No. 18-474

In the United States Court of Appeals
for the Second Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS UNITED, INC., JILL PHANEUF, AND ERIC GOODE,
Plaintiffs-Appellants,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York, No. 17-cv-458-GBD
(Hon. George B. Daniels)

BRIEF OF SENATOR RICHARD BLUMENTHAL AND REPRESENTATIVE JERROLD NADLER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Senator Richard Blumenthal and Representative Jerrold Nadler are the lead plaintiffs in *Blumenthal, Nadler, et al. v. Trump*, the lawsuit brought by nearly 200 members of Congress against President Donald J. Trump for his violations of the Foreign Emoluments Clause. *Amici* have a strong interest in ensuring that the President complies with the Clause, which was adopted to guard against foreign corruption of our nation's leaders and ensure that those leaders put the interests of the American people ahead of their own self-interest. Moreover, as members of Congress, *amici* are acutely aware that Congress is unable to redress the President's violations of the Foreign Emoluments Clause so long as he insists on accepting prohibited benefits from foreign states without first obtaining congressional consent. Thus, they recognize that the courts have a critical role to play in enforcing the Foreign Emoluments Clause. Indeed, judicial relief is necessary to uphold Congress's unique constitutional role in determining when exceptions are warranted to the Clause's strict prohibition. Accordingly, *amici* have a strong interest in this case.

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

INTRODUCTION

"In Republics," Alexander Hamilton warned, "persons elevated from the mass of the community by the suffrages of their fellow-citizens to stations of great pre-eminence and power may find compensations for betraying their trust, which, to any but minds actuated by superior virtue may appear . . . to overbalance the obligations of duty." *The Federalist No. 22*, at 149 (Clinton Rossiter ed., 1961). Mindful of this threat, the Framers included numerous safeguards against foreign influence and self-dealing in our national charter. Among the most important is the Foreign Emoluments Clause, which prohibits federal officials from accepting any benefits from foreign states "without the Consent of the Congress." U.S. Const. art. I, § 9, cl. 8. President Donald J. Trump has brazenly violated this prohibition by accepting untold financial benefits from foreign governments through his vast business empire, without ever obtaining "the Consent of the Congress." *See* J.A. 33-49. The court below nevertheless concluded that it lacked jurisdiction to redress these violations because, in its view, "Congress is the appropriate body to determine whether, and to what extent, Defendant's conduct unlawfully infringes on that power." *Id.* at 349.

This is wrong. Nothing about the Foreign Emoluments Clause's congressional consent provision supports the district court's conclusion that this case presents a "non-justiciable political question," *id.*, or that it is not "ripe for adjudication," *id.* at 352. The judiciary, not Congress, is the "ultimate interpreter of

the Constitution," *Baker v. Carr*, 369 U.S. 186, 211 (1962), and resolving the constitutional question here—whether the President has accepted "emoluments" or "presents" without first obtaining "the Consent of the Congress"—is no different than resolving any other constitutional question. Moreover, this case is certainly ripe for adjudication: the Plaintiffs allege that the President is currently violating the Constitution by accepting foreign emoluments without first obtaining congressional consent, and that they are being injured as a result. Thus, this is no "abstract disagreement[] over administrative policies," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), but rather an effort by the Plaintiffs to redress the injury they suffer as a result of the President's ongoing constitutional violations.

Moreover, far from honoring Congress's role under the Foreign Emoluments Clause, the district court's conclusion, if affirmed, would eviscerate the requirement that federal officials obtain congressional consent before accepting benefits from foreign governments. After all, as *amici* well know, so long as the President accepts foreign emoluments without first obtaining the consent of Congress, there is nothing Congress can do to redress this violation of the Constitution's Foreign Emoluments Clause. Indeed, that is why *amici*, along with nearly 200 of their colleagues, are currently seeking judicial relief to redress the President's violations of the Foreign Emoluments Clause in separate litigation. *See Blumenthal v. Trump*, No. 17-1154 (D.D.C. filed June 14, 2017).

According to the district court, judicial relief is inappropriate because "it is up to Congress to decide whether to challenge or acquiesce to Defendant's conduct." J.A. 349. But if *post hoc* action by Congress were the only remedy available, the Clause would cease functioning as the Framers provided: No longer would a majority of Congress be needed to approve of any foreign emolument, as the Constitution's plain language demands. Instead, a majority would be required to *disapprove* of such an emolument—and even that would be possible only when Congress managed to discover a President's violation of the Clause. That is not the Foreign Emoluments Clause the Framers adopted.

Rather, the Framers adopted the Foreign Emoluments Clause to serve as a broad prophylactic safeguard against all undue foreign influence, insulating American leaders from even the possibility of corruption or divided loyalty. The Framers believed that requiring federal officials to obtain "the Consent of the Congress" *before* they accept any "present, Emolument, Office, or Title, of any kind whatever," from a foreign state was essential to preventing the corruption and divided loyalty among American leaders that the Framers feared—and that still threaten our nation today. The Clause's "consent" provision thus establishes a simple process that enables federal officials to accept benefits from foreign states in a manner that ensures accountability and transparency. By providing a lawful avenue through which federal officials may accept such benefits—one that is open

to public scrutiny and that incorporates safeguards derived from the separation of powers—the "consent" provision discourages federal officials from accepting those benefits illicitly and in secret. This, in turn, reduces the threat that receiving them will compromise an official's loyalty or judgment. As explained by one member of Congress more than two centuries ago, the consent provision requires officials "to make known to the world whatever presents they might receive from foreign Courts and to place themselves in such a situation as to make it impossible for them to be unduly influenced by any such presents." 8 Annals of Cong. 1583 (1798) (Joseph Gales ed., 1834) (Bayard).

President Trump has refused to make "known to the world" the benefits he is accepting from foreign governments, and he has refused to obtain congressional consent before accepting them. It is the responsibility of the courts to redress this violation of one of the Constitution's vital anti-corruption provisions.

ARGUMENT

I. The Congressional Consent Provision of the Foreign Emoluments Clause Does Not Make this Case a Political Question or Unripe for Adjudication

According to the district court, this case presents a "non-justiciable political question" because "Congress is the appropriate body to determine whether, and to what extent, Defendant's conduct unlawfully infringes on" its power to consent under the Foreign Emoluments Clause. J.A. 349. This is wrong.

The political question doctrine is a "narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). A controversy "involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (additional quotation marks omitted)). Neither criterion is present here.

While the Constitution gives Congress the power to consent to the acceptance of foreign emoluments, the ability to make that discretionary choice—a policy judgment—is entirely distinct from the power to authoritatively decide which actions require consent in the first place. As to *that* question, a matter of constitutional interpretation, there is no "textually demonstrable constitutional commitment of the issue" to Congress, *id*., any more than a president's ability "to grant Reprieves and Pardons for Offences against the United States," U.S. Const. art. II, § 2, cl. 1, commits to him the power to authoritatively interpret the federal criminal laws. *See Applicability of the Emoluments Clause to Non-Gov't Members of ACUS*, 17 Op. O.L.C. 114, 121 (1993) (explaining that the decision "textually

committed to Congress" by the Clause is "[t]he decision whether to permit exceptions that qualify the Clause's absolute prohibition" (emphasis omitted)).

Significantly, it is well established that the courts can resolve cases arising under other constitutional provisions that prohibit action "without the Consent of the Congress." *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 4, 6 (2009) (Tonnage Clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964) (Import-Export Clause). After all, it is the responsibility of the courts to determine what the Constitution means. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Supreme Court, not Congress, is the "ultimate interpreter of the Constitution," *Nixon*, 506 U.S. at 238 (quoting *Baker*, 369 U.S. at 211), and of whether a president has violated the Constitution, *id.* ("courts possess power to review . . . executive action that transgresses identifiable textual limits").

Moreover, the district court does not even suggest that the other basis on which the political question doctrine can be invoked is satisfied—a "lack of judicially discoverable and manageable standards for resolving" the Plaintiffs' claims. *Id*. at 195. No such argument is plausible. *Cf. Nixon*, 506 U.S. at 228-33 (providing an example of when such standards are lacking). Interpreting the meaning of the Foreign Emoluments Clause in a case like this one "demands careful examination of the textual, structural, and historical evidence put forward by the parties . . . . This is what courts do." *Zivotofsky*, 566 U.S. at 201.

The district court also held that this case is not "ripe for adjudication" for essentially the same reason. Relying primarily on an opinion by a single Justice, *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring), the court concluded that "this case involves a conflict between Congress and the President in which this Court should not interfere unless and until Congress has asserted its authority and taken some sort of action with respect to Defendant's alleged constitutional violations of its consent power." J.A. 351. But the "basic rationale [for the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs.*, 387 U.S. at 148. There is nothing premature about this litigation, and this disagreement is anything but abstract. Rather, the Plaintiffs allege that the President is currently harming them financially by accepting prohibited benefits from foreign governments in violation of the Foreign Emoluments Clause, and they seek relief to end the harm from that ongoing constitutional violation.

Relying on Justice Powell's *Goldwater* concurrence is particularly inapposite here because the ripeness test it proposed was designed for cases involving "a dispute between Congress and the President." J.A. 350 (quoting *Goldwater*, 444 U.S. at 996 (Powell, J., concurring)). Indeed, like *Goldwater*, every opinion cited by the district court on this point involved cases in which the plaintiffs suing the President were

members of Congress. *See id.* at 351 n.7. Justice Powell never suggested that private parties harmed by the President's unconstitutional conduct cannot sue for redress until Congress attempts to stop that conduct through legislative means. The district court cited no authority for that strange proposition, and there is none.[2]

In sum, the district court's conclusion misunderstands the relevant legal doctrines. As the next Section discusses, it also misunderstands Congress's ability to redress the President's constitutional violations.

II. Congress Cannot Redress the President's Violations of the Foreign Emoluments Clause

According to the district court, the judiciary should decline to redress Foreign Emoluments Clause violations, no matter how serious they are, until Congress acts. J.A. 351-52; *see id.* at n.8 ("Congress . . . . is a co-equal branch of the federal government with the power to act as a body in response to Defendant's alleged Foreign Emoluments Clause violations, if it chooses to do so."). This conclusion, which would allow the President to accept all the foreign emoluments and presents he wants *unless* Congress acts, gets the Foreign Emoluments Clause entirely backwards.

[2] Justice Powell's ripeness concerns are inapplicable for another reason, as well: as discussed below, there is no way the "normal political process [can] . . . resolve the conflict" in this particular case, *Goldwater*, 444 U.S. at 996 (Powell, J., concurring). *See infra* at 9-17.

The Foreign Emoluments Clause establishes a blanket prohibition that remains in force until Congress affirmatively acts by consenting to a waiver: "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. The Clause does not authorize federal officials to accept prohibited foreign emoluments unless and until Congress affirmatively votes to disapprove of their acceptance. Nor does it obligate Congress to investigate and discover the circumstances under which federal officials may be accepting prohibited foreign emoluments, and then take *post hoc* votes on whether or not it deems those circumstances acceptable, in light of whatever limited information it has been able to gather. Instead, the Constitution's default rule is exactly the opposite: no consent, no acceptance.

Among other things, that rule puts the burden on officials to provide enough information about the emoluments they wish to accept that *Congress* is satisfied it is appropriate to consent to their acceptance. Thus, if Congress finds an official's proposal to be insufficiently informative about the foreign benefits he wishes to accept, the default state of affairs remains in place—and the official may not accept those benefits. Only by persuading a majority of Congress's members to consent can the official lawfully accept benefits from a foreign state.

The facts here amply demonstrate why this default constitutional rule is so essential. Before assuming the presidency, Donald Trump promised to "voluntarily donate all profits from foreign government payments made to his hotel[s] to the United States Treasury." *Donald Trump's News Conference: Full Transcript and Video*, N.Y. Times (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html (statement of Sheri A. Dillon, Partner, Morgan, Lewis & Bockius LLP). Notably, this pledge extended only to earnings from his hotels, not to the myriad other types of foreign emoluments he is now accepting. *See* J.A. 33-49. More fundamentally, the Foreign Emoluments Clause does not allow the President to accept foreign-government payments according to a plan of his own devising that he asserts should ameliorate concerns about those payments. Congress, not the President, is entrusted with making that policy judgment. Therefore any such plan must first be submitted to Congress and receive its approval. This process allows members of Congress to scrutinize the details of the proposed arrangement and withhold their consent if they disapprove of the plan or are simply unsatisfied that they have been given enough information to make a decision.

Instead, defying the Constitution's clear mandate, President Trump unilaterally implemented his own favored protocols while asserting that "this approach is best from a conflicts and ethics perspective." *Donald Trump's News*

Conference, *supra* (statement of Sheri A. Dillon). Members of Congress have thus been forced to attempt, with limited success, to learn how the Trump Organization is tracking foreign payments at the President's hotels and calculating the "profit" attributable to those payments. *See, e.g.*, Trump Organization, *Donation of Profits from Foreign Government Patronage*, https://www.documentcloud.org/documents/3730551-Trump-Org-Pamphlet-on-Foreign-Profits.html (undated pamphlet provided to the House Oversight and Government Reform Committee as the Trump Organization's response to inquiries on this matter).

Critically, there is nothing Congress can do to redress a President's ongoing violations of the Foreign Emoluments Clause when he engages in such violations through his private affairs. As the Founders knew too well, rewards from a foreign state can be accepted in secret. *See* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 484 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter "*Elliot's Debates*"] (Mason) ("It will . . . be difficult to know whether [the President] receives emoluments from foreign powers or not."). Unlike most constitutional provisions, the Foreign Emoluments Clause regulates private conduct that a President can carry out without the assistance of government funds or personnel. And this limits the strings that Congress can pull to exert its will and prevent further violations. The legislative remedies that are available to

stop activities requiring federal money and employees are ineffective when an officeholder is accepting foreign-government money through his private businesses.

The district court suggested that Congress could "enact legislation codifying its views by statute or expand the Constitution's conflict-of-interest protections." J.A. 350. But Congress clearly cannot, by itself, "expand the Constitution's conflict-of-interest protections," *see* U.S. Const. art. V, nor can it enact any legislation that would actually ameliorate the constitutional violation here. The Clause entitles Congress to approve or reject foreign emoluments *before* the President accepts them, and it establishes that Congress may deny its consent for an emolument by simply failing to approve it. *See supra* at 10. While in theory a statute could demand that a President divest from his financial holdings, or explicitly require consent for business transactions with foreign governments, these remedial options share a fatal flaw: they would require a majority of Congress to act in disapproval of President Trump's conduct, instead of requiring him to garner a majority willing to approve his conduct.

Such a result would essentially rewrite the Clause, undermining its value in the process. Under the Clause's default rule, Congress's failure to act functions as a denial of consent. That puts the burden on officeholders to move Congress to action. Significant barriers stand in the way of such a legislative effort. It must

compete with other priorities for lawmakers' attention. Members must be willing to go on record in support of the emolument's acceptance, and numerous parliamentary hurdles must be surmounted. In the end, a majority of lawmakers must vote in favor of acceptance. Once this process is completed in one house, it must be repeated in the other. The Clause harnesses these legislative obstacles in aid of its purpose, by requiring them to be surmounted to overcome its default prohibition on foreign rewards. In doing so, the Clause ensures that federal officials may accept the largesse of foreign states only when a request is deemed sufficiently compelling by the people's representatives. To say that the courts may not adjudicate this case because Congress can take action to stop the President's acceptance of emoluments would make these legislative roadblocks an ally of foreign corruption, instead of an enemy.

Indeed, the problem is actually worse. If President Trump were to obey the Constitution by seeking consent before accepting emoluments, he might need to secure *more* than a majority of votes in the Senate, given that body's Cloture Rule requiring 60 votes to end debate on a matter. *See* Standing Rules of the Senate, Rule XXII, § 2. In other words, when advance consent is sought, 41 Senators can block Congress's approval, whereas stopping the President from accepting emoluments through corrective legislation may require mustering 60 Senators instead. *Cf. Goldwater v. Carter*, 617 F.2d 697, 703 (D.C. Cir. 1979) (holding that

Senators had standing to challenge the President's termination of a treaty without Senate approval, because "[t]he only way the Senate can effectively vote on a treaty termination, with the burden on termination proponents to secure a two-thirds majority, is for the President to submit the proposed treaty termination to the Senate as he would a proposed treaty"), *vacated on other grounds*, 444 U.S. 996. Thus, prospective legislation cannot effectively vindicate the Foreign Emoluments Clause.

Nor do the problems end there. To become law, bills require a presidential signature. U.S. Const. art. I, § 7, cl. 2. The nominal authority to enact statutes, therefore, is no remedy against a President intent on continuing to reap financial rewards from foreign states. And the option of convincing President Trump to bind himself against further self-enrichment is an especially poor remedy for a constitutional provision that gives Congress total authority over such enrichment—and the President none. To be sure, two-thirds of the members of both houses can override a presidential veto. But requiring such a measure to stop the President from accepting foreign emoluments would only exacerbate the problem discussed above, requiring a super-majority of members to prohibit acceptance of emoluments when the Clause requires a majority to consent to their acceptance.

For similar reasons, it is no answer to say that Congress could vote, after the fact, to condemn specific emoluments that the President has already accepted.

Once the President has accepted a foreign emolument, he has already done the thing that the Constitution says he needs Congress's permission to do. And such after-the-fact votes are not even possible except when Congress, through its own efforts, happens to learn about a particular emolument and gather enough detail and context to form a judgment about whether it should be approved. When a President systematically conceals his financial transactions from Congress and the public, as President Trump continues to do, there is no way to stop him from accepting foreign emoluments that he manages to keep secret.

In short, even if remedial legislation or other after-the-fact responses could accomplish anything, withholding judicial relief on that basis would fundamentally transform the Foreign Emoluments Clause. Its rule is textually clear and unambiguous: accepting foreign emoluments is barred unless Congress has approved of their receipt. Accepting the district court's conclusion would flip this structure on its head and require Congress to affirmatively disapprove of what the President is doing.

Likewise, foreclosing judicial enforcement of the Clause because of Congress's impeachment power would force upon Congress a Hobson's choice: either acquiesce to the President accepting all of the foreign emoluments he wants or overturn his entire presidency and the results of the most recent election. It cannot be that the political question and ripeness doctrines were designed to force

Congress to make this choice. "[T]he 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." *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974).

In sum, the district court's decision, if upheld, would create a system in which Congress must ferret out a President's secret foreign emoluments and labor to stop him from accepting them. That type of catch-me-if-you-can system is not the process set forth in the Constitution by the Framers. And as the next Section explains, our democracy risks profound damage if the courts allow the President to accept prohibited emoluments without first obtaining congressional consent, opening the door to foreign corruption of "the chief constitutional officer of the Executive Branch," who is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

III. Enforcing the Constitutional Requirement that Officials Obtain Congressional Consent Before Accepting Foreign Emoluments Is Essential to Preventing Corruption and Divided Loyalty Among American Leaders

The Framers included the Foreign Emoluments Clause in the Constitution because they recognized that "[f]oreign powers will intermeddle in our affairs, and spare no expence to influence them," 2 *The Records of the Federal Convention of*

1787, at 268 (Max Farrand ed., 1911) (Gerry) [hereinafter "*Convention Records*"], and that "if we do not provide against corruption, our government will soon be at an end," 1 *id.* 392 (Mason). While the Framers' goal was ambitious—establishing a government whose leaders serve the public instead of themselves—the means they employed were pragmatic. To ward off "dependency, cabals, patronage, unwarranted influence, and bribery," the Framers relied on "procedural devices and organizational arrangements." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 181 (1994); *see id*. at 177-82 (describing how fear of corruption influenced the structure of the electoral college, Congress's power to impeach, the prohibition on members of Congress holding additional offices, and the prohibition on acceptance of foreign emoluments).

The Framers' adoption of the Foreign Emoluments Clause was a repudiation of the corruption and foreign intrigue they perceived as arising from the European practice of diplomatic gift-giving, in which ambassadors and ministers were bestowed lavish presents by the sovereigns with whom they dealt, often consisting of "Jewels, Plate, Tapestry, Porcelain, and sometimes Money." Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-16-02-0206-0003; *see* 8 Annals of Cong. 1589 (1798) (Bayard) ("in Holland, it was customary to give a gold chain and medal; in France, a gold snuff-box; and in Spain, a picture"); *id*. at

1587 (Venable) ("these presents were sometimes made in pictures, sometimes in snuff-boxes, and sometimes in money"). Seeking to cultivate undivided loyalty on the part of public officials, America's Founders made a clean break from such customs as soon as they established their own national government, by including in the Articles of Confederation a nearly identical precursor to the Foreign Emoluments Clause. *See* Articles of Confederation of 1781, art. VI, para. 1. That measure was one of the few to be transferred from the Articles to the new Constitution in 1787, reflecting its importance to the Founding generation. *See* 2 *Convention Records* 384, 389.

While "the possibility of corruption and foreign influence of foreign ministers apparently was of particular concern to the Framers, they expressly chose not to limit the prohibition on accepting emoluments from foreign governments to foreign ministers." *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm'n*, 10 Op. O.L.C. 96, 98 (1986). Instead, to guard against corruption in the highest reaches of the nation's government, the Framers "drafted the Clause to require undivided loyalty from *all* persons holding offices of profit or trust under the United States." *Id.* As Edmund Randolph later explained at the Virginia Ratifying Convention: "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 *Convention Records* 327 (emphasis added).

Indeed, even as delegates to the Constitutional Convention settled upon the need for a single president to serve as chief executive of the new government they were devising, they expressed deep concern that foreign states would give benefits and rewards to this president to subvert his loyalty. Among other precautions against that threat, the Framers rejected entrusting the treaty power solely to the president—susceptible as he was to foreign influence—and instead required Senate approval. *See* 4 *Elliot's Debates* 264-65. As Hamilton noted, the personal interest of a hereditary king was "so interwoven with that of the Nation . . . that he was placed above the danger of being corrupted from abroad." 1 *Convention Records* 289. By contrast, Madison observed, an elected president would lack "that permanent stake in the public interest which would place him out of the reach of foreign corruption." *Id.* at 138. During the state debates over ratification of the Constitution, former delegate Charles Cotesworth Pinckney similarly explained that while "kings are less liable to foreign bribery and corruption . . . because no bribe that could be given them could compensate the loss they must necessarily sustain for injuring their dominions . . . . the situation of a President would be very different." 4 *Elliot's Debates* 264. As a temporary officeholder, a president "might receive a bribe which would enable him to live in greater splendor in another country than his own; and

when out of office, he was no more interested in the prosperity of his country than any other patriotic citizen." *Id.*

By adopting the Foreign Emoluments Clause and its broad prohibition on accepting benefits from foreign states, the Framers confronted the threat that corruption from abroad would undermine the integrity of American leaders, including the nation's president. But in doing so, the Framers made an important change to the language of the Clause's precursor in the Articles of Confederation—permitting officials to accept foreign emoluments if they obtained "the Consent of the Congress." U.S. Const. art. I, § 9, cl. 8. That change reflected "practices that had developed during the period of the Confederation," in which officials sought and received permission from Congress to accept items of value from foreign states that otherwise would have been prohibited. *Applicability of Emoluments Clause to Emp't of Gov't Emps. by Foreign Public Univs.*, 18 Op. O.L.C. 13, 16 n.4 (1994) (citing instances under the Articles in which Congress consented to the acceptance of gifts from foreign monarchs, including miniature portraits and a horse); 8 Annals of Cong. 1585 (1798) (Otis) (citing officials who were offered gifts from foreign governments and "communicated the fact to Congress" for its approval).

By providing a lawful avenue through which American officials may accept emoluments from foreign governments—one that is open to public scrutiny and incorporates safeguards derived from the separation of powers—the "Consent of the

Congress" provision discourages officials from accepting emoluments illicitly and in secret. It thus reduces the threat that receiving such benefits will compromise an official's loyalty or judgment. That, in turn, furthers the Clause's vital purpose: ensuring that foreign powers do not interfere in America's internal affairs or compromise its republican institutions by making its leaders subservient to foreign interests.

When Congress was first asked to approve a foreign benefit under the Foreign Emoluments Clause, its members discussed at length how the "consent" provision fosters transparency and accountability that mitigate the risk of corruption. In 1798, foreign envoy Thomas Pinckney was offered "the customary presents" by the kings of England and Spain, but in obedience to the Clause he "declined receiving them, saying, that he would lay the matter before Congress." 8 Annals of Cong. 1590 (1798) (Rutledge). In the debate that followed, lawmakers echoed the views expressed a decade earlier about the dangers of foreign influence. But they also emphasized that the very act of seeking and obtaining congressional consent in a public process helped minimize those dangers.

Representative William C.C. Claiborne described the Foreign Emoluments Clause as "intended to lock up every door to foreign influence," which "could not but prove baneful to every free country." *Id*. at 1584. Representative Matthew Lyon similarly declared that "he should not be willing to lay this country under an

obligation to a foreign country by our Ministers accepting presents." *Id.* at 1589. And Representative Joseph McDowell stated that "he objected to the principle of these presents," asking: "What are they given for? He supposed it was to gain their friendly offices and good wishes towards the country who gave them. He thought this improper[.]" *Id*. at 1583.

Lawmakers were particularly concerned that if American officials could accept foreign benefits at will, solely in their own discretion, the secrecy of their conduct would create the conditions most likely to foster corruption and divided loyalty. Representative James Bayard expressed the point this way: "If presents were allowed to be received without number, and privately, they might produce an improper effect, by seducing men from an honest attachment for their country, in favor of that which was loading them with favors." *Id*.

At the same time, however, lawmakers emphasized that when officials obey the Constitution's mandate by seeking and obtaining congressional consent before accepting foreign-government benefits, the open and transparent process that ensues diminishes the risk of undue foreign influence. As Bayard explained, the Foreign Emoluments Clause requires officials "to make known to the world whatever presents they might receive from foreign Courts and to place themselves in such a situation as to make it impossible for them to be unduly influenced by any such presents." *Id*. Representative Harrison Gray Otis similarly declared, "When 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." *Id.* at 1585.

Thus, because "the Constitution of the United States has left with Congress the *exclusive* authority to permit the acceptance of presents from foreign governments by persons holding offices under the United States," Letter from James Madison to David Humphreys (Jan. 5, 1803), *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/02-04-02-0275 (emphasis added), any foreign benefits that are accepted in compliance with this process will necessarily be transparent and subject to public critique—reducing the danger of corruption that such transfers of wealth might otherwise pose. When every official wishing to accept such a benefit seeks congressional consent and thereby "comes before his country to be judged," 8 Annals of Cong. 1585 (1798) (Otis), the public has less need to fear that American leaders are sacrificing the national interest to their own self-interest when making critical policy decisions.

Moreover, by giving Congress—and only Congress—the power to decide which emoluments may be accepted from foreign states, the Framers tried to ensure that federal officials would not be in a position of deciding for themselves whether particular emoluments were likely to jeopardize their independence or lead them to

unduly favor the governments offering them. No official, in short, would be the sole judge of his own conduct. *See The Federalist No. 10*, *supra*, at 79 (Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

In sum, the "consent" provision of the Foreign Emoluments Clause is meant to deter American officials from secretly and illicitly accepting the largesse of foreign nations, and to steer them toward a process in which transparency and the independent judgment of a coordinate government branch help reduce the risk of corrupting foreign influence. Befitting this goal, compliance with the "consent" provision is simple, as illustrated by Thomas Pinckney's example: an official informs Congress of a foreign benefit he wishes to accept, and Congress votes on whether or not to consent to the official's acceptance of that benefit. Past presidents have consistently followed that process. *See* Amended Complaint ¶ 31, *Blumenthal v. Trump*, No. 17-1154 (D.D.C. Aug. 15, 2017), https://www.theusconstitution.org/wp-content/uploads/2018/01/Blumenthal_v_Trump_DDC_Amended_Complaint_Final.pdf.

President Trump's conduct grossly departs from this tradition. Where the Framers established in the text of the Constitution the exclusive mechanism by which officials may accept foreign emoluments, President Trump has substituted rules of his own making. Where the Framers elevated the transparency that arises

from the process of openly seeking congressional consent, President Trump has chosen to operate in secret. Where the Framers made use of the separation of powers, calling upon the independent judgment of a coordinate branch of government, President Trump has appointed himself the sole judge of his own integrity. This Court should not use the Clause's "Consent of the Congress" language as an excuse to decline to enforce the Constitution's clear terms. Only if the courts enjoin the President from accepting foreign emoluments without first obtaining congressional consent will Congress be able to play the vital role the Constitution assigns it—determining when exceptions are warranted to the Clause's strict prohibition.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amici curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 1st day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on May 1, 2018.

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