ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2019

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

No. 19-5237

Senator RICHARD BLUMENTHAL, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF FORMER GOVERNMENT ETHICS OFFICERS AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amici curiae Former Government Ethics Officers hereby certify as follows:

(A) Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the briefs of appellant and appellees, except for the following amici who have appeared in this Court: Seth Barrett Tillman, Scholar; Judicial Education Project; legal historians and Professors Jed H. Shugerman, John Mikhail, Jack Rakove, Gautham Rao, and Simon Stern; scholars of standing, federal jurisdiction, and constitutional law; and bipartisan former members of Congress. Counsel is not aware of any intervenors or other amici in this Court at this time.

(B) Rulings Under Review. Reference to the rulings at issue appears in the Brief for the Appellant.

(C) Related Cases. The case on review has previously been before this Court on a petition for writ of mandamus, *In re Trump*, No. 19-5196 (D.C. Cir. July 19, 2019).

CERTIFICATE OF COUNSEL
PURSUANT TO D.C. CIRCUIT RULE 29(d)

Pursuant to D.C. Circuit Rule 29(d), amici curiae Former Government Ethics Officers hereby certify that the filing of this brief separate from other amici is necessary because the positions taken in this brief reflect amici's particular expertise in this area.

October 29, 2019

s/Tejinder Singh
Tejinder Singh

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INTEREST OF THE AMICI[1]

Amici are former government ethics officials with decades of experience applying ethical rules in the real world, under administrations of both parties.[2] Throughout their service, in addition to advising their agencies about ethical considerations generally, they have also given advice about the Foreign Emoluments Clause, observing firsthand how the clause works. They submit this brief to explain how the clause is implemented in practice, and to highlight the pertinence of interpretive guidance already issued by the executive and legislative branches on the clause's meaning.

PERTINENT CONSTITUTIONAL PROVISION

The applicable constitutional provision is reproduced in the Brief for Appellant.

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[1] No party's counsel authored this brief in whole or in part; and no person other than the amici and their counsel—including any party or party's counsel—contributed money that was intended to fund the preparation or submission of this brief. The parties have consented to the filing of this amicus brief.

[2] A full list of the amici and their qualifications is appended to this brief.

SUMMARY OF ARGUMENT

The government—including the Office of Legal Counsel (OLC), the Comptroller General, and the Department of Defense—has decades of experience interpreting and applying the Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8. These offices' legal interpretations establish that the clause is not arcane or irrelevant today; in fact, it is an important check on corruption, and a beacon for good governance. The interpretations also indicate that the clause should be read broadly, consistent with its text and its purpose of preventing foreign states from attempting to corrupt public officials. At a minimum, it is clear that whenever an official's interest in a business could plausibly create a conduit for foreign influence to reach him, the Foreign Emoluments Clause prohibits the interest. This history belies the President's argument that the "history of Executive practice supports the President's interpretation." Appellant Br. 43.

The President argues that such a rule would create "absurd results." Appellant Br. 39. Those concerns are mistaken. Even when the clause is read broadly (as it consistently has been), public officials, including Presidents, have had no trouble modifying their conduct to comply with the Constitution. Moreover, Congress's ability to permit officials to take emoluments solves this problem.

Finally, we stress that in all of our experience as federal ethics officers, we have seen few financial disclosure reports containing a web of personal and business entanglements that raise as many serious ethics concerns as President Trump's—and we have never seen a President go to such lengths to obscure his finances from Congress and the American people. These facts matter for two reasons. First, they explain why there is no precedent directly addressing the current unprecedented situation, and they counsel in favor of interpreting the Foreign Emoluments Clause consistent with its purpose in this case. Second, the extreme facts of this case mean that the Court need not define all the metes and bounds of the Foreign Emoluments Clause or decide how it would work in every possible hypothetical case. Indeed, the allegations in the complaint identify conduct that is on the wrong side of every reasonable line a court could draw. The district court was correct to say so, and this Court should affirm.

ARGUMENT

I. The Government's Legal Interpretations Explain That The Foreign Emoluments Clause Prohibits All Payments That Have Any Realistic Potential Of Corrupting A Public Official.

Given the dearth of judicial precedent interpreting the Foreign Emoluments Clause, the best sources of authority about how the clause actually works are opinions by the Office of Legal Counsel (in the Department of Justice) and the Comptroller General (in the Government Accountability Office), as well as guidance from the Department of Defense. For decades, these agencies have applied the clause to modern financial arrangements, and their opinions have created strong ethical norms that guide the conduct of the executive branch every day. As this Court seeks to interpret and apply the clause in this case, it would make sense to consider and heed those legal interpretations, which have allowed the government to manage ethical problems without creating practical ones. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 524, 548-49 (2014) (explaining that government practice can inform the proper interpretation of the Constitution); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (analyzing the foreign affairs power in light of "longstanding practice"); *Dames & Moore v. Regan*, 453 U.S. 654, 686

(1981) (noting that government practice "may be treated as a gloss on" the Constitution) (quotation marks omitted).

A. The Government's Guidance Interprets the Foreign Emoluments Clause Broadly, Emphasizing Its Anti-Corruption Purpose.

Before considering the opinions in detail, we highlight some of the interpretive principles contained therein. First, the government has consistently noted that the Foreign Emoluments Clause's "expansive language and underlying purpose . . . strongly suggest that it be given broad scope." *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 98 (1986); *see also Applicability of the Emoluments Clause to Non-government Members of ACUS*, 17 Op. O.L.C. 114, 121 (1993) ("The language of the Emoluments Clause is both sweeping and unqualified."); Memorandum for Andrew F. Oehmann, Office of the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Invitation by Italian Government to Officials of the Immigration and Naturalization Service and a Member of the White House Staff* 2 (Oct. 16, 1962), https://www.justice.gov/olc/page/file/935741/download (noting "the sweeping nature of the constitutional prohibition and the fact that in the past it has been strictly construed, being directed against every possible kind of influence by foreign governments over officers of the United States”). Government analyses have therefore usually started from the presumption that the clause applies. This presumption of breadth is important. As OLC has explained, “[t]hose who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty.” *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 18 (1994). Payments by foreign governments carry the real potential to bias that judgment and divide that loyalty—cracking the bedrock of our system of public service.

Second, the government always applies the clause “with the underlying purpose of the constitutional prohibition in mind.” Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions Raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales*, 1986 WL 1239553, at *1 (May 23, 1986); *see also Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the*

Göteborg Award for Sustainable Development, 2010 WL 4963117, at *2 (Oct. 6, 2010) (explaining that OLC looks to a number of non-dispositive factors, "keeping in mind the underlying purpose that the Clause serves"); *Expense Reimbursement in Connection with Chairman Stone's Trip to Indonesia*, 1980 WL 596567, at *1 (Aug. 11, 1980) ("[W]ith the underlying purpose of the constitutional prohibition in mind, we have relied for our analysis on the terms of the contract . . . and on the circumstances under which the arrangements for the trip were made.").

For example, the government has reached varying conclusions as to whether particular payments come from a "foreign state" depending on how much control foreign governments exercise over those payments. When the government of Indonesia paid Harvard University to establish a consulting project, and some of those funds were used by Harvard to pay for the Chairman of the CFTC's trip to Indonesia, OLC determined that because "the foreign government neither controls nor even influences the selection and payment of consultants, the Emoluments Clause is not implicated." *Expense Reimbursement*, 1980 WL 596567, at *3. Instead, the payment effectively came from Harvard, which is not a foreign state. Similarly, when the University of New South Wales sought to enter into a consulting agreement with two NASA scientists, OLC concluded that the University's "functional and operational separation and independence from the government of Australia and state political instrumentalities" counseled against treating the University as a foreign state. *See NASA Scientists*, 1986 WL 1239553, at *2.

On the other hand, when an employee of the Nuclear Regulatory Commission sought to accept employment with a domestic consulting company to review the design of a nuclear power plant being constructed by the Mexican government, the government concluded that because Mexico retained "ultimate control, including selection of personnel," the "interposition of the American corporation" was not enough to "relieve[] the NRC employee of the obligations imposed by the Emoluments Clause." *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158-59 (1982). Similarly, when a retired military officer nominally worked for a domestic company, but the application of ordinary agency principles revealed that he functionally worked for a foreign corporation that was wholly owned by a foreign government, the Comptroller General had no trouble concluding that the officer's "acceptance of salary incident to that employment is prohibited by the Constitution in the absence of 'the consent of Congress.'" *To N.R. Breningstall, Dep't of the Air Force*, 53 Comp. Gen. 753, 757 (Apr. 9, 1974). The opinion explained that under the Foreign Emoluments Clause, "the evil intended to be avoided is the exercise of undue influence by a foreign government upon officers of the United States." *Id*. at 756. It emphasized that "it has been the consistent and longstanding view of this office that this clause prohibits regular members of the armed services, including those retired for length of service, from receiving retired pay during any period while employed by a foreign government or instrumentality thereof." *Ibid*. In the face of these concerns, the fact that the retired officer was nominally employed by a domestic company did not shield his violation.

In sum, the government applies a case-by-case approach to Foreign Emoluments Clause questions, with a bias in favor of breadth, and a keen eye to the anti-corruption purpose of the clause. It has never come close to adopting anything like the narrow rule advanced by the President, *i.e.*, that the Foreign Emoluments Clause is limited only to employment-or-office-related payments.

B. The Government Has Never Approved An Arrangement Whereby A Public Official's Interest In A Business Could Even Potentially Constitute A Conduit For Prohibited Emoluments To Reach The Official.

In the decades that it has applied its approach to the Foreign Emoluments Clause, the government has never determined that the clause permits a public officeholder to also own a company that does substantial business with foreign governments. The purpose of the Foreign Emoluments Clause is to prevent foreign governments from attempting to influence public officers through money or other favors. In deciding whether a particular arrangement is constitutional or not, government ethics officials have paid close attention to whether the arrangement creates even a potential for improper foreign government influence over a person in an office of public trust. When such a potential exists—even if the probability is quite low—the government has found that such arrangements violate the Foreign Emoluments Clause.

Thus, in 1993, OLC considered whether lawyer members of the Administrative Conference of the United States (ACUS) could receive partnership distributions from their firms if the funds included fee revenue from foreign governments—and it concluded that the answer was "no" even if the lawyers "did not personally represent a foreign government, and indeed had no personal contact with that client of the firm." *ACUS*, 17 Op. O.L.C. at 119.[3] OLC reasoned that:

> Because the amount the Conference member would receive from the partnership's profits would be a function of the amount paid to the firm by the foreign government, the partnership would in effect be a conduit for that government. Thus, some portion of the member's income could fairly be attributed to a foreign government. We believe that acceptance of that portion of the member's partnership share would constitute a prohibited emolument.

Ibid.

In the ACUS case, it was clear that if a lawyer's livelihood depended, in any part, on the fees paid to her firm by foreign governments, her judgment with respect to legal issues affecting those governments might be shaded by a desire to continue earning (or to augment) those fees—and those governments might attempt to exploit their client relationship to influence U.S. policy. The law firm partnership could therefore become an illicit conduit for foreign-government influence on U.S. law.

[3] OLC subsequently modified the conclusion of this guidance, deciding that private members of the ACUS were not officers covered by the Emoluments Clause. *Applicability of the Emoluments Clause to Nongovernmental Members of ACUS*, 2010 WL 2516024 (June 3, 2010). But it did not question its prior analysis. *See id.* at *1 n.2.

As the district court found, the ACUS case devastates the President's primary argument for a narrow reading of the clause because it shows that even an attenuated economic interest in ordinary commercial transactions that generate value for both sides can violate the Emoluments Clause if that business nevertheless creates the potential for undue influence over public officials.[4]

Indeed, the ACUS decision makes this case look easy, but it is important to recognize that ACUS was not a boundary case. The government has found a violation even when the risk of corruption was even lower than it was in ACUS. Thus, OLC determined that an employee of the National Archives could not accept an appointment to a commission of international historians established by the Austrian

[4] The logic of the ACUS decision is not limited to partnerships. The Department of Defense has extrapolated from OLC's guidance that revenues from a limited liability corporation would be covered by the Foreign Emoluments Clause for the same reasons. *See* Department of Defense, White Paper: Application of the Emoluments Clause to DoD Civilian Employees and Military Personnel 5, http://ogc.osd.mil/defense_ethics/resource_library/emoluments_clause_applications.pdf. Moreover, OLC also found—in the case of the NRC employee who sought to advise Mexico—that employees of U.S. corporations can violate the Foreign Emoluments Clause if the revenue coming their way comes from a foreign power. *See Application of the Emoluments Clause*, 6 Op. O.L.C. at 158-59.

government to review the wartime record of the President of Austria—even though the employee was willing to forgo an honorarium and seek private funding for his own expenses. OLC explained that even though it did not believe that the employee "would be subjected to improper foreign influence," his appointment "on an entity established and funded by a foreign government raises serious issues under the Emoluments Clause." *Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 91 & n.5 (1987).

In contrast with that decision, the Comptroller General concluded that a U.S. employee who was entitled to damages from the German government for harm he suffered at the hands of the Nazi regime was not prohibited from receiving those damages while in office. The analysis explained that the payments did not contravene the letter of the clause, nor its spirit, because the payments "obviously were not intended to influence [the employee] as an officer of the United States," but were instead "required largely as a result of the policy imposed by the United States and its allies and finally by the terms of the Bonn Convention."

Assistant Comptroller General Weitzel to the Attorney General, 34 Comp. Gen. 331, 335 (1955).[5]

The key fact separating these cases is whether the arrangement creates the potential for a payment or favor to influence the official's conduct in office. Such potential certainly exists when foreign governments do business with a public official's enterprise in order to curry favor with him—even if those governments do not transact with the official personally, and even if the official receives the money only as an owner.

[5] OLC actually reached the opposite conclusion about this same case, determining that the payments from Germany were not exclusively payment for past damages, but instead incident to the official's prior employment as a German judge. *See* Memorandum for S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* (Oct. 4, 1954), https://www.justice.gov/olc/page/file/935721/download. In that opinion, OLC stated that "the term 'emolument', . . . particularly since it is modified by the phrase 'of any kind whatever', was intended to cover compensation of any sort arising out of an employment relationship with a foreign state." *Id*. at 8. In the district court, the President quoted this language to suggest that the Foreign Emoluments Clause applies only to payments arising from an employment relationship. But in context, the language is clearly there to suggest breadth, not limitations. It does not remotely suggest that *only* compensation arising from an employment relationship is covered.

For obvious reasons, the government has never approved such an arrangement, and this Court would be on very safe ground holding that, at a minimum, when an officeholder's business interests create the potential for foreign government influence, the Foreign Emoluments Clause applies.

II. Compliance With The Foreign Emoluments Clause Is Not Especially Difficult.

The President warns of "absurd" consequences if the Court adopts a broad interpretation of the Foreign Emoluments Clause, hypothesizing that public officials will be unable to comply or to structure their lives around their jobs. That is wrong for three reasons.

First, there is already an established body of guidance in the OLC and Comptroller General opinions that covers a tremendous range of situations. A decision embracing those interpretations would enhance predictability. A rule like the President's—which deviates substantially from the government's legal interpretations—would have the opposite effect, creating a conflict between judicial precedent and the political branches' settled understandings.

As demonstrated above, the approach embodied in the government's opinions upholds the purpose of the Foreign Emoluments Clause while avoiding absurd results. Indeed, following the interpretations cited in this brief would resolve essentially all of the farfetched hypotheticals the President raises. For example, the President argues that under a broad reading of the word "emolument" a President could not hold Treasury bonds because the interest would violate the Domestic Emoluments Clause, and he could not hold stock in a publicly traded company that deals with foreign governments because that might violate the Foreign Emoluments Clause. But under the approach enshrined in the OLC, Comptroller General, and Department of Defense opinions, these payments are unlikely to violate the clause because it is highly doubtful that holding publicly traded securities would create the potential for undue influence over the holder. The terms of Treasury bonds, for example, are relatively static, and it is unlikely that a President or Congress—never mind foreign governments—could do anything to augment those returns. Moreover, because of the size of publicly traded companies, the complexity of securities markets, and the many factors that affect share prices, it is unlikely that foreign government payments to publicly traded corporations would result in a traceable increase to a public official shareholder's wealth in the same way that payments to a partnership or private company would. Of course, an idiosyncratic case may arise if a public official owns a very large stake in a publicly traded company that does a lot of business with foreign governments, or if a foreign government contracts with a publicly traded company in order to curry favor with a public official shareholder. In those cases, there may be real emoluments concerns, and the clause may require obtaining congressional consent. But in the ordinary case, it is extremely unlikely that ownership of any publicly traded security would create potential for influence over the shareholder by the issuer's customers.[6]

Similarly, royalties from book sales to foreign libraries are unlikely to raise concern. Foreign libraries might be sufficiently independent from their sovereign governments to not qualify as foreign states under the approach that has sometimes permitted U.S. officials to work for foreign

[6] Independently, OLC has explained that when a particular action has been common practice for an extended period of time, that may inform the constitutional inquiry. *See Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 2009 WL 6365082, at *4 (Dec. 7, 2009) (noting the "consistent historical practice of the political branches"). To the extent holding investments in publicly traded securities is also a common activity, there is a high probability that OLC would find it outside the scope of the Emoluments Clauses on that basis.

universities. But even if that were not the case, the emoluments concerns are minimal because even if all of the public libraries in a given country buy a book—and even if they do so because the author of the book is President—those payments will only ever reach the President (if at all) through a complicated web of intermediaries (wholesalers, publishers, etc.). The President himself will likely never know who bought the books, and the amount of the royalty attributable to a particular country's book purchases will likely not be substantial. So no corruption concern would arise. But again, the clause must be read in a purposive manner: if a competent authority finds that book royalty payments create a potential for foreign government influence, then the Foreign Emoluments Clause could very well prohibit the President from accepting the royalties without Congressional approval. And that would be a good thing.

Second, concerns about consequences are exaggerated because there is an easy way for any federal official to determine whether particular conduct would violate the clause: just ask. Federal agencies have ethics officers, and it is their job to determine and communicate the answers to questions like these in a clear and timely fashion. Those officers can help to resolve cases at the margins after hearing and considering all of the relevant facts. In this case, the President could have obtained a formal opinion from OLC, but so far as the public is aware, he chose not to (likely for the obvious reason that his conduct is completely inconsistent with past OLC interpretations). Indeed, it is quite telling that in a brief that claims to find support in "modern Executive Branch practice," (Br. 45) the President does not cite a single OLC opinion.

Third, the remedies for violations of the Foreign Emoluments Clause are hardly draconian; it is not as if violations carry criminal penalties or result in asset seizures. In this case, the plaintiffs merely ask the President to stop violating the clause—thus behaving like every other President. He can stop the violation by divesting from his businesses, as the Office of Government Ethics urged this President to do. *See* Sheelah Kolhatkar, *Walter Shaub's Brave, Quixotic Ethics Battle with Trump*, New Yorker (July 7, 2017), http://www.newyorker.com/news/news-desk/walter-shaubs-brave-quixotic-ethics-battle-with-trump. It is not unreasonable for Presidents to prioritize holding the highest office in the land over their business interests.

If the President doesn't want to divest from his business, he has other options. His businesses could stop transacting with foreign governments.

The businesses could sell assets or properties that engage in such transactions. Or the President can comply with the Foreign Emoluments Clause by obtaining Congress's consent. This safety valve allows Congress to create express waivers for particular emoluments or classes of conduct. By combining congressional power to approve foreign emoluments with an otherwise "sweeping and unqualified" prohibition on their acceptance, the Foreign Emoluments Clause "lays down a stark and unqualified rule, and leaves it to the legislative process to work out any needed qualifications." *ACUS*, 17 Op. O.L.C. at 121, 123 n.10. The congressional consent provision of the Clause serves two salutary functions: it fosters transparency by encouraging American officials to disclose potential emoluments to Congress, and it pragmatically allows the legislature to permit certain emoluments that do not jeopardize the public interest. *See* 8 Annals of Cong. 1583 (1798) (Bayard); *id*. at 1585 (Otis).

Congress has exercised its power to permit emoluments on multiple occasions. One well-known example is the Foreign Gifts and Decorations Act, codified at 5 U.S.C. § 7342, which permits federal personnel to accept certain small gifts, educational scholarships, foreign travel, meals, and lodging, and certain military honors. Congress has also acted to permit retired military personnel and other officials to accept paid civil employment by foreign governments under certain circumstances. *See* 37 U.S.C. § 908(a). On other occasions, Congress has acted to permit specific emoluments on a one-off basis, in response to requests from government officials. In 1856, for instance, it passed a resolution allowing a Navy surgeon to accept a "token of thankfulness" from a foreign government for his services on behalf of one of its citizens. *See* Resolution allowing Doctor E.K. Kane, and the Officers associated with him in their late Expedition to the Arctic seas, in search of Sir John Franklin, to accept such Token of Acknowledgment from the Government of Great Britain as it may please to present, Aug. 30, 1856, 11 Stat. 152. In 1896, Congress authorized President Benjamin Harrison to personally accept certain medals from Brazil and Spain. *See* Joint Resolution No. 39, Joint Resolution to authorize Benjamin Harrison to accept certain medals presented to him while President of the United States, Apr. 2, 1896, 29 Stat. 759. These examples illustrate that the process of seeking congressional consent is user-friendly and administrable—and most importantly, it can conclusively resolve any Foreign Emoluments Clause issue.[7]

III. The Complaint States A Valid Claim, And This Is Not A Close Case.

Under the approach taken by the government in the past—and indeed, under any plausible reading of the Foreign Emoluments Clause—the question whether the complaint states a valid claim is not even close. The complaint alleges a dense web of personal and financial conflicts that expose the President to myriad sources of foreign influence. Since at least the enactment of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, and likely going back much further than that, no full-time executive branch official has retained an ownership interest in a business that brandishes his name (usually in all-capital, shiny lettering) on hotels, real estate developments, consumer products, and services all across the world. And no President during that same period, or likely ever before that, has been so overtly focused on the development of his

[7] When it has been unclear whether accepting a particular type of benefit requires congressional consent, past presidents have honored the independent recommendations of the OLC. *See, e.g.*, Norbert A. Schlei, *Proposal That the President Accept Honorary Irish Citizenship: Memorandum Opinion for the Special Assistant to the President*, 1 Op. O.L.C. Supp. 278 (1963); *Nobel Peace Prize*, 2009 WL 6365082, at *1.

personal brand while in office. The statements cited in the complaint show that the President welcomes favoritism from foreign governments for his business interests, and the facts alleged indicate his willingness to repay that largesse with political and policy favors. This is precisely the type of corruption that the Foreign Emoluments Clause was supposed to prevent.

Consider, for example, the President's Washington D.C. hotel, which raises Foreign Emoluments Clause concerns because foreign officials frequent the hotel. *See* Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel Is Place to Be*, Wash. Post (Nov. 18, 2016), http://wapo.st/2fNSW6E?tid=ss_mail&utm_term=.1014029956cf.[8] The

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[8] The Trump Organization has agreed to donate hotel profits from foreign governments to the U.S. Treasury, and this year donated $191,538 pursuant to this promise. *See* Ann E. Marimow & Jonathan O'Connell, *Congressional Democrats Subpoena Trump's Financial, Business Records*, Wash. Post (July 8, 2019), https://www.washingtonpost.com/local/legal-issues/congressional-democrats-subpoena-trumps-financial-business-records/2019/07/08/338e5470-9cce-11e9-b27f-ed2942f73d70_story.html. But it is not at all clear what percentage of revenue is treated as "profit," or how much "profit" is attributed to governments. Moreover, the co-owner of one of the Trump hotels said there was no plan in place at that hotel to segregate the profits from foreign governments. Dan Alexander, *Trump's Vegas Partner Says Business Is Not Dividing Profits from Foreign Governments as Promised*, Forbes (Mar. 22, 2017). When the Oversight and Government Reform Committee of the House of

hotel reported that in four short months, it turned a $2 million profit, a figure that "represents a 192 percent improvement over what the Trump family planned to make when the company opened the hotel in the fall." Jonathan O'Connell, *Trump D.C. Hotel Turns $2 Million Profit in Four Months*, Wash. Post (Aug. 10, 2017), http://wapo.st/2fwHh0s?tid=ss_mail&utm_term=.d2cd98095b03. And the building has been described as "a kind of White House annex," where "groups with foreign interests" go to "attract Washington star power." Jonathan O'Connell, *How the Trump*

Representatives requested information from the Trump Organization about how the President's promise was being implemented, it received a sparse eight-page pamphlet making clear that the Trump Organization is not tracking all payments from foreign governments or calculating the profit that stems from any individual payment. *See* Trump Organization, Donation of Profits from Foreign Government Patronage (undated pamphlet), https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Trump%20Org%20Pamphlet%20on%20Foreign%20Profits.pdf. Instead, the pamphlet directs Trump hotels to make only "commercially reasonable efforts" to identify foreign government payments, because identifying them "fully and completely" is "impractical" and "would impede upon personal privacy and diminish the guest experience of our brand." *Id*. at 5, 4. As for calculating profits from any payments that the hotels do track, the pamphlet says that attempting to "distinctly attribute certain business-related costs as specifically identifiable to a particular customer group is not practical," because it would require "an inordinate amount of time, resources and specialists." *Id*. at 6.

Hotel Changed Washington's Culture of Influence, Wash. Post (Aug. 7, 2017), https://www.washingtonpost.com/graphics/2017/politics/trump-hotel-business/?utm_term=.208ea23dc2bb. Put succinctly, "[t]his is nothing Washington has ever seen" because "[f]or the first time in Presidential history, a profit-making venture touts the name of the U.S. president in its gold signage." *Ibid.*[9]

The D.C. hotel is not the only example. A recent news investigation determined that "[r]epresentatives of at least 22 foreign governments appear to have spent money at Trump Organization properties." Shelby Hanssen & Ken Dilanian, *Reps of 22 Foreign Governments Have Spent Money at Trump Properties*, NBC News (June 12, 2019), https://www.nbcnews.com/politics/donald-trump/reps-22-foreign-governments-have-spent-money-trump-properties-n1015806. And by all indications, the President is inviting these payments. For example, the

[9] It is no coincidence that the head of the Office of Government Ethics repeatedly and publicly called for the President to divest his holdings, and then resigned in protest when it became clear that ethical norms were being flouted. *See Ethics Office Director Walter Shaub Resigns, Saying Rules Need to Be Tougher*, NPR (July 6, 2017), http://www.npr.org/2017/07/06/535781749/ethics-office-director-walter-shaub-resigns-saying-rules-need-to-be-tougher.

President sought to host a summit of the Group of 7 leaders at a Trump-branded golf course—effectively ordering foreign governments to pay his businesses money as a condition of engaging in diplomacy with the United States. *See, e.g.*, Maggie Haberman et al., *Why Trump Dropped His Idea to Hold the G7 at His Own Hotel*, N.Y. Times (Oct. 20, 2019), https://www.nytimes.com/2019/10/20/us/politics/trump-g7-doral.html. Although the President reversed course, he remained recalcitrant, blaming "Media & Democrat Crazed and Irrational Hostility" instead of his own ethical lapse—even though there has been "no other time when a president effectively tried to force global political leaders to pay his or her family money at a resort owned by the head of state" in the history of Group of 7 meetings. *Ibid*. In a particularly telling statement, the President denounced the "phony emoluments clause." Anne Karni, *Trump Dismisses 'Phony Emoluments Clause,' Defending Doral*, N.Y. Times (Oct. 21, 2019), https://www.nytimes.com/2019/10/21/us/politics/trump-doral-emoluments-clause.html.

One of the most striking features of this case is how much more serious the allegations in the complaint are than any past case considered by OLC or the Comptroller General. In the opinions cited in this brief, the government frequently weighed in on cases involving relatively small one-time payments, or a low risk of corruption—and nevertheless concluded that those payments were unlawful. *See, e.g.*, the Austrian historians' commission described *supra*. Even when the government found that the payments were permissible, it wrestled with the question. *See, e.g.*, *Nobel Peace Prize*, 2009 WL 6365082 (issuing a thirteen-page opinion canvassing the history of the Nobel Peace Prize to conclude that its receipt is constitutional). This case is simply on a different scale from anything in the published guidance. The district court was correct to conclude that the complaint states a valid claim against the President, and this Court should affirm.

CONCLUSION

The judgment below should be affirmed.

October 29, 2019

Respectfully submitted,

s/Tejinder Singh

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), this document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this document contains 5,391 words.

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October 29, 2019

s/Tejinder Singh
Tejinder Singh

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 D.C. Circuit by using the appellate CM/ECF system on October 29, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Tejinder Singh
Tejinder Singh

APPENDIX

APPENDIX: THE AMICI AND THEIR QUALIFICATIONS

Don Fox – Former Office of Government Ethics (OGE) General Counsel and Acting Director (career; also served at the Department of Defense in career legal capacity)

Marilyn Glynn – Former OGE Acting Director and General Counsel (career)

Karen Kucik – Former ethics official for DOJ, Department of Commerce, and Department of Health & Human Services (career)

Lawrence D. Reynolds – Former Assistant General Counsel for the Department of Housing & Urban Development with responsibility for ethics (career; also served at the Department of Labor in career ethics capacity)

Amy Comstock Rick – Former Director of OGE; former Associate Counsel to President Clinton for ethics (originally career ethics official at Department of Education)

Trip Rothschild – Former Associate General Counsel at the Nuclear Regulatory Commission

Richard M. Thomas – Former Associate General Counsel, OGE; Former Ethics Counsel, Department of Health & Human Services

Harvey Wilcox – Former Navy Deputy General Counsel (career) and Designated Agency Ethics Official

Leslie Wilcox – Former Associate General Counsel for OGE (career), and principal author of the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635)