we're talking about the Foreign Emoluments Clause, it doesn't say the President can't -- it doesn't say anyone can't do it. It says they can do it with Congress's consent. We're not talking about George Washington or Thomas Jefferson. At that time the fact that Congress did not react, did not find this of concern to them, was silent on the issue, why should that be taken as anything than Congress's lack of concern about the issue, or why shouldn't it simply be taken as Congress's implicit consent, that there were a lot more important things going on in the world at the time that they were concerned about, and they weren't particularly concerned about George Washington selling tobacco. Even if someone went to Congress and said, "We think this is an emolument. You ought to prevent it." They might have simply said, "Well, we don't care. We're not concerned whether it's an emolument or not. We have the power to consent and we're going to consent."

Why is that silence -- what is it in the history that defines emolument simply because they didn't raise any concern about George Washington's conduct, or why can't that be considered some implicit consent on their part that they did not consider this to be a concern and did not consider it something that they wanted to prevent? It doesn't mean they couldn't. I don't read anything that said Congress says, "This

is not an emolument. We can't stop the President from doing this, and we have no power to consent." I don't see that written any place. I don't see anybody saying that.

MR. SHUMATE: Your Honor, all of that proves my point; that nobody at the time of the founding up until this President ever understood the clauses to apply to forbid engaging in private business pursuits.

THE COURT: Well, that's interesting, and the way you characterize it in the abstract may be true, but let's go back to the treaty example. If a foreign government said to the President, "We'd like you to sign this treaty that's favorable to our country."

And the President says, "Well, you know, I can't."

And they said, "Well, we'll give you a million dollars."

And he says, "Well, you know, I can't accept emoluments for doing this."

And then they said to him, "Well, we know you own a hotdog stand. We'll buy a million dollars worth of your hotdogs."

Would you say that that can't be an emolument?

MR. SHUMATE: Well, at some point, your Honor, there may be extreme examples where something like that given--

THE COURT: We don't have to deal with the extreme examples. We have to deal with the more limited examples

because you want me to define it for all emoluments. So that either falls within the definition of emolument or it doesn't fall within your definition.

MR. SHUMATE: No, it would not fall in within our definition of emolument. It may in some cases fall within the definition of a present. If you give something, give a gift far beyond any reasonable market value, that might be a present in a particular case, but if it's just a business example --

THE COURT: The example I gave, you you're not arguing that that's a present.

MR. SHUMATE: In an extreme example it could be.

THE COURT: The actual example I just gave you, you're not arguing that that would be a present.

MR. SHUMATE: It potentially could be, your Honor.

THE COURT: How would it be a present? If they said, "We will give you" -- if they said, "We want you to sign this treaty, and if you sign this treaty we'll buy a million dollars worth of your hotdogs, so you could put a million dollars into the bank." How is that a gift?

MR. SHUMATE: I think I misunderstood the hypothetical.

THE COURT: OK.

MR. SHUMATE: So, if there is a benefit conferred, yes you have a benefit. If you have personal service by the President signing the treaty, that would be in his official

capacity, so it wouldn't matter if the payment is just funneled through a hotdog stand.

THE COURT: So it wouldn't matter whether or not it's a business transaction -- because the drafters of the Constitution probably understood that because they wanted to make sure that they said an emolument of any kind. So just because it's a business transaction doesn't necessarily mean that it can't be an emolument. Would you agree with that?

MR. SHUMATE: I would agree it would have to meet our definition, and in the hypothetical you provided, there would be a benefit conferred on the President in exchange for a personal service in an official capacity, signing the treaty. So I would be willing to concede if that definition is met, it wouldn't matter if the President were handed the money or if it were funneled through some business. But that is far afield from what the allegations are in the Complaint here.

The allegations in the Complaint here are that the President is engaging in ordinary business transactions not in exchange for anything, and we know from the historical record that early presidents participated in private business transactions. The Supreme Court said, the practices of the early presidents are entitled to significant weight.

What the plaintiffs want the Court to assume is that President Washington was a crook because he engaged in private business with the federal government in 1793. This is an

indisputable fact: That in 1793, President Washington purchased public lots from the federal government. Under their view, anything of value, President Washington received an emolument that would be prohibited by the Domestic Emoluments Clause. Under our definition, it would not be.

But nobody, like you said earlier, your Honor, nobody had ever understood and nobody was ever concerned about a President or a federal official engaging in private business. That is just not what the clause was intended to protect against. The clause was intended to protect against exchanging for personal services in an official capacity for some benefit. It was not intended to regulate private business conduct.

Another example that they cannot explain away is the 1810 constitutional amendment that was passed by Congress by a wide margin, ultimately was not ratified by two states, but what that constitutional amendment said was that any citizen that received an emolument from a foreign government would be stripped of their citizenship.

There is no discussion in historical record that they intended that constitutional amendment to strip the citizenship of any American engaging in business with a foreign government, foreign trade. That couldn't possibly be correct.

THE COURT: Well, there is no evidence that they ever ratified that. So it has absolutely no effect.

MR. SHUMATE: Well, it is significant, your Honor,

because this was still the founding generation. James Madison was the President at the time. It was passed by Congress by a wide margin. Ultimately, was not ratified by two-thirds of the state, but it is a significant historical example.

If their interpretation is right -- anything of value -- that a large majority of Congress of the United States intended to strip the citizenship of any American that received anything of value from a foreign diplomat on U.S. soil, that can't be possibly be right. xxx

THE COURT: But the state said that wasn't right. They would not ratify such a provision.

MR. SHUMATE: But Congress did. You have to assume under their theory that the founding generations were idiots for doing that, and that is not an assumption --

THE COURT: There are people on one side of the issue and there are people on the other side of the issue. How you want to characterize it is a definition. I don't know why people voted one way or the other, and I don't know how significant that is in terms of defining -- I'm not sure what you say should be taken from that; that means what about emoluments?

MR. SHUMATE: That if their interpretation is correct, then the founding generation reached an absurd -- passed an absurd constitutional amendment that would have restricted trade within the country. That would have stripped the

citizenship of any American that received anything of value from any foreign diplomat. No American can rent a room to an foreign diplomat on U.S. soil. That may have been a violation of international law at the time.

THE COURT: I'm not sure what you say that they were attempting to do.

MR. SHUMATE: They were attempting to prevent, I think, Americans from engaging in employment-like relationships with foreign governments. They didn't want divided loyalty. They wanted Americans to be working not for a foreign embassy on U.S. soil but working in some other capacity. That is a much more logical interpretation of what the founders intended.

THE COURT: Why does that define what the rules are? Why is that relevant to the rules for employees of the federal government? Just as you argued, this is an anti-bribery, anticorruption provision. This is not a provision primarily put into place for some competitive purpose, anti-competition provision. This has to do with making sure that your government is not corrupt.

What does that have to do with whether or not you strip a citizen who may or may not be a government employee of their citizenship particularly with regard to a provision that was never enacted into law? I'm not sure I understand what intent you say that that demonstrates on the part of Congress at the time that translates into their application of the

Emoluments Clause.

MR. SHUMATE: Well, the word emolument is used in both clauses, both provisions, and the constitutional amendment would have applied that restriction to any American, not just the holders of an office of profit or trust.

The point I'm making is that it shows the absurdity of the plaintiff's interpretation. If emolument means anything of value, then we have to assume that Congress by a large margin which involved members of the founding generation, intended to strip the citizenship of any American who received anything of value from a foreign government, and that just seems implausible.

If I can, I'd like to explain a few more points why the plaintiff's interpretation of the word emolument, meaning anything of value, is not a reasonable interpretation. The first reason is that it leads to redundancy in the clause itself. Again, your Honor, the Foreign Emoluments Clause lists four things: Present, emolument, office and title.

We give present and emolument different definitions. The plaintiffs give them the same definition. They interpret emolument to mean anything of value, anything of value.

THE COURT: Well, the way I read your papers is that you say that certain things are emoluments. If it's not an emolument, it must be a gift. They say certain things are gifts. If it's not a gift, it must be an emolument.

MR. SHUMATE: But their definition of emolument is anything of value.

THE COURT: Your definition of gift is anything that's not an emolument.

MR. SHUMATE: No, our definition of gift is a present given.

THE COURT: Well, a gift is anything that is not an emolument.

MR. SHUMATE: A gift is a present a gift given without consideration. An emolument is something different. I can't think of an example, but there may be something that falls within neither definition.

THE COURT: But every example I gave you was with consideration, and you said that that was a gift.

MR. SHUMATE: The promise in the hypothetical.

THE COURT: Right. That's not what you said to me. You didn't say if it's without consideration, it's a gift, because every example I gave you has consideration in it as we define it in legal terms. It is an exchange of promises which both parties are expected to be bound by, and that is legally the consideration.

MR. SHUMATE: I don't think the framers were concerned about an exchange of promises. They were concerned about some personal service being provided.

THE COURT: Well, I don't know why you would say that.

I don't know why it would be logical for them not to be concerned about an exchange of promises. Why they wouldn't naturally say to themselves, look, not only do we not want the President to take this money for things he does for foreign governments; we want him to not take this money for things he promises to foreign governments. Why would that not be the more logical reading of what they did here? They said "an emolument of any kind." Are you really arguing that what they meant to do is say, you could promise them anything you want. As long as you don't follow through, you can take the money. But that can't be what they intended. They were smarter than that.

MR. SHUMATE: Your Honor, that hypothetical is far afield from this case.

THE COURT: I know, but the problem is the reason why the hypothetical is far afield from this case is because you give me a rule that I'm trying to apply to the situations you say that they should be applied to. The rule you just gave me I can't apply to that situation. So that rule is not a workable rule. So the rule must be different than just, well, the President can promise anything he wants to a foreign government and then take money in exchange for those promises from foreign governments as long as he doesn't follow through with that promise or as long as they can't prove that why he did it was because of the money. That's not what they

intended.

MR. SHUMATE: Your Honor, let me tell you what would not be workable - their definition, anything of value. If they're right, if emolument means anything of value, no federal officer could hold stock in a company that receives income from a foreign government. No federal official could own Treasury bonds that pays interest from the federal government because that would be an emolument, something of value, received from the federal government. No official could receive royalties from the sale of books if a purchaser of that book happened to be a foreign government representative. No federal officer could receive a driver's license, a trademark, a copyright, a tax deduction. All of those things --

THE COURT: Wouldn't an extension of your argument be this, particularly parts of other argument. You argue that that is really a political question; that, look, they wrote the Constitution not to prohibit this for all time, but to say you can't do it unless Congress says it's OK. So the answer to that question, your answer to that question would be, no, as long as Congress says it's OK, it doesn't matter. It doesn't matter. They don't say that they're preventing the President from doing all these things. They're just saying that, "Look, if the other branch of government thinks that this is an emolument and decides that they are not going to consent, then you're going to have to rethink this."

MR. SHUMATE: That's exactly right. Only Congress can grant exceptions to the Emoluments Clause. But the plaintiffs grant their own ad hoc exceptions that don't fit their theory. They have these absurd situations that fall within the definition of emolument. They try to carve them out with ad hoc exceptions, but they can't do that because, as you said, only Congress can grant those exceptions. And Congress has granted exceptions in several circumstances, with the Foreign Gifts and Decorations Act grant and de minimis exceptions for circumstances, but the question is whether something is an emolument or not. It's not a totality of the circumstances test. It's a bright-line rule. Is this an emolument or is it not? And that is problem under their definition because anything of value sweeps in everything. Again, this clause applies to judges. It applies to retired military officers. Nobody ever thought that retired miliary officers could not engage in private business. That would be the consequence of their interpretation.

So, your Honor, respectfully, if you agree with our interpretation of the word emolument, the plaintiffs have failed to state a claim because there is no allegation in the Complaint that the President is receiving a benefit in exchange for personal service in his official capacity or in an employment capacity.

Your Honor, if I may reserve some time for rebuttal.

THE COURT: Surely.

Mr. Gupta, did you want to start?

MR. GUPTA: Good morning, your Honor. Deepak Gupta.

THE COURT: Let's take a short break. I want to take a five minute break. Our equipment may not be functioning properly. Take literally five minutes.

(Recess)

MR. GUPTA: Good morning, your Honor.

I'd like to address three issues. I would first like to start by explaining why the plaintiffs have standing.

Then I want to address the government's view that the president is above the law and the extreme suggestion that we just heard that the Court lacks even the power to declare what the law is with respect to the President.

Then I want to address the government's contrived reading of the emoluments clause, which would, as some of your Honor's questions suggested, transform a broad prophylactic anti-corruption rule into effectively a bribery prohibition, something that is elsewhere addressed in the Constitution.

And then I would like to turn the podium over to my colleague, Mr. Sellers, who will address the way, if the Court were to deny the motion to dismiss, we would approach discovery in this case, how we would try and litigate the case, and how we would approach the question of remedy.

So first, why the plaintiffs have standing. Now, most of the plaintiffs are proceeding under a theory of competitor injury, so I think it makes sense to start there.

The purpose of the emoluments clauses is to ensure that public officials do not profit at the expense of the citizenry. Now, of course that harms all citizens, but it uniquely harms competitors in the marketplace who are doing business with a public official who is profiting from that

office in the market. And that is why these plaintiffs are the ideal plaintiffs, along with CREW, to come forward and assert these violations.

Now, in the government's motion to dismiss, it largely alleges that the competition we claim is speculative; there are lots of restaurants and hotels in New York, in Washington, D.C., and so we can't possibly show competitor standing. But by the time of the reply brief, the government, faced with the unrebutted expert testimony that we've provided, from experts in the hotel and restaurant industries in New York and Washington, largely retreats into an attack on the competitor standing doctrine itself. Because they can't deny that we have standing under the law as it exists, they attack that law.

The competitor standing doctrine is a well-established doctrine. It comes from the Supreme Court. It's been recognized by the Second Circuit and by circuits around the country. And we cite over a dozen cases recognizing the doctrine and allowing standing in circumstances where the competition is much less substantiated than it is here, where you have competition, for example, in a national market and somebody shows that they participated in that market and there is some action either by the government or by a competitor that allegedly harms them.

Here, what we've shown is much more specific and much more direct. And, again, it's unrebutted. We have expert

declarations, experts on the hotel and restaurant industry, including the former dean of the Boston University hospitality school, who explain in detail why specific hotel and restaurant plaintiffs in this case are competing with the defendant's properties.

And so I thought it would be useful to give you just a few examples to show how concrete and how specific the competition is. So imagine that you are at a United Nations permanent mission here in New York. You want to plan an embassy function. You want to rent out a room. And you want it to be in a high-end restaurant in Midtown Manhattan, a restaurant ranked by Michelin as two or three stars. The number of choices you have at that point is down to a universe of seven restaurants. If you don't want sushi, you're down to four restaurants. One of those restaurants is Jean Georges at the Trump International Hotel in New York, and a few blocks away, one of those restaurants is The Modern, one of the ROC restaurants, under which ROC is asserting standing in this case.

So already the universe is very, very small, and we know that those restaurants compete for foreign government and domestic government business. If you go to Jean Georges, there is a prix fixe menu for $208. If you go to the Modern, there is a prix fixe menu for $208. The prices are the same, which shows not only are they in direct competition, but they show

that they are in direct competition.

If you want to hold an event downtown, again, for a foreign or domestic government and you want to do it at a hotel, let's say you are looking at the Trump Soho Hotel. The Trump Soho Hotel is four blocks from Houston Street. Another four blocks from Houston Street is the Bowery Hotel, owned by plaintiff Eric Goode. Condé Nast recently did ratings of hotels in New York. The Trump property was ranked 35. Eric Goode's property, the Bowery, was ranked 33. They have almost an identical raw score. If you wanted to book a room, a king-sized bedroom, at one of these hotels tonight, the price would differ by only one dollar. That shows again, these hotels are not just in direct competition, but they recognize that they are in direct competition. They have the bed spaces. They have meals they can offer. But what our clients can't offer is the ability to curry favor with the President of the United States.

THE COURT: Where do they get that right? If this isn't -- you don't have a claim for unfair competition -- and let's talk about first the zone of interest. That is not the intent of this provision of the Constitution. It is not an anti-competitive provision. It's not a provision to protect competition. It is an anti-corruption provision. So it's not intended to protect, provide a right specifically to protect individuals from competition. In fact, it really does very

little about that issue, because, as you indicated, you're only talking about asserting, under the provision, an injury that you say arises out of government -- U.S. and non-U.S. government patrons.

MR. GUPTA: Right.

THE COURT: I would assume that you have, all of the plaintiffs have a great number of individual claims. If most of the people in this room who don't work for the federal government decide they want to go to one of the other hotels, the President's hotel, because they would like to get his autograph or curry favor or whatever reason that they want to go to his hotel, this provision doesn't protect you from that unfair competition, that you can't compete with the President because the person who lives in Kansas and decides he wants to go visit Washington, D.C., decides, you know what, I've got two choices, I could stay at the plaintiff's hotel or I could stay at the President's hotel, you know what, he's the President right now, so let's go stay at the President's hotel. This provision doesn't protect any of the plaintiffs from that. Where do you get this into the zone of interest and where do you get this as the injury caused by his violation of the emoluments clause, when it's clear that, as they say, as unfair as the plaintiffs may think it is that they can't compete with the President's hotel because people are going to have that other incentive to go to his hotel or his restaurant rather

than theirs, the law doesn't protect them from that, and you don't claim the law protects them from that. So how is this within the zone of interest and how is this an injury that's caused by his violation of the emoluments clause, when they're going to suffer that injury anyway? It's not going to be less competitive in that regard. It doesn't eliminate or reduce the competition or patrons simply by saying a foreign government, or the U.S. government, under your theory, shouldn't be able to book into his hotel because of the emoluments clause.

MR. GUPTA: Sure. So, your Honor, you addressed a number of topics: the purpose of the clause, the zone of interest test, and also the issue of causation. So let me take them in turn.

First, I think you're right that this is a broad anti-corruption provision. That was the purpose of the amendment. It's pretty clear from the ratification debates and all of the history. It was a clause aimed at preventing officials from profiting at the expense of the citizenry.

THE COURT: That's too broad a statement. A lot of things are intended to do that. It's intended to do that in a particular way.

MR. GUPTA: That's right.

THE COURT: And the only way that it intends to do that, as articulated, is that it doesn't want foreign governments to influence a federal government official, not

just the President. And it doesn't want -- it was clear at the time, when there was great debate about these united states, it was clear at the time that they did not want particular states to have undue influence. They didn't want the state of Virginia to get more advantages because the President was from Virginia. That was the intent. It wasn't about whether or not the tobacco farmer who was in the market when George Washington was in the market was saying, well, wait a minute, that's the President, how am I supposed to compete against him? You're going to go over there and buy your tobacco from George Washington instead of buying it from John Doe. John Doe doesn't have a complaint under the emoluments clause.

MR. GUPTA: Right. So if I understand what your Honor is saying, I think it's basically right, that the clause had a purpose. The framers of the Constitution probably weren't thinking particularly about competitors, individuals when they drafted the clause. We've alleged a violation of the clause. And we have alleged that those violations harm us. I want to get to explaining exactly why that is. But your question is, even if you have all of that, how do you have a federal case if you're not within the zone of interest of the clause?

And I think you could ask the same question about the plaintiffs in the *Free Enterprise Fund*, where an accounting firm was alleging that the way that an accounting regulatory body was constructed violated the separation of powers. You

could have asked the same question in *INS v. Chadha*, where an immigrant who would have been sent out of the country was complaining that the way the law had been promulgated violated the bicameralism and presentment clauses in the Constitution. You could have said the same thing in *Bond v. United States* where a criminal defendant was complaining about Tenth Amendment questions. These are all examples where a litigant is invoking structural provisions of the Constitution.

And when the framers drafted those provisions, they weren't intending to confer particular rights. It's not alike a provision in the Bill of Rights. And what the Supreme Court said -- and I think the best case to look to this, your Honor, is *Bond* -- when you otherwise have a justiciable case or controversy, in other words, if you otherwise have plaintiffs, as we do under the competitor standing doctrine and the organization standing doctrine, who have been injured, who have a harm that they're pointing to, it's caused by the violations and the court can do something about it with either a declaration or an injunction, then you can hear that case and you don't ask, is this within the zone of interest.

Another case I would point to is the Supreme Court's recent decision in *Lexmark*, which makes clear that whatever else the court may have said in the past about the zone of interest test, that it's now largely a matter of statutory interpretation. And so if we were proceeding under a typical

statute and we weren't the sort of person Congress intended to proceed under that statute, then that question would be relevant. But it's not relevant here, where we're alleging a violation of a structural provision of the Constitution.

And I want to be clear; you're right that the President is also visiting his properties one out of every few days in office, he's promoting his properties, and there are a lot of folks who are going to be going to his properties because of that, and we can't do anything about that. That doesn't violate the emoluments clauses, because they're not foreign-government officials or domestic officials. But we are in competition with his properties for that government business, and it unquestionably harms us.

If you look at plaintiff Jill Phaneuf, who the government started with in their presentation today, her only job is booking events at these hotels in Embassy Row in Washington, D.C., that are with governments, either foreign governments or domestic governments. So she is unquestionably harmed. When the Trump International hotel hires --

THE COURT: She is theoretically harmed. She's not unquestionably harmed, because you have made no allegation that she has lost any business.

MR. GUPTA: I want to be clear about that, because I think that's a misstatement that the government made today, that I think is really important to unpack. If you look at the

competitor standing doctrine cases -- and I would especially recommend the *Traffic School* case, *Adams v. Watson*, and the *Canadian Lumber* case, what they explain is that you don't come into court with competitor standing and have to show lost sales, because of course that's often going to be very hard to do, whether it's an antitrust case or an unfair competition case. Instead what you have to show is that you are a competitor in the market with the defendant and that there is some advantage that the defendant is getting as a result of what you claim is illegal. And under those circumstances, there is a presumption that the plaintiff has been harmed.

THE COURT: Well, what is the assertion that she's a competitor in the market with the President? What is that fact? What is the fact that that conclusion would be based on?

MR. GUPTA: Well, we have other declaration where she explains that she is in this market.

THE COURT: Well, she explains what?

MR. GUPTA: She explains that her job is booking events for --

THE COURT: Right. That doesn't tell me she's in competition with the President.

MR. GUPTA: Well, with respect to the hotel and restaurant plaintiffs, we have expert declarations that explain in detail -- these are experts on competition in the hotel and restaurant industry. And they have explained, in detail, how

competition works in those industries and how you isolate all the variables, as I was doing with those restaurants in New York and the hotels in New York. It is undeniable that these businesses are in direct competition with one another.

THE COURT: Well, when you say that, that's not my analysis. My analysis is, is it undeniable that the President's restaurants are in competition with the plaintiff.

MR. GUPTA: Yes.

THE COURT: So what is it that I should extrapolate from the experts that's supposed to give me a factual basis to say that she is one of those in competition with the President?

MR. GUPTA: Right. Well, it's true that the expert declarations don't address her business to the same degree that they address the hotels and restaurants. But --

THE COURT: Well, to what extent -- just give me an example of what the experts say that would be a basis on which I should find that she is in direct competition with the President.

MR. GUPTA: Well, the experts explain that the Trump businesses, the Trump International Hotel in Washington and its restaurants, are seeking out government business, particularly foreign government business. You also have the allegations in the complaint which show that they have hired a director of diplomatic sales. They did a briefing for embassies where they sought their business.

THE COURT: Based on a factor like that, you could ask me to conclude that somebody who has a restaurant in Japan is in competition with the President.

MR. GUPTA: No, not at all, your Honor.

THE COURT: So wouldn't that advance her argument that she is a proper plaintiff because she has suffered a concrete and particularized injury?

MR. GUPTA: So what the experts explain is that not every hotel or every restaurant in the city are competing with one another, certainly not one in Japan. Instead, competition breaks down into a few factors, and they break them down. One is geographic proximity. The other is the class of the restaurant, the prices, the ratings by objective rating services.

THE COURT: She doesn't have a restaurant.

MR. GUPTA: No. She works for the Kimpton Hotels, which are high-end hotels in Washington, D.C., that are in Embassy Row. And those hotels attract foreign government business, just as José Andrés' restaurants, that are within three blocks of the Trump International Hotel -- these are very high-end restaurants, that have foreign government business. And that is explained in the declaration.

THE COURT: But if she is never -- if the President doesn't have one of her former customers, she can't say that she sought customer A and the President also sought customer A

and customer A went to the President. If she just says, well, you know, I do catering, so take all the experts' testimony and extrapolate from that that he must be taking business from me. I can't make it on that basis.

MR. GUPTA: I totally agree. There is a spectrum. And we are not saying, oh, we're just kind of in the same business. Nor are we saying, for every one of these plaintiffs you can point to a particular customer that the President took away. And if you read the competitor standing cases, they're all about this spectrum and where you draw the line.

THE COURT: So where does she fit on that spectrum?

MR. GUPTA: She is a competitor of the Trump --

THE COURT: Well, how? Tell me how she is a competitor.

MR. GUPTA: Because she is seeking to secure events at two high-end embassy hotels in Washington D.C. that have in the past had foreign government business and can be expected to continue to do so. Same thing with the restaurant --

THE COURT: That means, since this President, she has gotten less business, or you want me to extrapolate that she would have gotten more business than she was getting in the past had it not been for this President? How am I supposed to make that?

MR. GUPTA: If you read the cases about competitor standing, and especially I would recommend *Adams v. Watson*,

what they say is, in any case like this, like -- take a typical antitrust case where somebody is alleging monopoly competition, right, you walk into court. It's always going to be about a counterfactual world, right, your Honor. It's always going to be about what would have happened had this person not had legal monopolization, had they not been taking bribes. Imagine that I am a construction company and I am competing for construction contracts with the government, and somebody else's construction company is engaging in kickbacks or bribes. Now, can I prove that I would have got the contract had they not engaged in those kickbacks? I may not be able to prove that, certainly not at the pleadings stage.

THE COURT: But otherwise you would have to demonstrate that you are in fact in competition.

MR. GUPTA: Exactly. That's what we have to do.

THE COURT: So I'm trying to figure out in what way I am supposed -- if the experts say nothing about this plaintiff, make no conclusions about this individual plaintiff, am I supposed to take from that that everybody who is in the restaurant or hotel business who happens to be in D.C. is a potential plaintiff?

MR. GUPTA: No. No. I mean, for most of the plaintiffs, the experts have specific conclusions. I think you're only asking about Jill Phaneuf. But she is in some ways the most obvious, if you're just looking at the allegations in

the complaint, the most obvious competition, because the only thing that she does -- and her compensation comes as a percentage of revenue -- the only thing that she does is these kind of high-end embassy events at an Embassy Row hotel.

Now, we also have Eric Goode's hotels in New York, and I already discussed the Bowery Hotel. We have the Restaurant Opportunities Center, which is an association of hundreds of restaurants, including some very high-end restaurants in New York City, including one I mentioned and many in D.C.

So if you take a look at the expert declarations, which, again, are unrebutted, I think they more than show what we need at the pleadings stage.

And government hasn't pointed to a single case from anywhere in the country in which any court has tossed out a case proceeding on competitor injury standing where you have this kind of unrebutted evidence of direct market competition.

What they say in their reply brief is really an attack of the competitor standing doctrine itself. They say that we don't have standing because it relies on the actions of third parties, meaning buyers in the marketplace. Well, of course that's always going to be true in any competitor standing case. And the only case they rely on for that proposition is actually one where the alleged competitor that was being sued was doing worse than the plaintiff. So, you know, of course they don't have competitor standing.

And if I can, if your Honor doesn't have any more questions about competitor standing, I would like to turn to the *Havens* standing, which is CREW's standing. So CREW's standing is based -- and, again, the pattern is similar here. The government's arguments are really ultimately an attack on the doctrine itself, on the law as it's been established both in the Supreme Court and in the Second Circuit. The Second Circuit has been clear since *Havens* that there is a test for how you determine whether a nonprofit organization that is carrying out its established mission and has to divert resources as a result of alleged legal violations, have they got standing. And the test is, is there a perceptible impairment on their resources? In some of these cases, like *Nnebe v. Daus*, the Second Circuit has said, even if the impairment is scant, if the organization spent some resources through the course of the year because of those legal violations, that's sufficient.

So here you have CREW. It's an established organization. It's a nonpartisan group in Washington that is headed by the top ethics lawyer from the Obama White House and from the Bush White House? And what it does is conflicts of interest in government. It would be a complete abdication of CREW's established mission if, in the face of the unprecedented conflicts of interest, CREW did nothing.

THE COURT: Let's start with a basic proposition, a

legal proposition, and see if you agree with it. "An organization cannot manufacture an injury for the purpose of standing by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." Do you agree with that proposition?

MR. GUPTA: No. That's where the government goes astray. You've isolated exactly where they go wrong. And frankly they make that up.

THE COURT: They didn't make that up. I just quoted it from the Ninth Circuit.

MR. GUPTA: Right. But that's not the rule in the Second Circuit.

THE COURT: I understand that.

MR. GUPTA: They would like that to be the law in the Second Circuit. But the Second Circuit has consistently rejected that rule.

THE COURT: All right. But let me ask you this with regard to the rule. You don't meet that rule. You don't allege any injury other than the money you have to spend suing the President.

MR. GUPTA: Well, that's basically right. We allege -- no, no, it's not just suing the President. It's the

research activities that we've engaged in, the communications activities and legal activities that are not just this raw suit.

THE COURT: But you don't allege any other injury that's caused by the President's action to CREW, other than the fact that CREW is expending energy to fight and litigate this issue with the President.

MR. GUPTA: I would say it differently, but I don't want to punch you too hard.

THE COURT: You could say it differently, but I'm just trying to figure out where you're defining the injury. You're not claiming that CREW -- in most cases, the examples that we have are situations where a statute or some rule has put a burden on a particular plaintiff. And that burden is defined as the injury that the plaintiff has the right to sue about. You would agree that you don't have standing to sue simply because you don't like what's going on.

MR. GUPTA: Absolutely.

THE COURT: And you can't change it into standing by saying, well, it forced me to have to sue the person who was doing what I didn't like. That's not standing.

MR. GUPTA: That's not our theory of standing. Our theory of standing is just like the *CREW* case itself and the Second Circuit cases interpreting *CREW*. Some of those are constitutional cases like this one. They're not just statutory

cases. And in one of those cases, for example, you have an organization, what they do, their typical activity, consistent with their established mission -- this is the *Ragin* case, the leading case in the Second Circuit -- is to do information sessions for the community about housing discrimination, much like CREW's job is to put out information about conflicts of it with the government.

THE COURT: Well, CREW's job hasn't been, for the 200 years, to put out issues about whether the President violated the emoluments clause.

MR. GUPTA: If you define it at that level of generality, no. But that's only because, you know, I mean, the last White House, when they had an emoluments issue, they sought an Office of Legal Counsel opinion. Had that President been violating the emoluments clause, CREW would have been saying the same thing.

THE COURT: Right. But that's their choice. They're not forced to do that. That is their argument --

MR. GUPTA: That is their argument, yes.

THE COURT: -- that you can't simply say that they made a choice, that they disagree with it, so it's the President's fault that they have to put resources into trying to defeat him on this issue.

MR. GUPTA: You have accurately characterized their argument. And let me tell you what the problem with their

argument is. You could say the same thing about just about all of the *Havens* cases.

THE COURT: Well, no, that's not true. In most of the *Havens* cases you can't, if not all of the *Havens* cases, you can't say the same thing, because there is a direct injury that the organizations can point to that is a result of whatever independent action has been taken and not as a result of their simply saying, well, I want to sue them because I don't like what's going on.

MR. GUPTA: I don't think that's true. If you look at the *Ragin* case, for example, it's a housing organization. It put out information to the community about how to fight housing discrimination. And then this developer, that they hadn't been dealing with before, started putting out ads that the organization thought were racially discriminatory. And they diverted their resources to investigating that problem and counteracting it. And part of that included an effort to, ultimately, to challenge those practices in court. And the Second Circuit said you have standing.

THE COURT: But what the courts concentrated on was not the nature of the fight with the defendant. It was the nature of the consequences of the act by the defendant that they found, that the plaintiff had to respond to protect people's rights, individually, because what was being done was violative of those individual rights. And the only way to

vindicate that was to expend money that they would have used for another purpose. I'm not sure what you say that CREW is doing to protect whom, other than suing the President to prove that he is wrong.

MR. GUPTA: Oh, it's not just suing the President to prove that he is wrong. This is an organization that polices conflicts of interest rules. That's what it does. These violations came about. And they're fulfilling their established mission.

THE COURT: Right. But then this is part of their established mission.

MR. GUPTA: Exactly.

THE COURT: It's not diverting resources. They want to play police. If they're policemen, then they're going to -- you can't say, well, our role as policemen gives us the standing to sue anybody that we decide, as police, we want to arrest.

MR. GUPTA: Yes, that's right. But I think, if you look at the Second Circuit cases, like *Ragin*, like *Nnebe*, they fail the government's test. And that proves that that's not the law of the Second Circuit. If you look at the facts of those cases, you will not find some harm to those organizations that preexisted the distraction of resources. And the Second Circuit doesn't identify that as something that's required.

THE COURT: That's true. But the distraction of

resources is pointed to as something else other than the litigation. And the only thing I hear you saying about how CREW has been injured, in the way that they have been injured by diverting their resources, is that before -- somehow there is an injury separate from the litigation that amounts to some extra research that they had to do to figure out whether the President was violating the emoluments clause.

MR. GUPTA: Let me be much clear, then, because I misspoke if that's the impression that I left you with. So, for example, before the emoluments violations, CREW had put out 17 reports about money in politics, what they were doing. Since the emoluments clause violations, they have put out two. All of their research staff has had to be diverted to these issues.

THE COURT: Well, it didn't have to be diverted to these issues. They made a choice to divert them. That's the biggest distinction that I see in this case and the cases that you've cited, is the "has to" question.

MR. GUPTA: But it's not a distinction with the cases, right. In all of those cases you could have said, look, that organization didn't have to deal with those racially discriminatory ads, they didn't have to deal with what that housing developer was doing, they made a choice, because of the illegality, to do something about it.

THE COURT: No. But in each of those cases they

articulated a way in which they or their constituents were being harmed other than their diverting their resources to opine on this issue.

MR. GUPTA: I think it's important, if you go back to *Havens* -- you mentioned constituents, your Honor -- if you go back to *Havens*, the court rejected, in an alternative basis of standing, which would have been representational standing, that standing would have relied on the injury to members or clients or constituents. That wasn't the theory that the court adopted. The *Havens* theory that we're relying on is the injured organization itself and its distraction of resources. And it includes organizations, you know, in the Second Circuit's cases, like the New York Civil Liberties Union, like a mental health law clinic.

THE COURT: So any organization that is a, quote, good government organization, why couldn't they make the same argument and say, well, we're a plaintiff too? Why does that just make them a plaintiff, because they're a good government organization and they say, well, we've got ten things that are bad government, we're going to put out a report on nine of them, but we don't like this one, so we won't do our nine reports on this one, we'll do one report, and then we'll do nine other reports on emoluments? So why is that an injury?

MR. GUPTA: You could have said about the same thing about the New York Civil Liberties Union, which has a much

broader mission, and in that case was helping with First Amendment rights relating to taxicab proceedings in New York.

THE COURT: Right. But they were specifically taking action that would redress or benefit taxi drivers because of the circumstance that had been forced upon them. That's not this kind of situation. It's clear that the harm is not an individual harm that they are trying to redress on behalf of any other representative or individual plaintiffs, who have to respond to what the President is doing because they've been harmed, in and of itself, by what the President is doing. They're not taking that position. There are others who are taking that position. But CREW is not taking that. CREW is not -- I don't know who has ever thought about the emoluments clause before this. Most people have not. So I don't know what made CREW, forced CREW, how did the President force CREW into suffering all of this expenditure of resources simply because they want to pick a fight with the President?

MR. GUPTA: Right. Well, believe it or not, CREW is an organization that has people that are experts in these clauses. They have government ethics lawyers who dealt with this as a matter of practice within the government. So if any organization is going to be well situated to address this problem, it's CREW.

I think your Honor understands the arguments on CREW's standing, and I think you understand the objections from the

other side. They are arguments that could be made in the Supreme Court, in a higher court, about whether to limit *Havens* standing, but as the standing doctrine has been developed in the Second Circuit, I think we fall squarely within that doctrine.

And so unless you have other questions about *Havens* standing, what I would like to turn to is the argument that we heard from the government this morning, that this Court lacks the power to issue relief against the President.

THE COURT: Well, the only other thing I wanted to address, before you get there, or after you do that, is still the question of causation. If there's still an anti-competitive effect by the President being able to appeal to patrons who may want to come his restaurant and hotels instead of the plaintiff, and that is going to occur, no matter what, how do you trace that as an injury caused by a violation of the emoluments clause, when they will have to suffer that injury regardless?

MR. GUPTA: I think you're asking a question about causation and redressability, right?

THE COURT: Yes.

MR. GUPTA: And so causation, the competitor standing cases explain this. Take an example, an easy example that's sort of an abstract unrealistic one. Imagine that there are only two companies in a market. And one company is doing

something anti-competitive and illegal. It's obvious. Nobody in their right mind would deny, you don't have to have a Ph.D. in economics to know that that's going to harm the other person in the market and they can sue. So the relevant question becomes what's the market and how diffuse can the market be. And so you have competitor standing cases like the *Association of Data Processing* case from the Supreme Court where it's a national market, and the Supreme Court says, they're all in the same market, this might harm you, good enough. What we have here is much more granular. We've shown competition in the same market. And what these cases -- and I point to the *Traffic School* case. That was a case where you had companies that ran online training programs, driving schools, and one of the schools, the defendant, was claiming an affiliation with the government. Now, the plaintiffs couldn't prove that they had lost, at least at the pleadings stage, couldn't prove that they had lost specific sales. But what the court said is that, you know, you've shown that you're competing in the same marketplace and the laws of economics are such that that is a competitive harm. And that competitive harm is an actual harm you're suffering.

THE COURT: But the laws of economics doesn't support a conclusion that the competitive injury, as I'll call it, is caused by the violation of the emoluments clause, when we know that that competition, competitive injury, is going to have to

be suffered in any event, because the emoluments clause doesn't decide who gets to patronize your hotel.

MR. GUPTA: No. I think the point is you have to look at the relevant conduct. And the conduct is that the defendants' properties are receiving payments from foreign governments -- and you don't have to speculate about this, your Honor; we have allegations in the complaint that are specific about this -- where if diplomats are bragging that they're going to the President's hotel to curry favor with him, if you were in that marketplace and your job was to try to get diplomatic sales, you've lost sales because people are making those payments that are prohibited by the Constitution.

THE COURT: I'm not sure I can articulate it that way. You've lost sales because the President of the United States is in this business. That's why you're losing sales. Because you're losing sales even if you're not violating the emoluments, even if he's not violating the emoluments clause. So the loss of sales is not directly attributable to the emoluments clause. The loss of sales is attributable to the fact that he is now the President and people want to patronize, for whatever reason, they want to patronize his facilities rather than your facilities. To trace the injury, the injury would have to be more accurately characterized as an injury that is suffered because he is now the President, not an injury that is suffered because he's violating the emoluments clause,

because even when he's not violating the emoluments clause, you're still suffering that injury.

MR. GUPTA: To be perfectly precise, the relevant market is the market for government business, for foreign government business, for domestic government business.

THE COURT: Why is that the relevant market? Only because that's the only one that fits into the emoluments clause? Why isn't the relevant market the patrons who patronize the hotel?

MR. GUPTA: No, because that's where the alleged legal violations were. If this was a regular commercial case and you had two competitors and you were alleging the kind of kickback scenario I described earlier, let's say I sell to different kinds of -- I do all sorts of construction jobs, right, but the relevant market between the two competitors, if you were trying to determine whether there was standing, would be their competition for government business, let's say in Rhode Island, OK, where those kickbacks were occurring. And you would have to determine, are they relevant competitors in that marketplace. There's nothing strange or exotic about this. This happens all the time in antitrust cases, unfair competition cases, cases involving regulations. And the government hasn't suggested that this kind of well-established standing doctrine shouldn't apply in this circumstance.

THE COURT: But it's sort of like saying, well, the

bridge is out and we drove off the bridge, and everybody died. You were driving a Ford, I was driving a GM car. You want to say that what caused us to drive off the bridge and to drown is because you were driving a Ford. That's not the reason that you suffered that injury. It may be consistent with that happening. But the reason you suffered the injury is because the bridge was out. Here, the reason that the plaintiff is suffering injury is not because the President is violating the emoluments cause, because even if he doesn't violate the emoluments clause you're still suffering this -- you concede that they're suffering an anti-competitive injury. And the same injury other -- I guess other than -- well, I'd have to evaluate other than CREW's -- I don't know if it would apply to CREW. But if the injury is really traceable to the lack of competition that is engendered by the President's owning hotels, to sort of say, well, there's a bunch of hotels that he has that have his name on it, so we say, it's the hotel that has his name on it that's causing us injury -- no, that's not what causing injury. It could be the hotel that doesn't have his name on it, it's still causing you injury. So how do you trace that injury to the emoluments clause?

MR. GUPTA: I think, to give you a concrete example involving this case and what we're going to prove if the case moves forward -- so the Trump International Hotel in D.C. has much higher rates than comparable hotels in -- much, much

higher rates than comparable hotels in D.C., and the rates have gone up substantially since the election.

THE COURT: For both foreign government and U.S. citizens.

MR. GUPTA: This is the point that I want to make. The occupancy at that hotel has gone down -- not down, I mean, it's just opened -- but is much, much lower than comparable hotels. So they're making a high profit, but there are not a lot of people there. And what we'll show, as the case moves forward, if we withstand this motion, is that that is because it is an emoluments magnet, because it is getting business from governments, particularly foreign governments, and that is driving their business. And they knew this. It's why they hired a director of diplomatic sales to pitch their business to embassies.

So it's not speculative. We have allegations already in the complaint.

THE COURT: Except that will not get you all the way there, because the question is not why are his profits higher. The question is, how do you define that as an injury to the plaintiff, that somehow it is a loss to the plaintiff. It is not evaluated by whether it's a greater profit to the President. It's evaluated by whether or not it has inflicted an injury upon plaintiff. And the injury that's been inflicted, I don't even know if the allegations are such that

you say that the injury is clearly not exclusively because of foreign business. And I'm not even sure whether at this point you're even in a position to allege that it is primarily -- because I'm not even sure you're relying on an actual loss of business with regard to any of these, as you say, your experts and what you want to extrapolate with regard to the competition, you want that to be a logical conclusion, that they're in direct competition so that should be good enough. That's good enough for part of the test, but that's not good enough for all of it.

MR. GUPTA: Right. It's not just a logical conclusion. We have empirical evidence. We've shown, there's unrebutted testimony that there is direct competition. And what those cases say, what the competitor standing cases say, is, where you are competitors in the relevant arena and there is an alleged illegal competitive benefit to the defendant, even if there might be other things -- there are always going to be other things going on in the market -- that's enough to get your foot in the door.

THE COURT: Well, but it's not other things going on in the market. It's the same thing that's going on in the market. It is that people, both foreign governments, U.S. government, and nongovernment patrons are being affected in the same way as you are.

MR. GUPTA: That's another argument the government is

making, the idea that some people who are not governments who don't have particular reasons to curry favor with the President as governments, that they are going to the President's hotel and that defeats the chain of causation. That's not even something they've argued in their papers.

THE COURT: Well, you have argued injury. They have argued broader, that you cannot trace the injury to a violation of the emoluments clause.

MR. GUPTA: Right. They have alleged that. They have argued that. And I think, you know, what these cases show is, standing is not Mount Everest, right. We're at the pleading stage. We have done more at the pleading stage than I've seen in any of these other competitor standing cases, to show that there is direct relevant competition in this market for foreign and domestic government business. And as the case moves forward, the quantum of evidence is going to go up. And if there's time, I would like my colleague, Mr. Sellers, to explain how we intend to prove the case and show that these competitive events are actually being realized by the plaintiffs.

And so in the time I have left, let me briefly turn to the argument that the government made that you lack the power to issue any relief against the President.

Now, the government relies on this case *Mississippi v. Johnson*. It's a case from just after the civil war, where the

state of Mississippi was suing the President and trying to restrain the President from acting as commander in chief and putting Mississippi under military government. And the Supreme Court said, in a case that has since been understood as a political question case, that we are not going to restrain the President in the exercise of his discretion as commander in chief and as executive in political functions.

Now, right after that case, they went back and they brought another lawsuit that the Supreme Court dismissed explicitly on political question doctrine grounds. So the argument they're making is that you don't have the power even to declare what the law is with respect to the President or issue an injunction.

And the problem for that is, there are actually plenty of cases where courts have issued both declaratory and injunctive relief against the President since *Mississippi v. Johnson*. You can find some of these cases in a *Law Review* article cited at page 56 of our brief, the Siegel article. I'm also going to site you a case, your Honor, that we neglected to site in our papers, because I think it's helpful. It's the *National Treasury Employees Union Case v. Nixon*, 492 F.2d 587. And that case says, it would elevate form over substance to say that there is some difference between enjoining the President and enjoining, say, the Attorney General or the Secretary of Defense, which, courts do that every day.

So there are plenty of cases in which courts are issuing relief against the President. So that shows that the reading of *Mississippi v. Johnson* is wrong. And it's basically a political question case.

And the problem for the government is that they can't invoke the political question doctrine. And that's why they haven't done so.

THE COURT: Why does the political question doctrine not apply to the foreign emoluments clause? We have a situation where clearly the framers of the Constitution gave the initial power to determine what's an emolument and the choice of whether to consent to an emolument to Congress. And if the President had gone to Congress and said, this is an issue I'm concerned about, you may or may not think it's an emolument, but I would like your consent, why is that a legal question at this point, for the courts? Why isn't that an issue between two branches of government that doesn't lend itself to a strict legal analysis? Because, one, as you say, we have no defined definition from Congress as to what they think an emolument is. And they would have to determine that, whether they were satisfied with that. And then they would have to determine whether they were going to consent. And whether or not your clients were injured by that would become irrelevant. Your clients would not have a cause of action, regardless of how severely they were injured, if Congress

decided that it wanted to consent.

MR. GUPTA: Right.

THE COURT: So how is this not an issue that should be addressed by the political question doctrine? And how is this an issue, when it is not a dispute presently between Congress and the President? And clearly the Constitution is written so that the Congress would make the determination whether or not they were going to consent or not consent to a foreign emolument. Why is that not the most appropriate application of the political question doctrine?

MR. GUPTA: That would completely turn the clause on its head. The clause sets a broad prophylactic anti-corruption rule, you may not accept emoluments. And then Congress in its discretion can decide to consent. But that's a different question.

THE COURT: No, I can't agree with that. That is not a strict anti-corruption rule. If it was a strict anti-corruption rule, then Congress wouldn't be able to consent to it. It is an area, just like when the government argues about whether or not you have to take the money or it has to be a bribe or it can't be -- that's not the issue. If that was the issue, that would be a clearly justiciable issue, of whether or not the President is violating the law by doing this and doesn't have any ability to do it. The President has an ability to do this. He has the ability to do this whether or

not -- the Constitution doesn't say you weigh who's being hurt by it. It doesn't say that Congress has to weigh whether or not it is anti-competitive.

MR. GUPTA: That's right.

THE COURT: It says -- it doesn't give any reason at all -- that they have to consent.

MR. GUPTA: Exactly. Congress doesn't have to give any reason.

THE COURT: Congress can simply say, you asked if you could keep this. And we know what they intended originally. It wasn't just talking about emoluments, but with regard to emoluments, you know, Presidents and other government officials, ambassadors, they go places and they're given gifts, foreign governments. And there is a certain protocol. And sometimes it looks bad. Sometimes it is bad, you know. Sometimes it looks bad but it's really not indicative of criminal intent. But the framers of the Constitution said, you don't even have to analyze that, because we're going to say, look, we know there are circumstances that you may want to say, yes, the President or other government officials can keep these gifts or keep this compensation, and you make the judgment about that. That's not a legal question. That's for you to decide. If you want to consent to it -- as a matter of fact, I'm not sure there's anything in the Constitution or in law that would prevent Congress from consenting to the President

taking an emolument even if they concluded that it was a bribe. There's nothing in the emoluments clause which says they can't do that. It says that they can consent. And they can exercise that consent the same way they can exercise any consent power that the Constitution gives them with regard to judges, cabinet members, declaring war, treaties. They can exercise this power. They have the authority to exercise this power. They can make this an issue between them and the President that has to be resolved by the third branch of government. They have not presently done so. Why is it appropriate, given the political question doctrine, why is it appropriate for the judiciary to have the President fight this out with individuals, as they say, in a street brawl, rather than letting the Constitutional provision decide whether or not, as they argue, whether or not they're concerned about this or not concerned about this, whether they should decide whether it is an emolument or isn't an emolument, whether they should decide whether they want to consent to it or not consent to it? Those are not legal questions. They have the authority to do that for any reason that they want. Why isn't that the most appropriate application or applicability of what we define as the political question doctrine?

MR. GUPTA: So the political question doctrine, it's not just an ad hoc test about, you know, does this seem political. Right. That's a test. And *Zivotofsky* gives us the

most recent formulation of the test. You've got to ask, is there a textually demonstrable commitment to another branch. And I think what you're suggesting is, what you're asking is, does the consent-of-Congress clause represent such a textually demonstrable commitment.

THE COURT: In most cases the answer would be yes.

MR. GUPTA: No.

THE COURT: In most cases the answer would be no?

MR. GUPTA: Oh --

THE COURT: If it gives Congress the ability to consent?

MR. GUPTA: Well, actually, there are other clauses in the Constitution that we've cited where there is a consent-of-Congress exception but there is a default rule. Courts hold those rules to be justiciable.

And what this would do is turn the clause on its head. Rather than ban emoluments unless Congress has consented to them, the clause would permit emoluments unless Congress bans them. That would flip the script.

The other problem here is that what you don't have is a lack of judicially discoverable and manageable standards.

THE COURT: But that happens all the time. I mean, if the President -- there are a number of treaties that Presidents have signed that Congress has not approved, not acted upon. It may affect the enforceability of that treaty. It may affect

the viability of that treaty. But it doesn't mean that somebody could sue the President because he signed the treaty.

MR. GUPTA: No, right. But we're not suing over whether Congress has consented or Congress's failure to consent and exercise its discretion in that way. The problem here, of course, is, the President hasn't told Congress what payments he's accepting and asked for consent. He can certainly do that.

THE COURT: If Congress had a concern about it, they certainly have the power to request that information, to hold hearings, to enact legislation, to pass a resolution. They have the power to act if they were concerned about acting. I can only assume that back in the early 1800s they had the same conversation, that Congress can act if they want. They are a coequal branch of government. They don't have to sit on their hands if they think there's a problem. They can do something about it. And sometimes they do, sometimes they don't.

The President can't declare war without the consent of Congress. We haven't declared war since World War II. Does that mean that somehow the President is violating the Constitution because the military actions the Presidents have taken over the last 70, 80 years, they didn't go to Congress and ask Congress to approve all this?

MR. GUPTA: No, of course not. But the fact that Congress has the ability to consent in its discretion and make

exceptions to a broad rule doesn't mean that the rule is one that lacks judicially discoverable and manageable standards.

And the best place to look, maybe, for those judicially manageable and discovery standards is the significant body of precedent that has developed interpreting this clause. And you notice, in the government's argument, they didn't once mention their own department's body of precedent, the Office of Legal Counsel's precedent. We have an amicus brief from government ethics officials that shows, people in the government are constantly interpreting this clause, applying it. And so there is a body of judicially discoverable and manageable precedent that can be applied here. And our interpretation of the clause is fully consistent with that body of precedent. The problem for the government is that, given the facts of this case, they've got to run away from that interpretation.

And I thought your hotdog-stand hypothetical kind of illustrated this. I think what that hypothetical did is extracted a fairly major concession from the government that this clause does indeed extend to business transactions. And we know that because it has been extended that way in opinions. So, for example, there is a 1993 Office of Legal Counsel opinion that I recommend the Court take a look at, where you have partners in a law firm. The partners are getting distributions from the firm. They haven't personally done any

services for a foreign government. They are simply getting profits that are coming from foreign governments. And that was sufficient to constitute a prohibited acceptance of an emolument under the emoluments clause.

We have also sent you, as a notice of supplemental authority, a very recent example where the emoluments clause was violated by the rental of rooms for the Consulate of Japan in Guam.

So there are ways to discover what this clause means, and it is, as you said, a broad prophylactic rule. And what the government has done, particularly in its reply brief, is retreat and come up with a contrived interpretation, inconsistent with its own precedent, to try to fit the facts of this case. And in the motion to dismiss, they suggested that the emoluments clause was about whether or not it's related to office. And we've showed you the problem with that understanding is, it's completely inconsistent with all the dictionary definitions, which, as you said, is much simpler. It just means profit gain or advantage.

And so we showed, in the opposition to the motion to dismiss, that actually we state a claim, under the emoluments clause, even under their interpretation. So they tightened the interpretation in the reply brief. Now they say there have also got to be personal services in exchange for the payment; the President has to do something. And so here's a

hypothetical that I think illustrates, like your hotdog example, how extreme their position might be. If the merchant ambassador comes to the Oval Office with a check for $100,000 made out to The Trump Organization and says, this is for a block of rooms that we have rented at the Trump International Hotel. We consider this to be a fair market exchange. We're giving this to you because you're the President and we like you, and now let's sit down and discuss matters of state. In their view, that is not an emolument. Why? Because the President isn't performing any personal services in response to the check. But presumably if he went down to the Trump International Hotel and opened the doors and turned down the sheets personally, he would be receiving an emolument. That is an absurd reading of the clause.

THE COURT: I'm not even sure why that's necessarily a relevant discussion, because even the government concedes that if it was -- it wouldn't be an emolument, it would be a gift. And the emoluments clause prohibits both.

MR. GUPTA: It does.

THE COURT: So it doesn't make it any more or less prohibited. If it's a gift or an emolument, it's prohibited. Now, if you want to define it as something other than a gift or an emolument, then the emoluments clause, at least the foreign emoluments clause, wouldn't apply. But I'm not sure why that makes a distinction, to define it -- the argument can't be that

it's not an emolument but it's a gift. It's got to be that it's not an emolument or a gift, in order for it not to violate the clause.

MR. GUPTA: I think something could be both.

THE COURT: It could be both.

MR. GUPTA: If I bribed you through -- if I pay you $50,000 for a hotdog, is that a present or is that an emolument? Does it really matter? I think the point of the clause, of any kind, whatever language, is to sweep very broadly.

THE COURT: I would define that as an emolument. Because if you expect something for it, it is not a gift.

MR. GUPTA: Right. I think that's right. That's the common-sense understanding. I give you a gift, I'm not expecting anything in exchange for it. I give you an emolument -- but that's not a word we use -- but I give you an emolument, and I'm expecting something in exchange. That could include the fair market value for a good or service. And as your hotdog example shows, the $50,000 hotdog shows, it's very hard to detect the difference between a bribe embedded in a commercial transaction and a totally honest commercial transaction. And that's exactly why we have this broad prophylactic rule.

THE COURT: Is there anything in your complaint that alleges that the President is accepting an emolument for

another reason, other than he is doing a legitimate business transaction? I don't read anything in your complaint as accusing the President of doing anything other than engaging in a legitimate business transaction.

MR. GUPTA: Well, the whole point of this rule, the whole point of making it a broad prophylactic rule, is, it is very difficult to prove quid pro quo. That doesn't mean that we don't think that some of these payments raise the inference of quid pro quo. For example, the Chinese trademark sequence that's described in the complaint and the idea that these diplomats are saying, we're bringing business there, that suggests an inference, they think they're getting something for it. And the President has said -- this is at paragraph 96 of the complaint -- of Saudi Arabia, "I get along great with them. They buy apartments from me. They spend 40 million, 50 million. Am I supposed to dislike them?" He says comments like this about countries that patronize his businesses. It at least raises an inference that they have sought to curry favor with the President and they have obtained favor from the President.

THE COURT: But is it your argument, as the Justice Department has articulated, that you believe that the President's simply engaging in a business transaction, that that in and of itself is a violation of the emoluments clause?

MR. GUPTA: The acceptance of profits or gain from

foreign governments without the consent of Congress is a violation of the foreign emoluments clause.

THE COURT: That was a long answer to a yes-or-no question.

MR. GUPTA: No, it would be -- the answer is --

THE COURT: Is it your position that the President's being simply engaged in a business transaction while he is President is a violation of the emoluments clause? Yes or no.

MR. GUPTA: Yes, it certainly can be. The government just conceded that it can be. They conceded --

THE COURT: Well, not that it can be. Is it automatically a violation of the emoluments clause?

MR. GUPTA: If it includes the taking of profits or gains from a foreign government, yes, absolutely. That's what the clause is --

THE COURT: You give me an "if." I'm trying to get an affirmative answer from you. It's not with an "if." Is it your position that the President is prohibited from engaging in any business transaction, personally, in which he sells goods or services and gets paid market value for those goods or services, that that is prohibited by the emoluments clause?

MR. GUPTA: Yes. So long as he is accepting them from a foreign state. Yes. That's right.

And that's not just our view. That is the view -- I would recommend taking a careful look at the amicus brief by

the government ethics lawyers. It's the consistent view of a body of -- I mean, I want to make it clear. This may be the first case in court involving alleged violations of the foreign emoluments clause. But it is not the first case in which careful lawyers have analyzed these clauses and say what they mean.

And that matters a lot in Constitutional interpretation. If there's a settled interbranch understanding that has developed, as we've shown in the two examples I cited, the 1993 OLC opinion, that example involving the rooms rented in Guam, this is not some new interpretation. The government's interpretation is a new interpretation.

And the problem for the government is, let's remember the purpose of the clause. How do they square their interpretation with the purpose of the clause? I think your exchange with my client --

THE COURT: That question is an important question for both of you. How do you square the purpose of the clause with the kind of lawsuit that you want to bring? That's a critical question for both of you, because both of you are in uncharted water with regard to that issue.

MR. GUPTA: Right. But when it comes to the merits, when it comes to how you interpret this clause, if you look at the OLC opinions, they are clear, every sing of one of them virtually is clear, the purpose of this clause was to have a

broad prophylactic rule against corruption, against payments from foreign governments. And what you have from the government today, what's so different from all of the Justice Department's opinions about the clause, is a tortured rule that has been devised for this case, because they need to develop a rule that fits the facts, and suggest that there aren't any alleged violations. And the difficulty for them particularly is the violations surrounding the Trump International Hotel, where people are saying, we're patronizing these businesses because he's the President, we want to curry favor with him. Now, we don't have to prove all of that for a broad prophylactic rule, right? The rule is violated, is triggered when there are payments made by foreign governments where the President profits or gains. It's a simple rule. It doesn't have a scienter requirement. It's easy to administer. It's been administered across the federal government. And it's embodied in those Office of Legal Counsel opinions.

So for those reasons, we have stated a claim sufficient to withstand a motion to dismiss. You don't need to, in writing an opinion denying the motion to dismiss, you don't need to interpret all of the many hypotheticals that could come up. In any Constitutional provision, there are going to be difficult problems that could come up another day. As long as there is a sensible interpretation, consistent with all of the precedent, and we have stated a claim based on that

interpretation, we should be allowed to proceed with the case.

And so unless you have further questions on the merits, your Honor, I would like to turn it over to my colleague, Mr. Sellers.

THE COURT: How much time do you want to spend, Mr. Sellers?

BACK TABLE ATTY: Five minutes or less.

THE COURT: OK. And, Mr. Shumate, do you want to respond after that or before that?

MR. SHUMATE: If I could respond now, I think that would be helpful. I'll try and be quick, your Honor.

First I would like, your Honor, to respond to this point about whether this is a political question or whether the Court should excise its equitable power. I think that's what the Court should focus on. Is this an appropriate case to exercise the Court's equitable power to enjoin the President of the United States?

They try to relegate *Mississippi v. Johnson* to an historical footnote. The Supreme Court, in *Franklin v. Massachusetts*, reaffirmed that ruling. It is still good law. If I may, I will quote from the court's opinion. "The District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the

performance of a purely 'ministerial' duty. We have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution. But in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" And Justice Scalia concurs that an injunction, declaratory relief, doesn't matter, it's not appropriate against the President. So the question the Court should ask is, is this really an appropriate case, to enjoin a sitting President of the United States? We would respectfully submit that, yes, this is a question that should be resolved by the political branch, not a court sitting in equity.

If I could go to the question of competitor standing, we don't dispute all the existing case law. We don't dispute *Havens*. We don't dispute that the Second Circuit has recognized competitive standing in certain cases. But the question that is central to that analysis is whether the Court can infer a "certainly impending" competitive harm, loss of business. And they cannot reach that conclusion. It is entirely speculative, whether Ms. Phaneuf is going to receive lost commission.

I think it quite telling that they rely on her as their lead example of a competitor suffering harm, because she clearly is not, and they ask the Court to speculate about competitive harm.

MR. SHUMATE: (Continued) If I can go to the question of proper interpretation of emoluments, your Honor, I think it's quite extraordinary that their position is that no federal officer can engage in private business. That is their position. If they are right, other presidents, other federal officers have engaged in prohibited transactions than the Emoluments Clauses. President Obama, we know he received royalties from the sale of books during his presidency. Did he violate the Emoluments Clause because he likely would have received royalties from the sale of the books to foreign government representatives? Did the Secretary of Commerce Penny Pritzger violate the Emoluments Clause merely because she held stock in the Hyatt Hotels during her time in office, and very likely there were foreign government customers that stayed at Hyatt Hotels during her tenure. For all of these absurd reasons, we respectfully submit that the proper interpretation of the word emolument is profit arising from office or employ.

I just wanted to correct the record on one thing I may have misspoke during my previous discussion. I think when I was talking about the absurdities from the plaintiff's interpretation, I may have said no federal official could receive income from Treasury bonds. I meant, the President. I was using a hypothetical applying Domestic Emoluments Clause.

One final thing, on your hypothetical involving the promise to take some official act, your Honor, I had some time

to reflect on that. I think you will be pleased to know that you persuaded me to come around to your point of view, and the reason --

THE COURT: Neither pleased, nor unhappy.

MR. SHUMATE: The reason, your Honor, if I may, is because in that situation, the President would be taking some official act. A promise by the President would be something that the President would make in his official capacity, and I think that would be, in our view, an emolument if it was in exchange for something else.

Just to be clear, for purposes of this motion, we are assuming the President is subject to the Domestic Emoluments Clause. We have conceded that question, but it's not relevant to the resolution of the motion to dismiss.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Sellers.

MR. SELLERS: Your Honor, I know the hour is late. I really want to just comment on a few things that might help the Court in anticipating, in the event it were to deny the motion to dismiss in any respect, what would lay ahead of us. And in some respects because of the Court's inquiries about remedies, I want to address the nature of the remedies we might be seeking in the event we are given that opportunity.

Let me begin with the proposition that we would intend

to undertake a brief period of discovery if we were permitted to do so, after the Court were to rule, primarily focused on evidence of the violations of the Emoluments Clause as to which the commercial plaintiffs and CREW might have claimed that they have been injured, and keeping in mind that we are seeking both declaratory and potential injunctive relief, as the Court observed, the declaration that this conduct is unlawful is a very significant ruling that we would attach, we would regard as a substantial remedy for our clients, and indeed, if the Court were to so rule, we would hope that we could make some arrangements with the President in which he would in fact take appropriate steps to avoid the receipt of emoluments, illegal emoluments in the future, and may or may not require the need for injunctive relief.

In the event we were to seek injunctive relief, we would be proceeding on a well-trod path. This is certainly not the first time that a senior executive of the federal government has been called upon to have to take action to eliminate conflicts, and there are approaches including the segregation of profits and income from businesses. That would be one approach that could be taken to avoid receipt of emoluments.

Another, of course, which has been used even in this administration by senior executives nominated for cabinet positions, is divesture. I want to assure the Court, because I

think counsel for the government suggested perhaps otherwise, we in no way expect if that were to occur that this would require the Court's oversight over any period of time of the President's businesses. There are ways in which, of course, as long as the businesses are sufficiently opaque that we are not in a position to recommend particular steps that would be taken to achieve the divesture, but we would expect there are ways, and indeed there are ways, in which using third parties and neutrals they can oversee the sale of assets and the placement of those proceeds in a truly blind trust that would eliminate the risk of ongoing conflicts.

So I would like to just assure the Court that if we were permitted to proceed, we would expect to undertake a period of perhaps at most, three, four, five months of discovery and ask the Court to consider a trial that might last about a week sometime as soon as its schedule would permit after that.

As the Court is aware, we have alleged not only violations of the Emoluments Clause in the past, but we contend that there continue to be ongoing violations of the Emoluments Clause, and as a result we believe that there is a sense of urgency about reaching the means by which to eliminate this conflict of interest if the Court were to permit us to proceed.

I'm happy to answer any questions, but I wanted to make sure the Court understood that.

THE COURT: Thank you, sir.

Thank you very much, ladies and gentlemen. I am going to try to make sure that I can get you a decision within the next 30 to 60 days at the latest. I will try to move as quickly as possible.

This has been helpful. I want to get the transcript to review. Thank you very much.

(Adjourned)