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

BRIEF OF HAROLD H. BRUFF, PETER M. SHANE, PETER L. STRAUSS, AND PAUL R. VERKUIL AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae—Harold H. Bruff, Peter M. Shane, Peter L. Strauss, and Paul R. Verkuil—are distinguished professors of administrative and constitutional law who are experts in separation of powers issues. They have a strong interest in ensuring that the separation of powers principles and the checks and balances found in the Constitution are upheld. They thus file this *amici* brief to urge the Court to grant the petition for a writ of *certiorari*.

Harold H. Bruff is the Rosenbaum Professor of Law Emeritus at the University of Colorado School of Law, where he was Dean from 1996-2003. His numerous writings on constitutional and administrative law include *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press 2006), and *Untrodden Ground: How Presidents Interpret the Constitution* (University of Chicago Press 2015), examining how presidents have interpreted their constitutional powers. He has served in the Office of Legal Counsel in the U.S. Department of Justice and has testified before Congress many times on public law issues.

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of *amici*'s intent to file this brief, and all parties consented in writing. Pursuant to Rule 37.6, counsel for *amici* certify no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Peter M. Shane is the Jacob E. Davis Chair and Jacob E. Davis II in Law at the Ohio State University's Moritz College of Law. Among his many writings, he has co-authored or edited eight books, including *Separation of Powers Law: Cases and Materials* (Carolina Academic Press, 4th ed. 2018) and *Madison's Nightmare: How Executive Power Threatens American Democracy* (University of Chicago Press 2009), and he is a former public member of the Administrative Conference of the United States ("ACUS"). Before entering full-time teaching in 1981, Professor Shane served as an attorney-adviser in the Office of Legal Counsel in the U.S. Department of Justice and as an assistant general counsel in the Office of Management and Budget.

Peter L. Strauss is the Betts Professor of Law Emeritus at Columbia Law School. His many influential articles bearing on separation of powers issues include *Overseer or "The Decider"?: The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007), and *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984). An editor of *Gellhorn and Byse's Administrative Law: Cases and Comments* since its Seventh Edition and author of Administrative Justice in the United States (1989, 2002, 2016), he served as the first general counsel to the U.S. Nuclear Regulatory Commission while on leave from Columbia, and as an attorney in the Office of the Solicitor General before his joining the Columbia faculty in 1971. Professor Strauss was elected in 2010 to the American Academy of Arts & Sciences.

Paul R. Verkuil is a Senior Fellow at ACUS and President Emeritus of the College of William & Mary. He is the last Senate-confirmed Chairman of ACUS (2010-2015). ACUS is the federal agency devoted to matters of administrative procedure and policy that has long produced recommendations of value to the judiciary, Congress, and the executive. Mr. Verkuil is a well-known administrative law scholar and the co-author of the treatise *Administrative Law and Process* (Foundation Press, 6th ed. 2014). He has served as special master to the U.S. Supreme Court in the original jurisdiction case of *New Jersey v. New York*, 523 U.S. 767 (1998).

SUMMARY OF THE ARGUMENT

The Constitution does not provide merely for an "abstract generalization" of the separation of powers. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). It instead establishes a structure of government consisting of specific processes that enable concrete checks and balances. These elements reflect the founders' belief that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). And in that structure, it is the fundamental role of the courts "to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and to safeguard the "enduring structure" of the Constitution, *Public Citizen v. Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring). At issue in this case is one of the Constitution's critical checks and balances: the Foreign Emoluments Clause.

This Clause reflects the founders' profound concerns about foreign influence and corruption. To address these fears, the founders imposed an

absolute duty on all federal officials not to accept foreign emoluments of any kind, and allocated to Congress the sole authority to provide exceptions to this absolute prohibition.

This case raises exceptionally important issues regarding the integrity of the Foreign Emoluments Clause. Requiring—as the lower court's ruling does—that Congress or a majority of its Members take affirmative action to prevent the President from accepting foreign emoluments would turn the Clause on its head. Such an outcome would undermine the President's duty to comply with his Constitutional obligations, strip Petitioners of their right to vote on the acceptance of specific emoluments, and abrogate the judiciary's duty to safeguard the structure of the Constitution. This Court should not allow the President to deprive members of Congress of their constitutional duty to guard against foreign influence and corruption by selectively consenting to the acceptance of only those foreign emoluments they deem appropriate. The petition for a writ of *certiorari* should be granted.

ARGUMENT

I. AT STAKE IS THE INTEGRITY OF THE FOREIGN EMOLUMENTS CLAUSE, ONE OF CONSTITUTION'S CRITICAL CHECKS AGAINST CORRUPTION.

At issue in this case is one of the Constitution's critical checks and balances: the Foreign Emoluments Clause. "The[] provisions of Art. I," which include the Foreign Emoluments Clause, "are integral parts of the constitutional design for the separation of powers." *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 946

(1983). As this Court explained in *Chadha*, "'[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. at 124). So too was a commitment to using the Constitution's structures to prevent corruption. *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. Univ. L. Rev. Colloquy 30, 30 (2012) (noting the Constitution's "structural commitment to fighting corruption"). Indeed, the Foreign Emoluments Clause relies on separation of powers as a means of preventing corruption in the Offices of the United States.

A. The Foreign Emoluments Clause reflects the framers' grave concerns about the risk of corruption and foreign influence.

Among the Constitutional Convention delegates, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 181 (1994). According to James Madison's notes on the convention, the term "corruption" was mentioned by fifteen delegates "no less than 54 times" and "[e]ighty percent of these references were uttered by seven of the most important delegates, including Madison, Morris, Mason, and Wilson," *id.* at 177 (referencing James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (1987)), with Mr. Mason arguing that "if we do not

provide against corruption, our government will soon be at an end." 1 *The Records of the Federal Convention of 1787*, at 392 (Max Farrand ed., 1911).

The Office of the President was not considered immune from this danger. As Alexander Hamilton argued in The Federalist No. 68 regarding the "mode of electing the President":

> [n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils.

The Federalist No. 68 (Alexander Hamilton).

Anti-corruption concerns were likewise prominent in the public advocacy efforts to garner support for the Constitution's ratification. Four of the first five Federalist Papers addressed the "Dangers from Foreign Force and Influence." The Federalist Nos. 2-5 (John Jay). The concerns over whether a foreign nation might provoke or influence the newly-formed union thus extended to all corners of the country, and the founders explicitly sought to address this issue. The Foreign Emoluments Clause was designed as one structural safeguard against these concerns. As Governor Randolph observed during the Virginia Ratification Convention:

> All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community . . . . It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.

3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465 (Jonathan Elliot ed., 1827) (emphasis omitted). The Clause was inserted into the Constitution by a motion of Charles Pinckney, who "urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence." 2 *The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., 1911). The measure passed unanimously. *Id.*[2]

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[2] The Clause in the Constitution mirrors a similar clause contained in the Articles of Confederation, the country's original governing document. Under the Articles of Confederation of 1781, art. VI, the clause stated that "nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever, from any king, prince, or foreign state." That version of the clause lacked an express reference to the consent of Congress; however, even under the Articles of Confederation, the accepted interpretation of the clause allowed for congressional consent. *See* Teachout, *supra*, at 36.

B. The congressional consent element of the foreign Emoluments Clause is a deliberate and critical separation of powers mechanism to prevent corruption

The Constitution could not be clearer: Congress has "exclusive authority to permit the acceptance of presents from foreign governments by persons holding offices under the United States." 4 John Bassett Moore, *A Digest of International Law* 579 (1906) (quoting Letter from James Madison, Sec'y of State, to David Humphreys (Jan. 5, 1803)) (internal quotations omitted). It is mandatory that any "Person holding any Office of Profit or Trust," including the President, seek and obtain congressional consent in order to keep "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; *see also Applicability of Emoluments Clause to Emp't of Gov't Emp. by Foreign Pub. Univs.*, 18 Op. O.L.C. 13, 17-18 (1994) ("The decision whether to permit exceptions that qualify for the Clause's absolute prohibition or that temper any harshness it may cause is textually committed to *Congress* . . . .") (emphasis in original). As now-Supreme Court Justice Alito observed while he was Deputy Assistant Attorney General at the Office of Legal Counsel of the Department of Justice ("OLC"), "the Emoluments Clause is 'directed against every kind of influence by foreign governments upon officers of the United States,' (24 Op. A.G. 116, 117 (1902)), unless the payment has been expressly consented to by Congress." Memorandum for H. Gerald Staub, Office of Chief Couns., NASA, from Samuel A. Alito Jr., Deputy Assistant Att'y Gen., *Emoluments Clause Questions Raised by NASA*

Scientist's Proposed Consulting Arrangement with the University of New South Wales, 1986 OLC Lexis 67, at *2 (May 23, 1986).

By allocating to Congress the broad power to determine whether to grant an exception to this prohibition, the framers of the Constitution imbued the Clause with two related purposes. It serves first to guard against corruption and foreign influence, and second to establish a congressional check on persons holding offices of profit or trust under the United States. The Foreign Emoluments Clause, like other provisions of the Constitution, protects "against a gradual concentration of the several powers" and "control[s] the abuses of government" by having one branch serve as a constitutional check against members of another branch. The Federalist No. 51 (James Madison). Critically, rather than requiring Congress to act as check against an official after-the-fact, the Clause places the burden on the official to obtain the consent of Congress before accepting any foreign emolument.

During the first recorded circumstance of Congress considering application of the Clause, Representative Harrison Gray Otis explained that:

> [w]hen every present to be received must be laid before Congress, no fear need be apprehended from the effects of any such presents. For, it must be presumed, that the gentleman who makes the application has done his duty, as he, at the moment he makes the application, comes before his country to be judged.

5 *Annals of Cong.* 1585 (1798) (Statement of Rep. Otis).

Ultimately, as Professor Zephyr Teachout explained:

> Congressional acquiescence is not a minor check. It takes power from the executive branch and gives Congress oversight responsibility to make sure that officers . . . are not being seduced from their obligations to the country. The congressional requirement leads to a radical transparency and interrogation that could chill quiet transfers of wealth for affection.

Teachout, *supra,* at 36.

Indeed, modern Presidents have recognized that the Foreign Emoluments Clause imposes an *ex ante* prohibition on accepting foreign emoluments absent the consent of Congress. President Kennedy sought an opinion from the OLC as to whether the offer of an "honorary Irish citizenship" would be subject to the Foreign Emoluments Clause. *Proposal That the President Accept Honorary Irish Citizenship*, 1 Op. O.L.C. Supp. 278 (1963) (holding that Foreign Emoluments Clause applies to offer of honorary citizenship to President Kennedy). Similarly, President Obama sought an OLC opinion as to whether accepting the Nobel Peace Price would conflict with the Foreign Emoluments Clause. *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1 (Dec. 7, 2009) (determining that the Nobel

Committee that awards the prize is not a "King, Prince, or foreign State," and thus the prize does not fall under the auspices of the Foreign Emoluments Clause). In contrast, President Trump has sought neither legal opinion as to whether specific emoluments fall within the scope of the Foreign Emoluments Clause nor the consent of Congress before accepting specific emoluments. Instead, there are concerns that he has tasked at least one U.S. ambassador to actively solicit foreign emoluments on his behalf.[3]

If true, this would constitute a serious dereliction of duty of precisely the sort the Foreign Emoluments Clause was meant to prevent. To the extent that members of Congress did not have a chance to weigh in on this—and similar emoluments—they have been denied the right to fulfill an oversight role given to them by the Constitution. There is no question this raises concerns of great national importance.

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[3] *See, e.g.*, Mark Landler, Lara Jakes & Maggie Haberman, *Trump's Request of an Ambassador: Get the British Open for Me*, N.Y. Times (July 21, 2020), https://www.nytimes.com/2020/07/21/world/europe/trump-british-open.html (reporting that U.S. Ambassador to Britain "told multiple colleagues in February 2018 that President Trump had asked him to see if the British government could help steer the world-famous and lucrative British Open golf tournament to the Trump Turnberry resort in Scotland," and that "[e]xperts on government ethics pointed to one potential violation of the emoluments clause that still may have been triggered by the president's actions: The British or Scottish governments would most likely have to pay for security at the tournament, an event that would profit Mr. Trump").

C. Requiring Congress to affirmatively act to prevent the acceptance of foreign emoluments is fundamentally contrary to the Constitution.

The decision below was no doubt correct in observing that "[t]he Members can, and likely will, continue to use their weighty voices to make their case to the American people, their colleagues in the Congress and the President himself, all of whom are free to engage that argument as they see fit." *Blumenthal v. Trump*, 949 F.3d 14, 20 (D.C. Cir. 2020). Those general rights, however, will not vindicate the Member's *specific* rights under the Foreign Emoluments Clause.

In any routine political disagreement, Congress has means of pursuing its interests. It 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 Constitution, however, does not treat foreign emoluments as a routine political disagreement. Had the founders intended that Congress dissuade officials from accepting foreign emoluments through appeals to the public, by withholding funds sought by the official in question, or even via individual *post hoc* pieces of legislation, there would be no need to include the Foreign Emoluments Clause in the Constitution in the first place. Instead, they created the Clause with a very particular structure—it is *Officers* of the United States that must take an affirmative action (i.e., going before Congress) in order to accept an emolument. The opinion below negates that requirement entirely.

Nor does the looming specter of impeachment as a means to enforce the Foreign Emoluments Clause lessen the importance of this case. Although impeachment is a mechanism clearly provided for in the Constitution, any decision that renders impeachment the sole remedy for a violation of law would leave Congress with no remedy save a "nuclear bomb." *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974).[4] The D.C. Circuit has cautioned that "the Constitution should not be construed so as to paint this nation into a corner which leaves available only the use of the impeachment process to enforce the performance of a perfunctory duty by the President." *Id.* Although the House recently voted to impeach President Trump on two articles, which the Senate subsequently voted to acquit, neither of these articles was based on violation of the Foreign Emoluments Clause. Those proceedings are thus not relevant to the rights Petitioners seek to vindicate.

Here, the President has an absolute duty under the Constitution to not accept foreign emoluments of any kind without the consent of Congress. Requiring that a majority of Congress act to disapprove or prevent the acceptance of emoluments is directly contrary to the clear

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[4] Moreover, the high standard the Constitution requires for impeachment exceeds its specific requirements regarding foreign emoluments. No action is required by Congress to prevent the acceptance of foreign emoluments, whereas impeachment requires "concurrence of two thirds of the Members [of the Senate] present" (in addition to prior action by the House of Representative). U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

structure of the Foreign Emoluments Clause. This Court should grant the petition for a writ of *certiorari* to address this profoundly important constitutional issue.

II. ADJUDICATION OF THIS IMPORTANT CASE IS CONSISTENT WITH THE SEPARATION OF POWERS.

While suits by federal legislators raise "separation-of-powers concerns," *Raines v. Byrd*, 521 U.S. 811, 824 n.8 (1997), this Court has never held that those concerns foreclose members of Congress from seeking judicial relief. Given the exceptionally important issues raised in this case, separation of powers concerns weigh in favor of granting the petition for a writ of *certiorari*, not against it.

A. This case is well within both the competence and authority of the judiciary.

That this case implicates the separation of powers—in that it implicates a clause of the Constitution requiring congressional consent to the otherwise prohibited conduct of a member of the executive branch—does not remove it from the realm of justiciability. It is the "'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'" *Nat'l Labor Relations Bd. v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. at 177). To reach "[a]ny other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (citing The Federalist No. 47, at 313 (James Madison) (Sherman Mittell ed. 1938)). As

such, in *United States v. Nixon*, this Court concluded that it is the province of the judiciary to "say what the law is" with respect to the claim of executive privilege presented in that case. *Id.* at 705 (quoting *Marbury v. Madison*, 5 U.S. at 177) (internal quotations omitted). Here, too, it is the province of the judiciary to say what the law is with respect to the Foreign Emoluments Clause.

Courts regularly address disputes that focus on the constitutional boundary between the legislative and executive branches. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court considered justiciable the question of whether Congress could limit an executive officer's removal by the President for cause. In *Bowsher*, 478 U.S. at 726, the Court concluded that "Congress cannot reserve for itself the power of removal of an [executive] officer charged with the execution of the laws except by impeachment." In *Myers v. United States*, 272 U.S. 52 (1926), the Court considered whether Congress could reserve the right to consent to removal of a postmaster during his term, and in *Buckley* whether Congress could appoint members of the Federal Election Commission. And just recently in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Court held that Congress cannot establish an independent regulatory agency led by a single person removable by the President only for good cause. *See also Chadha*, 462 U.S. 919 (striking down a one-house legislative veto); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (considering whether nationalization of the steel mills constituted law making); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)

(considering for-cause restrictions on removal of Federal Trade Commissioners).[5]

Here, the President has a duty not to accept foreign emoluments absent the consent of Congress. It is the duty of members of the executive branch, in the first instance, to ensure that they do not violate applicable constitutional prohibitions. This duty, however, does not mean that such members operate free of any check from coordinate branches.

This Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). That is the natural result of the interdependence—expressed in part as a system of checks and balances—of the three branches of government. As Justice Burger stated in *United States v. Nixon*, 418 U.S. at 707, "[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute

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[5] The Import/Export Clause and the Tonnage Clause, both of which lay prohibitions on the actions of states that have not obtained such consent, are regularly litigated and certainly found justiciable—indeed, their justiciability appears to be unchallenged. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009); *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *La. Land & Expl. Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990).

independence." *See Buckley*, 424 U.S. at 121 (explaining that the founders did not, in creating the Constitution, provide for the "hermetic sealing off of the three branches of Government from one another"). It is the province and duty of the courts to say what the law is—and the Foreign Emoluments Clause does not constitute an exception to that duty. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."). This case presents a clear legal question—whether the President has violated the Foreign Emoluments Clause—that the judiciary is both authorized and well-suited to handle.

The "mere fact that there is a conflict between the legislative and executive branches" has never been sufficient to remove a case from justiciability. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976). And indeed, here there is not even a conflict. This case does not interfere with Congress's internal affairs, and, as discussed below, adjudicating this case does not interfere with the President's constitutional duty to ensure that the laws are faithfully executed. To the contrary, allowing this case to proceed ensures that the President's judgment in undertaking that duty is not compromised through violation of another constitutional mandate. And only judicial resolution of this case will ensure that Congress is asked for its consent, as the Constitution requires. Doing so will

effectuate the checks and balances established by the Constitution.

B. This case represents a valid exercise of judicial power against the President.

That this action is brought against the President only heightens the need for this Court to grant the petition for a writ of *certiorari* and preserve the specific checks and balances in the Constitution. The concerns regarding foreign influence and corruption that underlie the Foreign Emoluments Clause are of even greater importance when applied to the President as compared to lower officials. Moreover, while seeking injunctive or declaratory relief against the President may be unusual, they are not prohibited by the Constitution.

Indeed, the Members of Congress who brought this case lack alternative means to press their Foreign Emoluments Clause claims in court. In contrast, "[i]n most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328, 1331 n.4 (D.C. Cir. 1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)). This is not like "most cases." Here, relief cannot be obtained by an injunction against subordinate officials, and declaratory or injunctive relief against the President is the only way to ensure the rule of law. President Trump himself has refused to disclose any information

surrounding his private businesses to Congress, and has refused to ask for consent of acceptance of foreign emoluments.

Finally, although this Court has noted that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties," *Loving v. United States*, 517 U.S. 748, 757 (1996), no risk of such impairment is present here. This case does not involve the exclusive constitutional duties of the executive branch; it involves a mandatory constitutional duty imposed on all officeholders, whether in the executive or another branch, that the founders included in the Constitution to prevent undue foreign influence. Far from distracting the President from his official duties, "any Presidential time spent dealing with, or action taken in response to" a case clarifying the scope of the Foreign Emoluments Clause is actually "part of a President's official duties." *See Clinton v. Jones*, 520 U.S. 681, 718 (1997) (Breyer, J., concurring). "Insofar as a court orders a President, in any [separation of powers] proceeding, to act or to refrain from action, it defines, or determines, or clarifies the legal scope of an official duty." *Id.*

Beyond imposing an independent constitutional duty, the Foreign Emoluments Clause is a critical check on the President's Article II powers. It protects against foreign influence over and corruption of the President, as with inferior officers. Compliance with the Foreign Emoluments Clause bolsters the resistance of the executive branch to corruption and foreign influence and thus enhances, rather than interferes with, his ability to take care that the laws are faithfully executed. By adjudicating

this case, this Court would effectuate one of the checks and balances found in the Constitution, and thus be acting precisely in line with how the separation of powers was intended to function.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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