

HAIQCREc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 CITIZENS for RESPONSIBILITY
4 and ETHICS in WASHINGTON,
5 RESTAURANT OPPORTUNITIES
CENTERS (ROC) UNITED, INC.,
6 JILL PHANEUF, ERIC GOODE

7 Plaintiffs

8 v.

17 Civ. 00458 (GBD)
Motion

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

10 Plaintiff

11 -----x
New York, N.Y.
12 October 18, 2017
13 10:30 a.m.

14 Before:

15 HON. GEORGE B. DANIELS
District Court Judge

16 APPEARANCES

17 COHEN MILLSTEIN SELLERS & TOLL PLLC
Attorneys for Plaintiff
18 JOSEPH SELLERS

19 GUPTA WESSLER PLLC
Attorneys for Plaintiffs

20 DEEPAK GUPTA
21 JONATHAN TAYLOR
22 JOSHUA MATZ
23 NORM EISEN
24 NOAH BOOKBINDER
25 ZEPHYR TEACHOUT

UNITED STATES DEPARTMENT OF JUSTICE
Attorneys for Defendant Donald J. Trump
BRETT A. SHUMATE
JEAN LIN

HAIQCREc

1 (In open court; case called)

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

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

6 THE COURT: Good morning, Mr. Shumate.

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

9 THE COURT: Good morning, Ms. Lin.

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

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

16 THE COURT: Good morning.

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

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

20 THE COURT: Yes, please use the podium.

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

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

HAIQCREc

1 with the President and speculative fears about increased
2 competition.

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

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

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

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

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

HAIQCREc

1 First, it is an abstract harm. It is a generalized
2 grievance shared in common with the entire public. And the
3 case I would point the Court to is the *Schlesinger* case from
4 1974, a Supreme Court case, in which an organization dedicated
5 to ending the war in Viet Nam brought suit alleging that
6 members of Congress were violating the Constitution because
7 they held memberships in the Armed Forces Reserve at the same
8 time they were members of Congress. What these plaintiffs were
9 concerned about is that these members of Congress were not
10 faithfully discharging the duties of their office, and that
11 they might be subject to undue influence by the Executive
12 Branch. The Supreme Court said that this is an abstract harm.
13 It is a generalized grievance shared in common with the entire
14 public.

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

HAIQCREc

1 standing.

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

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

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

HAIQCREc

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

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

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

HAIQCREc

1 does not have standing and should be dismissed.

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

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

HAIQCREc

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

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

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

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

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

HAIQCREc

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

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

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

HAIQCREc

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

25 Your Honor, even if you find that any of these

HAIQCREc

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

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

HAIQCREc

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

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

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

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

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

HAIQCREc

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

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

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

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

HAIQCREc

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

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

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

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

HAIQCREc

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

5 So, three uses of the word emolument.

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

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

HAIQCREc

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

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

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

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

HAIQCREc

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

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

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

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

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

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

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

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

HAIQCREc

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

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

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

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

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

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

21 THE COURT: That is the entire content.

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

HAIQCREc

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

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

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

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

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

HAIQCREc

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

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

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

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

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

HAIQCREc

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

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

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

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

HAIQCREc

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

4 THE COURT: Provided rather than promised?

5 MR. SHUMATE: Correct.

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

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

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

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

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

HAIQCREc

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

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

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

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

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

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

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

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

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

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

HAIQCREc

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

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

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

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

HAIQCREc

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

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

HAIQCREc

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

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

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

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

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

25 THE COURT: Well, compensation is always for services,

HAIQCREc

1 isn't it?

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

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

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

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

13 MR. SHUMATE: That's correct.

14 THE COURT: It's still an emolument.

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

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

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

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

HAIQCREc

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

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

7 MR. SHUMATE: Well, he did it.

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

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

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

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

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

HAIQCREc

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

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

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

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

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

HAIQCREc

1 and likely would apply to any --

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

4 MR. SHUMATE: Correct.

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

8 MR. SHUMATE: Correct.

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

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

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

HAIQCREc

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

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

HAIQCREc

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

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

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

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

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

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

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

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

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

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

HAIQCREc

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

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

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

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

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

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

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

20 MR. SHUMATE: I think I misunderstood the
21 hypothetical.

22 THE COURT: OK.

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

HAIQCREc

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

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

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

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

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

HAIQCREc

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

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

13 Another example that they cannot explain away is the
14 1810 constitutional amendment that was passed by Congress by a
15 wide margin, ultimately was not ratified by two states, but
16 what that constitutional amendment said was that any citizen
17 that received an emolument from a foreign government would be
18 stripped of their citizenship.

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

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

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

HAIQCREc

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

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

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

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

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

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

HAIQCREc

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

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

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

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

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

HAIQCREc

1 Emoluments Clause.

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

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

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

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

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

HAIQCREc

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

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

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

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

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

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

15 MR. SHUMATE: The promise in the hypothetical.

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

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

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

HAIQCREc

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

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

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

HAIQCREc

1 intended.

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

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

HAIQCREc

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

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

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

HAIQCREc

1 THE COURT: Surely.

2 Mr. Gupta, did you want to start?

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

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

7 (Recess)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

HAIACRE2ps

1 MR. GUPTA: Good morning, your Honor.

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

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

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

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

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

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

HAIACRE2ps

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

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

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

1 that they are in direct competition.

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

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

HAIACRE2ps

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

5 MR. GUPTA: Right.

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

HAIACRE2ps

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

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

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

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

22 MR. GUPTA: That's right.

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

HAIACRE2ps

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

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

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

17 THE COURT: Well, she explains what?

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

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

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

HAIACRE2ps

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

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

8 MR. GUPTA: Yes.

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

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

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

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

HAIACRE2ps

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

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

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

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

15 THE COURT: She doesn't have a restaurant.

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

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

HAIACRE2ps

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

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

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

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

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

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

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

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

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

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

16 THE COURT: I understand that.

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

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

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

HAIACRE2ps

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

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

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

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

18 MR. GUPTA: Absolutely.

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

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

HAIACRE2ps

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

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

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

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

19 MR. GUPTA: That is their argument, yes.

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

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

HAIACRE2ps

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

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

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

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

HAIACRE2ps

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

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

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

12 MR. GUPTA: Exactly.

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

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

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

HAIACRE2ps

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

8 MR. GUPTA: Let me be much clear, then, because I
9 misspoke if that's the impression that I left you with. So,
10 for example, before the emoluments violations, CREW had put out
11 17 reports about money in politics, what they were doing.
12 Since the emoluments clause violations, they have put out two.
13 All of their research staff has had to be diverted to these
14 issues.

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

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

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

HAIACRE2ps

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

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

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

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

HAIACRE2ps

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

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

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

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

HAIACRE2ps

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

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

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

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

21 THE COURT: Yes.

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

HAIACRE2ps

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

1 decided that it wanted to consent.

2 MR. GUPTA: Right.

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

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

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

HAIACRE2ps

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

4 MR. GUPTA: That's right.

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

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

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

HAIACRE2ps

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

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

HAIACRE2ps

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

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

7 MR. GUPTA: No.

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

9 MR. GUPTA: Oh --

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

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

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

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

HAIACRE2ps

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

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

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

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

HAIACRE2ps

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

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

19 MR. GUPTA: It does.

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

HAIACRE2ps

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

4 MR. GUPTA: I think something could be both.

5 THE COURT: It could be both.

6 MR. GUPTA: If I bribed you through -- if I pay you
7 \$50,000 for a hotdog, is that a present or is that an
8 emolument? Does it really matter? I think the point of the
9 clause, of any kind, whatever language, is to sweep very
10 broadly.

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

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

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

HAIACRE2ps

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

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

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

25 MR. GUPTA: The acceptance of profits or gain from

HAIACRE2ps

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

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

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

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

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

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

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

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

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

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

HAIACRE2ps

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

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

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

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

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

HAIACRE2ps

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

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

HAIACRE2ps

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

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

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

7 BACK TABLE ATTY: Five minutes or less.

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

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

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

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

HAIACRE2ps

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

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

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

HAIQCRE3

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

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

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

HAIQCRE3

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

4 THE COURT: Neither pleased, nor unhappy.

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

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

15 Thank you, your Honor.

16 THE COURT: Thank you.

17 Mr. Sellers.

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

25 Let me begin with the proposition that we would intend

HAIQCRE3

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

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

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

HAIQCRE3

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

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

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

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

HAIQCRE3

1 THE COURT: Thank you, sir.

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

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

8 (Adjourned)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25