

No. 20-1839

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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DISTRICT OF COLUMBIA AND STATE OF MARYLAND,

*Plaintiffs-Appellees,*

- v. -

DONALD J. TRUMP, in his individual capacity,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND,  
CASE NO. 8:17-CV-1596-PJM (HON. PETER J. MESSITTE)

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**BRIEF OF *AMICI CURIAE* SCHOLAR SETH BARRETT TILLMAN AND THE JUDICIAL  
EDUCATION PROJECT IN SUPPORT OF DEFENDANT-APPELLANT**

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### Interest of Amici

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

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

The Appellant and Appellees consented to the filing of this brief.

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

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

## Introduction

The Appellant asked this Court to “order that Plaintiffs’ action be dismissed with prejudice for lack of Article III standing.”<sup>3</sup> *Amici* submit two additional grounds on which Plaintiffs’ complaint should have been dismissed. First, the Plaintiffs lacked an equitable cause of action. Indeed, their complaint conflated *equitable relief* with *equitable jurisdiction*. The Plaintiffs do not invoke a traditional equitable cause of action, and therefore cannot establish equitable jurisdiction. The Plaintiffs’ complaint should have been dismissed because the District Court lacked subject matter jurisdiction. Second, the complaint should have been dismissed in light of two “nonmerits threshold question[s]”: (1) the absence of an equitable cause of action and (2) the failure to properly plead an individual capacity case. Under either path, the District Court should have dismissed the Plaintiffs’ complaint.

## Argument

### **I. The Plaintiffs Lacked an Equitable Cause of Action and Therefore the District Court Lacked Equitable Jurisdiction to Hear this Case**

Article III of the Constitution gave the federal courts jurisdiction over both law and equity. Litigants often conflate these concepts. A plaintiff cannot establish equitable jurisdiction by merely seeking equitable relief. Rather, the plaintiff must invoke a traditional equitable cause of action that was established by 1789, or a cause that was

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<sup>3</sup> Appellant’s Opening Brief at 1.

created by Congress or the courts. The Plaintiffs, however, did not assert a traditional equitable cause of action. The Supreme Court has not recognized a free-floating equitable cause of action to challenge ultra vires government conduct. In the absence of equitable jurisdiction, the District Court should have dismissed the Plaintiffs' complaint due to a lack of subject matter jurisdiction.

**A. Litigants often conflate law with equity, and conflate equitable relief with equitable jurisdiction**

All too often, litigants conflate law and equity. But they are different concepts. Indeed, the Constitution expressly identifies this distinction: Article III provides that “[t]he judicial Power shall extend to all Cases, in *Law and Equity*.”<sup>4</sup> In *Federalist* No. 80, Alexander Hamilton offered separate discussions of law and equity.<sup>5</sup>

Moreover, litigants routinely conflate “equitable relief” with the “equity jurisdiction of the federal courts.”<sup>6</sup> These concepts are also distinct. A plaintiff can seek equitable relief—such as a declaration or an injunction—with a complaint that invokes general federal question jurisdiction.<sup>7</sup> And a plaintiff can seek those types of equitable relief, even if the cause of action arises in law.

A party can also seek equitable relief with a complaint that invokes federal equity jurisdiction. But seeking equitable relief is not sufficient to invoke a federal court's

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<sup>4</sup> U.S. Const. art. III (emphasis added).

<sup>5</sup> *Federalist* No. 80 (Hamilton) (“It has also been asked, what need of the word ‘equity?’”).

<sup>6</sup> *See In re Trump*, 958 F.3d 274, 293 (4th Cir. 2020) (Wilkinson, J., dissenting).

<sup>7</sup> *See* 28 U.S.C. § 1331.

equitable jurisdiction. Rather, a plaintiff must *also* assert a cause of action that arises in equity. A plaintiff cannot magically unlock the door to a federal court by merely pleading that his action arises in “equity” or under the federal district court’s “equitable jurisdiction.” *Equity* is not a jurisdictional talisman.

A complaint that merely states in a conclusory fashion that the court has “equitable jurisdiction” and that the plaintiff is seeking “equitable relief” does not comply with Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Instead, “[t]he equity jurisdiction of the federal courts is strictly limited to the ‘authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery’” in 1789.<sup>8</sup> And the plaintiff always bears the burden to establish the federal court’s jurisdiction, including equitable jurisdiction. Thus, the scope of the federal court’s equity jurisdiction is defined and limited.

**B. Litigants often conflate causes of action grounded in law with equitable causes of action**

Litigants often make a third mistake in cases that seek an equitable remedy: They conflate a cause of action grounded in law, with an equitable cause of action. These two concepts are also distinct. Congress can create causes of action that arise in law by enacting statutes. Perhaps the most famous statutory cause of action that arises in law

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<sup>8</sup> *In re Trump*, 958 F.3d at 293 (Wilkinson, J., dissenting) (quoting *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)).

is 42 U.S.C. § 1983. Moreover, in cases like *Bivens v. v. Six Unknown Named Agents*, the Supreme Court has recognized that certain causes of action can be implied from the federal Constitution.<sup>9</sup> When a cause of action arises in law, a plaintiff needs more than a valid cause of action in order to survive a motion to dismiss. The plaintiff also needs to assert a valid basis for federal jurisdiction. Usually, where a plaintiff invokes a cause of action that arises in law—whether created by Congress or implied by the Constitution—federal subject matter jurisdiction arises under 28 U.S.C. § 1331.

When a lawsuit arises in equity, the same principles apply, but in a different fashion. First, the plaintiff must invoke an *equitable cause of action*. Equitable causes of actions include those traditional causes of action that the English Court of Chancery had recognized by 1789.<sup>10</sup> This baseline remains subject to modification by Congress and by the courts.<sup>11</sup> Second, the plaintiff must also establish that the federal court has *equitable jurisdiction* to hear the case. Professor Samuel Bray explains that in a court of chancery, “the Chancellor would look forward to the remedy in considering ‘*equitable jurisdiction*,’ a concept that *overlapped* with what we would now call ‘standing’ and ‘*cause of action*.’”<sup>12</sup>

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<sup>9</sup> See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

<sup>10</sup> *Grupo Mexicano*, 527 U.S. at 318.

<sup>11</sup> See *Jurisdiction: Equity*, Federal Judicial Center, <https://www.fjc.gov/history/courts/jurisdiction-equity>.

<sup>12</sup> Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 472 n.316 (2017) (emphasis added).

In *Federalist* No. 80, Alexander Hamilton recognized this overlap between an equitable cause of action and equitable jurisdiction. Hamilton listed four common “equitable causes” of action that existed in the late eighteenth century: “FRAUD, ACCIDENT, TRUST, or HARDSHIP.”<sup>13</sup> Under modern doctrine, a defendant could raise such objections as defenses in a court of law. But in Hamilton’s time, a party would assert “fraud, accident . . . and hardship” as equitable causes of action in the separate court of chancery.

Hamilton describes a hypothetical case. Consider a contract that was not obtained through “direct fraud or deceit.” However, the plaintiff may have taken “undue and unconscionable advantage . . . of the necessities or misfortunes” of the defendant. This contract could not be “invalidate[d] . . . in a court of law.” In the event of a breach, the plaintiff could sue the defendant for damages on his contract claim in a court of law. But “a court of equity would not tolerate” such a “hard bargain[.]” In this hypothetical, after the plaintiff received an award of damages, the defendant would go to the state’s court of chancery. Then, the defendant would raise an equitable cause of action to enjoin the common law court’s damages award. However, it was not enough to simply allege improper conduct in contracting. The defendant had to assert a cause of action that was recognized by a court of chancery: for example, hardship.

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<sup>13</sup> *Federalist* No. 80 (Hamilton).

Hamilton then posed the threshold question: “What *equitable causes* can grow out of the Constitution and laws of the United States?”<sup>14</sup> Here, Hamilton was referring to the sort of equitable causes of action that were known in state chancery courts with equitable jurisdiction in the late 18th century, such as “fraud, accident, trust, and hardship.” He was not referring to *equitable remedies*, such as an injunction. Hamilton then returned to his hypothetical case: with such a “hard bargain[] . . . it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction.” Hamilton expressly equated the existence of “equitable causes” of action with the “equitable jurisdiction in the federal courts.”

To this day, the Supreme Court follows Hamilton’s understanding of equitable jurisdiction. *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund* held that the *equitable jurisdiction* of the federal courts is coextensive with all of the traditional *equitable causes of action* that were recognized by the “High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act [of] 1789....”<sup>15</sup> In equity, *jurisdiction* and *causes of action* are overlapping concepts.<sup>16</sup> Thus, if a party lacks an equitable cause of action, the party cannot invoke the federal court’s equitable jurisdiction. More importantly, equitable *jurisdiction* is not properly invoked merely by requesting equitable *relief*. The process works the other way around. First, the

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<sup>14</sup> *Federalist* No. 80 (Hamilton) (emphasis added).

<sup>15</sup> *Grupo Mexicano*, 527 U.S. at 318 (citation omitted).

<sup>16</sup> See Bray, *supra* note 12.

plaintiff must assert a traditional *equitable cause of action* that was known to the English Court of Chancery in 1789.<sup>17</sup> At that point, the *equitable jurisdiction* of the federal court is properly invoked. Second, the federal district court can then offer *equitable relief*, such as an injunction or a declaration. At bottom, *equitable jurisdiction* is a body of causes of action. A plaintiff must assert a traditional equitable cause of action to open the courthouse door.

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In this lawsuit, the Plaintiffs have merely requested *equitable relief*, which is insufficient to invoke equitable jurisdiction. Additionally, Plaintiffs assert that there is a recognized *equitable cause of action* to challenge ultra vires government conduct. This argument fails for reasons *Amici* will discuss in Part I.D. Thus, the Plaintiffs fail to assert an equitable cause of action, and, therefore, cannot establish equitable jurisdiction.

**C. A cause of action grounded in law does not establish jurisdiction, but an equitable cause of action does establish jurisdiction**

The jurisdictional analysis in this appeal is affected by the distinction between causes of action grounded in law and equitable causes of action. The Supreme Court has held that the existence of a cause of action grounded in law—whether statutory or implied by the Constitution—is *not* jurisdictional.<sup>18</sup> However, the Supreme Court has

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<sup>17</sup> *Grupo Mexicano*, 527 U.S. at 318. That equitable jurisdiction remains subject to modification by the courts and by Congress. *See supra* FJC, note 11.

<sup>18</sup> *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

not extended this analysis to equitable cause of actions. *Amici* submit that an equitable cause of action is a necessary component of equitable jurisdiction.

Often, a claim premised on an equitable cause of action will overlap with a claim premised on a cause of action grounded in law. In such cases, federal jurisdiction would be apparent under 28 U.S.C. § 1331; there would not be a need to decide whether an equitable cause of action, standing by itself, provided a basis for jurisdiction. But in some cases, the plaintiff does not raise a cause of action grounded in law. What happens if a plaintiff *only* asserts an equitable cause of action to establish equitable jurisdiction, and the court finds that equitable cause of action did not exist in 1789, and was not authorized by Congress or the courts? In that case, the case must be dismissed for lack of subject matter jurisdiction.<sup>19</sup>

The Plaintiffs' purported cause of action does not overlap with any cause of action created by positive law or implied by the Constitution. Plaintiffs assert an equitable cause of action to challenge ultra vires government conduct. In Part I.D, *Amici* will show that Plaintiffs' cause of action is not a traditional cause of action that supports equitable jurisdiction. Therefore, the Plaintiffs failed to properly invoke the equitable jurisdiction of the federal courts.

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<sup>19</sup> Fed. R. Civ. P. 12(h)(3).

**D. The Plaintiffs do not assert a traditional equitable cause of action that establishes jurisdiction**

In this case, the Plaintiffs contended that “[t]he ability to sue to enjoin unconstitutional actions by state and federal officers” is “the creation of courts of equity,” and reflects “a long history of judicial review of illegal executive action, tracing back to England.”<sup>20</sup> Plaintiffs invoked the term “equity,” as if seeking an equitable remedy establishes the equitable jurisdiction of the District Court. And, the District Court below accepted this argument.<sup>21</sup> The Plaintiffs, and the District Court, erred.

First, the Plaintiffs failed to identify any “analogous” cause of action that may have been obtained at equity.<sup>22</sup> Nor did they demonstrate that the High Court of Chancery in England could have exercised jurisdiction over an analogous case in 1789. The Plaintiffs’ purported equitable cause of action would have been unknown to William Blackstone, Chancellor Kent, or Justice Story—and they “do not even argue this point” otherwise.<sup>23</sup>

Second, Plaintiffs’ rule lacks any limiting principle: it would open the courthouse door to *every* assertion of illegal conduct against *every* federal officer at the request of *every* litigant. It is not enough to merely assert a violation of the Constitution. For example,

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<sup>20</sup> D.Ct. Doc. 117 at 29 (quoting *Armstrong v. Exceptional Child Center*, 135 S.Ct. 1378, 1384 (2015)).

<sup>21</sup> *D.C. v. Trump*, 291 F. Supp. 3d 725, 755 (D. Md. 2018); *see also* *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 210 (D.D.C. 2019); *cf.* *CREW v. Trump*, 276 F. Supp. 3d 174, 179 n.1 (S.D.N.Y. 2017).

<sup>22</sup> *See Grupo Mexicano*, 527 U.S. at 319.

<sup>23</sup> *Id.*

in *Armstrong v. Exceptional Child Center*, the Supreme Court rejected the proposition that “the Supremacy Clause creates a cause of action for its violation” in the federal court’s equitable jurisdiction.<sup>24</sup> The Plaintiffs repeatedly cite *Armstrong*, but fail to note that in this case the Supreme Court held that there was no equitable cause of action. *Armstrong* cuts against Plaintiffs’ free-floating claim to an equitable ultra vires cause of action.

Third, the Plaintiffs’ approach would allow the courts, rather than Congress, to deviate from traditional understandings of equitable jurisdiction. *Grupo Mexicano* recognized that under the Court’s “traditionally cautious approach to equitable powers,” Congress is responsible for “any substantial expansion of past practice.”<sup>25</sup> If the Plaintiffs are correct, then any party who invokes “equity” can easily evade the Administrative Procedure Act’s (APA) restrictions on seeking a judicial remedy. Such a “wrenching departure from past practice” must be carefully scrutinized.<sup>26</sup> Judge Wilkinson accurately described this dynamic: cases in which “a plaintiff has a legally cognizable interest in challenging unlawful conduct” are “largely outgrowths of the administrative state.”<sup>27</sup> The APA, Judge Wilkinson observed, allows “would-be plaintiffs [to] benefit from . . . ‘generous’ statutory judicial review provisions.”<sup>28</sup>

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<sup>24</sup> 575 U.S. 320, 326 (2015).

<sup>25</sup> *Grupo Mexicano*, 527 U.S. at 329.

<sup>26</sup> *Id.* at 322.

<sup>27</sup> *In re Trump*, 958 F.3d 274, 295 (4th Cir. 2020) (Wilkinson, J., dissenting) (quoting (Resp. Br. 46)) (citations omitted).

<sup>28</sup> *Id.* (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987)) (citations omitted).

*Equity*, however, is not a substitute for complying with the APA. Yet, the Plaintiffs put forward this argument. And the Ninth Circuit Court of Appeals accepted this argument in *Sierra Club v. Trump*.<sup>29</sup> The Plaintiffs in this case, as well as the Ninth Circuit, were wrong.<sup>30</sup> The Supreme Court stayed the Ninth Circuit's ruling. The per curiam order stated that the federal government had "made a sufficient showing at this stage that the plaintiffs have no cause of action."<sup>31</sup> This order suggests that the Plaintiffs' analysis of equitable causes of action was also in error. Equity jurisdiction is not a tabula rasa or constitutional free-for-all in which litigants may prosecute claims that would otherwise fail under the APA and in law.

The Plaintiffs' unbounded theory of equitable jurisdiction creates a fourth problem: it deprives the Defendant of his right to a jury trial. Article III federal court jurisdiction extends to cases arising "in Law and Equity."<sup>32</sup> But the jury right in civil trials is not coextensive with all cases arising in law and equity. The Seventh Amendment provides: "In suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."<sup>33</sup> This

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<sup>29</sup> *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019); *cf. In re Trump*, 781 Fed. App'x 1, 2 (D.C. Cir. 2019) ("The question of whether the Foreign Emoluments Clause or other authority gives rise to a cause of action against the President is unsettled.")

<sup>30</sup> See Josh Blackman & Seth Barrett Tillman, *What is the Plaintiffs' Cause of Action in the Wall Litigation?*, The Volokh Conspiracy, <https://perma.cc/F5Z2-VEDB>.

<sup>31</sup> *Trump v. Sierra Club*, 140 S.Ct. 1 (2019). A petition for a writ of certiorari is currently pending in this case. See Supreme Court Docket No. 20-138.

<sup>32</sup> U.S. Const. art. III.

<sup>33</sup> U.S. Const. amend. VII (emphasis added).

Amendment expressly refers to the “law” prong of Article III. But where an action arises under the “equity” prong of Article III, there is no Seventh Amendment jury right in civil actions. This dichotomy is consistent with historical practice.<sup>34</sup>

In short, adopting the Plaintiffs’ theory of equity would restrict the right to a civil jury. This concern is not novel. Historically, “[t]he right to trial by jury often depend[ed] on whether the case would have been . . . an equity case or not.”<sup>35</sup> This Court should avoid any reading of Article III that would effectively curtail what Hamilton described as the “palladium of free government.”<sup>36</sup> The Plaintiffs do not even recognize this serious consequence of their theory of equity—which will apply to other cases and other defendants. Finally, the Plaintiffs’ theory of equitable jurisdiction usurps Congress’s role to establish causes of actions. If any branch is to deprive the people of the right to trial by jury, it should be the elected branches, and not the judiciary.

**E. The Supreme Court has not recognized a free-floating equitable cause of action to challenge ultra vires government conduct**

The Plaintiffs invoke the equitable jurisdiction of the federal courts to challenge allegedly ultra vires government conduct. But the Supreme Court has never recognized such an equitable cause of action that applies in *all cases*. Rather, the Court explained,

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<sup>34</sup> Akhil Reed Amar, *America’s Constitution: A Biography* 210 n.\* (2005) (“Juries traditionally sat in common-law suits but not in equity . . .”).

<sup>35</sup> Lawrence M. Friedman, *A History of American Law* xxvii (4th ed., 2019).

<sup>36</sup> *Federalist* No 83 (Hamilton). *See also Federal Farmer* No. IV.

“in a proper case relief may be given in a court of equity . . . to prevent an injurious act by a public officer.”<sup>37</sup>

Moreover, the Plaintiffs cite precedents in which the federal courts issued an equitable *remedy*, and treat those cases as if equity provided the *cause of action* and *equitable jurisdiction*.<sup>38</sup> This approach puts the remedial cart before the jurisdictional horse. In each of these cases, the cause of action arose in *law* and not in *equity*. That analysis is not changed even when the court ultimately granted *equitable relief*, as well as *legal relief*, like money damages.

The Plaintiffs allege that three leading Supreme Court cases involved an equitable cause of action to challenge ultra vires conduct: *Ex Parte Young*, *Larson v. Domestic & Foreign Commerce Corp.* and *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* None of these cases supports Plaintiffs’ novel cause of action. Therefore, Plaintiffs lack a traditional equitable cause of action. Plaintiffs’ assertion of equitable jurisdiction also fails.

1. *Ex Parte Young* did not involve an equitable cause of action to challenge ultra vires government conduct

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<sup>37</sup> *Armstrong*, 575 U.S. at 327 (quoting *Carroll v. Safford*, 3 How. 441, 463 (1845)) (emphasis added).

<sup>38</sup> See *In re Trump*, 958 F.3d 274, 295–96 (4th Cir. 2020) (Wilkinson, J., dissenting) (noting that the decisions Plaintiffs cite that “challeng[ed] unlawful conduct” “were premised on *written* law creating and protecting such interests—not on traditional equitable rights” (citations omitted)); see also *California v. Trump*, 963 F.3d 926, 965–67 (9th Cir. 2020) (Collins, J., dissenting).

First, the Plaintiffs cite *Ex Parte Young*.<sup>39</sup> In this old chestnut, the Supreme Court held that the federal courts could issue injunctive relief to prevent state officers from prospectively violating the Due Process Clause of the Fourteenth Amendment.<sup>40</sup> In the instant litigation, the Plaintiffs draw an inference from *Young*'s well-known holding: the District Court had equitable jurisdiction to prevent the President from prospectively violating the Emoluments Clauses.

The Plaintiffs, however, focus only on the remedial aspect of *Young*: injunctive relief. The Plaintiffs do not address the facts of *Young*, which involved a run-of-the-mill dispute: a governmental regulation of private property, a railroad company.<sup>41</sup> The posture of *Young* was, admittedly, complex. The case began when shareholders of the railroad company sued the company and its directors.<sup>42</sup> The shareholders wanted the directors to challenge the constitutionality of the state regulations as violations of the Due Process Clause of the Fourteenth Amendment.<sup>43</sup> At the time, Minnesota Attorney General Edward Young enforced the railroad regulations.<sup>44</sup> The shareholders could

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<sup>39</sup> D.Ct. Doc. 117 at 29–31.

<sup>40</sup> 209 U.S. 123, 159–60 (1908).

<sup>41</sup> *Id.* at 144 (explaining that “the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take *property* without due process of law” (emphasis added)). *See also* *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

<sup>42</sup> *Ex parte Young*, 209 U.S. at 143 (“[T]he complainants in the suit commenced in the circuit court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill.” (citing former Equity Rule 94)).

<sup>43</sup> *Id.* at 150.

<sup>44</sup> *Id.* at 170.

invoke the equitable jurisdiction of the federal court because they relied on traditional equitable principles and former Equity Rule 94.<sup>45</sup> (This provision was the precursor to the modern-day Fed. R. Civ. P. 23.1, which governs derivative actions.<sup>46</sup>)

In *Young*, the shareholders sought to enforce their fiduciary relationship with the directors. This “trust”-like relationship lies at the core of historical equitable jurisdiction. Indeed, in *Federalist* No. 80, Hamilton listed “trust” as a traditional cause of action, along with “fraud,” “accident,” and “hardship.”<sup>47</sup> The shareholders could also rely on a traditional equitable cause of action to challenge the regulations. In the English High Court of Chancery, and in early American courts, causes of action existed that would allow private citizens to challenge governmental regulations of *their* property. In *Young*, the government was regulating the railroad company. Such disputes about contested rights and duties involving property (e.g., interpleader) also lie at the very core of historical equitable jurisdiction. Specifically, the *Young* plaintiffs sought to prevent *future* state action regulating *their* property. To accomplish this goal, they invoked the court’s equitable jurisdiction to sue their company, its directors, and state officers before those state officers could regulate the plaintiffs’ property through an imminent coercive lawsuit.<sup>48</sup>

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<sup>45</sup> *Id.* at 143. See Equity Rule 94, 104 U.S. ix–x (1882), <https://bit.ly/2FWwiL8>.

<sup>46</sup> See Archie E. Williams, Jr., *Derivative Suits*, 4 Fordham Urban L.J. 565 n.4 (1976).

<sup>47</sup> *Federalist* No. 80 (Hamilton).

<sup>48</sup> *Young*, 209 U.S. at 129.

The Plaintiffs present an entirely different claim. Here, the Plaintiffs' suit does not concern the government's effort to regulate Plaintiffs' own property. Rather, the Plaintiffs seek to use the legal system to regulate Donald J. Trump's property. (To be precise, the Plaintiffs are seeking to regulate LLCs and corporations in which Donald Trump holds equity.) Donald Trump's purported constitutional tort—that is, *accepting or receiving purported emoluments* through private commercial transactions—does not regulate or seize the Plaintiffs' property. Nor do these cases involve a *threatened coercive suit* brought by the government to take or regulate plaintiffs' property. Plaintiffs do not allege that the Defendant, or the federal government, are taking or regulating their property. Thus, *Young* provides no support for establishing an equitable cause of action in the context of the Emoluments Clauses.

Allegations that Trump's properties compete with the Plaintiffs' businesses may affect the Article III standing inquiry in a case that relies on a cause of action grounded in the positive law of antitrust or competition law. But modern competitor standing doctrine does not inform whether the Plaintiffs can invoke the traditional *equitable jurisdiction* of the federal courts.

The Plaintiffs' case and *Young* share one trait in common: both sets of plaintiffs asked for *equitable relief*. But what the Plaintiffs in the instant litigation need to show, but do not, is that they can assert a traditional *equitable cause of action* which would establish the existence of *equitable jurisdiction*.

2. *Larson* did not involve an equitable cause of action to challenge ultra vires conduct

Second, the Plaintiffs have cited *Larson v. Domestic & Foreign Commerce Corp.*<sup>49</sup> That case involved a simple contract claim.<sup>50</sup> Causes of action for specific performance based on a breach of contract have longstanding roots in the law of equity.<sup>51</sup> But in *Larson*, the cause of action arose under the common law of contract.

Here, the Plaintiffs cannot point to any common law or contract-based cause of action. *Larson* does not stand for the proposition that Plaintiffs have a free-floating equitable cause of action to challenge purportedly ultra vires government conduct.

3. *Free Enter. Fund* did not involve an equitable cause of action to challenge ultra vires conduct

Third, the Plaintiffs cited *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*<sup>52</sup> This citation is perplexing, because that case did not discuss the federal court's equitable jurisdiction. Rather, a footnote in that decision cited *Correctional Services Corp. v. Malesko* for the proposition that “equitable *relief*” has long been recognized as the proper means for preventing entities from acting unconstitutionally.”<sup>53</sup> Once again, the Plaintiffs

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<sup>49</sup> D.Ct. Doc. 117 at 31, 34–35 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)).

<sup>50</sup> *Larson*, 337 U.S. at 686.

<sup>51</sup> See, e.g., 1 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 712–93 (12th ed., 1877) (providing a chapter on specific performance).

<sup>52</sup> D.Ct. Doc. 117 at 28, 29, 31 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)); see also Scholars Amicus Brief, D.Ct. Doc. 56 at 3 (citing *Free Enter. Fund*).

<sup>53</sup> *Free Enter. Fund*, 561 U.S. at 491 n.2 (quoting, *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001)) (emphasis added).

conflate the request for equitable *remedies* with the invocation of equitable *causes of action* and equitable *jurisdiction*. Seeking equitable relief does not establish equitable jurisdiction. Moreover, *Malesko* involved an *unsuccessful* cause of action under *Bivens* for damages.<sup>54</sup> The *Malesko* plaintiffs did not invoke equitable jurisdiction to obtain equitable relief—the word “equity” appears nowhere in the opinion. Indeed, throughout the course of this litigation, Plaintiffs eschewed any claim of a *Bivens*-like implied cause of action arising directly from the Constitution.<sup>55</sup>

Plaintiffs have misread *Free Enterprise Fund*. That case does not allow a plaintiff with an Article III injury to obtain prospective injunctive relief if he simply alleges government officers acted illegally. Critically, *Free Enterprise Fund* involved a *statute-based* cause of action: the Sarbanes-Oxley Act and the threat of a future coercive action by the SEC against the plaintiffs under that statute.<sup>56</sup>

The Supreme Court has never recognized an amorphous, open-ended equitable jurisdiction permitting plaintiffs to challenge alleged violations of the Constitution. Merely asserting that a case arises in “equity” does not authorize state and territorial officers, such as the Attorneys General for Maryland and the District of Columbia, to act as private attorneys general. Equity does not authorize local officers to force federal

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<sup>54</sup> *Malesko*, 534 U.S. at 63.

<sup>55</sup> D.Ct. Doc. 117 at 27.

<sup>56</sup> *Free Enter. Fund*, 561 U.S. at 489–92.

officers to conform to Plaintiffs' understanding of federal law. Such a result stands federalism and federal supremacy on its head.

At bottom, the federal court's "flexible" equitable jurisdiction is "confined within the broad boundaries of traditional equitable relief."<sup>57</sup> Only "in a proper case [may] relief . . . be given in a court of equity . . . to prevent an injurious act by a public officer."<sup>58</sup> This case is not proper: unlike the *Free Enterprise Fund* plaintiffs, Maryland and the District of Columbia are not threatened by the Government with a future coercive lawsuit, much less a threatened future coercive lawsuit that involves their property interests.

4. *Youngstown* and *Dames & Moore* did not involve any equitable causes of action to challenge ultra vires conduct

Other courts have cited two seminal cases to support an equitable cause of action to challenge ultra vires conduct: *Youngstown Sheet & Tube Company v. Sawyer* and *Dames & Moore v. Regan*. Neither of these precedents is availing.

First, in *Youngstown*, the federal government seized control of private steel mills.<sup>59</sup> The mill owners sued Secretary of Commerce Charles Sawyer to challenge his actions. In *Sierra Club v. Trump*, the Ninth Circuit found that *Youngstown* "illustrate[s]" why there is a "cause of action to enjoin the unconstitutional actions."<sup>60</sup> The Ninth Circuit erred.

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<sup>57</sup> *Grupo Mexicano*, 527 U.S. at 322 (citation omitted).

<sup>58</sup> *Armstrong*, 575 U.S. at 327 (citation omitted) (emphasis added).

<sup>59</sup> 343 U.S. 579, 582–84 (1952).

<sup>60</sup> *Sierra Club v. Trump*, 963 F.3d 874, 891 (9th Cir. 2020).

In *Youngstown*, the mill owners did not assert a free-floating equitable cause of action to challenge Secretary Sawyer’s illegal seizure. Rather, the mill owners’ brief explained their cause of action was based on resolving “a simple cloud on title” of the mills.<sup>61</sup> This cause of action, the mills owners argued, “has always moved equity to grant relief because no other remedy is complete or adequate.”<sup>62</sup> The mill owners contended that “[t]he seizure of the properties and business of the plaintiffs, with its host of uncertainties and legal and practical problems arising from the ambiguous position in which the owners are left, should appeal to equity at least as strongly as a cloud on title.”<sup>63</sup>

*Youngstown* was decided half a century before *Grupo Mexicano*. But the mill owners used the *Grupo Mexicano* framework to establish equitable jurisdiction. They demonstrated that their cause of action was “analogous” to an equitable cause of action that would have been recognized by the High Court of Chancery in 1789.<sup>64</sup> The government seized the mill owners’ property. That seizure nullified their property rights. The plaintiffs did not rely on a generalized allegation of ultra vires conduct by the Secretary of Commerce; instead, they relied on a cause of action to quiet title—*their*

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<sup>61</sup> Brief for Plaintiff Companies at 78, <https://bit.ly/33DDvYH>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Grupo Mexicano*, 527 U.S. at 319.

title to *their* property. Here too, *Youngstown* was in the heartland of historical equity jurisdiction involving disputed property rights.

Second, *Dames & Moore v. Regan* did not establish a free-floating equitable cause of action to challenge allegedly ultra vires government conduct.<sup>65</sup> In this case, the Dames & Moore company asserted that the federal government violated federal law and the Constitution.<sup>66</sup> But the plaintiffs pleaded an important, additional fact: that the government's actions "were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization . . . ."<sup>67</sup>

The Dames & Moore company did not use the courts to block purported ultra vires conduct by government officers. Rather, equitable jurisdiction was premised on a final judgment involving the company's vested property rights that the government sought to *extinguish*. The executive order that nullified Dames & Moore's judgment operated in a similar fashion to the executive order that gave rise to *Youngstown*. In both cases, plaintiffs were seeking to protect concrete property rights. And the vindication of such property interests lies at the core of historical equity jurisdiction.

The federal courts had equitable jurisdiction to resolve both *Youngstown* and *Dames & Moore*. But these cases do not support the Plaintiffs' position.

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<sup>65</sup> 453 U.S. 654 (1981).

<sup>66</sup> *Id.* at 664.

<sup>67</sup> *Id.* at 667.

**F. The Plaintiffs' Complaint should have been dismissed because the District Court lacked subject matter jurisdiction**

On July 17, 2020, the Fourth Circuit issued its formal mandate.<sup>68</sup> That same day, the Plaintiffs filed with the District Court a renewed notice of voluntary dismissal of the Individual Capacity Defendant without prejudice.<sup>69</sup> The Plaintiffs, therefore, reserved the right to refile the same case.<sup>70</sup> Later that day, the President's private counsel filed an opposition to the notice of voluntary dismissal.<sup>71</sup> Eleven days later, the Individual Capacity Defendant asked the District Court to rule on the stipulation of voluntary dismissal "to preserve his appellate rights."<sup>72</sup> On July 30, 2020, the District Court issued a short order: "The Court finds that the Notice was effective when filed and that no further action is needed by Plaintiffs or this Court to voluntarily dismiss without prejudice the above captioned matter against Donald J. Trump in his individual capacity."<sup>73</sup> Later that day, the Individual Capacity Defendant filed a notice of appeal from that order.

The District Court erred. The complaint should have been dismissed for lack of subject matter jurisdiction: the District Court never had equitable jurisdiction to begin

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<sup>68</sup> D.Ct. Doc. 181.

<sup>69</sup> D.Ct. Doc. 182.

<sup>70</sup> *See* D.C. v. Trump, 959 F.3d 126, 136 (4th Cir. 2020) (Niemeyer, J., dissenting).

<sup>71</sup> D.Ct. Doc. 183.

<sup>72</sup> D.Ct. Doc. 185 at 2.

<sup>73</sup> D.Ct. Doc. 187.

with. As a practical matter, a dismissal based on a lack of subject matter jurisdiction would prevent the Plaintiffs from refileing the same operative complaint.

## **II. In the Alternative, the District Court Should Have Dismissed the Complaint Under *Sinochem* and *Ruhrgas***

Under *Ruhrgas* and *Sinochem*, the Supreme Court has recognized that certain “nonmerits threshold question[s]” may warrant “dismissal short of reaching the merits.”<sup>74</sup> Moreover, the courts can dismiss such cases without first considering the existence of subject matter jurisdiction. *Amici* submit that there are two such “threshold question[s]” in this case: (1) the absence of an equitable cause of action, and (2) the failure to properly plead an individual capacity case. The District Court should have dismissed the complaint in light of these “threshold question[s].”

### **A. The Plaintiffs’ lack of an equitable cause of action was a “threshold question”**

The Plaintiffs lacked an equitable cause of action and therefore the District Court lacked equitable jurisdiction over the case. Therefore, dismissal was proper under Rule 12(b)(1). In the alternative, *Amici* submit that the Plaintiffs’ lack of an equitable cause of action provided another “nonmerits threshold question” that warranted dismissal of the complaint.<sup>75</sup> Therefore, dismissal was also proper under Rule 12(b)(6). This approach would allow the Court to avoid resolving novel and difficult questions

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<sup>74</sup> *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431, 433 (2007) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)).

<sup>75</sup> *Id.*

presented in this case. Under either a jurisdictional analysis, or the *Ruhrgas/Sinochem* doctrine, the District Court should have dismissed the complaint for lack of an equitable cause of action.

**B. The Plaintiffs' failure to properly plead an individual capacity case was a "threshold" question**

The allegations in Plaintiffs' Amended Complaint cannot possibly be characterized or pleaded as an *individual capacity* federal constitutional tort.

Consider a hypothetical. A guard works at a prison, and decides to steal a prisoner's mail. The guard goes rogue while working in the prison mailroom. On his own initiative, the guard intercepts a prisoner's mail from the prisoner's attorney. He was not following a government policy, but instead personally wished to injure the prisoner. The prisoner could sue this guard in his individual capacity. Why? Because the guard acted *under the color of law*.<sup>76</sup> That is, the guard wore a prison guard uniform, he was an employee of the government's prison service, he had lawful access to the prison mail room, and he acted with apparent authority. This sort of suit is the quintessential individual capacity claim.

Consider another example. A prison guard broke into the law offices of the prisoner's attorney while off-duty and out of uniform. He then stole the prisoner's correspondences. Such conduct is tortious. But the burglary is not a cognizable

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<sup>76</sup> See 42 U.S.C. § 1983; *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

individual capacity federal constitutional tort. The wrong was not done pursuant to a government policy or custom. The prisoner could not sue the guard in his *official* capacity. Nor could the guard be sued in his *individual* capacity. The guard did not act under the color of law. Rather, the guard's tortious conduct could only be challenged through a private civil lawsuit under state law. The guard could be sued *personally* for his private conduct, but a federal individual capacity civil rights suit would be inconsistent with all controlling precedent.

The allegations put forward by the Plaintiffs most closely resemble the off-duty prison guard example: a government officer independently commits a tort, without regard to any governmental custom or policy, and he is not acting under the color of law.

Such conduct might be wrongful. It might be tortious under state law. However, this conduct cannot possibly be characterized or pleaded as an individual capacity federal constitutional tort. Plaintiffs pleaded this suit as an individual capacity suit, not as a lawsuit against Donald Trump, the private individual.<sup>77</sup> The Plaintiffs' failure to properly plead this case provides another ground for dismissal under *Rubrgas/Sinochem*. This analysis can be performed strictly based on the face of the complaint.

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<sup>77</sup> D.Ct. Doc. 90-1.

## Conclusion

The Plaintiffs lacked an equitable cause of action. Therefore the District Court lacked equitable jurisdiction to hear this case. The complaint should have been dismissed for lack of subject matter jurisdiction. Alternatively, the complaint should have been dismissed in light of two “threshold question[s]”: (1) the absence of an equitable cause of action, and (2) the failure to properly plead an individual capacity case.

Dated: Baltimore, Maryland  
September 25, 2020

Respectfully submitted,

By:

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### Certificate of Compliance

I hereby certify that the foregoing Amicus Brief complies with the requirements of Fed. R. App. P. 21(d) and 32(c)(2). The petition is prepared in 14-point Garamond font, a proportionally spaced typeface; it is double-spaced; and it does not exceed 6,492 **words**, exclusive of certificates and documents required by Rule 21(a)(2)(C).

DATED: September 25, 2020

/s/ Jan I. Berlage

**Certificate of Service**

I hereby certify that on September 25, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

DATED: September 25, 2020

/s/ Jan I. Berlage

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21839Caption: District of Columbia and State of Maryland v. Donald J. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Amici Curiae Scholar Seth Barrett Tillman & the Judicial Education Project in Support of  
(name of party/amicus)Defendant-Appellantwho is Amici, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim?  YES  NO  
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jan I. Berlage

Date: September 25, 2020

Counsel for: Amici Curiae