No. 20-5

IN THE

Supreme Court of the United States

SENATORS RICHARD BLUMENTHAL, RICHARD J. DURBIN, PATTY MURRAY, ELIZABETH WARREN, AMY KLOBUCHAR, BERNARD SANDERS, PATRICK LEAHY, SHELDON WHITEHOUSE, CHRISTOPHER A. COONS, MAZIE K. HIRONO, CORY A. BOOKER, KAMALA D. HARRIS, MICHAEL F. BENNET, MARIA CANTWELL, BENJAMIN L. CARDIN, TOM CARPER, CATHERINE CORTEZ MASTO, TAMMY DUCKWORTH, KIRSTEN E. GILLIBRAND, MARTIN HEINRICH, TIM KAINE, EDWARD J. MARKEY, JEFF MERKLEY, CHRIS MURPHY, JACK REED, BRIAN SCHATZ, TOM UDALL, CHRIS VAN HOLLEN, AND RON WYDEN, *Petitioners*,

v.

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

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

REPLY BRIEF FOR PETITIONERS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org
Counsel for Petitioners

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* Counsel of Record

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REPLY BRIEF FOR PETITIONERS

Respondent asserts that the decision below "does not conflict with any decision of this Court," BIO 8, but his own brief quickly belies that claim—and makes clear why this Court's review is warranted.

As Respondent concedes, *Raines v. Byrd*, 521 U.S. 811 (1997), explicitly left open the very question that the court of appeals wrongly held was settled by *Raines*: whether members of Congress who "do not constitute a majority" of their chamber may have standing to contest the denial of their ability to vote, Pet. App. 11. Respondent also effectively concedes that the court of appeals' holding—that "only an institution can assert an institutional injury," *id.* at 10—is incompatible with this Court's repeated reaffirmance of *Coleman v. Miller*, 307 U.S. 433 (1939). Far from reconciling the decision below with that precedent, Respondent essentially argues that *Coleman* is wrong, unless it is reimagined as "a suit brought on behalf of the Kansas senate itself." BIO 14-15.

Respondent also attempts to defend the court of appeals' reliance on *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019). Just like the court of appeals, however, he does not even try to counter Petitioners' explanation of why *Bethune-Hill* is fully compatible with their suit. As explained, in *Bethune-Hill*, the House of Delegates alleged no deprivation of its procedural role under the federal or state constitutions, nor harm to any other recognized entitlement it possessed, whereas Petitioners' suit is based on their express right under the Constitution to vote on the President's foreign emoluments and have their votes "given full effect." *Raines*, 521 U.S. at 824.

Unable to defend the court of appeals' decision on its own terms, Respondent devotes most of his brief to

a slew of separate arguments against Petitioners' standing. But his labored effort to rationalize the holding below demonstrates only one thing: the question whether individual members of Congress may ever invoke *Coleman* to challenge the nullification of their votes is "an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c).

I. This Court Should Decide Whether Its Precedent Forecloses All Suits by Members of Congress Asserting Institutional Injuries.

A. As Respondent concedes, *Raines* left open the very question that the court of appeals wrongly believed *Raines* settled—whether members of Congress who constitute less than a majority of their chamber can ever have standing to sue over vote deprivation. This Court explicitly raised that question in *Raines* and just as explicitly declined to resolve it. *See* Pet. 24 (citing *Raines*, 521 U.S. at 824 n.7). Indeed, Respondent admits that "this Court reserved the question whether individual legislators might have standing, whether or not they constituted a majority," in some situations. BIO 15. Yet the court of appeals ruled to the contrary, holding that *Raines* requires dismissal of Petitioners' suit solely because they "do not constitute a majority" of either chamber. Pet. App. 11. That understanding of *Raines*' holding—the crux of the decision below—is indisputably wrong.

To be sure, Respondent introduces new arguments in an effort to excuse the court of appeals' mistake. But those arguments fall flat. For instance, although he acknowledges that *Raines* deferred judgment on scenarios in which a minority of members are denied their right to vote, he simply responds that "no such discriminatory treatment has occurred here." BIO 15. That misses the point: *Raines*'s refusal to address such

scenarios is flatly incompatible with the decision below—which held that *Raines* forecloses standing unless the plaintiffs constitute a majority of their chamber.

Respondent likewise maintains that the scenarios involving less than a majority of members that were left open by *Raines* are not relevant here. He posits that if a minority of members were selectively denied their voting rights, this would "arguably present a 'personal[]' injury" like the "loss of salary" recognized as a basis for standing in *Powell v. McCormack*, 395 U.S. 486 (1969). BIO 15 (citation omitted). But under the dichotomy of injuries that *Raines* describes, the denial of members' ability to vote is clearly not a "personal" injury like that in *Powell* but rather an "institutional" injury, *i.e.*, an "injury to their institutional power as legislators." *Raines*, 521 U.S. at 820-21 & n.4; *see id.* at 821 ("a loss of political power, not loss of any private right"); *id.* ("injury [that] runs . . . with the Member's seat"). The notion that vote deprivation could be a "personal" injury under *Raines* also contradicts Respondent's own assertion that "[a] legislator's vote is not personal to the legislator but belongs to the people." BIO 14 (quotation marks omitted); *see also* Second Supp. Br. for Appellee at 2, *Maloney v. Murphy*, No. 18-5305 (D.C. Cir. Aug. 21, 2020) ("individual Members of Congress may not bring suit to assert 'institutional injury' based upon impairments of legislative functions"). By failing to supply a viable rationale for the court of appeals' holding, Respondent merely underscores how far that court deviated from *Raines*.

Importantly, it was not just "a footnote in *Raines*," BIO 15, that deferred judgment on whether individual members of Congress may sue under *Coleman* when their votes are nullified. To the contrary, this Court took pains to emphasize that the *Raines* plaintiffs

alleged no interference with their past votes, which "were given full effect," 521 U.S. at 824, nor claimed that anything would "nullify their votes in the future," *id.*, but simply objected to a perceived shift in "the constitutional balance of powers between the Legislative and Executive Branches," *id.* at 816; *see id.* at 826 (contrasting the "vote nullification at issue in *Coleman*" with "the abstract dilution of institutional legislative power that is alleged here"). Not stopping there, this Court also stressed that the denial of standing in *Raines* "neither deprive[d] Members of Congress of an adequate remedy . . . nor foreclose[d] [a] constitutional challenge" by others. *Id.* at 829. And if the limits of its holding were not already clear enough, this Court ended with the explicit proviso: "Whether the case would be different if any of these circumstances were different we need not now decide." *Id.* at 829-30.

Despite all this, the court of appeals discerned in *Raines* a rule that legislators never have standing to allege vote nullification if they "do not constitute a majority" of their chamber. Pet. App. 11. That interpretation is plainly at odds with this Court's decision.

B. The decision below also contravenes *Coleman v. Miller*, as Respondent's brief further confirms.

As Petitioners have explained, the court of appeals misconstrued the term "institutional injury," wrongly taking it to mean harm *to an institution*, rather than harm to "institutional power." *Raines*, 521 U.S. at 820 n.4. Based on that misunderstanding, the court held that because Petitioners are not asserting a "private right," they necessarily must be seeking "to assert the institutional interests of a legislature," which "only [the] institution" can do. Pet. App. 10 (quotation marks omitted).

In *Coleman*, however, this Court "upheld standing

for legislators (albeit *state* legislators) claiming an institutional injury." *Raines*, 521 U.S. at 821. As the district court noted, "the claim in *Coleman* was not brought on behalf of the state senate as an institutional plaintiff," but rather by individual senators. Pet. App. 42. And because *Raines* did not overrule *Coleman* but rather distinguished it, no decision of this Court holds that it is always "necessary for an institutional claim to be brought by or on behalf of the institution." *Id.* at 32.

The court of appeals disagreed, declaring that "only an institution can assert an institutional injury *provided the injury is not 'wholly abstract and widely dispersed*.'" Pet. App. 10 (quoting *Raines*, 521 U.S. at 829) (emphasis added). But if "only an institution can assert an institutional injury," *id.*, then the italicized caveat makes no sense—a claim brought by an institution cannot be "widely dispersed." *Id.* Only a claim shared among an institution's members can be characterized that way. And only when such a claim is *also* "abstract," 521 U.S. at 829, does *Raines* foreclose it. *See id.* ("the institutional injury they allege is wholly abstract *and* widely dispersed" (emphasis added)); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016) ("injuries from a mass tort, for example, are widely shared"). Thus, while members of Congress may not prevail on "widely dispersed" claims that are also "wholly abstract," *Raines*, 521 U.S. at 829, that rule does not prevent claims of vote nullification under *Coleman*.

Far from erecting any categorical barrier against

individual-member suits, *Raines* stated that it attached only "some importance" to the fact that the plaintiffs were not "authorized to represent their respective Houses of Congress," and that, indeed, "both Houses actually oppose[d] their suit." 521 U.S. at 829. This is yet another passage that would have been incoherent if *Raines* had established that "only an institution can assert an institutional injury." Pet. App. 10.

Respondent does not even attempt to defend the decision below on this key point.[1] To the contrary, he acknowledges that *Raines* "reserved the question whether *Coleman* extends to a suit brought by federal legislators." BIO 18 (quotation marks omitted).

Worse, Respondent's brief makes clear that the only way to reconcile the decision below with *Coleman* is to rewrite *Coleman*. Respondent suggests reimagining *Coleman*'s facts and holding to bring it in line with the court of appeals' broad rule. He states that because the votes of the *Coleman* plaintiffs would have defeated the constitutional amendment at issue if not for the lieutenant governor's tie-breaking vote, "their suit was at least arguably analogous to a suit brought on behalf of the Kansas senate itself, asserting that *its* vote against the amendment had been permanently nullified." BIO 14-15 (emphasis added).

This stab at revisionism is untenable, as Respondent's telling caveat ("at least arguably") all but admits. Among other things, the *Coleman* plaintiffs were suing

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[1] The court of appeals, for its part, simply deemed *Coleman* "inapposite" with virtually no analysis. Pet. App. 11 n.3. It failed to confront, much less rebut, the district court's explanation of why Petitioners' claim fits within the narrowed understanding of *Coleman* that this Court embraced in *Raines*. Instead, tacitly acknowledging the conflict between its holding and *Coleman*, the court of appeals suggested that *Coleman* is no longer good law.

the Secretary of the Kansas senate, Clarence Miller, "to compel [him] to erase an endorsement on the resolution to the effect that it had been adopted by the Senate and to endorse thereon the words 'was not passed.'" *Coleman*, 307 U.S. at 436. This Court ultimately ruled "that *these* senators have a plain, direct and adequate interest in maintaining the effectiveness of *their* votes," vindicating their "right . . . to have *their* votes given effect." *Id.* at 438 (emphasis added). No matter how hard one squints, *Coleman* cannot be made to resemble "a suit brought on behalf of the Kansas senate itself." BIO 14-15. Respondent's failed attempt to shoehorn *Coleman* into the holding of the decision below merely underscores, once again, the gulf between that decision and this Court's precedents.

C. Like the court of appeals, Respondent also invokes *Virginia House of Delegates v. Bethune-Hill* in support of his position. But *Bethune-Hill* is compatible with Petitioners' suit, and Respondent—like the court of appeals—does not even attempt to address Petitioners' explanation of why that is so. *See* Pet. 25-27.

In *Bethune-Hill*, the Virginia House of Delegates sought to assert a legal interest belonging to the Virginia legislature as a whole, without showing harm to any recognized entitlement that the House possessed in its own right. The House "argued that it had standing because Virginia's constitution allocates the authority to establish 'electoral districts' to 'the General Assembly,'" BIO 10 (quoting *Bethune-Hill*, 139 S. Ct. at 1953), a proposition with "no support" in this Court's precedent, *Bethune-Hill*, 139 S. Ct. at 1953. Significantly, the House did not allege interference with its own voting power or its unique procedural role under the federal or state constitutions. Nor could it: the House fully participated in enacting the redistricting law, and it retained its ability to vote on all future

redistricting legislation. In distinguishing *Coleman*, this Court highlighted both points. *Id*. at 1954.

Here, by contrast, President Trump's refusal to allow Petitioners to vote on his foreign emoluments deprives them of a specific institutional prerogative to which the Constitution expressly entitles them: the right to vote on those emoluments and have their votes "given full effect." *Raines*, 521 U.S. at 824. Because the Constitution entitles all members of Congress to participate in every vote that comes before their chambers, *see, e.g.*, U.S. Const. art. I, § 3, cl. 1 ("each Senator shall have one Vote"), the denial of specific congressional votes that are mandated by the Foreign Emoluments Clause directly prevents Petitioners from exercising their own individual voting rights.

To be sure, it is only by flouting "*Congress'*s power to approve or disapprove the President's acceptance of foreign emoluments," BIO 11, that President Trump is depriving Petitioners of their own individual voting rights. But that causal chain—and the possibility that Congress itself is also being injured—does not make this deprivation any less of an interference with Petitioners' own constitutional entitlements. Nor does it transform their suit into an effort "to assert the institutional interests *of a legislature*." *Bethune-Hill*, 139 S. Ct. at 1953 (emphasis added).

D. The balance of Respondent's brief is spent advancing other arguments that the court of appeals never addressed. The district court's opinion and Petitioners' appellate brief amply demonstrate why these arguments are wrong. Tellingly, Respondent never answers Petitioners' showing that under *Raines*, *Bethune-Hill*, and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), vote nullification includes the deprivation of future voting opportunities, Pet. 19, without a

requirement of legislative majorities, Pet. 23-24.

This Court has recognized that individual legislators suffer a cognizable injury from the nullification of their votes, and it has specifically declined to foreclose members of Congress from asserting such an injury. In concluding otherwise, the court of appeals departed from this Court's precedents.

II. The Question Needs Resolution Now.

Respondent does not deny that the decision below is a sharp break from the court of appeals' prior cases. Until now, that court has never imposed an absolute bar on suits by members of Congress who "do not constitute a majority" of their chamber. Pet. App. 11.

Instead, following *Raines*, the court of appeals established a rigorous standard for claims of vote nullification, demanding the override or denial of specific votes *and* the absence of adequate legislative remedies. *See Campbell v. Clinton*, 203 F.3d 19, 22-23 (D.C. Cir. 2000). That strict standard kept Congress's internal disputes out of the courts while holding open a safety valve for the rare situation in which judicial intervention alone can preserve the Constitution's bedrock procedural requirements. The decision below eviscerated that failsafe. And because the D.C. Circuit is the only place where congressional suits can reliably be filed, it will be the final word on this topic unless this Court grants review.

One dangerous result is already apparent: a President accepting, with impunity, unknown sums of money from an unknown range of foreign governments. That is precisely what the Foreign Emoluments Clause, "designed to protect the Nation . . . by prophylactically preventing the corruption of official action," Pet. for Certiorari at 10, *Trump v. CREW*, No. 20-330 (Sept. 9, 2020), is supposed to prevent.

Recognizing "the close connection between the Office of the President and its occupant," *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020), and perceiving that there would "not always [be] a clear line between his personal and official affairs," *id.*, the Framers intended the Clause to prevent "the only person who alone composes a branch of government," *id.*, from secretly accepting rewards from foreign states. *See, e.g.*, 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 484 (Jonathan Elliot ed., 1836) (George Mason warning of presidents "receiv[ing] emoluments from foreign powers"); *id.* at 486 (Edmund Randolph responding that under the Clause "he is restrained from receiving any present or emolument whatever"). And in a global economy, Respondent is unlikely to be the last President with business holdings subject to foreign enrichment.

Respondent's only answer is to note the existence of two other emoluments lawsuits—both of which he is asking this Court to dismiss. But those suits are limited to emoluments accepted through a small number of Respondent's hotels and restaurants in two cities. Unlike in *Clinton v. City of New York*, 524 U.S. 417 (1998), where a plaintiff injured by a single application of the Line Item Veto Act could obtain an order invalidating the Act entirely, plaintiffs in the other emoluments lawsuits can hope to enjoin only those violations that demonstrably cause them competitive injury. They cannot redress the vast array of financial benefits that Respondent is accepting through his many other hotels and resorts around the world, his even more lucrative commercial and residential skyscrapers, his foreign trademarks and licensing deals, or the myriad other business ventures through which foreign states are bestowing rewards on him without the consent of Congress.

Profound harms ensue when the President, whose duties "are of unrivaled gravity and breadth," *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020), compromises the integrity of his decisions by taking unauthorized payments from foreign governments. Because the decision below departed from this Court's precedents in "foreclos[ing] [those harms] from constitutional challenge," *Raines*, 521 U.S. at 829, review is essential.

CONCLUSION

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Petitioners

September 22, 2020 * Counsel of Record