[ORAL ARGUMENT NOT SCHEDULED]

No. 19-5196

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

In re DONALD J. TRUMP, in his official capacity
as President of the United States,

Petitioner.

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND OPPOSITION TO MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING MANDAMUS

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INTRODUCTION

As the Constitution's chief bulwark against the foreign corruption of America's leaders, the Foreign Emoluments Clause binds every person who holds an office of profit or trust in the federal government. Since the eighteenth century, officeholders have obeyed its mandate by obtaining the consent of Congress before accepting rewards from foreign states or by simply declining to accept such rewards. Yet for more than half of his term, President Trump has been violating this critical prohibition, accepting benefits from foreign governments without first obtaining Congress's affirmative consent. His defense is that the Clause prohibits him from receiving ornamental gifts and fees for personal services, but not the vast sums of money foreign governments are paying him through his businesses.

In his effort to escape accountability, the President now asks this Court to grant the extraordinary remedy of mandamus relief, principally on the ground that the district court was "clearly and indisputably incorrect" in recognizing that Plaintiffs have standing. Yet instead of engaging with the district court's careful analysis of why *these* Plaintiffs have standing to challenge *this particular* constitutional violation, President Trump largely ignores that analysis, preferring to traffic in generalities about why members of Congress often lack standing to sue—a point that no one disputes.

The President takes that approach for a reason: since the Supreme Court first

recognized individual legislator standing in *Coleman v. Miller*, 307 U.S. 433 (1939), both the Supreme Court and this Court have been careful not to foreclose all standing for individual members of Congress. Rather, they have preserved those members' ability to seek judicial relief in at least one narrow circumstance: when the executive has completely denied them the effectiveness of their votes and no legislative remedy is "adequate," *Raines v. Byrd*, 521 U.S. 811, 829 (1997). As the district court held, that is what is happening here. By choosing not to confront the district court's analysis, the President fails to show that it was "clearly and indisputably incorrect." And his claim that other aspects of the court's ruling are "indisputably" incorrect is equally groundless. The President's mandamus petition should be denied.

Even if this Court were to conclude that additional briefing or argument on the mandamus petition were necessary, there is no basis for the President's request for a stay of discovery. The President barely offers any argument as to why he is entitled to a stay under this Court's demanding standards, resting instead on the fact that stays have been granted in other cases. That is patently insufficient. It is the President's burden to demonstrate that a stay is appropriate in *this* case. He has not made that showing, and he cannot.

Most significantly, President Trump cannot show that he will suffer "irreparable injury." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555

(D.C. Cir. 2015). His petition expresses concern that discovery will "distract [him] from the performance of his constitutional duties," Pet. 26, but none of the discovery Plaintiffs have propounded is directed at him. To be sure, Plaintiffs seek records from companies the President owns, but he has repeatedly claimed that he is not involved in running those companies. And in any event, the Supreme Court has made clear that litigation of the type at issue here can impose some demands on a president's time without raising separation-of-powers concerns.

Moreover, the President ignores the very real harm that delay will cause Plaintiffs, who for more than two years have been denied the exercise of a right to which they are expressly entitled by the Constitution. A stay at this juncture may ensure a *de facto* victory for the President, because regardless of who prevails on appeal, an entire presidential term may end up passing with Plaintiffs unable to obtain the relief they seek: a final judgment ordering the President to stop accepting benefits from foreign governments without first obtaining congressional consent.

Finally, as that point underscores, additional delay would gravely harm the public interest—a component of this Court's stay standard that the President does not acknowledge, let alone address. By flouting the Foreign Emoluments Clause, President Trump is depriving the American people of assurance that their highest elected official is pursuing their interests with undivided loyalty, and creating the very risk of undue foreign influence that the Framers sought to prevent. Resolving

Plaintiffs' allegations and enforcing the Clause are thus matters of the utmost importance, not only to Plaintiffs but to the entire nation.

ARGUMENT

I. The President Cannot Satisfy the High Standard for Mandamus Relief

To establish his entitlement to mandamus relief, the President must demonstrate that there is "no other adequate means to attain the relief," that "[his] right to issuance of the writ is clear and indisputable," and that "the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (quotation marks omitted). He does not come close.

A. Standing

The Supreme Court's precedent on legislative standing, although complex, resolves into three basic propositions: (1) individual legislators have standing when they are unlawfully denied the right to have their votes given effect, *Coleman*, 307 U.S. at 438, and (2) a legislative body has standing when it is unlawfully deprived of a power the body possesses, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015), but (3) individual legislators and the subcomponents of a legislature lack standing to vindicate interests that are possessed only by the legislature as a whole, *Raines*, 521 U.S. at 829-30; *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). Under these principles, Plaintiffs have standing because President Trump has completely denied them a right

to which the Constitution explicitly entitles them: the right to vote on whether to give or withhold their consent to his acceptance of emoluments before he accepts them.

In arguing to the contrary, the President fails to reckon with the unique nature of the Foreign Emoluments Clause, which has two features that are each "unusual" in their own right, Pet. Add. 31, 47, and which no other constitutional provision combines.

First, the Clause imposes a specific procedural requirement (obtain "the Consent of the Congress") that federal officials must satisfy before they take particular actions (accept "any" emolument "of any kind whatever" from "any ... foreign State"). U.S. Const. art. I, § 9, cl. 8. The "only similar provision" in the Constitution is the requirement that presidents obtain the Senate's advice and consent before appointing officers and making treaties. Pet. Add. 31 n.8.

This requirement of a successful prior vote, combined with the right of each Senator and Representative to participate in that vote, *id.* at 11 (citing U.S. Const. art. I, § 3, cl. 1, and *id*. art. I, § 5, cl. 3), means that "each time the President ... accepts a foreign emolument without seeking congressional consent, plaintiffs suffer a ... deprivation of the right to vote on whether to consent to the President's acceptance of the prohibited foreign emolument," *id*. at 38-39. Under the Constitution, the

President can no more deny members of Congress that vote than he can install a Supreme Court Justice without the Senate's prior consent.

Second, the Foreign Emoluments Clause—unlike the Appointments and Treaty Clauses—regulates the *private* conduct of federal officials, not just the performance of their governmental responsibilities. *See* MTD Opp. 24 (Dkt. No. 17); Pls.' Suppl. Mem. 35-37 (Dkt. No. 50). Because President Trump is violating the Clause through his private businesses, without the need to use government money or personnel, Congress cannot stop him by exercising its power of the purse—the "ultimate weapon of enforcement available to the Congress," *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974). Without Congress's "most complete and effectual weapon" for keeping the executive in line, *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990), or any other means of forcing President Trump to obey the Clause, Plaintiffs have "no adequate legislative remedies" for the President's denial of their voting rights. Pet. Add. 37.

President Trump is thus inflicting on Plaintiffs a harm that falls within the narrow class of institutional injuries over which individual members of Congress may seek judicial relief. The Supreme Court, and this Court, have been careful to preserve that option, recognizing that in an extreme and unusual case—where unlawful executive action completely negates their voting rights, and where no

political remedy is adequate—members of Congress may need to turn to the courts to vindicate their institutional prerogatives. This is that case.

1. The Foreign Emoluments Clause

The Foreign Emoluments Clause states that "no Person" holding an office of profit or trust under the United States "shall ... accept ... any" emolument "without the Consent of the Congress." U.S. Const. art. I, § 9, cl. 8. Thus, the Clause puts the burden on anyone who wishes to accept an emolument to convince a majority of the members of both Houses of Congress to give their consent. Until members of Congress oblige, it is unlawful to "accept" the emolument.

Without this structure, the Clause could not achieve its purpose. If officeholders could accept foreign benefits until Congress voted to *disapprove* of them, it would encourage acceptance of such benefits in hopes that congressional inertia, other legislative priorities, or even simple favoritism would prevent Congress from censuring an already accepted benefit. Accordingly, the Constitution's default rule is the opposite: no consent, no acceptance.

Settled historical practice confirms this structure. Since the 1790s, federal officeholders have obeyed the Clause's clear textual command by writing to Congress about benefits they wish to accept and allowing members of Congress to

vote (if they choose) on those benefits *before* accepting them. *See, e.g.*, Second Am. Compl. ¶¶ 27-31.[1]

Federal officeholders thus may accept foreign emoluments only by first obtaining "the Consent of the Congress." The Framers' decision to give Congress an ongoing procedural role in vetting foreign emoluments—a role exercised independent of the executive branch—was a deliberate one: other constitutional prohibitions allow no exceptions or specify only that certain acts must be authorized "by Law." U.S. Const. art. I, § 4, cl. 2; *id*. § 9, cl. 7.

Congress "consist[s] of a Senate and House of Representatives," *id.* art. I, § 1, and each member of the House and Senate has a right to vote on matters that come before those bodies, *see id*. art. I, § 3, cl. 1 ("each Senator shall have one Vote"); *id*. art. I, § 5, cl. 3 (requiring the House and Senate to record "the Yeas and Nays of the Members" upon request). The Constitution, therefore, expressly entitles individual members of Congress to vote on whether to consent to an officeholder's acceptance of emoluments from a foreign state before he accepts them. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011) (while a legislator remains in office, his

[1] Congress can provide advance consent for classes of benefits, *see, e.g.*, 5 U.S.C. § 7342, but where blanket consent has not been given, Congressmembers retain their right to vote on each individual emolument, 6 Op. O.L.C. 156, 158 (1982).

vote is "the commitment of *his apportioned share* of the legislature's power to the passage or defeat of a particular proposal" (emphasis added)).

Thus, by accepting numerous foreign emoluments without consent, *see* Second Am. Compl. ¶¶ 34-67, President Trump is denying Plaintiffs the opportunity to cast specific votes to which they are constitutionally entitled.

2. Vote Nullification

That injury, moreover, is cognizable under Article III. When legislators sue over "injury to their institutional power as legislators," rather than over the loss of a "private right" enjoyed in their personal capacities, they are asserting an "institutional injury." *Raines*, 521 U.S. at 820-21 & n.4. To date, the Supreme Court has identified just one type of institutional injury that individual legislators may vindicate in court: the right "to have their votes given effect." *Coleman*, 307 U.S. at 438. Legislators whose votes "have been completely nullified" by unlawful action have a cognizable interest "'in maintaining the effectiveness of their votes.'" *Raines*, 521 U.S. at 823 (quoting *Coleman*, 307 U.S. at 438).

Vote "nullification," this Court has explained, means "treating a vote that did not pass as if it had, or vice versa," *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (citing *Raines*, 521 U.S. at 824), in the "unusual situation" where legislators lack "an adequate political remedy," *id*. at 21-22 (citing *Raines*, 521 U.S. at 829). In *Coleman*, for instance, Kansas officials treated a constitutional amendment as having

been ratified by the state senate even though, according to the plaintiffs, the senate had not approved the amendment. This inflicted an "institutional injury" on the plaintiffs because their votes were "deprived of all validity." *Raines*, 521 U.S. at 821-22.

Vote nullification occurs not only when a past vote is disregarded but also when the right to cast a specific vote is denied. In *Raines*, "the Court emphasized that the congressmen were not asserting that their votes had been 'completely nullified,'" *Campbell*, 203 F.3d at 22 (quoting *Raines*, 521 U.S. at 823), and in doing so, the Court did not merely stress that "their votes were given full effect" in the passage of the Line Item Veto Act. Instead, the Court continued: "*Nor can they allege that the Act will nullify their votes in the future* in the same way that the votes of the *Coleman* legislators had been nullified." *Raines*, 521 U.S. at 824 (emphasis added).

What *Raines* suggested, *Arizona State Legislature* confirmed: vote denial is a form of vote nullification. The Court held that a legislature could challenge a ballot measure that removed its redistricting authority because the measure "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Ariz. State Legislature*, 135 S. Ct. at 2665 (quoting

Raines, 521 U.S. at 823-24).[2] By contrast, in *Bethune-Hill* (as in *Raines*), the Court denied standing in part because the purported injury—a court's invalidation of a legislative enactment—did not deprive the legislature of any future voting power. *See* 139 S. Ct. at 1954.

In decisions applying *Coleman*, this Court has similarly held that legislators are injured when executive action "nullifies a specific congressional vote or opportunity to vote." *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979); *see Bliley v. Kelly*, 23 F.3d 507, 510 (D.C. Cir. 1994); *AFL-CIO v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 877 (D.C. Cir. 1981); *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974).

Nor are these principles inapplicable to members of Congress. To be sure, federal cases "raise separation-of-powers concerns." *Ariz. State Legislature*, 135 S. Ct. at 2665 n.12. But in *Raines*, the Supreme Court declined to foreclose federal suits on this basis, despite the Justice Department's argument that because of separation-of-powers concerns "*Coleman* has no applicability to a similar suit brought by federal legislators." *Raines*, 521 U.S. at 824 n.8. Acknowledging those concerns, this Court developed a strict limiting principle to ameliorate them: suits

[2] In *Arizona*, the argument that votes are nullified only when a past vote is disregarded was specifically pressed—and rejected. *See* Appellees Br. 20, 2015 WL 254635; U.S. Br. 21, 2015 WL 309078.

by federal legislators may proceed only if Congress is unable to provide the relief the plaintiffs seek. The district court fully embraced that rule, Pet. Add. 43, but correctly recognized that this is the rare situation in which "plaintiffs lack such tools," *id.*[3]

3. *Raines v. Byrd* and Subsequent Precedent

President Trump's arguments rely chiefly on *Raines.* Rather than overrule *Coleman*, however, *Raines* reaffirmed it. And while the Court declined to adopt "a drastic extension of *Coleman*," *Raines*, 521 U.S. at 826, it clearly preserved the doctrine "that legislators may have standing based on the nullification of their votes," Pet. Add. 40.

Significantly, by the time of *Raines*, this Court had expanded its legislator standing doctrine far beyond *Coleman*'s vote-nullification rationale and had come to recognize standing for almost anything that affected Congressmembers' duties or diminished their influence. *See* MTD Opp. 9-10. It was that precedent on which the lower court in *Raines* had relied, *see id.*, and at the Supreme Court the plaintiffs argued that "the 'meaning' and 'integrity' of their vote ha[d] changed" under the Line Item Veto Act, *Raines*, 521 U.S. at 825.

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[3] In claiming that Plaintiffs' position would allow one House of Congress to sue the other, Pet. 13, the President ignores this need to establish the absence of any legislative remedy. He also ignores the fact that any suit against "sovereign States" based on the Constitution's other provisions requiring congressional consent, *id.*, would raise untested federalism concerns.

The Supreme Court was "unwilling" to endorse the "drastic extension of *Coleman*" needed to sustain that claim. *Id.* at 826. In passing the Act, the plaintiffs' votes "were given full effect," *id*. at 824 ("They simply lost that vote."), and the Act did not "nullify their votes in the future," *id*. Because no past votes were disregarded and no future votes denied, *Coleman* provided "little meaningful precedent" for the plaintiffs' argument: "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id*. at 824, 826.

Raines did not hold that individual legislators may never sue over injury to their institutional powers. Accepting that argument would have required overruling *Coleman*, which the Court reaffirmed—as it did again in *Arizona*, 135 S. Ct. at 2665 n.13 (reaffirming *Coleman*'s "precedential weight"); *cf. Bethune-Hill*, 139 S. Ct. at 1954 (distinguishing *Coleman*).

Nor did *Raines* hold that congressional lawsuits are foreclosed because of the relative novelty of such litigation. Here the President simply misrepresents *Raines*, which discussed history only after concluding that the plaintiffs' arguments were unsupported by precedent. *Compare* Pet. 10 ("*Most important to that institutional-injury analysis*, the Court emphasized the absence of any 'historical practice' supporting the legislators' suit." (emphasis added)), *with Raines*, 521 U.S. at 826 ("Not only do appellees lack support from precedent, but historical practice *appears*

to cut against them as well." (emphasis added)). Had the Court meant that members of Congress can never sue the executive branch, it could have said that. The rest of the opinion—not to mention this Court's extended discussions in two subsequent opinions, *see infra*—would have been completely unnecessary.

Neither did *Raines* hold that standing to allege vote nullification always requires legislators to demonstrate that their "votes would have been sufficient to defeat (or enact) a specific legislative Act." Pet. 16 (quoting *Raines*, 521 U.S. at 823). That statement describes cases, like *Coleman*, involving the negation of *past* votes—because nothing is nullified unless the will of the majority is thwarted. But lawmakers who are denied their right to cast a vote in the first place are injured by that denial alone, which certainly deprives their votes "of all validity," *Raines*, 521 U.S. at 822, regardless of how the vote might have turned out.[4] The Kansas officials in *Coleman* would still have injured the plaintiffs if they had simply deemed the amendment ratified without submitting it for a vote.

In short, "*Raines* does not foreclose [Plaintiffs'] standing to bring their claims and indeed provides support for it." Pet. Add. 13-14; *see* MTD Opp. 9-14.

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[4] Furthermore, the words "at most" in this passage of *Raines* do not mean that *Coleman*'s rationale is limited to its facts. *Cf.* Pet. 18. As explained in the accompanying footnote, the caveat simply acknowledges that the appellants raised arguments against applying *Coleman* to federal suits, which the Court did not resolve. *Raines*, 521 U.S. at 824 n.8.

Needing some wind in his sails, the President looks to the Supreme Court's recent decision in *Bethune-Hill*. It serves him no better. In *Bethune-Hill*, "a single chamber of a bicameral legislature" claimed standing to appeal the judicial invalidation of a measure enacted by the legislature as a whole. 139 S. Ct. at 1950. But the Court "has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Id.* at 1953. (By contrast, the Court *has* clearly held that legislators are injured by the complete nullification of their votes.) Thus, there was "no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment." *Id.* As in *Raines*, there was a "mismatch" between the parties seeking to litigate and the parties that could plausibly claim injury. *Id*. at 1953-54 ("Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." (citation omitted)).

Critically, the Court emphasized that vote nullification was not at issue because the Virginia House of Delegates was permitted to play its full role in the enactment of the legislation: "Unlike *Coleman*, this case does not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote." *Id.*

at 1954. And just as no vote was disregarded in the past, none would be impaired in the future: "the challenged order does not alter the General Assembly's dominant initiating and ongoing role in redistricting." *Id.*

In sum, even as the Supreme Court has rejected other forms of legislative standing, it has carefully preserved vote nullification as a viable, cognizable injury—albeit one limited to narrow circumstances.

Nor can the President gain any succor from this Court's post-*Raines* decisions. Neither *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), nor *Campbell v. Clinton*, 203 F.3d 19, are comparable to this case, because (among other things, *see infra*) neither involved a plausible allegation of vote nullification or a constitutional provision requiring "the Consent of the Congress." The *Chenoweth* plaintiffs claimed impairment of their ability to "debate and vote on issues and legislation," 181 F.3d at 113 (quoting complaint), but the President had not added laws to the U.S. Code without their participation, nor prevented them from legislating. The *Campbell* plaintiffs claimed that the President's military action was illegal without a declaration of war, but the President had not purported to declare war, an act triggering emergency statutes and other "profound" legal consequences. 203 F.3d at 29 (Randolph, J., concurring in the judgment). In both cases, the plaintiffs simply alleged that certain actions were beyond the scope of presidential authority without a law or a declaration of war.

Here, by contrast, President Trump is taking the precise action that the Foreign Emoluments Clause says he may not take without Congress's "Consent": accepting foreign emoluments. *Cf.* U.S. Const. art. I, § 8, cl. 11 (empowering Congress "To declare War" but not specifying how that power bears on the President's military authority). Unlike *Campbell* and *Chenoweth*, therefore, this is a true case of vote nullification—an interference with the procedural role Congressmembers play in the acceptance of foreign emoluments.

Both decisions, moreover, rested heavily on Congress's "ample" power to effectuate a "legislative remedy," *Campbell*, 203 F.3d at 23, which made each controversy "fully susceptible to political resolution," *Chenoweth*, 181 F.3d at 116. No such remedy is available here, as explained below.

Finally, the President is simply wrong to assert, without qualification, that in *Chenoweth* this Court said "that *Raines* abrogated its prior precedent on legislative standing." Pet. 11. *Chenoweth* involved an alleged "dilution" of congressional authority by an executive order, a purported injury the Court rejected because "*the portions of our legislative standing cases upon which the current plaintiffs rely* are untenable in the light of *Raines*." 181 F.3d at 115 (emphasis added). In rejecting that claim, however, this Court distinguished the broad theories of legislative standing it had once endorsed from the narrow, *Coleman*-based rationale at the core

of *Kennedy v. Sampson*. *Id.* at 116-17.[5] Were there any doubt, *Campbell* subsequently confirmed that vote nullification remains a valid basis for legislator standing. 203 F.3d at 22 (defining it as "treating a vote that did not pass as if it had," where there is no adequate legislative remedy).

4. Legislative Remedies

Recognizing that Congressmembers' standing "often turns on whether they can obtain the remedy they seek … from fellow legislators," Pet. Add. 1, the district court devoted considerable attention to explaining why Plaintiffs "have no adequate legislative remedy," *id.* at 13; *see also* MTD Opp. 22-28; Stay Opp. 15-18. Strikingly, the President has no response to any of this. Instead he merely rattles off various powers held by Congress and declares, without explanation, that "[u]sing these remedies, Congress may force the Executive to comply with its view of the law." Pet. 16.

On legislative remedies, however, precedent makes two things clear. First, any such remedy must be "adequate." *Raines*, 521 U.S. at 829; *Campbell*, 203 F.3d at 21. It must actually be capable of stopping the harm that legislators complain of.

[5] Notably, this distinction has long been recognized. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1180 (D.C. Cir. 1982) (Bork, J., concurring) (the "distinction between diminution of a legislator's influence and nullification of his vote was adopted by the en banc court in *Goldwater v. Carter*"); *id.* at 1182 ("the rule … requiring a nullification of a legislator's vote for legislator standing entails few of the problems that would flow from standing in a case like this one").

The mere existence of some nominal recourse does not suffice if it would be ineffective in reality or would not truly vindicate the institutional prerogative in question. This means that generalized bromides about congressional "self-help" are useless—a court must be satisfied that Congress could, if it wished, prevent the executive from engaging in the challenged action. *Chenoweth*, 181 F.3d at 116 (it was "uncontested" that Congress could terminate the challenged program); *Campbell*, 203 F.3d at 23 ("appellants fail because they continued ... to enjoy ample legislative power to have stopped prosecution of the 'war'").

Second, in *Raines*, *Campbell*, and *Chenoweth*, it was significant that Congress could have halted the challenged conduct itself, without executive branch acquiescence. In *Raines*, Congress could exempt any bill from the Line Item Veto Act. 521 U.S. at 824. And in *Campbell* and *Chenoweth*, Congress could have made use of its "absolute control of the moneys of the United States," *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992) (quotation marks omitted), by declining to appropriate funds for activities it wished to stop. *See Campbell*, 203 F.3d at 23 ("Congress … could have cut off funds for the American role in the conflict.").

Ignoring all this, the President does not even attempt to show how Congress could stop his businesses from accepting foreign rewards.

Based on his petition, the President appears to concede that Congress cannot

stop him by exercising its power of the purse. That is especially noteworthy because this power, like the Foreign Emoluments Clause, allows Congress to assert its will through *inaction*—a failure to appropriate. *See United States v. MacCollom*, 426 U.S. 317, 321 (1976). As such, that unilateral power can furnish an adequate remedy, but only when the conduct Congress wishes to stop requires federal funds.

The President mentions legislation, Pet. 15, but that "solution" fares no better. The Clause functions as a default rule making Congress's *failure* to act a denial of consent. The Framers chose that structure for a reason: it puts the burden on officeholders to move Congress to action and to overcome the barriers standing in the way of such a legislative effort. Flipping this structure by requiring Congress to legislatively *disapprove* of foreign emoluments would fundamentally transform the Clause, making legislative roadblocks an ally of foreign corruption instead of an enemy. *See* MTD Opp. 24-25.

Worse, obtaining the President's signature for corrective legislation would require him to voluntarily stop enriching himself—a possibility that hardly furnishes an adequate remedy. *Ariz. State Legislature*, 135 S. Ct. at 2663 (standing for vote nullification does not require pursuing action that would be "unavailing"). President Trump's substantial financial stake in the defeat of that legislation introduces a dynamic that was entirely absent in *Raines*, *Campbell*, and *Chenoweth*. And while Congress can "override vetoes," Pet. 15, demanding that result would only

compound the problems just discussed: instead of requiring a congressional majority to *approve* foreign emoluments, as the Constitution specifies, it would require a two-thirds majority to *disapprove*.[6]

Moreover, Congress cannot vote on emoluments it does not know about. The President disagrees, saying that Congress should simply use "the congressional subpoena process for seeking information if there is a legitimate legislative interest." Pet. 26. That was always an unsatisfactory rejoinder: the Clause imposes no burden on Congress to ferret out every emolument a president is accepting in secret. And it is a downright astonishing assertion to make while the President's personal lawyers tell this Court that "monitoring the President's compliance with the Foreign Emoluments Clause" has no "legitimate purpose" and is an "attempt to engage in prohibited law enforcement." Appellants Br. 41, *Mazars USA*, No. 19-5142 (D.C. Cir. June 10, 2019).

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[6] The same goes for impeachment, which requires a two-thirds Senate majority to convict. While *Campbell* mentioned impeachment, it did not suggest that this power always offers adequate recourse—thus eliminating all congressional standing. The court simply noted that impeachment was available as an enforcement mechanism were the President to defy Congress's use of more surgical options. 203 F.3d at 23. Surgical options are absent here. And foreclosing judicial relief based on the impeachment power would force Congressmembers to either accede to *all* of the emoluments the President is accepting or overturn the last election—a Hobson's choice that falls far short of their right to evaluate emoluments on a case-by-case basis. *Cf.* Appellants Br. 46, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir. June 10, 2019) (impeachment "entails massive costs to our nation's economy, national security, diplomacy, and political health").

The President has one final suggestion: Congress can retaliate against him on topics unrelated to his violations, such as by "withhold[ing] funds from the Executive" or "declin[ing] to enact legislation that the Executive desires." Pet. 15. In other words, President Trump says that if Congress wants to coerce him into obeying the Constitution, it should take actions that may harm the American people instead of asking the courts to rule on the legality of his conduct. The separation of powers does not require that destructive result. *See Barnes v. Kline*, 759 F.2d 21, 29 (D.C. Cir. 1984), *vacated as moot*, 479 U.S. 361 (1987) (discussing "retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like," and concluding: "[t]hat sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case"). Neither the Supreme Court nor this Court has ever held the option of such retaliation to be an adequate remedy.

President Trump fails to show that the district court's standing analysis was wrong, much less "indisputably" wrong.

B. Cause of Action

In its April 30 opinion, the district court recognized that Plaintiffs have a cause of action because, as the Supreme Court has repeatedly made clear, "equitable relief ... is traditionally available to enforce federal law." *Armstrong v. Exceptional Child*

Ctr., Inc., 135 S. Ct. 1378, 1385-86 (2015). The President responds that "[i]mplied equitable claims ... have *typically* involved" potential defendants raising the claims preemptively, Pet. 19 (emphasis added), but he cites no case standing for the proposition that equitable relief is limited to that situation. Nor could he: the Supreme Court has said otherwise. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *see* MTD Opp. 41-43; Stay Opp. 23-25.

The President also argues that equitable relief is unavailable against him in his official capacity. Again, not so. The case on which he relies, *Mississippi v. Johnson*, 71 U.S. 475 (1866), distinguished injunctions involving a "purely ministerial act," *id*. at 498 ("a simple, definite duty, … imposed by law"). And the President's obligation to obey the Clause is ministerial, because it is a duty he "has no authority to determine whether to perform." *Swan v. Clinton*, 100 F.3d 973, 977-78 (D.C. Cir. 1996). That the President might wish to debate the Clause's scope does not change that. *Id.*; MTD Opp. 44-45.

Finally, President Trump raises the zone-of-interests test, but tellingly, cites no case in which a constitutional claim was dismissed under this test. In any event, Plaintiffs easily satisfy any test because the interest they seek to vindicate is at the heart of the Clause. MTD Opp. 43.

That makes three propositions for which President Trump cannot cite a single case from any court setting forth the rule he advocates. The district court's opinion

was not "clearly and indisputably incorrect" on these issues.

C. Scope of the Clause

The district court's April 30 opinion explained that Plaintiffs have stated a claim against the President for violating the Clause because its text, structure, history, and purpose all support Plaintiffs' position, as do executive branch and other precedent. Pet. Add. 60. The President's one conclusory paragraph on this issue does not even come close to establishing that the district court's holding was "clearly and indisputably incorrect." Pet. 23-24. Indeed, it is not. MTD Opp. 28-41; Stay Opp. 18-23.

D. Interlocutory Appeal

A party seeking interlocutory appeal "bears the burden of establishing all three elements" required by 28 U.S.C. § 1292(b). Pet. Add. 109 (quotation marks omitted). Despite that burden, in the district court the President "made little effort to demonstrate the third element—that 'an immediate appeal ... may materially advance the ultimate termination of the litigation.'" *Id.* at 110-11 (quoting § 1292(b)). The President repeats that mistake here. Rather than explain why the district court erred in analyzing this prong, the President says only that "the court ignored the unique separation-of-powers concerns posed by discovery in a case against the President in his official capacity." Pet. 1. But he offers no case law to support the radical suggestion that any litigation against the President in his official

capacity involving discovery must be subject to interlocutory appeal. Indeed, a number of Supreme Court cases suggest exactly the opposite. *See infra* at 29-31. Here too, then, the President cannot show that the district court's order was "indisputably" wrong.

* * *

In sum, the President is not entitled to the extraordinary remedy of mandamus relief. But even if this Court were to conclude that additional briefing or argument on his petition were warranted, there is no basis for a stay of discovery.

II. The President Is Not Entitled to a Stay

"'A stay is not a matter of right,'" and the movant "bears the burden" of justifying the use of this extraordinary remedy. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In determining whether to stay an order pending appeal, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Doe 1 v. Trump*, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017) (quoting *Nken*, 556 U.S. at 426). As this Court has consistently emphasized, these standards are "stringent." *CREW v. FEC*, 904 F.3d 1014, 1016 (D.C. Cir. 2018).

The President cannot satisfy any of the parts of this test. For the reasons

discussed earlier, he cannot show that he is likely to succeed on the merits. *See also* MTD Opp.; Stay Opp. 10-25. And even if President Trump could make a strong showing on this front, that would not be enough without satisfying the other criteria. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 926 (D.C. Cir. 1958) (despite "probability of success on the merits," an "inadequate showing on the remaining ... considerations prevents us from granting the stay").

A. Irreparable Injury

The President must show that he "will be irreparably injured absent a stay," *Nken*, 556 U.S. at 434, and under the "high standard" this Court has established, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006), irreparable injury "must be 'both certain and great,' 'actual and not theoretical,' 'beyond remediation,' and 'of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Mexichem Specialty Resins*, 787 F.3d at 555 (quoting *Chaplaincy*, 454 F.3d at 297). For that reason, this Court requires movants to "substantiate the claim that irreparable injury is 'likely' to occur" and consistently rejects "unsubstantiated and speculative allegations." *Wis. Gas Co.*, 758 F.2d at 674 ("Bare allegations of what is likely to occur are of no value.... The movant must provide ... proof indicating that the harm is certain to occur in the near future.").

This standard dooms the President's request. The President says "he is likely to suffer irreparable injury ... from the continuation of this suit and intrusive discovery into his personal finances." Pet. 28. But what exactly the *injury* is, or why it is *irreparable*, he does not say. The closest the President comes to answering these questions is to claim, in his separate discussion of mandamus relief, that discovery would "distract the President from the performance of his constitutional duties" and "would undoubtedly be publicized and used to distract and harass the President." Pet. 26.

With all due respect to the President's clairvoyance, that does not cut it. He has "provided no non-conclusory factual basis" for this "sweeping" assertion, *Doe 1*, 2017 WL 6553389, at *2, and he fails to explain "precisely" how the discovery Plaintiffs seek could distract him from his duties, *id*. The only discovery requests Plaintiffs have propounded are to third parties, and President Trump has repeatedly claimed he is no longer running any of his companies. To the extent the President is concerned about publicity, Plaintiffs have already indicated that they are willing to agree to a protective order. *See* Dkt. No. 75 (discovery report).

In sum, the President's claims are "entirely unsubstantiated." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1134 (D.C. Cir. 2017). Indeed, "belying [his] claims of irreparable tangible harm at this point," *Chaplaincy*, 454 F.3d at 298, the President is forced to point to discovery sought by "plaintiffs in parallel Emoluments suits."

Pet. 27 n.1. But Plaintiffs *here* have disavowed any intent to seek discovery from "government agencies" or to "inquire into the effect of alleged Emoluments on official actions of the President's administration," *id.*, because success on their claim requires neither: the President violates the Clause when he accepts prohibited benefits without first obtaining congressional consent, regardless of whether those benefits produce tangible policy consequences. Moreover, Plaintiffs in this case—unlike in "parallel ... suits"—do not bring a Domestic Emoluments Clause claim, obviating any need for information about federal payments to Trump businesses. Finally, because Plaintiffs' standing is not rooted in competitive injury, they do not need to scrutinize business and marketing practices; they need only establish, with sufficient clarity to enable the crafting of an injunction, that the President is accepting certain categories of benefits from foreign governments through his financial interest in Trump-affiliated companies.

Nor can the President demonstrate irreparable harm simply by waving around the phrase "separation of powers." *See John Doe Co.*, 849 F.3d at 1135 ("[T]he [plaintiff] insists that any alleged separation-of-powers injury is by its very nature irreparable. The short answer is that this Court has held otherwise."); *In re al-Nashiri*, 791 F.3d 71, 79-80 (D.C. Cir. 2015) ("abstract concern with the separation of powers" is not enough—irreparable injury requires "immediate or ongoing harm" such as "'interference with the internal deliberations of a Department of the

Government of the United States'" (citation omitted)).

Indeed, the Supreme Court has consistently rebuffed the notion that the separation of powers automatically exempts presidents from complying with the standard rules of our legal system. Instead, "the President, like all other government officials, is subject to the same laws that apply to all other members of our society." *Clinton v. Jones*, 520 U.S. 681, 688 (1997) (citation omitted).

In *Jones*, the Court rejected a president's categorical claim that allowing a civil lawsuit against him to proceed to trial would create "serious risks for the institution of the Presidency." *Id*. at 689 (quoting DOJ brief). Like this case, *Jones* involved alleged legal violations that the President committed through his private behavior.[7] It therefore did not implicate the concerns that animated *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which held presidents absolutely immune from damages liability for official acts taken as president because the specter of such liability would affect the discharge of their duties. *Jones*, 520 U.S. at 693-94.

Thus, President Clinton argued in *Jones*—as President Trump does here—that litigation demands would be a distraction, impinging on his constitutional role. *Id*. at 697-702. The Supreme Court unanimously rejected that argument. Despite the President's "'unique position in the constitutional scheme,'" it "does not follow ...

[7] To be clear, the obligation not to accept foreign emoluments, even through private behavior, is part of the President's official duties, *see* Pls.' Suppl. Mem. 36 n.14.

that separation-of-powers principles would be violated by allowing this action to proceed." *Id.* at 698-99 (quoting *Fitzgerald*, 457 U.S. at 749). "The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution." *Id.* at 703.

Crucially, the Court also emphasized that President Clinton's request to postpone the trial was "premature." *Id.* at 708. "The proponent of a stay bears the burden of establishing its need," and at the time "there [was] nothing in the record to enable a judge to assess the potential harm that may ensue," "[o]ther than the fact that a trial may consume some of the President's time and attention." *Id.* President Clinton, in other words, made the same error that President Trump makes here: "presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.* at 702.[8]

When the Supreme Court has sustained special executive privileges that require more than "judicial deference and restraint," *Fitzgerald*, 457 U.S. at 753, it

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[8] *Jones* reflects well-entrenched principles. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 702, 708 (1974) (while courts "should be particularly meticulous" when the President is involved, broad invocations of presidential prerogatives "must be considered in light of our historic commitment to the rule of law"); *see also* Stay Opp. 32-35.

has done so because the litigation threatened to intrude upon the executive branch's internal decision-making process. *See id.* at 745; *Cheney*, 542 U.S. at 385-88 (executive branch need not bear the burden of "making particularized objections" to "overly broad discovery requests" issued to officials who "give advice and make recommendations to the President"). Those risks are not present here because Plaintiffs do not plan to seek any executive branch materials.

As this case moves forward, if any particular discovery requests would, in the President's view, unjustifiably intrude upon his constitutional role, he can object to those requests at that time. His blanket resistance to *all* requests hinges on the "speculative" claim, *CREW*, 904 F.3d at 1019, that *any* discovery would be a distraction—combined with the further claim that *any* such distraction would necessarily derogate from the separation of powers. Both halves of this equation are false. "Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty." *Jones*, 520 U.S. at 704-05 (citing numerous examples).

B. Harm to Plaintiffs

Even if the President could make "showings of probable success and irreparable injury," he would still need to demonstrate that a stay will have no significant "adverse effect" on Plaintiffs. *Va. Petroleum Jobbers*, 259 F.2d at 925.

He has not, and cannot.

For more than half of this President's term, Plaintiffs have been denied their right, explicit in the Constitution, to participate in deciding which emoluments he may accept from foreign states. Only a judgment in this case can restore the gatekeeping role the Framers assigned them—and vindicate the effectiveness of their votes. "No more essential interest could be asserted by a legislator." *Kennedy*, 511 F.2d at 436.[9]

A stay pending appeal would not only prolong this injury but would seriously risk foreclosing the possibility of timely relief altogether. If discovery does not begin until all appellate proceedings are complete, the President may achieve a *de facto* victory regardless of who ultimately prevails, potentially delaying resolution of this case through an entire presidential term—with Plaintiffs unable to exercise their constitutionally guaranteed prerogative all the while. In these circumstances, a stay would not merely "increase the danger of prejudice" to Plaintiffs, *Jones*, 520 U.S. at 707-08, but could vitiate any meaningful chance to vindicate their rights.

C. The Public Interest

Plaintiffs have plausibly alleged that President Trump is violating the

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[9] The President's claim that Plaintiffs' decision not to seek preliminary injunctive relief shows a lack of immediate harm, Pet. 29, is spurious. The dearth of concrete, verified information about the President's financial transactions would have significantly complicated any effort to craft an appropriately tailored injunction.

Constitution's chief bulwark against corrosive foreign-government influence. While he insists that the special role of the presidency justifies a stay, the high position he occupies militates in the other direction. The President is empowered to make "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Fitzgerald*, 457 U.S. at 752. By accepting rewards from foreign states in secret, President Trump is defying the Framers' design and depriving the American people of assurance that their highest elected official is pursuing their interests with undivided loyalty. Resolving Plaintiffs' claims is thus a matter of the utmost importance, not only to Plaintiffs but to the entire nation. The public interest therefore tips—resoundingly—against a stay.

CONCLUSION

The President's mandamus petition and motion for a stay should be denied.

Respectfully submitted,

Dated: July 15, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with this Court's July 9 Order because it contains 7,781 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief 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 15th day of July, 2019.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: July 15, 2019

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra