No. 20-5

IN THE

Supreme Court of the United States

SENATOR RICHARD BLUMENTHAL, ET AL.,
Petitioners,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE SCHOLARS OF STANDING, FEDERAL JURISDICTION, AND CONSTITUTIONAL LAW IN SUPPORT OF CERTIORARI

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STATEMENT OF INTEREST[1]

Amici are law professors who teach and publish in the areas of standing, federal jurisdiction, and constitutional law. They have a professional interest in the coherent development of the law of legislative standing, based in their 362 combined years of teaching, research, and scholarship. While Amici hold a range of viewpoints on the proper scope of legislative standing, all agree that individual Members of Congress have standing in this case and thus support review of the decision below. Amici are listed in Appendix A.

SUMMARY OF ARGUMENT

The inquiry into legislative standing is rooted in "the relevant constitutional provision" invoked and where it "assign[s] authority." *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019). Because individual legislators rarely possess prerogatives apart from the power accorded to their institution as a whole, granting them individual standing is rarely appropriate. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997).

This case is a rare exception. Petitioners (Members of the United States Senate and House of Representatives) bring claims under the Foreign

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[1] In accordance with Rule 37.2(a), the parties' counsel of record received timely notice of the Amici's intent to file this brief and consented to its filing. No counsel for a party authored any part of this brief. Only Amici and their attorneys have financed the preparation and submission of this brief.

Emoluments Clause, which provides that "no Person holding any Office of Profit or Trust under [the United States], 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 (emphasis added). This means that any holder of an "Office of Profit or Trust"—including the President—cannot lawfully accept an emolument *unless and until* (1) the officer has identified the emolument for Congress, (2) each chamber of Congress holds a vote on it, and (3) a majority of Members in each chamber vote to approve specific terms of consent. In this way, Congress' failure to approve an emolument assumes a specific legal effect and provides a potent safeguard against the influence of foreign powers on federal officials.

By allegedly accepting such emoluments from foreign governments without first seeking and obtaining congressional consent, the President deprives the Petitioners of their right to consider the alleged emoluments before they are received, and to cast specific, identifiable votes thereon (regardless of whether they be for or against consent). That harm constitutes a concrete, particularized, and cognizable injury-in-fact that supports Article III standing. *See Raines*, 521 U.S. at 822 (legislator standing is proper when a measure is "deemed ratified" contrary to procedure defined by law because it nullifies a specific vote); *see also Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000).

The court of appeals held that the Petitioners failed to establish Article III standing because their injuries stem solely from a diffuse "loss of political power" of

the legislature as a whole. Pet. App. 9. This conclusion misconstrues the nature of the harm alleged and runs counter to the principal authority on legislative standing, including *Raines*. Review of the decision is imperative because it effectively precludes enforcement of the Foreign Emoluments Clause, raising issues of national and constitutional importance that merit this Court's engagement.

In addition to the sufficiency of their alleged injuries, Amici submit that Petitioners satisfy each element necessary to establish Article III standing in that their alleged injuries are fairly traceable to the challenged action and would be redressed by a favorable court order. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Unlike many legislator-standing cases (in which the alleged "injuries" are actually caused by the plaintiffs' own colleagues in Congress), here, the harm occurs when an officer accepts a foreign benefit without first disclosing it to Congress and submitting it for votes and approval.

Finally, this is not, as the court of appeals suggested, a matter in which the Petitioners might effectively address the harms through the political process. Pet. App. 12. A court order granting the requested relief is necessary to redress the Petitioners' alleged injuries *in the manner prescribed by the Constitution*. The court of appeals' conclusion to the contrary turns the text of the Clause on its head, placing the burden on Congress to identify and prohibit receipt of emoluments. But a measure from Congress requiring compliance with the terms of the Emoluments Clause could hardly be more effective

than the Constitutional command itself. An officer who ignores the Constitution will just as readily ignore a congressional enactment. Here, the President's alleged refusal to disclose emoluments for congressional approval prevents the informed exercise of Congress's powers of legislation and impeachment, and thus frustrates the Constitutional scheme of oversight.

Judicial intervention is necessary to ensure that an officer who has refused to identify and seek approval for foreign emoluments is compelled to do so. To conclude otherwise would be to interpret the Cases and Controversies Clause in a way that reads the Foreign Emoluments Clause out of the Constitution altogether.

ARGUMENT

Article III of the Constitution "confines the federal courts to adjudicating actual 'cases' and 'controversies'" and "defines [for] the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted). To establish standing and invoke the power of the federal courts, plaintiffs must allege a cognizable injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto,* 561 U.S. at 149.

This inquiry "often turns on the nature and source of the claim asserted," *Warth v. Seldin*, 422 U.S. 490, 500 (1975), making universal principles of application difficult and "[g]eneralizations about standing . . .

largely worthless as such," *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 151 (1970). The same holds true for legislative standing. While this Court has accorded standing to individual Members of Congress infrequently, it has never held that they *categorically* lack standing to bring claims in federal court. *See, e.g.*, *Raines*, 521 U.S. at 829-30. In all cases, the contours of standing remain claim- and context-dependent. Cases like this one—involving an unusual and infrequently litigated constitutional provision—warrant careful attention.

The court below adopted an unduly narrow conception of individual legislator standing that cannot be reconciled with this Court's jurisprudence. By prohibiting the President from accepting an emolument without the approval of both chambers of Congress, the Clause (1) entitles Members of Congress to receive information about emoluments prior to an officer's acceptance thereof, and (2) mandates a particularized voting opportunity for each Member on any proposed emolument. The President's alleged conduct injures Petitioners both by depriving them of information to which they are entitled, and by nullifying their right to consider each emolument and to cast individual votes thereon. And Petitioners' injuries cannot be remedied by legislative action. The unique requirements, structure, and function of the Foreign Emoluments Clause demands that Petitioners' claims be heard in federal court.

I. INDIVIDUAL LEGISLATORS SUFFER COGNIZABLE INJURY WHEN THE PRESIDENT ACCEPTS EMOLUMENTS WITHOUT FIRST SEEKING AND OBTAINING CONGRESSIONAL CONSENT

A. Negating the Authority of Individual Legislators is a Cognizable Injury

To present a justiciable case or controversy, Petitioners must establish standing to sue through having suffered an "injury in fact"—"'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Standing requires "a 'personal stake in the outcome,' or a 'particular, concrete injury,' or 'a direct injury'; in short, something more than 'generalized grievances.'" *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (citations omitted). "[G]eneralized grievances" are "not only widely shared, but . . . also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940)). Such nebulous complaints are better suited to resolution in the political process as they typically concern policy preferences rather than the deprivation of defined rights. *See id.*

To determine whether legislators have standing in a particular case, at issue here, courts look to the authority that is allegedly harmed, and the individual, bloc, or entity that is empowered to exercise that authority. In *Coleman v. Miller*, for instance, a resolution to ratify an amendment to the U.S. Constitution came before the Kansas Senate, and the vote split 20 in favor, 20 opposed. 307 U.S. 433, 435-36 (1939). The Lieutenant Governor then cast a vote in favor, breaking the tie, and individual state senators challenged the Lieutenant Governor's right to cast the deciding vote. *Id.* The plaintiffs alleged that their "votes against ratification ha[d] been overridden and virtually held for naught." *Id.* at 438.

Paying careful attention to the "nature and source of the claim asserted[,]" *Warth*, 422 U.S. at 500, the Court recognized the plaintiffs' standing. *Coleman*, 307 U.S. at 438. The plaintiffs' claims "arose under Article V of the Constitution, which alone conferred the power to amend *and determined the manner in which that power could be exercised*." *Id.* (emphasis added). If the legislators were correct on the merits—and the Lieutenant Governor was not allowed to vote in the amendment-ratification process—then the challenged action deprived the individual legislators' votes of their required legal effect. *See Raines*, 521 U.S. at 822-24. When their votes were improperly "deemed defeated" based on the contrary interpretation, *id.*, the legislators' particularized prerogative "to have their votes given effect" was nullified. *Coleman*, 307 U.S. at 438. Thus, the plaintiffs "ha[d] a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.*

Similarly, in *Raines*, this Court observed that "if state law authorized a school board to take action only by unanimous consent, if a school board member voted against a particular action, and if the board nonetheless took the action," then the lone dissenting board member could have standing to challenge the action. *See* 521 U.S. at 823 n.6 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 536, 544-45, n.7 (1986)).

Contrary to the decision below, then, not all claims by individual lawmakers involve power residing solely with the legislative body as a whole. *See* Pet. App. 9 (concluding that Petitioners did not have standing as they "shared" their injury with other Members of Congress). Rather, Article III's functional inquiry examines the source of the relevant authority and asks what person(s) or entity is expected to exercise that authority. In this framework, individual legislators have standing when the alleged injury implicates prerogatives residing with individual legislators.

For example, a legislature has standing to sue over an injury to a power belonging to that body. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*), the Arizona Legislature had standing to challenge the constitutionality of an initiative that "strip[ped] *the Legislature* of *its* alleged prerogative to initiate redistricting," where the "primary responsibility" for redistricting was vested in the legislature. 135 S. Ct. 2652, 2663 (2015) (emphasis added). This Court recently reaffirmed this principle in *Virginia House of Delegates v. Bethune-Hill*, holding that "a single

House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." 139 S. Ct. at 1953-54.

In the same vein, in *INS v. Chadha*, this Court considered the constitutionality of a law that conferred "legislative veto" power upon the House and Senate over certain decisions by the Immigration and Naturalization Service. 462 U.S. 919, 939-40 (1983). Because the statute "granted *each* Chamber of Congress an *ongoing* power," each chamber was independently permitted to defend its claimed authority in court. *Bethune-Hill*, 139 S. Ct. at 1954 n.5.[2] If the legislative veto required *both* chambers to act, it would require both chambers to participate in litigation. *See* Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 16 (2016) (citing *Consumers Union of U.S. v. FTC*, 691 F.2d 575, 577-78 (D.C. Cir. 1982)).

In *Raines v. Byrd*, on the other hand, six Members of Congress attempted to challenge the constitutionality of the Line Item Veto Act—which Congress had passed over their nay votes—by alleging that the Act diluted their institutional power and changed the "meaning" and "effectiveness" of their votes. *See* 521 U.S. at 814, 821, 825-26. This Court held that any injury would be to Congress itself, not

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[2] "*Chadha* is generally understood to recognize legislative injury in the threatened elimination of legislative powers, but not in the threatened invalidation of general federal statutes." Hall, *Legislative Standing*, *supra* at 16. *See also United States v. Windsor*, 133 S. Ct. 2675, 2700 (2013) (Scalia, J., dissenting) (describing *Chadha* as a case in which "the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers").

its Members, and thus individual lawmakers could not sue over an alleged infringement of the power to enact legislation. *See id.* at 814, 818-19, 821-26.[3]

In short, to establish standing, the party seeking to litigate must also be the person or body that holds the authority at issue. Injuries to a legislative body can be asserted by that body (under *Bethune-Hill*, *AIRC*, and *Chadha*), but not by its individual members (under *Raines*).[4] *See* Hall, *Legislative Standing*, *supra*, at 22. When legislators are denied the exercise of a prerogative that is particularized to the individual, then standing becomes not only

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[3] In *Raines*, Congress retained the power to exempt any bill from the Line Item Veto Act or to repeal the Act altogether, and thus could address the alleged injuries without judicial intervention. *See Raines*, 521 U.S. at 824. There is no similar legislative remedy available here. *See* Section III, *infra.*

[4] The Court of Appeals for the D.C. Circuit deployed precisely this reasoning in a recent *en banc* decision, relying on *Bethune-Hill, AIRC,* and *Raines* to hold that the House Committee on the Judiciary had standing to seek judicial enforcement of its duly issued subpoena. *Comm. on Judiciary v. McGahn*, No. 19-5331, 2020 WL 4556761, at *7 (D.C. Cir. Aug. 7, 2020) (*en banc*) (holding that "the body whose informational and investigative prerogatives have been infringed" had standing to sue). To be sure, the *McGahn* decision purported to distinguish this case, stating that it "understood Raines . . . to hold that unauthorized legislators lack standing to sue the President to vindicate injuries to the legislative bodies of which they are a part." *Id.* at *13. But the atypical structure of the Foreign Emoluments Clause, where a federal officer, not Congress, is required to take action to disclose and seek approval for an emolument, is exactly what differentiates this case and makes the harm to Petitioners here an injury to their prerogatives as *individual legislators* rather than a harm to the legislature as a whole. *Id.*

appropriate, but necessary. *Coleman*, 307 U.S. at 435-36.

B. Acceptance of a Foreign Emolument Without the Prior Consent of Congress Nullifies Individual Legislators' Right to Vote and Have Their Votes Given Legal Effect

In this case, a functional inquiry into the Foreign Emoluments Clause—where it lodges power, who may exercise that power, and how—supports the position that the actions allegedly taken by the President nullify the right of each Member of Congress to vote on each proposed emolument before its acceptance, and to have that vote given legal effect. That injury confers individual standing on Petitioners here.

Vote nullification "mean[s] treating a vote that did not pass as if it had." *Campbell*, 203 F.3d at 22. In the typical legislative process, true "vote nullification" is rare because bills are taken up and enacted at the *body's* initiative. Members have no right to vote on any specific piece of legislation that the body has declined to put on the calendar. In this way, legislative power (and any injury to that power) is vested in the "aggregate of [its] members" rather than in "any one individual" member. *Raines*, 521 U.S. at 829 n.10 (quoting *United States v. Ballin*, 144 U.S. 1, 7, (1892)).

This case, however, is not about the normal legislative process. Rather, the Foreign Emoluments Clause uniquely gives legal effect to congressional inaction. By prohibiting officials from accepting foreign benefits unless and until Congress passes

terms of consent, the Clause vests individual legislators with a right to vote on any emolument offered to a federal officer before it is received. If no vote is held, the official is constitutionally barred from accepting the benefit.

The Framers' decision to forbid emoluments absent affirmative congressional consent was a reasoned and deliberate part of the constitutional structure they created. Through the Clause, the Framers set forth the *only* procedure for a federal official to lawfully receive an emolument—with affirmative legislative consent—in detail. This degree of precision in the text reflects the "level of generality" at which the Framers could agree on the provision, John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1973 (2011), and judicial intervention is necessary to ensure adherence to the procedure as it was set forth in the Constitution. Indeed, "[w]hy would constitutionmakers go to the trouble to spell out in exquisite detail the procedures . . . if they viewed alternative procedures as equally acceptable?" *Id*. at 1952.

Here, the President, by allegedly accepting foreign benefits without first submitting them to Congress, has allegedly conducted himself as though votes were held in Congress and the emoluments were approved. *See Raines*, 521 U.S. at 822 (legislator standing is proper when a measure is "deemed ratified" contrary to procedure defined by law because it nullifies a specific vote). This is precisely what the Clause prohibits, and supports the Petitioners' concrete interests in restoring their right and opportunity to cast a vote. The structure of the Clause means "any

federal officer wishing to accept a foreign emolument must first petition Congress for consent, and each member of Congress is entitled to cast a vote on whether to grant consent." *See* Matthew I. Hall, *Who Has Standing to Sue the President Over Allegedly Unconstitutional Emoluments?*, 95 WASH. U. L. REV. 757, 769 (2017). As in *Coleman*, *AIRC*, and *Bethune-Hill*, the specific provision establishes the locus of authority, procedural requirements, and injury.

The court below relied on *Bethune-Hill* and *Raines* to support its conclusion that Petitioners do not have standing, but did not recognize the careful limits of those cases. *Bethune-Hill* does not undermine Petitioners' standing here. Rather, that case dealt with a single house of a bicameral legislature attempting to bring suit to vindicate alleged harm to the power of the legislature as a whole.

The logic of the Emoluments Clause itself illustrates the distinction between *Bethune-Hill* and this case. Under the Clause, the President cannot, for example, accept an emolument if only the House *or* Senate consents. Thus, each body independently possesses the relevant authority under the Clause. Similarly, neither chamber can provide "consent" unless a vote is held. Thus, each individual in each chamber is vested with authority to vote prior to any official's acceptance of any emolument. As the district court below observed, "the body can give its consent only through a majority vote of its individual

members" in each chamber. Pet. App. 24 (quoting *Ballin*, 144 U.S. at 7).[5]

Raines likewise supports the Petitioners' standing here, contrary to the court of appeals' suggestion. To start, *Raines* does not hold that *all* suits brought by individual legislators in their institutional capacities are barred. The decision's validation of *Coleman* forecloses such a reading. *See* 521 U.S. at 821-24. And the *Raines* Court's differentiation of *Powell v. McCormack* from *Coleman* supports the availability of individual standing *both* for "personal" as well as "institutional" injuries. *Id.* at 820-21. As the *Coleman* decision noted (and as Justice Souter pointed out in *Raines*), cases decided by this Court over the course of decades recognize that injuries suffered in an official capacity can be cognizable under Article III. *See Coleman*, 307 U.S. at 444-45; *Raines*, 521 U.S. at 830-32 (Souter, J., concurring).

Second, the *Raines* Court emphasized that the plaintiffs in that case sought to vindicate the interests of Congress as a whole rather than any individual voting right. Here, in contrast, Petitioners have suffered both informational injury and nullification of their individual authority to consider and vote on proposed emoluments. And unlike *Raines*, where both chambers "actively oppose[d]" the lawsuit, neither the

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[5] Given the structure of the Clause, the failure to hold a vote (or a refusal by a Chamber's leadership to hold a vote) is the functional equivalent of a majority vote against an emolument. Thus, because the President has allegedly received emoluments without consent, Petitioners here have been deprived of the benefit of the constitutionally mandated effect of Congress's inaction.

House nor the Senate institutionally oppose this lawsuit. 521 U.S. at 829.[6]

Presidential acceptance of foreign benefits with no prior congressional consent "treat[s] a vote that [has] not pass[ed] as if it had," *Campbell*, 203 F.3d at 22, and deprives Petitioners of a distinct prerogative guaranteed by the Constitution. Whether an individual legislator wishes to vote for or against consent (or whether Petitioners constitute a majority of the Senate or the House, Pet. App. 11) is beside the point.[7] The deprivation of any opportunity to consider

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[6] The "certain" existence of a private plaintiff capable of bringing suit may also weigh against judicial intervention. *See Raines*, 521 U.S. at 829-30. Here, the standing of private plaintiffs has been vigorously contested. Yet, even if such plaintiffs have standing to vindicate *some* emoluments-clause injuries (such as economic harm from unlawful competition), *see, e.g.*, *Citizens for Resp. & Ethics in Wash. v. Trump*, 939 F.3d 131, 160 (2d Cir. 2019), they could not address the full gamut of harms the Foreign Emoluments Clause was drafted to prevent. Receiving "a gold snuff-box" from France poses no threat to American businesses but still raises the risk of foreign influence. 5 Annals of Cong. 1582, 1589 (1798) (Joseph Gales ed., 1834) (Bayard). The Clause prevents this risk by imposing a unique duty on federal officeholders and conferring a unique power upon Petitioners.

[7] Not every injury that "damages all Members of Congress and both Houses of Congress equally" is for that reason necessarily "derivative" or "indirect." *Raines*, 521 U.S. at 821. Unlawfully interfering with voting rights injures all voters in the relevant jurisdiction equally, but the harm is individualized and direct. *See Akins*, 524 U.S. at 24-25 (citing *Shaw v. Hunt*, 517 U.S. 899, 905 (1996)). Similarly, unlawfully interfering with corporate voting rights may injure all shareholders equally, but that does not make the harm derivative. *See, e.g.*, *Avacus Partners, L.P. v. Brian*, No. 11011, 1990 Del. Ch. LEXIS 178, at *21-*22 (Ch. Oct. 24, 1990). The standing of such voters and shareholders does not

Footnote continued on next page

an emolument and vote prior to its receipt constitutes a cognizable injury that supports Article III standing here.

C. Legislators are Deprived of Their Individual Prerogatives When an Officer Refuses to Seek Congressional Approval for Foreign Emoluments

Because it requires the prior consent of Congress *before* an emolument is accepted, the Foreign Emoluments Clause ensures that foreign benefits are difficult for officials to receive. The Framers recognized that "[o]ne of the weak sides of republics . . . is that they afford too easy an inlet to foreign corruption." THE FEDERALIST NO. 22 (Alexander Hamilton) (1787); *see also id.* ("[H]istory furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments."). To thwart this threat, the Framers put the onus of disclosure and requesting consent on the officer who has been offered a foreign emolument.

This requirement that the recipient identify a potential emolument for the consideration and consent of Congress obviates the need for Congress to undertake a perpetual, roving investigation into all U.S. officials to determine who is or is not receiving foreign emoluments. Indeed, disclosure to Congress is a first and essential part of the process, as Congress cannot reasonably vote on unknown gifts from unidentified foreign powers. In this way, when an

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turn on *how* they wish to vote or whether they constitute a "bloc" sufficient to prevail.

official does not disclose emoluments for Congress to approve, Members of Congress are deprived of the information necessary to exercise their prerogatives in the first instance. *See Akins*, 524 U.S. at 20 ("The 'injury in fact' that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law" is required to be disclosed to them); *see also McGahn*, 2020 WL 4556761, at *1 (noting that the plaintiff "ha[d] shown that it suffers a concrete and particularized injury when denied the opportunity to obtain information necessary to the legislative, oversight, and impeachment functions of the House.").

By design, then, the Foreign Emoluments Clause requires that the requesting official—not Members of Congress—disclose the emolument and contend with the beast of legislative inertia. Our legislative process makes action purposefully difficult: "The House and the Senate, representing their different interests and with different time horizons, . . . both have to agree to the passage of any law." Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1291 (2017). Every bill must survive numerous "veto gates" in the legislative process "where one group or another has the ability to derail a bill." Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV 1401, 1404 n.11 (2016). Legislative action must "clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices that temper unchecked majoritarianism." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2005)).

These structures create a powerful status-quo bias. *See* David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 201, 212 (2017). "[E]ven majority coalitions frequently fail to enact legislative changes," *id.*, because "congressional inaction and obstruction does not require the broad consensus . . . of legislative action." Sant'Ambrogio, *supra*, at 1302. Any proposed "consent bill" or "consent resolution" approving an emolument would need to contend with these structures, compete with other pressing legislative priorities, and garner the votes of lawmakers who would be forced to go on a public record supporting the measure.

This accountability is a *feature* of our Constitution's design, and it is consistent with—not counter to—the separation-of-powers considerations that animate standing doctrine. *See Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance."); *cf. New York v. United States*, 505 U.S. 144, 182 (1992) (upholding structural provisions is most critical when "powerful incentives might lead . . . officials to view departures from the [Constitution's] structure to be in their personal interests").

Acceptance of foreign emoluments without the disclosure to and consent of Congress eliminates any opportunity for individual legislators to leverage these institutional structures and their roles therein to delay consent, deny consent, or shape the terms of consent on a federal official's receipt of any

emolument. Meanwhile, the foreign benefit is received, unknown to the public or to Congress, and without congressional power to require its return.

II. Petitioners' Injuries Are Directly Traceable to the President's Challenged Actions

To satisfy Article III standing, Petitioners must also show that their alleged injury is "fairly . . . trace[able] to the challenged action of the defendant." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). This criterion merits close attention in the legislative-standing context because many such claims are not truly "caused by" the defendant. Here, however, the procedures set out in the Emoluments Clause make plain that the Petitioners' injuries are directly traceable to the President's allegedly unlawful action.

Efforts to establish legislative standing often fail to establish both injury and traceability because the relevant harm is to the legislative body rather than the individual members. If the legislature itself ceded its authority or the legislature declined to take action in response to executive action, then the alleged "harm" is caused by the individual member's colleagues rather than the defendant. *See Raines*, 521 U.S. at 830 n.11. In *Raines*, the plaintiffs exercised their right to vote on the Line Item Veto Act; the plaintiffs "simply lost that vote" and the body as a whole enacted the challenged measure. *Id.* at 824. Such "self-inflicted injuries are not fairly traceable to . . . purported [unlawful action]." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

These kinds of traceability concerns are not implicated here. It is the President's alleged acceptance of emoluments without first seeking a vote by Congress that has and continues to deprive Petitioners of their constitutional prerogative. As the district court rightly held, "[t]he alleged injury is therefore directly traceable to the President's alleged failure to seek Congressional consent." Pet. App. 60.

III. THE DECISION BELOW ADOPTED AN INTERPRETATION OF ARTICLE III THAT PRECLUDES ENFORCEMENT OF THE FOREIGN EMOLUMENTS CLAUSE

To establish standing "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). In the legislative-standing context, courts also consider whether available legislative remedies would be more appropriate given the separation-of-powers considerations at play. *See Raines*, 521 U.S. at 824 (holding that legislators did not have standing where Congress could address the alleged harm through repealing the Act at issue and distinguishing *Coleman* on this point).

Petitioners seek declaratory and injunctive relief preventing the President from accepting foreign emoluments without first disclosing and obtaining congressional consent for them. Pet. App. 6. In the decision below, the court of appeals reasoned that Petitioners could raise their concerns with "the American people, their colleagues in the Congress and the President himself" rather than in federal court.

Pet. App. 12. But these venues cannot adequately address the Petitioners' alleged harms.

This case provides a rare example where respect for the Constitution's own checks-and-balances weighs in favor of judicial intervention. In most legislator-standing cases, resorting to judicial process threatens to short-circuit a dispute that is "fully susceptible to political resolution." *See Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1992). But no political resolution is available here. Simply put, there is no way for Congress to take legislative action to cure violations of the Emoluments Clause. The Clause requires "any present, Emolument, Office, or Title" to be disclosed and subjected to congressional approval, which makes congressional *inaction* an absolute prohibition on the receipt of foreign benefits by any federal officeholder.[8]

Were Congress to pass a statute expressly requiring compliance with the terms of the Clause, or a resolution expressly disapproving a particular emolument, it would do nothing to remedy the alleged injuries here. The Foreign Emoluments Clause is not self-executing, and the same would be true of any statute parroting its terms. Any federal officer already disregarding Constitutional responsibilities to disclose and obtain approval for foreign benefits could just as easily ignore those same obligations in a statute.

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[8] That the Clause applies to every holder of an 'Office of Profit or Trust' (*i.e.*, not just executive branch officials) also distinguishes this case from *Raines*, which dealt squarely with the boundaries of Executive power vis-à-vis the Legislature's power.

Even with a statute, Congress would remain powerless to prevent the continued receipt of undisclosed emoluments, or to order those received without the consent of Congress to be returned. [9] Without judicial intervention to compel a recalcitrant officer to disclose emoluments and to stop accepting them without consent from Congress, the Foreign Emoluments Clause would be a dead letter. Any judicial construction that risks functionally altering the bargains struck at the Convention in this manner must be approached with great caution. *See, e.g.*, *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) (rejecting an interpretation that would render a statutory provision "a dead letter") (*citing Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 475 (1911) ("We must have regard to all the words used by Congress, and as far as possible give effect to them")).

Congress' power to impeach likewise does not counsel against Petitioners' standing here. First, Congress' power of impeachment, no less than its power to vote up or down on emoluments, depends on federal officers first disclosing proposed foreign emoluments in accordance with the Clause. *See McGahn*, 2020 WL 4556761, at *10 ("Without the possibility of enforcement . . . [t]raditional

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[9] The inadequacy of congressional action as a resolution is further illustrated by the fact that the President could veto any affirmative legislation requiring compliance with the terms of the Clause. Construing the Cases and Controversies Clause in this way "would effectively nullify the Convention's decision" to prohibit the acceptance of emoluments in the absence of affirmative consent by majorities of both Chambers. *See Powell v. McCormack*, 395 U.S. 486, 496, 512-514 (1969).

congressional oversight of the Executive Branch would be replaced by a system of voluntary presidential disclosures, potentially limiting Congress to learning only what the President wants it to" thereby diminishing the power of impeachment "because a President would be unlikely to voluntarily turn over information that could lead to impeachment.").

Second, even if Congress' power of impeachment were not hampered by the President's alleged concealment of emoluments, this Court's legislative standing cases do not support such a categorical rule, which would effectively prevent congressional standing in every case. Such a cudgel is irreconcilable with the nuanced and measured treatment found in *Raines*. Third, "[i]mpeachment should not be the congressional response to a sincere presidential belief [about a simple question of constitutional interpretation]." Sant'Ambrogio, *supra*, at 1305. It remains "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The very limited type of judicial intervention sought in this case would remedy alleged violations of the Foreign Emoluments Clause in a manner consistent with its text, design, and purpose.

* * *

"Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it [spoil for one]." *Valley Forge Christian Coll. v. Ams. United for Separation of*

Church & State, 454 U.S. 464, 474 (1982). Legislator standing raises intricate questions about this constitutional structure. The Cases and Controversies requirement of Article III "is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787," *id.* at 476, but so too is the demanding procedural mechanism found in the Foreign Emoluments Clause of Article I. Neither can be read to the exclusion of the other. The decision below—which vitiates the ability of individual legislators to enforce their legislative prerogatives in federal court—does just that.

CONCLUSION

Petitioners have established Article III standing and their case must therefore be heard in federal court. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (The Judicial Branch "ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). No doubt, this case may have serious political consequences. But "courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Chadha*, 462 U.S. at 943). "[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Id.* at 194-95 (quoting *Cohens*, 19 U.S. at 404).

Amici respectfully urge the Court to grant the petition for a writ of certiorari.

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APPENDIX

APPENDIX A

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