

Competitor Standing to the Rescue: Saving the Emoluments Clause

Demitri Dawson

American University, Washington College of Law, dd6198a@student.american.edu

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/lpb>



Part of the [Constitutional Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Dawson, Demitri () "Competitor Standing to the Rescue: Saving the Emoluments Clause," *Legislation and Policy Brief*. Vol. 11: Iss. 1, Article 3.

Available at: <https://digitalcommons.wcl.american.edu/lpb/vol11/iss1/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Legislation and Policy Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

COMPETITOR STANDING TO THE RESCUE: SAVING THE EMOLUMENTS CLAUSE

DEMITRI DAWSON*

TABLE OF CONTENTS

I. A NATION OF LAWS AND LAWSUITS	1
II. PRINCIPLES OF STANDING AND THE EMOLUMENTS CLAUSE.....	2
A. TRADITIONAL STANDING PRINCIPLES.....	3
B. THE PRE-CONSTITUTIONAL ROOTS OF THE EMOLUMENTS CLAUSE	3
C. MODERN EMOLUMENTS CLAUSE CONTROVERSY	4
1. BLUMENTHAL V. TRUMP SERIES.....	4
2. DISTRICT OF COLUMBIA V. TRUMP SERIES.....	7
3. CITIZENS FOR RESPONSIBILITY IN WASHINGTON V. TRUMP SERIES.....	10
III. THE DIRE CONSEQUENCES OF THE TENSION BETWEEN THE EMOLUMENTS CLAUSE AND TRADITIONAL STANDING, AND THE COMPETITOR STANDING SOLUTION	12
A. CONSTITUTIONAL ENFORCEABILITY AS A REQUIREMENT	14
B. THE NATURE OF AN EMOLUMENTS CLAUSE “INJURY”	15
C. TRADITIONAL STANDING AND THE EMOLUMENTS CLAUSE: A RECIPE FOR DISASTER	16
D. A FAILED ALTERNATIVE: LEGISLATIVE REMEDIES.....	18
E. A CONSTITUTIONAL HERO: COMPETITOR STANDING	20
IV. RECOMMENDATIONS.....	22
V. CONCLUSION.....	23

I. A NATION OF LAWS AND LAWSUITS

The Foreign Emoluments Clause (“Emoluments Clause”) of the U.S. Constitution is a provision to prevent government officials from receiving payment, gifts, or any other forms of compensation that would unduly influence their decision-making.¹ The Emoluments Clause applies to any official of the federal government.² The Emoluments Clause’s express goal is to

*Demitri Dawson (J.D.) is the Law Clerk for Judge Gina Simms in the U.S. District Court for Maryland. He is a recent graduate of American University, Washington College of Law.

¹ U.S. CONST. art. I, § 9, cl. 8.

² *Id.*

limit the likelihood that individuals in power will have their loyalties diverted away from the responsibilities of their office.³

The Emoluments Clause has long remained in the background of American jurisprudence. Infrequently litigated, the courts have dedicated little time or analysis toward its application.⁴ That changed on day one of the Trump administration in January 2017. The courts saw a rapid influx of lawsuits, and, suddenly, the courts had their hands full with vexing questions surrounding the Emoluments Clause.⁵ The most common issue the courts faced, and the issue that this Comment grapples with, is constitutional standing. The crux of the controversy is determining who has standing in an Emoluments Clause lawsuit. This Comment will highlight how parties are injured by Emoluments Clause violations and discuss how individuals can establish standing. This discussion will argue that “competitor standing” is a viable path to redress and highlight its constitutional importance.

Part II of this Comment will lay a detailed foundation of the Emoluments Clause, its historical background, core mission, and modern relevance. Part III will analyze why competitor standing is needed to fulfill the Emoluments Clause’s constitutional mandate, and Part IV will recommend that courts treat competitor standing as a constitutional necessity. Part V will conclude that competitor standing is encompassed by the constitutional mandate of the Emoluments Clause.

II. PRINCIPLES OF STANDING AND THE EMOLUMENTS CLAUSE

The Emoluments Clause of the United States Constitution has a long but empty history.⁶ The Emoluments Clause’s life is bookended by two periods of tremendous activity with longstanding dormancy in between.⁷ However, introducing the concept of standing is necessary before that discussion.

³ See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 361 (2009) (“[T]he delegates were deeply concerned that foreign interests would try to use their wealth to tempt public servants.”); see also MICHAEL A. FOSTER & KEVIN J. HICKEY, CONG. RSCH. SERV., R45992, *THE EMOLUMENTS CLAUSE AND THE PRESIDENCY: BACKGROUND AND RECENT DEVELOPMENTS 2* (2019) (“The Foreign Emoluments Clause’s basic purpose is to prevent corruption and limit foreign influence on federal officers. . .”).

⁴ Jacob Gershman, *Lawsuit Against Donald Trump Shines Light on Emoluments Clause*, WALL ST. J. (Jan. 23, 2017, 4:21 PM), <https://www.wsj.com/articles/lawsuit-against-donald-trump-shines-light-on-emoluments-clause-1485204840> (referring to the Emoluments Clause as a rarely litigated passage of the Constitution); see also James D. Johnson, *Legal Front: What is the Emoluments Clause?*, COURIER & PRESS (Mar. 16, 2017, 8:47 AM), <https://www.courierpress.com/story/money/evansville-business-journal/2017/03/10/legal-front-what-emoluments-clause/97634660/> (“Evidently, the Emoluments Clause has never been litigated; thus, there have not been any interpretations of enforcement. The reality is this little-known article of the United States Constitution will now take on a new life with a ‘former’ businessman as the current President.”).

⁵ See Johnson, *supra* note 4.

⁶ See FOSTER & HICKEY, *supra* note 3, at 2–5.

⁷ *Id.*

A. TRADITIONAL STANDING PRINCIPLES

The cases outlined below wrestle with standing principles as applied to the Emoluments Clause. Standing is a citizen's ability to have judicial enforcement of an alleged right.⁸ Standing has three essential subdivisions. The first is "injury in fact," which requires litigants to suffer an injury that is "concrete" and "particularized."⁹ Second, courts require that parties state a causal link between the injury and the alleged conduct to maintain standing.¹⁰ To establish a causal link, parties must show that the injury is not "the result of some third party not before the court."¹¹ Lastly, parties must show that favorable court action will "likely" redress the alleged injury.¹²

B. THE PRE-CONSTITUTIONAL ROOTS OF THE EMOLUMENTS CLAUSE

The Framers originally intended the Emoluments Clause to be an anti-corruption measure.¹³ It prevents the President or other federal officeholders from receiving a "present, emolument, office, or title of any kind whatever from any king, prince, or state."¹⁴ Emoluments can only be accepted after the approval of Congress.¹⁵

During the Constitutional Convention, the nation was still young and vulnerable to European influence.¹⁶ Accordingly, the Framers feared potential French influence on the American political system.¹⁷ To offset this fear, Convention delegate Charles Pinckney proposed the inclusion of the Emoluments Clause.¹⁸

⁸ See William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 228–29 (1988) (discussing the nature of standing).

⁹ See *Lujan v. Defs. of Wildlife* 504 U.S. 555, 560 (1992).

¹⁰ *Lujan*, 504 U.S. at 560.

¹¹ *Id.*

¹² *Id.* at 561.

¹³ Teachout, *supra* note 3, at 361.

¹⁴ U.S. CONST. art. I, § 9, cl. 8.

¹⁵ *Id.*

¹⁶ See Teachout, *supra* note 3, at 361–62 (highlighting that fears of foreign influence were reasonable at the time); cf. Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. 30, 35 (2012) ("The American recipients of these gifts showed repeated anxiety about what to do with them. The new country was trying so hard to separate itself from courtly culture. . . .").

¹⁷ See Teachout, *supra* note 3, at 361–62 ("The fear was not that Frenchmen were heathens, but that they were strong, had no real interest in the good future of America . . .").

¹⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 389 (Max Farrand ed., 1911) ("[Pinckney urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence . . .]").

C. MODERN EMOLUMENTS CLAUSE CONTROVERSY

The relevance of the Emoluments Clause remained unclear for nearly two centuries. Infrequently litigated, the Emoluments Clause appeared to be a relic of the past.¹⁹ However, just one day after taking office in 2017, President Trump faced his first lawsuit concerning the Emoluments Clause.²⁰

Shortly after President Trump's inauguration, it became clear that the Framers possessed tremendous forethought because several parties brought lawsuits against President Trump under the Emoluments Clause.²¹ Three of those cases demand review: *Blumenthal v. Trump*,²² *District of Columbia v. Trump*,²³ and *Citizens for Responsibility and Ethics in Washington v. Trump*.²⁴ At the heart of each of these cases is a discussion about standing, the nature of the injury related to an Emoluments Clause violation, and the court's ability to redress the claimed injuries.

1. BLUMENTHAL V. TRUMP SERIES

In *Blumenthal*, 201 members of the United States Senate and House of Representatives sought a declaratory judgment stating that the President violates the Emoluments Clause when he accepts payments from foreign states, in the form of profits earned by the President's businesses, without the consent of Congress.²⁵ Additionally, those 201 Members of Congress sought injunctive relief asking the court to “enjoin[] the President from accepting any ‘present, Emolument, Office, or Title, of any kind whatever’ from a foreign state without obtaining ‘the [c]onsent of Congress.’”²⁶ The President moved to dismiss the case for lack of standing.²⁷

¹⁹ See Matthew Walther, *The Emoluments Clause is Meaningless*, THE WK. (Sept. 16, 2019), <https://theweek.com/articles/864240/emoluments-clause-meaningless> (“The clause has never given rise to any legal cases of note, and it has never been defined or even meaningfully addressed by the Supreme Court.”).

²⁰ E.g., Gretchen Frazee, *How the Emoluments Clause is Being Used to Sue Trump*, PBS (Mar. 28, 2018, 4:19 PM), <https://www.pbs.org/newshour/politics/emoluments-clause-used-sue-trump> (“The nonpartisan watchdog group Citizens for Responsibility and Ethics in Washington also announced a lawsuit against Trump the day after he took office . . .”).

²¹ E.g., Aaron C. Davis, *D.C. and Maryland Sue President Trump, Alleging Breach of Constitutional Oath*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/local/dc-politics/dc-and-maryland-to-sue-president-trump-alleging-breach-of-constitutional-oath/2017/06/11/0059e1f0-4f19-11e7-91eb-9611861a988f_story.html.

²² *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018), *rev'd*, 949 F. 3d 14 (D.C. Cir. 2020).

²³ *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), *rev'd sub nom. In re Trump*, 928 F.3d 360 (4th Cir. 2019), *rev'd on other grounds*, 958 F.3d 274 (4th Cir. 2020).

²⁴ *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *vacated*, 953 F.3d 178 (2d Cir. 2019).

²⁵ *Blumenthal*, 335 F. Supp. 3d at 50.

²⁶ *Id.* (quoting U.S. CONST. art. I, § 9, cl. 8).

²⁷ *Id.*

The plaintiffs alleged an institutional injury, arguing an impact on all Congress members through diminished legislative power.²⁸ The court stated that this type of injury does not satisfy standing requirements when a legislative remedy exists to address the injury. The injury merely represents a diminution of political power.²⁹ However, institutional injuries can establish standing when a legislator's vote is "completely nullified."³⁰

Utilizing this framework, the court found that the plaintiffs adequately alleged an institutional injury for which a legislative remedy did not exist.³¹ The court reasoned that the plaintiffs established their injury by alleging that the President nullified their opportunity to provide consent every time he accepted emoluments without first obtaining congressional authorization.³²

This practice resembles vote nullification rather than a diminution in political power because the injury at issue is not about the ability to legislate on the Emoluments Clause; instead, the issue is about having the opportunity to consent before the acceptance of an emolument.³³ Therefore, whether Congress can consent after the fact through legislation is irrelevant.³⁴

Although the court agreed that Members of Congress cannot seek the judiciary's aid when they have adequate political tools at their disposal,³⁵ it found that Congress lacked such tools in the present case.³⁶ President Trump suggested several legislative remedies, such as voting on whether the present claims amount to violations of the Emoluments Clause, passing a bill expressing consent or disagreement with the claimed violations, passing a joint resolution which defines an emolument and prohibits the receipt thereof, or utilizing the appropriations power to punish violations.³⁷

²⁸ *Id.* at 54 (suggesting that plaintiffs are denied right to vote on approval).

²⁹ *Id.* at 57 (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)).

³⁰ *Id.* at 58; *see, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 437-38 (1939) (upholding standing when legislators who had been locked in a tie vote that would have defeated the State's ratification of a federal constitutional amendment because legislators had no realistic opportunity to overturn the ratification using the political process); *see also* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 788 (2015) (quoting *Raines*, 521 U.S. at 823-24) (finding that state legislators had standing to challenge ballot initiative that would deprive them of their ability to initiate redistricting because the ballot initiative "together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan.").

³¹ *Blumenthal*, 335 F. Supp. 3d at 62.

³² *Id.*

³³ *Id.* at 63.

³⁴ *Id.*

³⁵ *Cf. Campbell v. Clinton*, 203 F. 3d 19, 23-24 (D.C. Cir. 2000) ("Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign . . .").

³⁶ *Blumenthal*, 335 F. Supp. 3d at 66.

³⁷ *Id.* at 66-67.

Drawing on *Raines v. Byrd*,³⁸ the court held these remedies inadequate.³⁹ First, the court noted that requiring Congress to pass legislation ignores the text of the Emoluments Clause.⁴⁰ The Emoluments Clause places the burden on the President to get prior consent from Congress, and the President cannot flip the burden as to require Congress to pass legislation expressing disapproval.⁴¹

The court also noted that Congress's appropriations power is inadequate.⁴² Congress cannot use its appropriations power to punish the President for accepting emoluments because no spending programs are directly tied to the Emoluments Clause.⁴³ The court stated that the appropriations powers are only adequate when withholding funds would directly remedy the situation.⁴⁴

The court also set aside the impeachment remedy as inadequate.⁴⁵ It labeled this remedy as "extreme" and inappropriate.⁴⁶ In the court's view, the impeachment process is a remedy of last resort and cannot function as a sole remedy.⁴⁷ Lastly, the court ruled that the plaintiffs adequately established traceability as the "alleged injury is therefore directly traceable to the President's alleged failure to seek Congressional consent."⁴⁸ Ultimately, the district court held that the plaintiffs established standing.⁴⁹

On an interlocutory appeal, the district court's decision was reversed.⁵⁰ The court of appeals concluded that the lower court had misread *Raines*.⁵¹ The appellate court asserted that

³⁸ *Cf. Raines*, 521 U.S. at 829 (finding that legislators were not deprived of adequate remedies because they could "repeal the Act or exempt appropriations bills from its reach . . .").

³⁹ *Blumenthal*, 335 F. Supp. 3d at 66–67 (asserting that legislative remedy must be an "adequate" remedy).

⁴⁰ *Id.* at 67.

⁴¹ *Id.*

⁴² *Id.* at 68.

⁴³ *Id.* ("Congress' appropriations power cannot be used to obtain a legislative remedy, such as refusing to appropriate funds for an Executive Branch program . . . because there are no federal appropriations associated with the President's receipt of prohibited foreign emoluments.").

⁴⁴ *See Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (finding the appropriations remedy adequate when Congress sought to halt military action).

⁴⁵ *Blumenthal*, 335 F. Supp. 3d at 68.

⁴⁶ *Id.*

⁴⁷ *See Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974) ("[T]he Constitution should not be construed so as to paint this nation into a corner which leaves available only the use of the impeachment process . . .").

⁴⁸ *Blumenthal*, 335 F. Supp. 3d at 72.

⁴⁹ *Id.*

⁵⁰ *Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020).

⁵¹ *Id.*

the injury here is entirely based on a loss of political power.⁵² Thereafter, the Supreme Court denied certiorari.⁵³

2. DISTRICT OF COLUMBIA V. TRUMP SERIES

As with the *Blumenthal* cases, the plaintiffs in *District of Columbia* alleged that President Trump violates the Emoluments Clause when his businesses receive patronage from foreign governments.⁵⁴ The plaintiffs, the State of Maryland and the District of Columbia, sought to establish an injury through various theories.⁵⁵ The President again sought dismissal, arguing that the injury is not judicially cognizable, not traceable to his actions, nor redressable by a court decision in the plaintiff's favor.⁵⁶

The first theory under which the plaintiffs claimed an injury is Maryland's sovereign interest in enforcing the terms upon which it entered the Union.⁵⁷ The plaintiffs argued that Maryland's 1776 *Declaration of Rights* included reference to its own Emoluments Clause, so the court should assume that Maryland joined the Union on the condition that the government enforce the Emoluments Clause.⁵⁸ The court found this argument unconvincing, ruling that states cannot operate as "constitutional watchdogs."⁵⁹

Maryland also claimed a sovereign interest in the tax revenues it receives from the sales and room rentals on Maryland hotels, restaurants, and event spaces that compete with President Trump's properties for government business.⁶⁰ The court rejected this argument, holding that the injuries failed to adequately show causation as lost tax revenues must be supported by offering "a direct injury in the form of loss of specific tax revenues, which the plaintiffs failed to do."⁶¹

⁵² *Id.* ("The Members can, and likely will, continue to use their weighty voices to make their case to the American people But we will not—indeed we *cannot*—participate in this debate.").

⁵³ *Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020), *cert. denied*, 2020 WL 6037222 (Oct. 13, 2020).

⁵⁴ *District of Columbia v. Trump*, 291 F.Supp.3d 725, 735 (D. Md. 2018) (alleging injuries resulting from violations of the Domestic Emoluments Clause, but those arguments are not relevant to this discussion).

⁵⁵ *Id.*

⁵⁶ *Id.* at 732.

⁵⁷ *Id.* at 738. See Katherine Mims Crocker, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2056 (2011) (quoting Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 411 (1995)) ("[S]overeign interests, in short, are states' interests in their core ability to govern. They underlie a state's suit against another government 'to establish its authority to exercise legislative, executive, or judicial power within a particular territory or over a particular subject matter.'").

⁵⁸ *District of Columbia*, 291 F.Supp.3d at 738 (first citing Amended Complaint at 33, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018); and then citing MD. DECLARATION OF RIGHTS of 1776, art. 4 (Aug. 14, 1776)).

⁵⁹ *Id.* at 739 (quoting *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011)).

⁶⁰ *Id.* at 739.

⁶¹ *Id.* (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992)).

Thereafter, the plaintiffs alleged injury to their proprietary interests.⁶² Specifically, the District of Columbia owns the Washington Convention Center, which it argued competes directly with the Trump properties for event bookings involving foreign governments.⁶³ Similarly, as a landlord of the Bethesda Marriott Conference Center, Maryland submitted that it has a financial interest in the Conference Center that competes with Trump-owned entities.⁶⁴

On this point, the court noted that the plaintiffs rely on “competitor standing,” under which they can allege an injury by showing that they compete in the same arena as a party receiving an illegal benefit.⁶⁵ Additionally, for such a claim, lost sales data is not required to prove a competitive injury; instead, basic economic logic will permit a finding that a plaintiff will suffer a damage.⁶⁶

The court found that, by presenting evidence that their properties compete for the same type of clientele and by showing that their properties are relatively close to the Trump-owned properties in the area, the plaintiffs adequately alleged that they compete in the same arena.⁶⁷ Further, the court ruled that the plaintiffs sufficiently alleged under competitor standing that the President’s Emoluments Clause violations put them at a competitive disadvantage.⁶⁸ Accordingly, the plaintiffs correctly established an injury.⁶⁹

Lastly, the plaintiffs asserted, an economic injury to their citizens’ welfare under the *parens patriae* doctrine.⁷⁰ They claimed that their citizens’ businesses are placed at a competitive disadvantage vis-à-vis the President when he accepts illegal benefits.⁷¹ Mirroring the earlier proprietary interest analysis, the court found that the competitor standing jurisprudence moves the plaintiff’s injury beyond mere speculation.⁷²

⁶² *Id.* at 742–43.

⁶³ *Id.* at 742–43.

⁶⁴ *Id.*

⁶⁵ *Id.* at 744 (citing *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620–21 (1971)) (concluding that companies had standing to challenge a regulatory decision because they were injured by the competition the regulation allowed).

⁶⁶ *Id.*; see also *In re U.S. Cath. Conf.*, 885 F.2d 1020, 1029 (2d Cir. 1989) (describing that plaintiffs utilizing competitor standing must allege that they compete in the same arena as the unlawfully benefited competitor); *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (stating that competitor standing relies on economic logic to establish causation).

⁶⁷ *District of Columbia*, 291 F. Supp. 3d at 744.

⁶⁸ *Id.* at 745.

⁶⁹ *Id.*

⁷⁰ See Lexi Zerillo, Note, *Who’s Your Sovereign?: The Standing Doctrine of Parens Patriae & State Lawsuits Defending Sanctuary Policies*, 27 WM. & MARY BILL RTS. J. 573, 578 (2018) (describing *parens patriae* and quasi-sovereign interest as the same concept).

⁷¹ *District of Columbia*, 291 F. Supp. 3d at 746.

⁷² *Id.* at 748.

The court also ruled that the injuries alleged were traceable to the President and redressable through court action.⁷³ The court highlighted competitor standing principles to establish traceability, asserting that losing the chance to compete on equal footing is directly traceable to the President's alleged actions.⁷⁴ The court rejected the President's argument that it is too speculative whether third parties would stop patronizing his entities after a favorable decision.⁷⁵ Instead, the court stressed that redressability requires injuries to be reducible to "some extent," not entirely resolved.⁷⁶ Ultimately, the court rejected the President's motion to dismiss with respect to the Trump operations inside the District of Columbia.⁷⁷

Following this defeat, the President sought an interlocutory appeal, which was denied.⁷⁸ Thereafter, the President filed a writ of mandamus to force the district court to certify his interlocutory appeal.⁷⁹

The appellate court, in granting the writ of mandamus, then considered the merits of the President's motion to dismiss.⁸⁰ Beginning with the district court's finding that the plaintiffs properly alleged an injury to their proprietary interests, the appellate court emphasized the speculative nature of such injuries.⁸¹ Although the court recognized the existence of competitor standing, it firmly stated that competitor standing is "an application of Article III standing principles, not a relaxation of them."⁸²

The court reasoned that this understanding forces one to interpret the alleged injuries as an overly speculative reading into an individual's subjective motivation for patronizing the President's businesses.⁸³ Further, the court asserted that the plaintiffs ignored the possibility that others would avoid patronizing the President's properties due to him being the president.⁸⁴ This possibility, in tandem with the court's understanding that injunctive relief would not stop

⁷³ *Id.* at 749.

⁷⁴ *Id.* at 749–50.

⁷⁵ *Id.* at 751.

⁷⁶ *Id.*

⁷⁷ *Id.* at 757.

⁷⁸ *In re Trump*, 928 F.3d 360, 367 (4th Cir. 2019).

⁷⁹ *Id.* at 368.

⁸⁰ *Id.* at 372.

⁸¹ *Id.* at 375.

⁸² *See id. Contra* CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE & PROCEDURE § 8341 (2d ed. 2020) (explaining that competitor standing is meant as a relaxation of traditional standing requirements). *See generally* Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178 (responding to *In re Trump*, 928 F.3d at 367, the court highlights the many ways in which competitor standing allows for a relaxed application of traditional standing principles).

⁸³ *In re Trump*, 928 F.3d at 375, 377.

⁸⁴ *Id.* at 376.

individuals from patronizing the President’s businesses, led the court to reject the plaintiffs’ proprietary injuries.⁸⁵

Shortly thereafter, a rehearing en banc overturned this ruling on writ of mandamus grounds without addressing the merits.⁸⁶ The Supreme Court, hearing the case after President Trump left office, ordered the case dismissed as moot.⁸⁷

3. *CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON V. TRUMP* SERIES

In this final case series, the Citizens for Ethics and Responsibility in Washington (“CREW”), a non-partisan government watchdog; Eric Goode, a restaurant owner; Jill Phaneuf, who books embassy functions and other events tied to foreign governments; and ROC United, a nonprofit member-based organization with over 25,000 restaurant employees and 200 restaurants brought claims against Trump for violations of the Emoluments Clause.⁸⁸

Trump moved to dismiss, which the court considered through a bifurcated analysis in which it grouped Phaneuf, Goode, and ROC United (“Hospitality Plaintiffs”) and CREW separately.⁸⁹ The court began by considering the Hospitality Plaintiffs’ claim that they face unfair competitive disadvantage because of the President’s alleged violations of the Emoluments Clause.⁹⁰ The Hospitality Plaintiffs argued that they suffer an injury by competing in the same arena as the President, who is receiving a benefit in violation of the Emoluments Clause.⁹¹

This court ruled that the Hospitality Plaintiffs failed to meet their burden.⁹² Ruling that the injury is too tenuously related to the President’s alleged actions, the court found that the injury is too speculative.⁹³ Additionally, it found that such an injury could not be redressed by court action.⁹⁴

⁸⁵ *Id.* at 377.

⁸⁶ *See In re Trump*, 958 F.3d 274, 283 (4th Cir. 2020) (ruling that the district court did not abuse its discretion in not granting the Presidents interlocutory appeal, making it inappropriate to compel the district court to do so.).

⁸⁷ *See Trump v. District of Columbia*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/trump-v-district-of-columbia/> (last visited Apr. 19, 2022) (covering proceedings).

⁸⁸ *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 180 (S.D.N.Y. 2017).

⁸⁹ *Id.* at 184.

⁹⁰ *Id.*

⁹¹ *Id.* at 185; *see also* CHRISTOPHER M. ERNST, BALDWIN’S OH. PRAC. TORT L. § 39:100 (2d ed.), Westlaw (2020) (“If a plaintiff is a direct competitor with a defendant and an injunction is sought, the ‘injury in fact’ and causation standing requirements may be satisfied . . .”).

⁹² *Citizens for Resp. & Ethics in Wash.*, 276 F. Supp. 3d at 187.

⁹³ *Id.* at 186.

⁹⁴ *Id.* (“[T]here is no remedy this Court can fashion to level the playing field for [p]laintiffs as it relates to overall competition.”).

Turning its attention to CREW's alleged injuries, the court reviewed how an organization could bring forward a claim.⁹⁵ CREW brought its claim under a theory of organizational standing, under which courts regard an organization as a person seeking to vindicate an individual right.⁹⁶

As a result of the President's alleged Emoluments Clause violations, CREW asserted that it had to devote time, resources, and research to obtain financial information about the benefits he receives from such violations.⁹⁷ Additionally, it has needed to devote resources toward combating the President's alleged violations.⁹⁸ All of these efforts were to the detriment of the organization and caused injury.⁹⁹

The court rejected this argument because the injury CREW sought to establish follows only from conduct that hinders an organization's ability to conduct out its normal operations.¹⁰⁰ However, the court held that the very mission of the organization is to combat the activity it alleges.¹⁰¹ Its devotion of resources toward this particular case is a matter of prioritization, not a departure from an organizational mission.¹⁰²

Hospitality Plaintiffs Eric Goode and ROC United appealed.¹⁰³ Leaning on competitor standing, the Court of Appeals for the Second Circuit reversed the district court.¹⁰⁴ It found that the Hospitality Plaintiffs adequately alleged a viable injury—the supposed increase in competition resulting from the illegal benefit bestowed on the President.¹⁰⁵ The Hospitality Plaintiffs allege they compete directly with the President's businesses and, accordingly, are hurt when the President receives increased patronage.¹⁰⁶ The adverse effects of higher levels of

⁹⁵ *Id.* at 188–89.

⁹⁶ *Id.*

⁹⁷ *Id.* at 189 (noting CREW hired two additional senior attorneys for legal research); *see also* Symposium, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2072 (2019) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)) (“[T]he Supreme Court recognized a form of organizational standing where the defendant's conduct has ‘perceptibly impaired’ the plaintiff's missional activities . . .”).

⁹⁸ *Citizens for Resp. & Ethics in Wash.*, 276 F. Supp. 3d at 189.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 190–91.

¹⁰¹ *Id.* at 191.

¹⁰² *Id.* at 191–92.

¹⁰³ *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 184 (2d Cir. 2019).

¹⁰⁴ *Id.* at 191–92.

¹⁰⁵ *Id.* at 190 (highlighting that under competitor standing injury flows from competitive disadvantage).

¹⁰⁶ *Id.* at 190–91.

competition on a business are fundamental economics, thereby demonstrating a causal connection between the two.¹⁰⁷

Further, the court rejected the notion that plaintiffs must dispel alternative causes of their harm.¹⁰⁸ Such a requirement is too rigorous at the pleading stage, and requiring as much would effectively prevent any claim of this type from moving forward.¹⁰⁹ The court reasoned that relying on basic economic logic is sufficient to find causality under competitor standing.¹¹⁰

Lastly, the court ruled that the Hospitality Plaintiffs adequately established redressability.¹¹¹ At the pleading stage, the court only requires that the injury be reduced to some extent.¹¹² Since the plaintiffs established causation, it naturally follows that an injunction preventing such conduct would, at the very least, provide some modicum of relief.¹¹³

III. THE DIRE CONSEQUENCES OF THE TENSION BETWEEN THE EMOLUMENTS CLAUSE AND TRADITIONAL STANDING, AND THE COMPETITOR STANDING SOLUTION

As the case law suggests, the courts disagree on when and how parties can sue over an Emoluments Clause violation. The injuries that manifest in these claims are often indeterminate and nonobvious, making uniform application of the elements of standing difficult and leading to conflicting outcomes.¹¹⁴

In the relevant case law, there are four types of plaintiffs: (1) congressional plaintiffs asserting injury to their rights as members of Congress; (2) state plaintiffs asserting injury to

¹⁰⁷ See John F. Duffy, *Standing to Challenge Patents, Enforcement Risk, and Separation of Powers*, 83 GEO. WASH. L. REV. 628, 642 (2015) (citing *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010)) (“[T]he courts have been willing to rely on “economic logic” and “basic law[s] of economics” in assuming that the competitors to a particular litigant will behave in predictable ways that will produce a sufficient injury to sustain standing.”).

¹⁰⁸ *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 191.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 192; see Duffy, *supra* note 107, at 642; see also *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (explaining that in competitor standing cases courts are required to accept a chain of causation as supported by rudimentary economic laws).

¹¹¹ *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 194.

¹¹² *Id.* at 192; see also *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) (“Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy . . .”).

¹¹³ *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 198–99; cf. *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007) (upholding redressability where harm reduced to some extent); *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of Health & Hum. Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020) (“Causation and redressability are generally implicit in injury-in-fact under the competitor standing doctrine.”).

¹¹⁴ See *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 192 (noting that the amorphous nature of the injury could lead to a reality where it would be virtually impossible to plead a competitive injury). See generally Claire Gianotti, *Ethics in the Executive Branch: Enforcing the Emoluments Clause*, 32 GEO J. LEGAL ETHICS 615 (2019) (suggesting that recent Emoluments Clause cases have tested our nation’s judiciary and strained separation of powers jurisprudence).

their interests as sovereigns; (3) organizational plaintiffs asserting injury to their organizational resources; and (4) individual plaintiffs asserting injury to their business interests.¹¹⁵

Of these four categories, individual plaintiffs with injury to their business interests present the most troubling constitutional consideration.¹¹⁶ The class of potential individual plaintiffs asserting injury to their business is by far the largest and effectively represents the total amount plaintiffs that can be injured by an Emoluments Clause violation.¹¹⁷ In cases involving individual plaintiffs as business owners, the injury resulting from an Emoluments Clause violation is an injury to the plaintiffs' ability to compete fairly in the marketplace.¹¹⁸ Assessing this injury is difficult.¹¹⁹ As such, the plaintiffs rely on competitor standing to provide a path to meet constitutional requirements.¹²⁰ Without the application of competitor standing, those parties could not bring their claim.¹²¹

The problem of constitutional enforcement would not be such a salient issue if these plaintiffs had an alternative route to redress these injuries or if an Emoluments Clause violation presented other redressable injuries.¹²² However, currently, an Emoluments Clause violation can only "injure" individual citizens by forcing them to unfairly compete with businesses in which federal officials are interested.¹²³

The original conception of an Emoluments Clause violation, in which an official accepts a physical gift from foreign governments, affects citizens by thwarting a constitutional

¹¹⁵ See *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 184–85 (containing individual and organization plaintiffs); *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. 2017) (containing congressional plaintiffs); *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 732 (D. Md. 2018) (containing state plaintiffs).

¹¹⁶ See generally *Citizens for Resp. & Ethics in Wash.*, 953 F.3d (elaborating on cases where courts can find standing even if an injury requires some action by a third party).

¹¹⁷ Cf. U.S. SMALL BUS. ADMIN. OFF. ADVOC., 2019 SMALL BUS. PROFILE (2019), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142719/2019-Small-Business-Profiles-US.pdf> (tabulating millions of small businesses).

¹¹⁸ See *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 189–90 (“[The] [p]laintiffs’ alleged injury meets the well-established Article III threshold for economic competitors who allege that, because of unlawful conduct, their rivals enjoy a competitive advantage in the marketplace.”).

¹¹⁹ See generally *id.* (discussing the nature of an Emoluments Clause injury).

¹²⁰ See WRIGHT ET. AL., *supra* note 82, § 8341.

¹²¹ Cf. Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. J. 809, 879 (1977) (noting, in the antitrust context, that requiring plaintiffs to assert “direct” injuries would effectively preclude standing due to the nature of possible injuries).

¹²² See *cf.* *Pennsylvania v. Koehler* 229 A.3d 915, 933 (Pa. 2020) (asserting that where there is a right there must be a remedy).

¹²³ Cf. *District of Columbia*, 291 F. Supp. 3d at 755 (“Under the President's interpretation, it would seem that no one—save Congress which, as discussed momentarily, may never undertake to act—would ever be able to enforce these constitutional provisions.”); see also Gianotti, *supra* note 114, at 625 (noting that certain judges find it inexplicable that the application of traditional standing principles to the Emoluments Clause may render the President's actions immune from judicial review).

safeguard.¹²⁴ However, it cannot be said that it causes a judicially cognizable injury to citizens as opposed to current plaintiffs.¹²⁵

Further, these citizens do not seem to have alternative recourse to receive redress.¹²⁶ Establishing standing without relying on competitor standing may be entirely impossible.¹²⁷ The nature of the injury itself appears incompatible with a rigid application of the standing doctrine, as causation and redressability do not neatly present themselves in the context of an Emoluments Clause violation.¹²⁸

A. CONSTITUTIONAL ENFORCEABILITY AS A REQUIREMENT

The principle that guides this analysis is the Constitution, and that the provisions therein must be enforceable.¹²⁹ Unfortunately, the Constitution does not directly state this principle. A reader can only find language slightly resembling this idea in Article VI of the Constitution's Supremacy Clause.¹³⁰

However, this idea finds direct support in what is perhaps the most foundational case in this nation's history.¹³¹ In *Marbury v. Madison*,¹³² Chief Justice Marshall firmly declared "that [i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."¹³³ Numerous courts have cited to this principle over the centuries and solidified it into the bedrock of American jurisprudence.¹³⁴ Therefore, if an Emoluments Clause violation primarily manifests itself as an unfair competitive disadvantage imposed on individual litigants, and the courts do not provide a path to redress, these provisions

¹²⁴ See Meredith M. Render, *Fiduciary Injury and Citizen Enforcement of the Emoluments Clause*, 95 NOTRE DAME L. REV. 953, 957 (2020) ("The first thesis is that current standing doctrine fails to adequately account for the *fiduciary* injury that arises in the context of an emoluments violation.").

¹²⁵ See generally Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863 (1996) (describing generalized grievances as mere interests in having the government follow the law).

¹²⁶ Cf. 291 F. Supp. 3d at 755 (noting that if Congress was prohibited from enforcing the constitutional provisions at issue, then everyone would be prohibited from enforcing them).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Marbury v. Madison*, 5 U.S. 137, 147, 163 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

¹³⁰ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . ."). See generally *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) ("It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities . . .").

¹³¹ *Madison*, 5 U.S. at 163.

¹³² *Id.*

¹³³ See *Madison*, 5 U.S. at 163; see also 3 WILLIAM BLACKSTONE, COMMENTARIES *115.

¹³⁴ E.g., *Bush v. Lucas*, 462 U.S. 367, 373 (1983) (citing *Marbury*).

are effectively unenforceable, and the courts will contravene a core legal principle in these cases.¹³⁵ The ruling in *Marbury* makes this an untenable reality.¹³⁶

B. THE NATURE OF AN EMOLUMENTS CLAUSE “INJURY”

As mentioned, the relevant case law places Emoluments Clause injuries into one of four categories.¹³⁷ In *Blumenthal*, the plaintiffs alleged an injury to their right to give or withhold consent to the President—though more generally, it is Congress’s ability to give or withhold consent from any federal official under the Emoluments Clause—accepting an emolument.¹³⁸ This injury, which is solely applicable to Congress members, only applies to those in the House of Representatives and United States Senate.¹³⁹

In *District of Columbia*, the plaintiffs alleged an injury to their sovereign interests and their economic rights as business owners.¹⁴⁰ As to the alleged injury to sovereign interests, the scope of potential plaintiffs is also limited.

In contrast, the injury asserted in *Citizens for Responsibility and Ethics in Washington* and, in part, *District of Columbia* addresses unfair business competition.¹⁴¹ Therefore, the number of parties affected can extend to a substantial population. The United States is home to a staggering thirty-one million small businesses.¹⁴² Through their owners, these businesses represent the approximate population that could suffer the injury alleged in these cases.

However, if a type of injury has not been recognized as valid by the courts, it would be entirely irrelevant if the Emoluments Clause could produce such an injury.¹⁴³ The injuries in *Citizens for Responsibility and Ethics in Washington* and *District of Columbia*, relating to a

¹³⁵ Cf. *District of Columbia*, 291 F. Supp. 3d at 755 (noting that prohibiting Congress from enforcing the constitutional provisions will render the provisions unenforceable to all).

¹³⁶ See *Madison*, 5 U.S. at 163 (ruling that every individual has a right to claim the protection of the laws when they have been injured).

¹³⁷ See *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 184 (2d Cir. 2019) (containing individual and organization plaintiffs); *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 49 (D.D.C. 2017) (containing congressional plaintiffs); 291 F. Supp. 3d at 731 (D. Md. 2018) (containing state plaintiffs).

¹³⁸ *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. 2018), *rev’d*, 949 F.3d 14 (D.C. Cir. 2020).

¹³⁹ See *Blumenthal*, 335 F. Supp. 3d at 50 (noting that the plaintiffs are members of Congress and the injury complained of is being prohibited from enforcing the Constitution).

¹⁴⁰ *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), *rev’d sub nom. In re Trump*, 928 F.3d 360 (4th Cir. 2019), *rev’d on other grounds*, 958 F.3d 274 (4th Cir. 2020).

¹⁴¹ *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *vacated and remanded by* 953 F.3d 178 (2d Cir. 2019).

¹⁴² U.S. SMALL BUS. ADMIN. OFF. ADVOC., 2019 SMALL BUS. PROFILE (2019), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142719/2019-Small-Business-Profiles-US.pdf>; see also *id.* (noting that small businesses employ a staggering sixty million individuals throughout the country).

¹⁴³ Cf. *Marbury v. Madison*, 5 U.S. 137, 163 (1893) (highlighting that every right must have its proper redress).

business's competitive vitality, are economic injuries.¹⁴⁴ The courts consistently find this kind of injury firmly within their purview.¹⁴⁵

So, given the size of the potential plaintiff class of individual plaintiffs, a violation of the Emoluments Clause has the potential to inflict a valid injury on millions of individuals.¹⁴⁶ The number of businesses in the United States, alongside the well-known and pervasive intermingling of private enterprise and politics, indicates that the primary injury of an Emoluments Clause violation is unfair competition imposed on businesses from elected officials illegally benefitting from their position of power.¹⁴⁷ Therefore, although the Emoluments Clause was intended as an anti-corruption measure, embedded into its very structure is a secondary constitutional mandate to prevent illegally benefitting government officials from unfairly competing with private businesses.¹⁴⁸

C. TRADITIONAL STANDING AND THE EMOLUMENTS CLAUSE: A RECIPE FOR DISASTER

Although the Emoluments Clause must be enforceable, no set path is required for enforcement.¹⁴⁹ Although it is unlikely that redress could be sought without competitor standing, if traditional concepts of standing can be applied with some success, then the constitutional problem will be avoided.

The case law clarifies that it is difficult for individual plaintiffs to establish standing without competitor standing.¹⁵⁰ The strict elements of standing often conflict with Emoluments Clause claims.¹⁵¹ Although the economic injury which follows an Emoluments Clause violation

¹⁴⁴ *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 743 (D.D.C. 2018); *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 190 (2d Cir. 2019).

¹⁴⁵ *See Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008); *see also Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 738 (5th Cir. 2016); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2321 (quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005)) (“Economic harm is also frequently treated as clearly sufficient for Article III injury in fact; as then-Judge Alito of the Third Circuit put it, “[w]hile it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.”); *Cottrell v. Alcon Labs.*, 874 F.3d 154, 163 (3d Cir. 2017) (quoting *Danvers*, 432 F.3d at 293) (“[W]here a plaintiff alleges financial harm, standing ‘is often assumed without discussion.’”).

¹⁴⁶ *See, e.g., SMALL BUS. ADMIN. OFF. ADVOC.*, *supra* note 142.

¹⁴⁷ *See, e.g., Eric Rosenberg, 9 Members of Congress who are also Business Owners*, NAV (June 16, 2017), <https://www.nav.com/blog/9-congressmen-who-are-also-business-owners-21072/>; *see also, e.g., Reity O’Brien, Blind Justice? Judges Owned Stock in Firms but Ruled on Cases Anyway*, (Apr. 28, 2014, 12:34 AM), <https://www.nbcnews.com/news/investigations/blind-justice-judges-owned-stock-firms-ruled-cases-anyway-n90916>.

¹⁴⁸ *See Teachout*, *supra* note 3, at 361–62.

¹⁴⁹ *Cf. Kentucky v. Claycomb*, 566 S.W.3d 202, 213 (Ky. 2018) (discussing a plaintiff's right to a remedy and asserting that the failure to provide any viable path for redress is unacceptable).

¹⁵⁰ *See generally Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178 (2d Cir. 2019) (highlighting that all Emoluments Clause claims may be precluded if competitor standing is not applied).

¹⁵¹ *Id.*

does neatly fit into the first requirement that injuries be “concrete” and “particularized,” the other elements are more difficult to establish.¹⁵²

The second requirement of standing, causation, outlines a standard that raises ambiguity regarding an Emoluments Clause injury. Under traditional standing requirements, there must be a “substantial likelihood” that the injury is traceable of the defendant’s actions and not the result of some third party.¹⁵³ Courts that adhere strictly to this standard have made it common practice to reject claims that rely on speculation to establish a causal connection between the alleged conduct and their injury.¹⁵⁴ This model conflicts heavily with the nature of an Emoluments Clause injury, which, as discussed, often derives from the violator’s unfair competitive advantages. At the pleading stage, parties have not established most of their facts.¹⁵⁵ So, an injury that is premised on unfair competition within complex marketplaces certainly must depend on some level of speculation.¹⁵⁶

Additionally, in the context of an Emoluments Clause, the injury is inextricably linked to third parties’ actions.¹⁵⁷ Customers, or, specific to this context, foreign government officials, are the actors that bestow the illegal benefit that results in unfair competition.¹⁵⁸ To suggest that the injury, inherently tied to third parties’ conduct, cannot be caused by the action of third parties leaves any and all injuries of this type without redress under the traditional standing scheme.¹⁵⁹ As a result, the traditional causation standard fails to adequately meet the needs of litigants facing an injury resulting from an Emoluments Clause violation.¹⁶⁰

A traditional application of the third element of standing, redressability, also presents serious problems in the Emoluments Clause context. To establish standing, a party must show

¹⁵² See *id.* at 189–90.

¹⁵³ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41–42 (1976)) (“[an injury] fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”)

¹⁵⁴ *E.g.*, *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 185 (S.D.N.Y 2017) (“[I]t is wholly speculative whether the Hospitality Plaintiffs’ loss of business is fairly traceable to Defendant’s ‘incentives.’”); *Simon*, 426 U.S. at 45 (saying plaintiffs cannot rely on speculative inferences connect their injury to the defendants alleged conduct); *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005)) (“[A]rticle III does ‘require proof of a substantial likelihood that the defendant’s conduct caused plaintiff’s injury in fact.’”).

¹⁵⁵ *Citizens for Resp.*, 953 F.3d at 191.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 197.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 197–98; see also *Bennet v. Spear*, 520 U.S. 154, 168 (“[A]s we have said, it does not suffice if the injury complained of is ‘th[e] result [of] the independent action of some third party not before the court’”) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

¹⁶⁰ See *Citizens for Resp.*, 953 F.3d at 197–98.

that it is “likely” as opposed to “speculative” that a favorable court decision will remedy the injury.¹⁶¹

This issue here, as with causation, boils down to the nature of the injury. When third parties are involved with an alleged injury, it is impossible to devise a fair remedy that would certainly change those individuals' behavior.¹⁶² Therefore, again, some level of leeway must be acceptable if the court wants to address this type of injury. Consequently, the application of traditional standing principles effectively bars any claim on economic injuries flowing from an Emoluments Clause violation because the courts will never be able to fashion redress that negates the injury in its entirety.¹⁶³

Unfortunately, as assumed, traditional standing does not permit parties to seek relief from an Emoluments Clause injury without the competitor standing. Thus, as reasoned above, a constitutional impermissibility is at play. If the traditional standing doctrine is the only path available, no path is available at all. Therefore, an alternative must exist.

D. A FAILED ALTERNATIVE: LEGISLATIVE REMEDIES

It must be considered whether legislation could address the issue instead of bringing claims under the Emoluments Clause. Although the question is if legislators can rectify an individual citizen’s rights, rather than their own as in *Blumenthal*, the analysis is functionally the same as it was in *Blumenthal*.¹⁶⁴

Three legislative remedies exist: (1) Congress can express disapproval of the alleged conduct through a resolution, (2) utilize their appropriations power to punish the violator, or (3) Congress can pursue impeachment.¹⁶⁵

The first remedy relies on a reading of the Emoluments Clause that places an affirmative duty on Congress to provide or withhold consent. This is an incorrect reading of the Emoluments Clause.¹⁶⁶ It is not incumbent on Congress to express disapproval;¹⁶⁷ it is the responsibility of a government official to affirmatively seek consent.¹⁶⁸ Requiring Congress to

¹⁶¹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (describing that it must be likely, as opposed to merely speculative, that the injury will be “redressed by a favorable decision”).

¹⁶² See *Citizens for Resp.*, 953 F.3d at 198–99.

¹⁶³ *Id.*

¹⁶⁴ See generally *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (describing the ways in which Congress could address President Trump’s alleged Emoluments Clause violations).

¹⁶⁵ *Id.* at 67–68. But see Stephen L. Carter, *The Political Acts of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. Pa. L. Rev. 1341, 1348–49 (“[O]ne might argue that because the constitutional system places so many express checks on presidential power directly in the legislative branch, that branch also ought to have special authority (if anyone has it) to create new ones. . . . If the Congress can limit the President's authority, why can't it legislate to punish him directly?”).

¹⁶⁶ See *Blumenthal*, 335 F. Supp. 3d at 67.

¹⁶⁷ U.S. CONST. art. I §. 9 cl. 8.

¹⁶⁸ *Id.*

take action places a burden on it that is not legally required to carry.¹⁶⁹ This interpretation also presupposes that a government official will be more responsive to congressional action than the U.S. Constitution, a baffling idea that defies reason.¹⁷⁰ The entire basis of this controversy is that a constitutional mission may go unfulfilled, and requiring Congress to take affirmative action would lead to that same outcome.¹⁷¹ Accordingly, it is not adequate.

The appropriations power can potentially provide a remedy; however, courts do not consider it effective unless the appropriations are directly tied to the problem.¹⁷² No federal programs are directly tied to the Emoluments Clause, so appropriations cannot be weaponized to enforce it.¹⁷³ Also, in *Blumenthal*, the controversy only concerned the President, but the scope of the Emoluments Clause extends beyond the President.¹⁷⁴ Instead, the Emoluments Clause applies to any “Person holding any Office of Profit or Trust under the United States].”¹⁷⁵ As mighty as it may be, the appropriations power may be ineffective against anyone other than the President.¹⁷⁶ If a federal official does not govern over programs funded through congressional appropriations, Congress would need to narrowly tailor an appropriations response, assuming an effective response could be fashioned.¹⁷⁷ Although a federal official lower in government may be harder to target, the potential injury he or she may inflict remains the same.¹⁷⁸

¹⁶⁹ See *id.*; see also *Blumenthal*, 335 F. Supp. 3d at 67 (“The legislation suggested by the President flips this burden, placing the burden on Members of Congress to convince a majority of their colleagues to enact the suggested legislation. This is not what the Clause requires.”)

¹⁷⁰ *Blumenthal*, 335 F. Supp. 3d at 67 (“[T]he President does not explain why such legislation, assuming he signed it, would prevent him from accepting prohibited foreign emoluments.”).

¹⁷¹ *Cf. id.* (describing how the constitutional mandate of the Emoluments Clause is violated whenever the President does not affirmatively seek consent from Congress).

¹⁷² See *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (“We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach) . . .”).

¹⁷³ See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (“Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign.”); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (highlighting that Congress had the option to terminate a challenged executive order if it chose to do so).

¹⁷⁴ *Blumenthal*, 335 F. Supp. 3d at 50; U.S. CONST. art. I, § 9, cl. 8; Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 644 (“According to secondary sources, an office of profit historically referred to a salaried office in which the holder had a proprietary interest, such that the office could be inherited or sold. An office of trust, by contrast, required ‘the exercise of discretion, judgment, experience and skill,’ such that the office itself or its assigned duties could not be transferred.”).

¹⁷⁵ U.S. CONST. art. I, § 9, cl. 8; see also FOSTER & HICKEY, *supra* note 3, at 5–6 (citing NOBEL PEACE PRIZE, 33 OP. O.L.C. at 4) (“OLC, which has developed a body of opinions on the Emoluments Clauses, has opined that the President ‘surely’ holds an ‘Office of Profit or Trust under the Constitution. OLC opinions are generally considered binding within the executive branch.”).

¹⁷⁶ See *cf. Blumenthal*, 335 F. Supp. at 68.

¹⁷⁷ See *cf. id.*

¹⁷⁸ *Cf.* U.S. CONST. art. I, § 9, cl. 8. (applying to any “[p]erson holding any [o]ffice of [p]rofit or [t]rust”).

Lastly, the impeachment remedy is inadequate. Although impeachment is a powerful and wide-ranging tool, it cannot function as the Emoluments Clause's sole enforcement mechanism.¹⁷⁹ Constitutional jurisprudence does not allow for such a reality.¹⁸⁰ A colorful example supporting this proposition is found in *National Treasury Union Employees v. Nixon* in which the court said, “[m]aking available only the impeachment process in a case such as this resembles making available a nuclear bomb as the sole weapon to bring down a pheasant.”¹⁸¹ This remedy must be available, but it cannot be the sole remedy.¹⁸² Thus, Congress is effectively powerless to address an Emoluments Clause injury.

The failure of traditional standing to provide a path forward and the absence of adequate legislative remedies requires an alternative solution that will address the looming constitutional problem.¹⁸³

E. A CONSTITUTIONAL HERO: COMPETITOR STANDING

With the failure of traditional standing principles, to adequately address the needs of litigants seeking to enforce the Emoluments Clause, competitor standing must be applied to provide a path toward redress.¹⁸⁴

Under traditional standing principles, problems surrounding speculation and third parties' involvement stifle claims based on unfair competition.¹⁸⁵ The elements of causation and redressability prevent a party from establishing standing. With competitor standing, however, the method for establishing causation and redressability is far more flexible.¹⁸⁶

In the appellate decision in *Citizens for Ethics & Responsibility*, the majority found causation established through competitor standing.¹⁸⁷ The court's reasoning relied on the fact that when competitors allege an injury, the mere chance to compete on equal footing is sufficient to establish a causal connection between the unfair competition faced and the alleged

¹⁷⁹ See *Blumenthal*, 335 F. Supp. 3d at 68.

¹⁸⁰ *Id.*

¹⁸¹ *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974).

¹⁸² See *id.* at 615.

¹⁸³ See *FOSTER & HICKEY*, *supra* note 3 (“If the courts lack jurisdiction to enforce the Emoluments Clauses, the political process would be the remaining avenue to enforce the provisions, such as through legislation or political pressure. The adequacy of those options is, however, disputed.”).

¹⁸⁴ *Cf.* *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 197–998 (2d Cir. 2019) (describing the ramifications of not employing competitor standing in a variety of contexts including antitrust).

¹⁸⁵ See generally *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017); *In re Trump*, 928 F.3d 360 (4th Cir. 2019).

¹⁸⁶ See *WRIGHT ET. AL.*, *supra* note 82, § 8341 (“Another context in which courts may take a relatively relaxed approach to causation and redressability involves ‘competitor standing’—i.e., situations in which a plaintiff challenges a government action for allegedly unfairly titling the economic playing field against the plaintiffs business interests and in favor of its rivals.”); see also *id.* (“In 2007's *Massachusetts v. Environmental Protection Agency*, the Court again took a relatively lax approach to the causation requirement.”).

¹⁸⁷ *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 203 (2d Cir. 2019).

violation.¹⁸⁸ It is not incumbent on the party to dispel viable alternative theories or specifically identify business lost pieces as a result of the alleged violation.¹⁸⁹

Also relevant is the court's understanding that without such a framework, standing would be nearly impossible to establish.¹⁹⁰ In Emoluments Clause claims, every claim would be defeated by a defendant merely pointing out that economic losses could be driven by other factors such as customer preference for the defendant's products, location, or anything else not tied to the alleged illegal conduct.¹⁹¹ The court in *District of Columbia* also solidified this point when it ruled that it was "not persuaded" by the defendant's causation arguments because it would "render impossible" any effort to enforce the Emoluments Clause.¹⁹²

Competitor standing also sidesteps the issues regarding redressability. Under competitor standing, the courts understand redressability that avoids many obstacles to establishing standing.¹⁹³ When using competitor standing, so long as causation is plausibly asserted, establishing redressability "logically flows" from causation.¹⁹⁴ Combining this notion with the traditional standing principle that an injury needs to be reduced only to "some extent" creates a path for establishing redressability.¹⁹⁵ This framework is critical for Emoluments Clause cases where the competitive disadvantage likely cannot be entirely remedied, and some speculation is unavoidable when asserting that redress will provide relief.¹⁹⁶

Compared to traditional standing or legislative remedies, competitor standing adequately addresses the type of injury that Emoluments Clause violations can generate.¹⁹⁷ Applying competitor standing principles to Emoluments Clause cases allows plaintiffs to overcome the

¹⁸⁸ See *id.* at 183 (citing *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, Fla., 508 U.S. 656, 666 (1993) (explaining that an economic competitor meets the standing requirement when it alleges the inability to compete fairly).

¹⁸⁹ *Id.* at 191 ("This, however, does not require ruling out all possible alternative explanations of a plaintiff's injury. The allegations of fact must plausibly support a 'substantial likelihood' that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions.").

¹⁹⁰ *Id.* at 192.

¹⁹¹ *Id.* ("Under the standard applied by the district court, it would be virtually impossible to plead a competitive injury . . .").

¹⁹² *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 749 (D. Md. 2018) ("[A]ccepting the President's third party argument would render impossible any effort to ever engage in Foreign or Domestic Emoluments Clause analysis.").

¹⁹³ See *WRIGHT ET AL.*, *supra* note 82, § 8341.

¹⁹⁴ *Id.* ("Because Plaintiffs have successfully alleged a plausible likelihood that President Trump's conduct caused their injuries, and the injury is ongoing, it logically follows that relief would redress their injury—at least to some extent.").

¹⁹⁵ See, e.g., *Massachusetts v. E.P.A.*, 549 U.S. 497, 548–49 (2007) (Robert, C.J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("[T]he Court's self-professed relaxation of those Article III requirements has caused us to transgress 'the proper—and properly limited—role of the courts in a democratic society.'").

¹⁹⁶ *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 194.

¹⁹⁷ *Cf. id.* at 193 (highlighting how competitor standing can satisfy the causation prong of standing analysis in Emoluments Clause cases).

hurdles associated with bringing forward such claims.¹⁹⁸ In effect, the competitor standing doctrine transforms the Emoluments Clause's enforcement from a legal impossibility into a straightforward process.¹⁹⁹ Therefore, the constitutional problem that circulates the Emoluments Clause is avoided with the proper competitor standing application.²⁰⁰

IV. RECOMMENDATIONS: PROTECT THE EMOLUMENTS CLAUSE, EMPLOY COMPETITOR STANDING

Though rarely litigated before the Trump administration, the Emoluments Clause is an essential protection for millions of businesses and business owners.²⁰¹ Even though the Emoluments Clause was originally intended to combat the influence of corruption in the American political system, the nature of the injury that naturally flows from violating the Emoluments Clause is economical.²⁰² Federal officials reaping their office's rewards through the patronage of foreign officials skew the playing field in their favor.²⁰³ Competitive disadvantages imposed on any business competing with a federal official can be heavy and widespread.²⁰⁴ Exploring this problem is far more than an academic or constitutional exercise. Instead, its consequences can leave business owners at the whim of federal officials benefitting from foreign patronage and illegal preferential treatment.²⁰⁵

However, the constitutional issue itself is daunting. It is a basic principle that the Constitution, and its provisions must be enforceable.²⁰⁶ Since a violation of the Emoluments Clause primarily threatens individual plaintiffs vis-a-vis competitive business disadvantages,

¹⁹⁸ *Cf. id.* at 192–93 (showing that plaintiffs need not establish absolute proof of illegal activity being the cause of unequal competition to have standing).

¹⁹⁹ *Cf. id.* at 194 (showing that redressability logically comes alongside causation under competitor standing for Emoluments Clause injuries).

²⁰⁰ *Cf. id.* at 192–93 (highlighting how competitor standing can tackle causation prong of standing).

²⁰¹ *See also* U.S. SMALL BUS. ADMIN. OFF. ADVOC., *supra* note 117 (detailing the industry employment rate, business size, and demographics of small businesses in the United States). *See generally* Citizens for Resp. & Ethics in Wash., 953 F.3d (finding that President Trump's acceptance of Emoluments potentially placed thousands of businesses and restaurants at a competitive disadvantage).

²⁰² Bianca Spinosa, Comment, *Interpreting Emoluments Today: The Framers' Intent and the "Present" Problem*, 78 MD. L. REV. 998, 1030 (2019) (“[T]his anticorruption interest covered more than a quid pro quo.”).

²⁰³ *See generally* District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (finding competitive injury properly asserted for the District of Columbia and State of Maryland which had financial interests in entities allegedly placed at disadvantage against Trump-owned properties).

²⁰⁴ *See id.*; *cf.* U.S. SMALL BUS. ADMIN. OFF. ADVOC., *supra* note 117 (tabulating millions of small businesses in the United States).

²⁰⁵ *See generally* Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178 (2d Cir. 2019) (describing the injury that can flow from an Emoluments Clause injury).

²⁰⁶ *Cf.* Marbury v. Madison, 5 U.S. 137, 163 (1803) (stressing the need for every valid injury to have some form of redress available).

those plaintiffs must be able to seek redress.²⁰⁷ Otherwise, the Emoluments Clause will be effectively unenforceable.²⁰⁸ Accordingly, competitor standing, the only viable theory of standing applicable to the unfair competition injuries the Emoluments Clause is most prone to produce, must be treated as a constitutional necessity.²⁰⁹ Without employing competitor standing, potential plaintiffs will be unable to satisfy the causation element of standing and redressability will be almost as difficult.²¹⁰ Therefore, failing to employ competitor standing in Emoluments Clause cases will fatally preclude claims on the issue and potentially leave millions of individual litigants without recourse through the court system.²¹¹

V. CONCLUSION

The primary legal principle that rights must have redress forces the conclusion that when the competitor standing requirements are met, courts must permit plaintiffs alleging an Emoluments Clause violation to have the merits of their case heard.

²⁰⁷ *Id.*

²⁰⁸ *See* Blumenthal v. Trump, 335 F. Supp. 3d 45, 71 (D.D.C. 2018) (raising concern that impeachment may be only remedy if plaintiffs cannot bring claim to enforce the Emoluments Clause).

²⁰⁹ *See generally* Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178 (2d Cir. 2019) (highlighting the ways in which competitor standing allows plaintiffs to bring forward claims to enforce the Emoluments Clause in places in which traditional standing theories would not).

²¹⁰ *See generally id.* (suggesting that without competitor standing principles courts will be unable to hear Emoluments Clause cases).

²¹¹ *Cf. id.* at 191–92.