[ORAL ARGUMENT NOT SCHEDULED]

No. 19-5237

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Senator RICHARD BLUMENTHAL, et al.,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLANT

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK R. FREEMAN
MICHAEL S. RAAB
MARTIN TOTARO
JOSHUA REVESZ
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5374

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 5(a) and 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs in district court, and appellees here, are 215 Members of Congress whose names appear at J.A. 131-149.

The defendant in district court, and appellant here, is Donald J. Trump, in his official capacity as President of the United States.

The amici in district court are: (1) Seth Barrett Tillman and the Judicial Education Project; (2) Michael Barnes, Leonard Boswell, Barbara Boxer, Bob Carr, Tom Coleman, Mickey Edwards, Lee Hamilton, Tom Harkin, Gary Hart, Bob Inglis, Carl Levin, Brad Miller, George Miller, Philip Sharp, Chris Shays, Peter Smith, Mark Udall, Henry Waxman, and Dick Zimmer; (3) Don Fox, Marilyn Glynn, Karen Kucik, Lawrence R. Reynolds, Amy Comstock Rick, Trip Rothschild, Walter Shaub, Richard M. Thomas, Kathleen Whalen, Harvey Wilcox, and Leslie Wilcox; (4) Madeleine K. Albright, Bruce Andrews, Daniel Benjamin, Antony Blinken, William J. Burns, Bathsheba N. Crocker, Ryan Crocker, Daniel Feldman, Joshua A. Geltzer, Suzy George, Chuck Hagel, Heather A. Higginbottom, Christopher R. Hill, John F. Kerry, Prem Kumar, James C. O'Brien, Jeffrey Prescott, Kori Schake, Eric P. Schwartz, Wendy R. Sherman, Vikram Singh, and James B. Steinberg; (5) Matthew I. Hall, Thomas Campbell, Erwin Chemerinsky, Perry Dane, Frank Deale, Robin Effron,

Heather Elliott, Jamal Greene, Aziz Huq, Jon D. Michaels, Sandra Rierson, Eric J. Segall, Joan E. Steinman, Emily Garcia Uhrig, and Arthur D. Wolf; (6) Rebecca L. Brown, Harold H. Bruff, Neil Kinkopf, Christopher H. Schroeder, Peter M. Shane, Kevin M. Stack, and Peter L. Strauss; and (7) Jed H. Shugerman, John Mikhail, Jack Rakove, Gautham Rao, and Simon Stern.

B. Rulings Under Review

Defendant-appellant seeks review of the September 28, 2018 and April 30, 2019 opinions and orders of the United States District Court for the District of Columbia in *Blumenthal v. Trump*, No. 1:17-cv-1154. Those opinions and orders are reproduced at J.A. 1, J.A. 2, J.A. 60, and J.A. 61. The district court certified those opinions and orders for interlocutory appeal on August 21, 2019. That opinion and order is reproduced at J.A. 123.

C. Related Cases

The case on review has previously been before this Court on a petition for writ of mandamus. *See In re Trump*, No. 19-5196 (D.C. Cir. July 19, 2019).

/s/ Martin Totaro
Martin Totaro

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S Constitution:

Statutes:

Legislative Material:

Other Authorities:

INTRODUCTION

This is an unprecedented suit brought by individual Members of Congress seeking to judicially enforce the Foreign Emoluments Clause against the President of the United States. In allowing this extraordinary suit to proceed, the district court made three novel and untenable rulings. *First*, the court held, contrary to both longstanding and recent Supreme Court precedent, that individual Members of Congress have Article III standing to sue for alleged institutional injuries to Congress. *Second*, the district court usurped power to create a cause of action in circumstances that Congress has not authorized. This suit bears no resemblance to the types of traditional equitable suits by private parties seeking to prevent government interference with their person or property that Congress has vested courts with power to adjudicate. Nor has Congress expressly authorized suit against the President, which, at a minimum, separation-of-powers principles require. Moreover, the members' purported inability to vote on whether to "consent" to the President's alleged acceptance of foreign emoluments falls well outside any cognizable interests that Congress would have intended to support a suit to enforce the Clause, which is a prophylactic measure to protect the public from foreign corruption of official action. *Third*, the district court adopted a sweeping understanding of the term "emolument" that contradicts the text and context of the Clause and that would mean numerous Presidents from the Founding to the present have likely violated the Clause. For each of these independent reasons, this Court should terminate this fatally flawed suit.

STATEMENT OF JURISDICTION

Plaintiffs assert claims under the Foreign Emoluments Clause. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331. The district court issued orders denying the government's motion to dismiss on September 28, 2018, and April 30, 2019. J.A. 1, 60. The district court certified those orders for interlocutory appeal on August 21, 2019. J.A. 123. On September 4, 2019, this Court granted permission to appeal pursuant to 28 U.S.C. § 1292(b). Order, No. 19-8005.

STATEMENT OF THE ISSUES

1. Whether plaintiffs have Article III standing to bring this action;

2. Whether to recognize an implied cause of action in a suit brought by Members of Congress to enforce the Foreign Emoluments Clause against the President; and

3. Whether plaintiffs have stated a claim that the President violated the Foreign Emoluments Clause.

PERTINENT CONSTITUTIONAL PROVISION

The Foreign Emoluments Clause provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8.

STATEMENT

A. Plaintiffs are 215 Members of Congress who have sued the President in his official capacity. The Members allege that, "[s]ince taking office, [the President] has accepted, or necessarily will accept, numerous emoluments from foreign states." J.A. 150, 184 (Second Am. Compl. ¶¶ 1, 77). They allege that the President owns hundreds of businesses in the United States and in at least twenty foreign countries, and that he violates the Foreign Emoluments Clause whenever such businesses receive "any monetary or nonmonetary benefit . . . from a foreign state without first obtaining 'the Consent of the Congress.'" J.A. 151, 167 (Second Am. Compl. ¶¶ 6, 34). The Members assert that those alleged violations injure them because they are denied an "opportunity to cast a binding vote that gives or withholds their 'Consent' before the President . . . accepts a foreign 'Emolument.'" J.A. 183-84 (Second Am. Compl. ¶ 76). They seek a declaration that the President has violated the Foreign Emoluments Clause and an injunction prohibiting him from accepting foreign emoluments without first obtaining congressional consent. J.A. 187-88 (Second Am. Compl. 57-58).

B. The government moved to dismiss the Members' complaint for lack of jurisdiction and for failure to state a claim on which relief could be granted. The district court bifurcated its motion-to-dismiss proceedings. On September 28, 2018, it held that the Members had Article III standing to bring this suit. J.A. 5. It reasoned that legislators have standing to allege that their votes have been "completely

nullified," J.A. 18, and that the Members' votes were so nullified due to the President's alleged acceptance of "prohibited foreign emoluments as though Congress had provided its consent," J.A. 33. The government moved to certify an interlocutory appeal of that order on October 22, 2018.

On April 30, 2019, the district court denied the remainder of the motion to dismiss. J.A. 63. As to the Members' cause of action, the court held that it is proper to imply a right of action to protect any "right[] safeguarded by the Constitution unless there is a reason not to do so." J.A. 101 (quotation marks omitted). The court further rejected the government's argument that relief was unavailable directly against the President, concluding that an injunction could properly be entered against him because compliance with the Emoluments Clauses is a mere "ministerial duty." J.A. 107. The court also determined that the Members fall within the Foreign Emoluments Clause's zone of interests because "the only way the Clause can achieve its purpose" is if Congress is permitted to vote on the receipt of emoluments. J.A. 102. As to the meaning of the Foreign Emoluments Clause, the district court ruled that the term "emolument" meant any "profit, gain, or advantage," a definition that encompassed the Members' factual allegations. J.A. 96. The government moved to certify an interlocutory appeal of that order on May 14, 2019.

On June 25, 2019, the district court denied certification of its two orders. J.A. 110. The court stated that, because the issues in this case could "be resolved on cross motions for summary judgment" after expeditious discovery and summary-judgment

briefing, the government did not satisfy the requirement in 28 U.S.C. § 1292(b) that interlocutory appeal "materially advance the ultimate termination of the litigation." J.A. 114-18.

C. The Members' pre-discovery statement made clear that they contemplate discovery from the President of a purportedly "limited" scope. Dkt. No. 75, at 2-3. That discovery might include attempts to obtain "the President's financial documents." *Id.* at 3. Moreover, while the Members asserted that they "plan to focus discovery" on third parties, even that would concern discovery into the personal financial interests of the President on account of his public office, to "determine whether President Trump is currently receiving funds" from his business enterprises attributable to proceeds from foreign governmental customers. *Id.* at 2-3.

On June 25, 2019, the district court entered a discovery schedule including three months of fact discovery. The Members propounded thirty-seven third-party subpoenas. The subpoena recipients were originally required to respond by July 29, 2019.

D. On July 8, 2019, the government filed a petition in this Court for a writ of mandamus directing the district court to dismiss this case or, in the alternative, to certify its orders for interlocutory appeal. This Court denied the petition without prejudice. J.A. 121-22. The Court explained that, although the President "identified substantial questions concerning standing and the cause of action, he has not shown a clear and indisputable right to dismissal of the complaint in this case on either of

those grounds." J.A. 121. But, the Court explained, the questions raised by the President's petition demonstrate that the district court's orders "squarely meet the criteria for certification under Section 1292(b)." *Id.* The Court concluded that the district court's contrary ruling disregarded the "separation of powers issues present in a lawsuit brought by members of the Legislative Branch against the President of the United States," particularly where discovery is contemplated. J.A. 122. Accordingly, the Court "remand[ed] the matter to the district court for immediate reconsideration of the motion to certify." *Id.*

E. Following this Court's remand, the district court stayed discovery. Minute Order (July 19, 2019). After additional briefing, the district court issued an order recognizing this Court's statement that the two dismissal orders "squarely meet the criteria for certification." J.A. 128. The court thus "certif[ied] the dismissal orders for immediate appeal pursuant to 28 U.S.C. § 1292(b)." J.A. 129. And, invoking its inherent power to manage proceedings, it "stay[ed] proceedings in this case pending the interlocutory appeal." J.A. 129 & n.2. The government promptly petitioned for leave to file an interlocutory appeal pursuant to Section 1292(b), which this Court granted.

SUMMARY OF ARGUMENT

I. The Supreme Court held in *Raines v. Byrd*, 521 U.S. 811 (1997), that federal legislators generally lack Article III standing to sue to enforce the asserted institutional interests of Congress. Since then, neither that Court nor this one has found standing on the part of Congress, much less individual Members, to sue the Executive. And the Supreme Court recently held in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), that one branch of a state legislature lacked standing to appeal a federal court's invalidation of a state law governing redistricting even though it affected the legislature's own composition. The Court reasoned that, where the interest asserted is shared by the entire legislature, Article III requires at a minimum that any suit be brought by the legislature itself—not an amalgam of individual legislators or even a single chamber of a bicameral body.

Assuming Article III would permit a suit by the legislative branch at all, that principle applies here *a fortiori*: a minority of Members of Congress clearly lack standing to vindicate an alleged interest in the President's compliance with the Foreign Emoluments Clause that is based solely on the ability of Congress as a whole to provide consent for the President's acceptance of otherwise-prohibited emoluments. Any reasonable application of *Bethune-Hill* and *Raines* compels dismissal of this case. And, although the Members attempt to fit this case into a narrow exception first identified in *Coleman v. Miller*, 307 U.S. 433 (1939), that case is doubly inapposite: it applies (at most) only to state legislators and only in circumstances

where legislators' injury from an alleged nullification of their votes is irrevocable through future legislative action. Because the Members have ample self-help remedies, they must proceed in their own chambers and not in the federal courts.

II. Equally indefensible was the district court's decision to infer a novel equitable cause of action for Members of Congress to enforce the Foreign Emoluments Clause against the President of the United States. Even in an ordinary case, judicially inferring a cause of action that goes beyond traditional equitable practice is a "significant step under separation-of-powers principles," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017), because "Congress is in a much better position than [the courts] to . . . design the appropriate remedy" for a legal injury, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

That basic principle increases by an order of magnitude when Members of Congress—who possess legislative tools to adopt an express cause of action—seek to infer an equitable cause of action directly against the President, who is not subject to suit in his official capacity even under statutory causes of action absent an "express statement by Congress," given his unique position in our constitutional structure. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). And all the more so because the Members lack cognizable interests protected by the Clause, which imposes a prophylactic requirement to protect the public from foreign corruption of official action. The district court's contrary holding that the President may be subject to an

injunction or declaratory judgment at the behest of individual Members seeking to enforce the Clause improperly minimized all those separation-of-powers concerns.

III. In all events, the district court erred in its interpretation of the Foreign Emoluments Clause. The text, structure, and history of the Constitution's Emoluments Clauses demonstrate that the term "emolument" therein refers only to compensation accepted from a foreign or domestic government for services rendered by an officer in either an official capacity or employment-type relationship. The district court's contrary construction of the term "Emolument," which would broadly encompass any "profit, gain, or advantage," renders parts of the constitutional text superfluous and is contradicted by unbroken executive practice from the Founding era to modern times.

STANDARD OF REVIEW

On the denial of a motion to dismiss, this Court reviews "legal determinations *de novo*" and "assume[s] the truth of [plaintiffs'] allegations." *Z Street v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015).

ARGUMENT

I. THE MEMBERS LACK ARTICLE III STANDING.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (brackets omitted). That requirement, set forth in Article III, Section 2 of the Constitution, "preserves the 'tripartite structure' of our Federal Government, prevents the Federal Judiciary from 'intrud[ing] upon the powers given to the other branches,' and 'confines the federal courts to a properly judicial role.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016)). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

The doctrine of Article III standing is "rooted in the traditional understanding of a case or controversy." *Spokeo*, 136 S. Ct. at 1547. It requires courts to satisfy themselves that "the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quotation marks omitted). The standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a

realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). It thus protects the judicial process from being converted into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 473 (citation omitted).

The first element of the "irreducible constitutional minimum" of standing requires a plaintiff to have suffered a "concrete and particularized" injury-in-fact to a "legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In requiring that the injury be "personal, particularized, concrete, and otherwise judicially cognizable," Article III ensures that federal courts intervene only in those disputes "traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997); *see FEC v. Akins*, 524 U.S. 11, 24 (1998) (Article III requires the "concrete specificity that characterized those controversies which were the traditional concern of the courts at Westminster" (quotation marks omitted)).

The standing inquiry is "especially rigorous" in suits involving the rights and duties of the political branches of the federal government. *Raines*, 521 U.S. at 819; *see Clapper*, 568 U.S. at 408-09. That is because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and therefore "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper*, 568 U.S. at 408.

As detailed below, "cases" and "controversies" traditionally did not include suits between branches of government regarding their respective powers and obligations. *Raines*, 521 U.S. at 833. Rather, as Chief Justice Marshall explained, the "province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *see Lujan*, 504 U.S. at 577-78 ("[U]nder Article III, Congress established courts to adjudicate … claims of infringement of individual rights."). This history and tradition is critical in "identify[ing] those disputes which are appropriately resolved through the judicial process." *Lujan*, 504 U.S. at 560 (quotation marks and citation omitted). And it thereby excludes the sorts of disputes, such as this one, that should be resolved through the political process instead.

A. Individual Members of Congress lack standing to pursue institutional injuries.

In *Raines*, the Supreme Court explained that Members of Congress generally lack Article III standing to vindicate institutional injuries to Congress as a whole. And in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Court held that, where the Constitution allocates authority to an entire legislature, even a single House of a bicameral legislature lacks a judicially cognizable interest to vindicate that authority. The principles set forth in *Raines* and refined in *Bethune-Hill* are dispositive and compel dismissal here.

1. a. In *Raines*, six Members of Congress who had unsuccessfully opposed the Line Item Veto Act brought suit following its enactment seeking to declare the Act unconstitutional. 521 U.S. at 814-16. The *Raines* plaintiffs contended that the Act had injured them by "alter[ing] the legal and practical effect of [their] votes" and "divest[ing] [them] of their constitutional role in the repeal of legislation." *Id.* at 816. The Supreme Court disagreed, holding that the plaintiff legislators lacked a judicially cognizable injury under Article III. *Id.* at 818, 829-30.

The Court began by emphasizing the "key" standing requirement that a plaintiff suffer a "*personal injury*." 521 U.S. at 818-19. The plaintiff legislators, the Court explained, lacked a "personal stake" in the litigation because they could not "claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress" or their "consequent loss of salary." *Id.* at 819-21. Thus, the Court turned to the question of whether the Members themselves suffered an "institutional injury" that was "legally and judicially cognizable." *Id.* at 819, 821.

Critical to that institutional-injury analysis, the Court emphasized the absence of any "historical practice" supporting the legislators' suit. *Raines*, 521 U.S. at 826. "It is evident from several episodes in our history," the Court observed, "that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id.* For example, despite their strong objections, "succeeding

Presidents" never brought suit to challenge the Tenure of Office Act of 1867—a law restricting the power of the President to remove Senate-confirmed officers—which ultimately was repealed through legislative action, and they likewise did not challenge successor legislation, the validity of which has been adjudicated instead in private-party litigation (such as suits where officials sought to recover lost salary for being terminated in violation of the law). *Id.* at 826-27. Nor did Congress or any of its Members "challenge[] the validity of President Coolidge's pocket veto" of an enacted bill; the legality of that veto was instead ultimately sustained in litigation brought by certain Indian tribes asserting rights under the purported law. *Id.* at 828. The fact that past Presidents and Congresses never resorted to the courts to resolve these and other interbranch disputes underscored that the *Raines* plaintiffs' suit against the Executive Branch was not one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819. Although there was one past precedent where state legislators were allowed to sue for institutional injuries, *Raines* narrowed and distinguished that case. *See id.* at 821-26 (discussing *Coleman v. Miller*, 307 U.S. 433 (1939)); *see also infra* Part I.B (explaining why *Coleman* is inapposite here).

Raines also noted two other factors militating against the plaintiffs' standing. First, the Court "attach[ed] some importance to the fact that [the plaintiffs] have not been authorized to represent their respective Houses of Congress in this action." 521 U.S. at 829. The Court observed that Congress's powers are "not vested in any one individual, but in the aggregate of the members who compose the body," and

reaffirmed that "[g]enerally speaking, members of collegial bodies do not have standing to [take litigative actions] the body itself has declined to take." *Id.* at 829 n.10. Second, the Court highlighted that the plaintiffs had "adequate" self-help remedies through the legislative process that would entirely address their injuries, if they could persuade a majority of their colleagues to agree. *Id.* at 829. For instance, Congress could "repeal the Act or exempt appropriations bills from its reach." *Id.*

b. Since *Raines*, this Court has twice considered whether federal legislators have standing to bring suit to redress claimed harms to their legislative roles. On both occasions, this Court reaffirmed that *Raines* generally forecloses such suits, while also emphasizing the narrowness of any possible exception under *Coleman*.

First, in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), four Members of Congress claimed that, by issuing an allegedly unlawful executive order, "the President denied them their proper role in the legislative process and, consequently, diminished their power as Members of the Congress." *Id.* at 113. This Court noted that *Raines* had abrogated much of its case law on legislative standing, which (before *Raines*) could be read to allow "Members of Congress … seek[ing] judicial relief from allegedly illegal executive actions" to establish standing based upon a claimed "impair[ment]" to "the exercise of their power as legislators." *Id.* at 114.[1] The Court observed that,

[1] Even this Court's pre-*Raines* decisions, despite finding standing, had in most instances dismissed such suits on related threshold grounds. *See Barnes v. Kline*, 759 F.2d 21, 28 (D.C. Cir. 1984) (noting that "[i]n congressional lawsuits against the

following *Raines*, the "separation of powers" concerns raised by legislator suits are properly considered under Article III. *Id.* at 116 (stating that *Raines* "require[s] us to merge our separation of powers and standing analyses"). And it noted that those concerns generally foreclose legislator standing to litigate harms to the "legislative process." *Id.* at 115. Moreover, although the Court assumed without deciding that any exception under *Coleman* for "vote-nullification" claims might be permissible if legislative remedies were foreclosed, the Court determined that the case did not fall within that "narrow rule" because the dispute there was "fully susceptible to political resolution," given that Congress could "terminate" the executive order "were a sufficient number in each House so inclined." *Id.* at 116.

Second, in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), thirty-one Members of Congress sued seeking a declaratory judgment that U.S. air strikes in Yugoslavia were unlawful. *Id.* at 20. Those same Members had previously defeated a congressional "authorization" of the air strikes through a tied vote, and they alleged that the President's decision to proceed with air strikes absent congressional authorization had effectively "nullified" their vote. *Id.* at 20, 22. Noting "the separation-of-powers problems inherent in legislative standing," *id.* at 21, the Court reasoned that "[t]he question whether congressmen have standing in federal court to

---

Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view," and collecting cases), *vacated as moot*, *Burke v. Barnes*, 479 U.S. 361 (1987).

challenge the lawfulness of actions of the executive was answered, at least in large part, by the Supreme Court's recent decision in *Raines*." *Id.* at 20. And the Court concluded that the *Campbell* plaintiffs could not assert any potential "vote nullification" exception under *Coleman*, because plaintiffs possessed adequate legislative remedies. *Id.* at 23; *see also infra* pp. 22-24.

c. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court applied *Raines* to hold that one chamber of Virginia's bicameral legislature lacked standing to appeal to defend a state redistricting plan affecting the composition of the legislature itself. *Id.* at 1952-55. The Virginia House of Delegates argued that it had standing because Virginia's constitution allocates the authority to establish "electoral districts" to "the General Assembly." *Id.* at 1953. But the Court rejected that argument, explaining that "the House constitutes only a part" of the General Assembly, and so lacked standing to sue regardless of whether the Assembly itself could establish a cognizable injury. *Id.* "Just as individual members lack standing to assert the institutional interests of a legislature," the Court concluded, "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole," such as the alleged interest in drawing the electoral maps that would determine its own composition. *Id.* at 1953-54 (citing *Raines*, 521 U.S. at 829).

2. Those principles demonstrate that the district court erred when it refused to grant the government's motion to dismiss.

a. To begin, the lack of Article III standing in this case follows a fortiori from *Bethune-Hill* for three reasons. *First*, individual Members of the House and Senate necessarily "lack standing to assert the institutional interests" of "the Congress" because even their respective Chambers could not alone assert the interests of Congress as a whole. *See Bethune-Hill*, 139 S. Ct. at 1953 (citing *Raines*, 521 U.S. at 829). *Second*, the separation-of-powers concerns that counseled against standing in *Bethune-Hill* are even stronger for federal legislators because the Constitution itself vests "enforcement powers" concerning compliance with federal law in the Executive, not the Legislative, branch. *See Buckley v. Valeo*, 424 U.S. 1, 138, 140-41 (1976); *Raines*, 521 U.S. at 824 n.8. And *third*, the asserted legislative interest in whether or not to pass a law merely concerning consent to foreign "emoluments" is weaker than the Virginia House's asserted interest in *Bethune-Hill* concerning a redistricting law that directly affected its own composition. *See* 139 S. Ct. at 1953.

The Members have previously argued that the Foreign Emoluments Clause is unusual because it expressly requires Congress to consent before Executive officials may take certain action. As a threshold matter, that proposed distinction makes no sense as it would perversely imply that the Members *lack* standing to enforce the Domestic Emoluments Clause because the latter prohibition is *stricter*—namely, absolute rather than qualified by congressional consent. *See* U.S. Const. art. II, § 1, cl. 7. More fundamentally, the proposed distinction is illusory. For example, the Appointments Clause and the Treaty Clause require the Senate's consent as a

condition for certain Executive actions. *Id.* art. II, § 2, cl. 2. Under the Members' breathtaking view, any Senator could challenge any unilateral appointment by the President or the Head of a Department, and any unilateral executive agreement with a foreign government, that the Senator claimed required Senate consent. Moreover, the Members' theory would mean that any member of one chamber of Congress would have standing to enforce against sovereign States, or the other chamber of Congress, the numerous constitutional provisions that require the consent of Congress as a whole. *E.g.*, U.S. Const. art. I, § 5, cl. 4 (adjournment of a House of Congress); *id.* § 10, cl. 2 (imposts or duties); *id.* § 10, cl. 3 (duties of tonnage and interstate compacts). None of that can possibly be correct, and the government is aware of no such suit despite countless controversies over the scope of such provisions.

The Members' theory is more radical still. Except for certain inherent executive powers under Article II, the Executive Branch can act only "*within the bounds of its statutory authority*." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). In other words, the Constitution *almost always* requires Congress to legislate before the Executive may take action. Thus, under the Members' theory, any single member of Congress would, for example, have standing to challenge any agency rulemaking or adjudication that allegedly exceeded the agency's statutory authority, *see* 5 U.S.C. § 706(2)(C), on the basis that unlawful executive action had negated that Member's voting rights. This Court would no longer "decide on the rights of individuals," *Marbury*, 5 U.S. at 170, but would instead be placed in the unprecedented position of

adjudicating an endless onslaught of "bitter political battle[s] being waged between the President and Congress," *Raines*, 521 U.S. at 827.

In a further attempt to evade *Bethune-Hill*, the Members have previously disclaimed any interest on behalf of Congress as the legislature, and insist that they are asserting their own interests in participating in the legislative process in one of the Houses of Congress. But the Members have no *personal* interest in their votes as legislators because their ability to vote exists "solely because they are Members of Congress." *Raines*, 521 U.S. at 821; *see id.* ("If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead."); *see also Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) ("The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."). And the legislators have no judicially cognizable *institutional* injury in the alleged inability to "consent" to the President's acceptance of otherwise-prohibited emoluments, just as the members of the Virginia House lacked a cognizable interest in whether the redistricting law that they had enacted would be judicially nullified. Accordingly, it is impossible to square the district court's standing holding with *Bethune-Hill* (and indeed, the district court never addressed that case, even though the government brought it to the court's attention while its certification motion was pending, *see* Dkt. No. 81).

b. Even if *Bethune-Hill* did not squarely foreclose the Members' attempt to enforce alleged institutional interests of their legislature as a whole, the Members' suit

would still fail. *Raines* and its progeny refute the existence of any judicially cognizable legislative interest in compliance with the Foreign Emoluments Clause by the President or other federal officers.

Most fundamentally, the lack of historical support for Article III adjudication of interbranch political disputes counsels strongly in favor of dismissal. *See Raines*, 521 U.S. at 826-29. Neither the Members nor the district court identified an analogous dispute that was resolved in federal court rather than through ordinary political reconciliation. *See Chenoweth*, 181 F.3d at 113-14 ("Historically, political disputes between Members of the Legislative and Executive Branches were resolved without resort to the courts."). And contrary to the district court's assertion (J.A. 54), the type of dispute implicated here is not new: Members of Congress frequently clash with the Executive on whether Congress's consent is constitutionally necessary before the President's taking particular actions. *See, e.g.*, *Campbell*, 203 F.3d at 20; *Chenoweth*, 181 F.3d at 113. That those legal disputes between the political branches have never culminated in adjudication by courts confirms that such interbranch disputes are not "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819 (citation omitted). Otherwise, Members of Congress could sue every time the President or his subordinates—by Executive Order, agency rulemaking, or other executive action—allegedly circumscribe Congress's institutional role of providing "consent" for federal action that the Executive lacks authority to

take unilaterally. *But see id.* at 826 (no standing to allege "the abstract dilution of institutional legislative power").

The district court likewise disregarded the additional factors that the *Raines* Court found relevant. The court never reckoned with the fact that the Members have not been "authorized to represent their respective Houses of Congress in this action," *Raines*, 521 U.S. at 829, and that they have not been and could not have been authorized to represent the United States itself, *compare Bethune-Hill*, 139 S. Ct. at 1952 (noting that Virginia "could have authorized the House to litigate on the State's behalf"), *with Buckley*, 424 U.S. at 138 ("[P]ower to seek judicial relief[] is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."). And the court's conclusion that "a single Member of Congress could have standing to sue based on a vote nullification theory when it was the President's action, rather than 'a lack of legislative support,' that nullified the Member's vote," J.A. 34, is impossible to square with this Court's holdings in *Campbell* and *Chenoweth*: there, too, it *was* the President's actions that caused the Members' alleged injuries. *E.g.*, *Campbell*, 203 F.3d at 20 ("Appellants claim that the President . . . failed to end U.S. involvement in the hostilities after 60 days.").

Similarly, the district court's statement that, unlike in *Raines*, 521 U.S. at 829, the Members lack legislative remedies as an alternative to suit is untenable. Congress, unlike members of the public, has access to various "self-help" remedies uniquely available to legislators. *Campbell*, 203 F.3d at 24; *see United States v. Windsor*, 570 U.S.

744, 791 (2013) (Scalia, J., dissenting) (noting that Congress has "available innumerable ways to compel executive action without a lawsuit"); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 319 (D.C. Cir. 1988) ("[T]he most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives."). Among other powers, Congress can withhold funds from the Executive, decline to enact legislation that the Executive desires, or enact and override vetoes of legislation that the Executive disfavors—including on the subject of emoluments. The availability of such political remedies reinforces the wisdom of Article III's "barrier against congressional legal challenges to executive action." *Campbell*, 203 F.3d at 21; *see id.* at 24 ("*Raines* explicitly rejected [the] argument that legislators should not be required to turn to politics instead of the courts for their remedy."). Using these remedies, Congress may seek to force the Executive to comply with its view of the law. But Congress "must care enough to act against the" Executive Branch itself, "not merely enough to instruct its lawyers to ask [the courts] to do so," much less outside counsel for a minority of Members. *See Windsor*, 570 U.S. at 791 (Scalia, J., dissenting).

The Members have previously asserted that the Foreign Emoluments Clause is also unusual because it is harder to remedy alleged violations through the legislative process, but *Campbell* and *Raines* foreclose that position. Specifically, the Members have claimed that requiring Congress to act affirmatively would not be adequate because instead of requiring a congressional majority to *approve* foreign emoluments, it

would require a two-thirds majority to *disapprove* foreign emoluments. But replace "foreign emoluments" with "military action" and that was the claim in *Campbell*. *See* 203 F.3d at 23; *see also Raines*, 521 U.S. at 829 (relying on the fact that Congress could "repeal the [Line Item Veto] Act or exempt appropriations bills from its reach," even though such actions could have prompted a presidential veto).

Once again, the Appointments Clause confirms the untenable implications of the Members' position. Under that Clause, the Senate must consent to all principal (and some inferior) officers. But once the President appoints an officer, the Senate alone cannot undo the appointment, nor can the Congress as a whole, except through impeachment. *See Bowsher v. Synar*, 478 U.S. 714, 728-29 (1986). The Senate may act only indirectly in the hopes that it might induce the President to remove the officer. Nonetheless, the potential difficulty of such remedies obviously does not permit the Senate—much less a single Senator—to sue over every contested presidential appointment. Congress and its Members must use the self-help tools the Constitution affords them instead of seeking unprecedented relief from the judicial branch.

B. Any *Coleman* exception does not apply.

Finally, the district court latched on to the possible narrow exception identified in *Raines*. The Court noted that it had only ever "upheld standing for legislators (albeit *state* legislators) claiming an institutional injury" in "one case." 521 U.S. at 821. In that case, *Coleman v. Miller*, *supra*, a group of state legislators brought suit in state court contending that their votes in the legislature, which would have been dispositive

to reject a proposed federal constitutional amendment, had been "completely nullified" through an improper voting procedure that ratified the amendment. *Raines*, 521 U.S. at 823. *Raines* explained that *Coleman* stands—"at most"—for "the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id.*

In contrast to the plaintiffs in *Coleman*, the *Raines* plaintiffs could not claim any such nullification. "[T]heir votes were given full effect" and "[t]hey simply lost that vote." 521 U.S. at 824. Moreover, the *Raines* plaintiffs were differently situated from the plaintiffs in *Coleman* because they were *federal* legislators, meaning that their suit would present "separation-of-powers concerns … not present in *Coleman*." *Id.* at 824 n.8. For that reason, the Court expressly reserved the question whether *Coleman* would "ha[ve] [any] applicability to a similar suit brought by federal legislators." *Id.*

Subsequently, this Court emphasized that the "very narrow possible *Coleman* exception to *Raines*" is satisfied if at all only in rare circumstances. *Campbell*, 203 F.3d at 22-23. As the *Campbell* Court explained, "the key to understanding the [Supreme] Court's treatment of *Coleman* and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation" in which, once an amendment is ratified, the plaintiff legislators likely "could [not] have done anything to reverse that position." *Id.*; *see Bethune-Hill*, 139 S.

Ct. at 1954 (limiting *Coleman* to "the results of a legislative chamber's poll or the validity of any counted or uncounted vote"). That is why the claim in *Campbell* fell outside of any *Coleman* exception, because the plaintiffs there had ample legislative remedies available to them, if they could persuade their colleagues to act. *See* 203 F.3d at 23 (noting that, among other things, Congress "could have passed a law forbidding the use of U.S. forces" or could have "cut off funds" via its appropriations authority).

The district court's attempt to fit this case into any *Coleman* exception fails at multiple levels. To begin, *Coleman*—a case involving state legislators—does not apply to claims brought by Members of Congress. Even before *Raines*, this Court recognized that "[a] separation of powers issue arises as soon as the *Coleman* holding is extended to United States legislators," because "[i]f a federal court decides a case brought by a United States legislator, it risks interfering with the proper affairs of a coequal branch." *Harrington v. Bush*, 553 F.2d 190, 205 n.67 (D.C. Cir. 1977). In light of "the separation-of-powers concerns present[ed]," the Supreme Court in *Raines* expressly reserved the question whether *Coleman* could be extended to a suit "brought by federal legislators." 521 U.S. at 824 n.8. And this Court, while likewise declining to resolve whether *Coleman* is limited to state legislators, has never applied that decision post-*Raines* to allow federal legislators to litigate claims of institutional injury. *See Campbell*, 203 F.3d at 21. To the extent any doubt remained that *Coleman* applies at most to state legislators, the Supreme Court has reiterated that "a suit between Congress and the President would raise separation-of-powers concerns absent" in a

case applying *Coleman* to a claim by a state Legislature. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015); *see also Bethune-Hill*, 139 S. Ct. at 1959 (Alito, J., dissenting) (noting that "[a]n interest asserted by a Member of Congress or by one or both Houses of Congress" may not be "consistent with the structure created by the Federal Constitution").

Moreover, even assuming *Coleman* could be extended to the federal context, the Members' claim here in no way resembles the claim in *Coleman*. The Members do not allege that their "votes have been completely nullified" such that their "votes would have been sufficient to defeat (or enact) a specific legislative Act" and yet the "legislative action [went] into effect (or [did] not go into effect)" despite their votes. *Raines*, 521 U.S. at 823; *see also Bethune-Hill*, 139 S. Ct. at 1954 (reiterating that *Coleman* applies, "at most," in that specific context). And no "legislative action" has occurred contrary to the Members' votes, *Raines*, 521 U.S. at 823, because no "consent" has been provided (or denied), let alone in an irrevocable manner, *see Campbell*, 203 F.3d at 23. Even assuming the President were accepting emoluments without Congress's consent, he would not be nullifying Congress's votes but rather acting in alleged violation of the law—precisely the same situation as in *Campbell*, where the legislators claimed that they possessed a constitutional right to consent prior to certain military action but lacked standing to assert such a right. *Id.*

Indeed, the Members do not even allege that their votes would be sufficient to approve or disapprove of the President's alleged acceptance of emoluments. And

unlike the ratification of a proposed constitutional amendment at issue in *Coleman*, the injuries alleged by the Members here are hardly irrevocable through future legislative action. *See Campbell*, 203 F.3d at 23 (stating that "the very narrow possible *Coleman* exception to *Raines*" applies only where a plaintiff legislator "ha[s] no legislative remedy"). In all events, as discussed above, even if this suit asserting legislative injuries somehow fell within a gap left open by *Raines*, it is foreclosed by *Bethune-Hill* because it is brought by a minority of Members rather than Congress as a whole.

II. THE MEMBERS LACK A CAUSE OF ACTION.

The Members' suit also fails because no cause of action authorizes this suit. Judicially creating a cause of action in these novel circumstances would be far outside the courts' equitable powers. And the inappropriateness of doing so is particularly acute, both because the President is not a proper defendant and because the Members assert no interests even arguably protected by the Foreign Emoluments Clause.

A. This suit exceeds the courts' traditional equitable powers.

Neither the Constitution nor any statute provides an express cause of action for alleged violations of the Foreign Emoluments Clause. And the Supreme Court has cautioned that the creation of a "judge-made remedy" of an implied cause of action in equity is available only in "some circumstances" that present "a proper case." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (federal equity jurisdiction is limited to historical practices of the English Court of Chancery).

"[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action," because "the Legislature is in the better position" to weigh the competing considerations involved in creating private rights of action. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017). While courts may nevertheless wield "traditional equitable powers," *id.* at 1856, "Congress is in a much better position than" courts "to design the appropriate remedy" when "depart[ing] from" "traditional equity practice," *Grupo Mexicano*, 527 U.S. at 322, 327.

Implied equitable claims against government officers have typically involved suits that "permit potential defendants in legal actions to raise in equity a defense available at law." *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014); *see, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Such suits ordinarily do not pose separation-of-powers concerns because they merely shift the timing and posture of litigating a legal question that Congress has already authorized to be adjudicated in federal court.

The situation here is entirely different. *First*, plaintiffs are not preemptively asserting a defense to a potential enforcement action against them by the government, and the parties' dispute otherwise would not be in federal court *at all*. *See Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting); *Michigan Corr. Org.*, 774 F.3d at 906. *Second*, although private parties have sometimes brought affirmative enforcement suits to protect their personal property or

liberty from unlawful government action, *see, e.g.*, *Armstrong*, 135 S. Ct. at 1384; *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902), the Members of Congress here seek to vindicate an institutional interest concerning legislative votes. Even assuming that novel interest somehow satisfies Article III, the courts' "traditionally cautious approach to equitable powers . . . leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 322, 329; *see also id.* at 319-21 (refusing to extend a traditional type of relief for post-judgment creditors that restrains the dissipation of a debtor's assets to the novel request for such relief by a pre-judgment creditor). *Third*, and relatedly, plaintiffs are Members of Congress who nevertheless ask the courts to imply a cause of action instead of themselves engaging in the self-help measure of codifying a cause of action through the ordinary legislative process. The evident reason, of course, is that they are unable to muster sufficient support to enact legislation to that effect. *Cf. Armstrong*, 135 S. Ct. at 1385 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). For all these reasons, equity counsels restraint in abrogating a centuries-long tradition of resolving emoluments-related issues through those political processes rather than suits before the federal judiciary.

The district court gave those factors short shrift. The court believed it could create a cause of action because the Supreme Court has permitted a suit in equity to enjoin a violation of the Appointments Clause. J.A. 100. But the cited precedent allowed such a suit where a formal investigation had been threatened against one of

the plaintiffs' private businesses. *Free Enter. Fund*, 561 U.S. at 487. The Members have neither alleged any such investigation as to which they are preemptively asserting a defense, nor any other analogous harm to their property or persons warranting invocation of equitable remedies. And the plaintiffs in *Free Enterprise Fund* did not have access to the same legislative tools as the Members here. Those crucial differences place *Free Enterprise Fund* squarely within the precedents discussed above, and this case squarely outside of them.

Beyond its flawed reliance on *Free Enterprise Fund*, the district court offered essentially no support for its decision. It cited no case holding that traditional equitable jurisdiction may be invoked to enjoin a federal officer's acceptance of property from a third party on the ground that the plaintiff allegedly would suffer indirect harm as a result, much less the "harm" of not getting to vote on whether or not to "consent" beforehand. Indeed, the court did not cite any case that squarely addressed the propriety of judicially created causes of actions. And the court minimized the fact that this case in particular presents controversial judgments about the proper scope of any cause of action to enforce the Foreign Emoluments Clause—namely, as discussed below, whether the President is a proper defendant and whether Members of Congress are proper plaintiffs. *See Armstrong*, 135 S. Ct. at 1385 (recognizing "implied … limitations" on equitable remedies, such as the "complexity associated" with judicial enforcement). Accordingly, the debate concerning this issue "should be conducted and resolved where such issues belong in our democracy: in the

Congress." *Grupo Mexicano*, 527 U.S. at 333; *see also Abbasi*, 137 S. Ct. at 1857 (the correct answer to the question "'who should decide[,]' … Congress or the courts . . . most often will be Congress"). The absence of an express decision by Congress to authorize this suit through a statutory cause of action thus provides an independent reason to dismiss this suit.[2]

B. The President is not a proper defendant.

The problems with judicially creating a cause of action are magnified when the defendant is the President of the United States. The Supreme Court has repeatedly held that, in light of the separation-of-powers concerns that inhere in suing the President, an express statement is at the very least required before even a generally available cause of action may be extended specifically to the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (Administrative Procedure Act's express cause of action); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (*Bivens* and other implied causes of action for damages). That principle of constitutional avoidance is dispositive here, where neither Congress nor the Constitution expressly has subjected

[2] Because there is neither an express cause of action nor an implied cause of action in equity, the Members cannot salvage their suit by invoking the Declaratory Judgment Act, 28 U.S.C. § 2201-2202. That Act is "procedural only," *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), and "is not an independent source of federal jurisdiction," *C&E Servs., Inc. of Washington v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002). Instead, it merely provides an additional remedy for suits that could otherwise be brought in the federal courts. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) ("[T]he availability of declaratory relief presupposes the existence of a judicially remediable right." (alteration omitted)).

the President to this suit. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466-67 (1989).

Indeed, even if Congress had authorized this suit, plaintiffs' action would still be defective because the entry of equitable relief against the President in his official capacity would be unconstitutional. As the Supreme Court has held, imposing such relief would violate the fundamental principle, rooted in the separation of powers, that federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867); *see Franklin*, 505 U.S. at 802-03 (plurality op.). "[F]or the President to 'be ordered to perform particular executive . . . acts at the behest of the Judiciary,' at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (second alteration in original; citation omitted). And this Court has further noted that "similar considerations" govern claims for declaratory relief against the President. *Id.* at 976 n.1; *see Newdow v. Roberts*, 603 F.3d 1002, 1012-13 (D.C. Cir. 2010).

The district court's contrary reasoning is incorrect. In the court's view (J.A. 107), an injunction against the President would be constitutionally permissible because compliance with the Foreign Emoluments Clause is the type of "ministerial duty" that *Mississippi* suggested (without deciding) might be an exception to the rule against relief directing the President's own actions. 71 U.S. at 478. But a ministerial duty is one in

"which nothing is left to discretion." *Id.* at 498. Here, by contrast, determining compliance with the Foreign Emoluments Clause requires ample "exercise of judgment." *Id.* at 499. It is immaterial that violating the Clause would be prohibited, because President Johnson in *Mississippi* likewise was prohibited from enforcing the statutes at issue if they were unconstitutional. *Id.* at 498. What matters is that President Trump must exercise judgment in determining whether his financial interests are compatible with the continued exercise of his office in light of the Clause, and thus his "performance of [that] official dut[y]" is not ministerial under *Mississippi*. *Id.* at 501. And regardless, even if it somehow would be constitutional to enter such ministerial relief against the President himself, Congress has not expressly authorized such relief, as it is required to do at the absolute minimum. *Supra* pp. 32-33.

C. The Members fall outside the Foreign Emoluments Clause's zone of interests.

In addition to the President not being a proper defendant, the Members are not proper plaintiffs. They lack any cognizable interests supporting a suit to enforce the Foreign Emoluments Clause.

1. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" authorized by Congress to enforce a particular statutory or constitutional provision. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). That limitation reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might

technically be injured in an Article III sense but whose interests are unrelated" to the prohibitions they seek to enforce. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011). "Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation," which excludes putative plaintiffs whose interests do not "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 129 (alteration in original) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

Under the Administrative Procedure Act's "generous review provisions," the zone-of-interests inquiry asks only whether "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the [provision invoked] that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395, 399 (1987). But importantly, the zone-of-interests requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, not just the APA's express cause of action. *See Lexmark*, 572 U.S. at 129 (the zone-of-interests test "is a 'requirement of general application'" (quoting *Bennett*, 520 U.S. at 163)).

The Supreme Court and this Court thus have made clear that the zone-of-interests requirement applies to causes of action to enforce constitutional prohibitions. *See, e.g.*, *Valley Forge*, 454 U.S. at 475 ("[T]he Court has required that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (quotation marks omitted)); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (applying the zone-of-

interests requirement to plaintiffs seeking to enforce the dormant Commerce Clause); *see also Moore v. U.S. House of Representatives*, 733 F.2d 946, 950 (D.C. Cir. 1984) ("In addition, the claimant's injury must fall within the zone of interests protected by the constitutional provision allegedly violated."). Indeed, if anything, the courts "requir[e] more" for cases where plaintiffs seek to invoke an implied right of action. *Clarke*, 479 U.S. at 400 n.16. In particular, the Supreme Court in *Clarke* suggested that such plaintiffs must show that they are "one of the class for whose *especial* benefit" the provision was adopted. *Id.*

Although the Supreme Court in *Lexmark* referred to the zone-of-interests requirement as applying to "statutory" or "statutorily created" causes of action, 572 U.S. at 129, the Court did not suggest—let alone hold—that the requirement does *not* apply to non-statutory causes of action in general or to equitable constitutional claims in particular. Accordingly, regardless of whatever "implication[s]" *Lexmark* might have for prior precedent applying the zone-of-interest requirement to such suits, this Court must "follow th[ose] case[s] which directly control[]" the outcome here, "leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *cf. Lexmark*, 572 U.S. at 127 n.3 (suggesting that third-party standing limits for claims asserting individual constitutional rights may properly be framed as restrictions on the cause of action rather than prudential-standing rules).

Moreover, the implied cause of action in equity, in fact, is statutorily created, as it rests on the general equitable powers that Congress by statute vested the lower federal courts with jurisdiction to exercise. *Grupo Mexicano*, 527 U.S. at 318 (citing the Judiciary Act of 1789). And again, that cause of action is thus limited to "traditional equitable practice," *id.* at 322, which is critical given that it would be both unprecedented and absurd to allow implied equitable actions by plaintiffs whose alleged Article III injuries "are unrelated" to the interests protected by the constitutional provisions invoked, *see Thompson*, 562 U.S. at 178; *cf. Lexmark*, 572 U.S. at 130 n.5 (explaining that the zone-of-interests requirement reflects common-law limitations on the types of plaintiffs who may sue). Indeed, it would turn the Constitution's separation of powers on its head for courts to allow a larger class of plaintiffs to sue the Executive under an implied cause of action in equity than the class of plaintiffs that Congress intended to allow to sue under the APA's express cause of action that it created for such challenges.

2. As the Members acknowledge, and as the district court held (J.A. 87-88), the Foreign Emoluments Clause is a prophylactic measure that aims to protect the public at large against the corrupting influence of foreign emoluments on official actions. *See, e.g.*, 3 Jonathan Elliot, *The Debates in the Several State Conventions* 465-66 (2d ed. 1891) (quoting Edmund J. Randolph's explanation that the Foreign Emoluments Clause is "provided to prevent corruption"). The Members, however, do not allege any such corrupted action *at all*, let alone any injury *to themselves* from such action.

Instead, their only asserted injury is an infringement of their ability to consent to otherwise-prohibited emoluments. But Congress's only role under the Foreign Emoluments Clause is to provide "consent" for emoluments—such as where the risk *to the public* that official action will be corrupted is either sufficiently minor, *see, e.g.*, 5 U.S.C. § 7342 (authorizing the acceptance of gifts of "minimal value"), or outweighed by some other competing interest, *see, e.g.*, 37 U.S.C. § 908 (authorizing retired and reserve members of the uniform services to accept civilian employment by foreign governments). Accordingly, the Members do not assert an interest that is even arguably protected under the Clause. Rather, they assert only a generalized grievance, shared by all members of the public, in having an official comply with a prophylactic provision of the Constitution adopted for the benefit of the public generally. *See United States v. Richardson*, 418 U.S. 166, 176-78 (1974); *accord Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 217 (1974). Although a divided panel of the Second Circuit erroneously held that businesses that purportedly competed with the President's hotel for foreign governmental customers fell inside the Clause's zone of interests simply because they allegedly suffered an economic injury, that court relied on inapposite competitor-standing cases and therefore characterized the interest of those business plaintiffs as a form of personal injury from alleged corruption. *See CREW v. Trump*, No. 18-474, 2019 WL 4383205, at *14 (2d Cir. Sept. 13, 2019). Neither point is true here, where the Members have alleged no economic injury and

cannot claim any personal harm from alleged corrupted action. Thus, there is no basis in Article III or in the courts' equitable authority for the Members' novel suit.

III. THE MEMBERS FAIL TO STATE A CLAIM UNDER THE FOREIGN EMOLUMENTS CLAUSE.

In all events, the district court erroneously held that the Members have stated a claim under the Foreign Emoluments Clause. Properly construed, the Clause prohibits only compensation accepted from a foreign government for services rendered by an officer in either an official capacity or employment-type relationship. That interpretation is supported by the Clause's text and context, as well as by consistent Executive practice from the Founding era to modern times. The broader interpretation advanced by the Members and adopted by the district court—covering any profit or gain—is contrary to these indicia of constitutional meaning and would lead to absurd results.

A. The text and context of the Foreign Emoluments Clause support the President's interpretation and refute the Members' interpretation.

As the district court acknowledged (J.A. 75), at the Founding, dictionaries defined "emolument" in two ways. Some defined the term to mean "benefit," "advantage," or "profit" generally, *A New General English Dictionary* (8th ed. 1754), while others gave the office-specific definition "profit *arising from an office or employ*," *Barclay's A Complete and Universal English Dictionary on a New Plan* (1774) (emphasis added), https://books.google.com/books?id=IwZgAAAAcAAJ. *See* James Cleith

Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution*, 59 S. Tex. L. Rev. 181, 190-91 (2017) (cautioning against simplistic reliance on Founding-era dictionaries). Similarly, scholars dispute which sense of the word "emolument" was used most often in the Founding era and by the Framers themselves. *See id.* at 192-96 (discussing other scholars' views). Where a term in the Constitution is "of doubtful meaning, taken by itself," the "doubt may be removed by reference to associated words." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Here, considering the word "emolument" within the Clauses in which it appears reveals that the most natural way to read it is to adopt the narrower, office-or-employment reading.

First, given that the Foreign Emoluments Clause prohibits the acceptance of a "present," in addition to an "Emolument," U.S. Const. art. I, § 9, cl. 8, the broader "profit" or "gain" definition of "emolument" would render the word "present" superfluous. *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) ("In expounding the Constitution … no word was unnecessarily used."). At the Founding, as now, a "present" was defined as "a gift, or something given which a person could not claim." *Barclay's A Complete and Universal English Dictionary on a New Plan*. Because a "present" clearly conferred upon its recipient a "profit" or "gain," it would have been gratuitous to list "present" separately if "emolument" had the broader meaning. By contrast, including "present" would have been warranted if "emolument" narrowly meant "profit from office or employ." Although the district court acknowledged that

"'Emolument' is sometimes used synonymously with 'present,'" it nevertheless concluded that the Clause should be read redundantly to "cover[] all types of financial transactions." J.A. 81.

Second, the narrower definition of "emolument" is further confirmed by comparing the Foreign Emoluments Clause's remaining terms. The Clause prohibits a person holding any "Office of Profit or Trust under [the United States]" from accepting from foreign governments "any present, Emolument, Office, or Title, of any kind whatever." U.S. Const. art. I, § 9, cl. 8. The three items in the list besides "emolument" are all things that the foreign government bestows on the person in his capacity as a federal officer or a type of foreign employee or honoree. That strongly supports construing "emolument" likewise to have the narrower, "profit from office or employ" definition. *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). The district court's contrary conclusion, which rests on the "expansive modifier" "any" (J.A. 79-80), ignores that the Clause's emphatic language simply underscores that the Clause reaches *all* "emoluments" *without exception*—it does not resolve the *meaning* of "emolument." *See Small v. United States*, 544 U.S. 385, 388 (2005); *Virginia*, 148 U.S. at 518-19; *see also Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (noting that the word "any" never has a "transformative" effect and thus "never change[s] in the least" the phrase that follows it).

Third, the Domestic Emoluments Clause's terms likewise confirm the narrower "profit from office or employ" definition. As relevant here, the Clause provides that, while the President "shall … receive for his Services, a Compensation," he "shall not receive … any other Emolument from the United States, or any of them," during his Presidency. U.S. Const. art. II, § 1, cl. 7. The Clause thus prohibits the President from accepting, in addition to his prescribed "Compensation," any "other Emolument" "for his Services," directly equating "emolument" with payment for services provided by the President.

Finally, the only other instance in which "emolument" is used in the Constitution again ties it to payments for an office. The Incompatibility Clause prohibits a Senator or Representative from assuming "any civil Office … which shall have been created, or the Emoluments whereof shall have been encreased," during his or her tenure. U.S. Const. art. I, § 6, cl. 2. The Clause thus treats an "emolument" as an aspect of an "Office" that may be "encreased" by Congress, expressly linking it to the official's employment and duties. That alone is powerful evidence, as scholars and jurists dating back to Chief Justice Marshall and Justice Story have noted that the Framers intended the same words to have the same meaning throughout the Constitution. *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 758-63 (1999).

B. The history of Executive practice supports the President's interpretation and refutes the Members' interpretation.

1. The "contemporaneous practice by the Founders themselves," which is "significant evidence" of constitutional meaning, *Mistretta v. United States*, 488 U.S. 361, 399 (1989), confirms that the Emoluments Clauses do not reach ordinary commercial transactions with customers of foreign or domestic governments. At the time of the Nation's founding, executive officials were not given generous compensations, and many were employed on the understanding that they would continue to have income from private pursuits. Leonard D. White, *The Federalists: A Study in Administrative History* 291-92, 296 (1st ed. 1948); *see generally* Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (2013). For example, numerous Founders, including Presidents Washington, Jefferson, and Madison, maintained their agricultural businesses. J.A. 235-36 & nn.23-32 (collecting sources). At least some of those Founders exported their goods to other nations, *id.*, and the Members have been unable to identify even a single piece of historical evidence that the Founders took any steps to ensure that they were not transacting business with a foreign government instrumentality. If the Foreign Emoluments Clause swept as broadly as the Members suggest, that would mean that the Founders were willfully blind to probable violations of the Clause.

Moreover, as the district court acknowledged, if the term "emolument" sweeps as broadly as the Members claim, then President Washington would have violated the

Domestic Emoluments Clause when he purchased public land in the District of Columbia from the federal government. J.A. 85. The court dismissed this as merely a "single incident." *Id.* But this Founding-era evidence concerning the practices of George Washington himself plainly deserved more weight. *See NLRB v. Noel Canning*, 573 U.S. 513, 524-26 (2014) (explaining that courts should "hesitate" to disregard historical "practice").

2. The historical anomalies of the Members' understanding are vividly illustrated by a proposed constitutional amendment in 1810 that would have extended the prohibitions of the Foreign Emoluments Clause to all private citizens on pain of loss of citizenship. S.J. Res. 2, 11th Cong., 2 Stat. 613 (1810) ("If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them."). Under the Members' view, this putative amendment would have prevented all U.S. citizens from transacting any business with foreign governments—an implausible construction that could not have been shared by the Founding generation. The district court gave this point essentially no weight because the amendment "never became law," but that dismissive treatment ignores that the proposed amendment had overwhelming support in Congress and was only two States short of ratification. *See*

J.A. 86. It is inconceivable that Congress and nearly three-fourths of the States intended to strip the citizenship of, for example, all lodge owners whose customers included visiting foreign diplomats using their governments' funds.

3. Finally, the district court's ruling creates absurd consequences and is irreconcilable with modern Executive Branch practice. Under the court's theory, royalties from book sales received by President Obama or any other officer would offend the Emoluments Clauses if they were attributable to purchases by any foreign or domestic government, such as a public university or visiting official. Additionally, the court never reconciled its view of the word "emolument" with the fact that it would preclude any President from receiving payments from U.S. Treasury Bonds and various other state or municipal securities, as many such Presidents quite likely have done. Moreover, the court never acknowledged that its reading of the Clauses would effectively require *every federal official* to divest from their stock portfolios given the inevitable profits flowing to them from foreign governments.

The district court's only response to these arguments—that such payments would not create the risk of corruption—is flatly inconsistent with the court's own reliance on the Clause's use of the word "any." *Compare* J.A. 79, *with* J.A. 88. If the district court's interpretation of the term "emolument" means that myriad government officials have always violated the Clauses, that is not a reason to invent an atextual exception to that counter-textual interpretation. It is a reason instead to adopt an interpretation consistent with the plain text, historical practice, and common

sense. And under that interpretation, which prohibits only compensation accepted from a foreign government for services rendered by an officer in either an official capacity or employment-type relationship, the President's share of the profits from governmental customers of his businesses does not constitute a prohibited emolument.

CONCLUSION

This Court should reverse the orders below.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK R. FREEMAN
MICHAEL S. RAAB
/s/ Martin Totaro
MARTIN TOTARO
JOSHUA REVESZ
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5374

October 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,469 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Martin Totaro
Martin Totaro

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Martin Totaro
Martin Totaro

General Information

Court	United States Court of Appeals for the District of Columbia Circuit; United States Court of Appeals for the District of Columbia Circuit
Federal Nature of Suit	Civil Rights - Other[2440]
Docket Number	19-05237
Status	Open