[ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2019]

No. 19-5237

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

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 *AMICI CURIAE* ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND FEDERAL COURTS SCHOLARS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Briefs for the Appellant and Appellees, except for *amici* who have signed onto this brief (listed in the Appendix A), and any other *amici* who have not yet entered an appearance in this case.

B. Rulings Under Review

Reference to the rulings under review appears in the Brief for the Appellant.

C. Related Cases

This case has previously been before this Court on a petition for a writ of mandamus. *See In re Donald J. Trump*, No. 19-5196 (D.C. Cir. July 19, 2019).

Dated: October 29, 2019

/s/ Jean Zachariasiewicz
Jean M. Zachariasiewicz

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INTEREST OF AMICI CURIAE

This case concerns not only the application of the Foreign Emoluments Clause, but also questions of the availability of federal remedies in actions that arise with some frequency in federal litigation. Appellant's arguments misconstrue U.S. Supreme Court and D.C. Circuit Court of Appeals case law concerning: (1) the availability of rights of action to enforce constitutional law; and (2) the authority of the federal courts to ensure that federal officials do not violate the Constitution. If accepted, Appellant's arguments would not only depart from well-settled law but would also curtail access to the federal courts for both private parties and congressional litigants and would undermine constitutional mechanisms designed to ensure public accountability of the Presidency.

Amici are scholars of administrative law, constitutional law, and federal courts who teach and research these subjects. They have a professional interest in the proper construction of constitutional limits on federal jurisdiction and are uniquely positioned to alert the Court to legal arguments and precedents that bear on the availability of relief in this case. *Amici* join this brief solely on their own behalf and not as representatives of the universities or any other organization with which they are affiliated. A full list of *amici* appears in Appendix A.[1]

[1] This brief is submitted pursuant to Fed. R. App. P. 29(a), and Circuit Rule of the United States Court of Appeals for the D.C. Circuit 29. All parties have consented (continued…)

SUMMARY OF ARGUMENT

The district court correctly ruled that there is an implied right to equitable relief to hold the President accountable for violating the Foreign Emoluments Clause. This Clause requires "the Consent of Congress" before any "Person holding any Office of Profit or Trust [under the United States]"—not only the President—accepts "any present, Emolument, Office, or Title, of any kind whatever," from "any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. Under longstanding precedent, the Foreign Emoluments Clause implies a remedy to ensure that federal officials—including the President—do not violate this safeguard against foreign influence and corruption.

First, Supreme Court precedent establishes that federal courts may imply a right to equitable relief in constitutional cases as a matter of course. *See, e.g., Armstrong v. Exceptional Child*, 135 S. Ct. 1378, 1384 (2015); *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd. ("PCAOB")*, 561 U.S. 477, 491 n.2 (2010); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Ex parte Young*, 209 U.S. 123, 149 (1908); *Allen v. Balt. & Ohio R.R. Co.*, 114 U.S. 311, 316–17

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to the submission of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

(1885). The present Court has similarly confirmed that equitable relief is available to enforce federal law against federal officials. *See, e.g., Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 107 (D.C. Cir. 2018); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). Thus, equitable relief "directly under the Constitution" is available "as a general matter" for constitutional violations, *PCAOB*, 561 U.S. at 491 n.2, including violations of the separation of powers. Such implied equitable relief is not limited to the assertion of a preemptive defense to an enforcement action or to the protection of private property and individual liberty. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 415 (2012); Seth Davis, *Implied Public Rights of Action*, 114 Colum. L. Rev. 1, 75–84 (2014) (citing cases). Contrary to Appellant's assertions, the type of relief requested here—injunctive and declaratory relief aimed at correcting a federal official's ongoing violation of a specific constitutional provision—is supported by longstanding judicial practice.

Second, the President is a proper defendant. Federal courts have authority to hold any federal official subject to the Foreign Emoluments Clause, including the President, accountable for accepting prohibited emoluments. Neither *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), nor any other decision supports the proposition that the separation of powers bars this suit. As this Court has held, when a "suit presents neither a nonjusticiable political question nor a constitutional

challenge to a statute giving the President discretionary duties, *Mississippi v. Johnson* does not require dismissal of this suit." *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 614 (D.C. Cir. 1974). Appellees' suit neither presents a nonjusticiable political question nor seeks to enjoin the President in the performance of a discretionary duty.

Unlike *Johnson*, Appellees do not seek to enforce a duty committed uniquely to the President. Instead, they seek to enforce a clear constitutional duty that affords no discretion to those federal officials to which it applies, including the President. Appellant argues that the Foreign Emoluments Clause creates a discretionary duty because the President has "to exercise judgment in determining whether his financial interests are compatible with the continued exercise of his office." Appellant's Br. 34. That argument misconstrues the distinction between discretionary and ministerial duties: "[A] ministerial duty can exist even where the interpretation of the controlling [law] is in doubt, provided that the [law], once interpreted, creates a peremptory obligation." *Swan v. Clinton*, 100 F.3d 937, 978 (D.C. Cir. 1996)) (quoting *13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980)). According to Appellees' complaint, the Foreign Emoluments Clause creates a peremptory obligation: The President may not accept a prohibited emolument without Congress' approval. *See* J.A. 150–51, ¶¶ 2–6; *id.* at 167–70, ¶¶ 34–43. This constitutional duty implies a right to an equitable

remedy against the President. As this Court has explained, if the "President has himself" violated the Constitution, "the court's order must run directly to the President." *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973).

In short, the district court correctly applied longstanding precedent in concluding that there is an implied right to a remedy to enforce the Foreign Emoluments Clause and that the President is the proper defendant to an action alleging that he has violated that Clause. This Court should affirm.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THERE IS AN IMPLIED RIGHT TO EQUITABLE RELIEF TO ENFORCE THE FOREIGN EMOLUMENTS CLAUSE.

A. The Supreme Court and this Court Have Held that Equitable Relief Is Broadly Available in Cases Involving Allegations of Constitutional Violations.

The Supreme Court has long explained that equitable relief is available in constitutional cases and is not limited to asserting a preemptive defense to federal enforcement actions. *See PCAOB*, 561 U.S. at 491 n.2; *Malesko*, 534 U.S. at 74; *Bolling*, 347 U.S. at 498–500; *Young*, 209 U.S. at 149; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (explaining that "[o]ne of the first duties of government is to afford" remedies "for the violation of a vested legal right"). Indeed, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*,

135 S. Ct. at 1384; *see also Davis v. Passman*, 442 U.S. 228, 243 (1979); *Young*, 209 U.S. at 149. This implied right to an equitable remedy extends to structural guarantees.[2] *See PCAOB*, 561 U.S. at 501.

The Foreign Emoluments Clause is one such guarantee. The Founders intended to ensure that officials within the federal government, including the President, would be responsive to the interests of the states and their citizens and not be unduly influenced by "any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. In short, the Foreign Emoluments Clause was intended "to prevent corruption" of federal officials. Statement of Edmund Randolph (1788), *in Debates and Other Proceedings of the Convention of Virginia* 328, 330 (2d ed. 1805). Appellant may not accept emoluments from foreign governments unless Congress authorizes it. By directing the President to obtain congressional approval before accepting foreign emoluments, this Clause helps ensure that the President

[2] This brief refers to a right to an equitable remedy – or a "right to relief" and "remedial right," interchangeably – to refer to the right to sue to enforce a primary duty and, "if claim proves to be well-founded, [to obtain] an appropriate official remedy." Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 136–37 (William N. Eskridge & Philip P. Frickey eds., 1994). This usage encompasses what some courts, as well as the parties and the district court in this case, have characterized as a "cause of action." Traditionally, that term has "include[d] within its scope the two distinct questions of defendant's duty and plaintiff's right to enforce that duty." William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 236 (1988). There is no question in this case about whether the Foreign Emoluments Clause expressly creates a legal duty to refrain from accepting foreign emoluments in the absence of congressional authorization. Because the question addressed here is whether there is a right to enforce that constitutional duty through judicial relief, this brief refers to an implied right to relief or remedy rather than to an "implied cause of action."

does not "use[] his office to profit himself and engage in financial transactions that primarily benefit himself." Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2179 (2019). Located within Article I, this structural guarantee "reinforce[s]" the President's duty to execute the laws faithfully by allocating authority to Congress to decide when, if ever, federal officials may accept foreign emoluments. *See id.*

In *PCAOB*, this Court and the Supreme Court confirmed the longstanding tradition of judicial enforcement of structural guarantees even in the absence of an express right to judicial relief. There, an accounting firm and a non-profit organization brought an action directly under the Constitution to challenge the statutory limitations on removal of members of the Public Company Accounting Oversight Board. *PCAOB*, 561 U.S. at 484. This Court held it had general federal question jurisdiction over the challenge and concluded that the statute was constitutional. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 672 (D.C. Cir. 2008). The Supreme Court reversed on the merits, concluding that the two layers of removal protection in the statute violated Article II and the separation of powers. *See PCAOB*, 561 U.S. at 484. However, the Supreme Court agreed with this Court on the propriety of federal question jurisdiction and rejected the federal government's argument that a federal court lacks authority to imply a right of action to enforce separation-of-powers

principles.[3] According to the Supreme Court, such relief is available "as a general matter." *Id.* at 491 n.2.

This Court, too, has explicitly held that a right to sue to enjoin federal officials from violating the Constitution "routinely exists for such claims." *D.C. Ass'n of Chartered Public Schs. v. D.C.*, 930 F.3d 487, 493 (D.C. Cir. 2019); *see also Delaware Riverkeeper*, 895 F.3d at 107 ("The Supreme Court has recognized an implied action for prospective relief against allegedly unconstitutional actions by federal officials . . . .").

The Supreme Court and this Court's precedents reflect "a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. Thus, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Bank of the United States filed an equitable action directly under the Constitution to enforce structural constraints on state taxation. *See* Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 688 (2009) ("The first notable case in equity in which the plaintiff sought relief directly under the Constitution was *Osborn* . . . ."). This equitable tradition continued with *Ex parte*

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[3] Specifically, the government argued that the federal courts lacked authority to imply a right of action to enforce either the Appointments Clause or a separation-of-powers claim. *See PCAOB*, 561 U.S. at 491 n.2. The Supreme Court rejected that argument but ultimately held that the appointment of Board members by the Securities and Exchange Commission did not violate the Appointments Clause. *Id.* at 511.

Young, 209 U.S. 123 (1908), "the best-known early example" of an implied right to equitable relief to enforce a constitutional right. Berzon, *supra*, at 689.

B. This Suit is Well Within the Tradition of Implied Equitable Relief to Enforce Constitutional Law.

Although *Ex parte Young* involved an equitable action by railroad shareholders to challenge a law that subjected officers, directors, agents, and employees of the corporation to criminal enforcement, 209 U.S. at 149, the tradition of equitable actions to enforce constitutional law is not limited to suits seeking to preempt an enforcement action. *See Bolling*, 347 U.S. at 498–500; *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1112 (2010). Nor is implied equitable relief limited to the protection of private property or individual liberty. *See, e.g.*, *Arizona*, 567 U.S. at 415; *Bolling*, 347 U.S. at 499–500. Thus, contrary to Appellant's assertion, this suit does not present the sort of "substantial expansion of past practice" that would otherwise typically be left to Congress. *See* Appellant's Br. 30 (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322, 329 (1999)).

Federal courts have implied the availability of injunctive relief for constitutional violations even where the plaintiffs were other than regulated parties subject to the threat of enforcement. For example, in *Brown v. Board of Education* and *Bolling v. Sharpe*, African-American children had an implied right to sue for equitable relief against de jure racial segregation in state and federal schools,

respectively. 347 U.S. 483 (1954); 347 U.S. 497 (1954); *see also* Berzon, *supra*, at 685–86 (explaining that "in *Brown* the plaintiffs grounded their claim for relief directly in the Fourteenth Amendment" and "did not cite the precursor to § 1983 in their briefs," while in *Bolling* "the Court again presumed that it could entertain direct constitutional claims without a statutory predicate"). Similarly, in *Weinberger v. Wiesenfeld*, the plaintiff had an implied right to a remedy for unconstitutional gender discrimination in the Social Security Act. 420 U.S. 636, 653 (1975).

Cases such as *Brown* "made injunctive relief the norm, rather than the exception, in [constitutional litigation] seeking to enforce broadly shared rights the value of which would be hard to quantify." Fallon, *supra*, at 1112 (citing *Brown*, *Bolling*, and *Weinberger*). Accordingly, this Court has recognized that regulatory beneficiaries have an implied remedial right when challenging federal action under the Constitution. *See, e.g., Delaware Riverkeeper*, 895 F.3d at 107 (holding that litigants seeking to protect aesthetic, recreational, and property interests against agency approval of gas pipeline had an implied right to enforce the Fifth Amendment through injunctive relief).

Although an equitable remedy is subject to applicable statutory limits, if any, *Armstrong*, 135 S. Ct. at 1385, analyzing such limits presumes at the outset that litigants challenging unlawful government action have such an implied remedial

right. For example, in *Armstrong*, the Supreme Court assumed that litigants challenging state action under federal law had a right to equitable relief unless Congress had foreclosed such relief. *See id.* (analyzing whether Congress intended "'to foreclose' equitable relief"). The Court explained that its "cases demonstrate . . . that, 'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'" *Id.* at 1384 (quoting *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845)).

In the present case, the district court correctly applied these longstanding legal principles by finding that Appellees had a viable right to enforce the Foreign Emoluments Clause. As the district court ruled, "there is no reason for the exercise of equitable discretion to be limited to defend[ing] a potential enforcement action and the President has cited no authority to the contrary." *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 209 (D.D.C. 2019). Rather, the federal courts have authority to imply a remedial right to enforce separation-of-powers principles. *See id.* at 208 (citing *PCAOB*, 561 U.S. at 491 n.2).

Notwithstanding the firm and longstanding legal principles supporting the use of equitable remedies to enforce constitutional provisions, Appellant incorrectly contends that an implied equitable remedy is not available unless a litigant seeks to protect a private right to property or individual liberty. *See* Appellant's Br. 28–32. Appellant specifically makes three erroneous arguments.

First, Appellant suggests that there is no implied right to sue in this case because Appellees are not asserting a preemptive defense to a potential enforcement action. *Id.* at 29. But as already noted, that argument cannot be reconciled with *Brown*, *Bolling*, or the legal principles contained therein. *See supra* pp. 9–11. Under Appellant's limited vision of equity, the plaintiffs in *Bolling* would have lacked a judicial remedy against de jure racial discrimination in D.C. public schools. *See Davis*, 442 U.S. at 243 (citing *Bolling v. Sharpe*, 349 U.S. 294 (1955)) (explaining "equitable relief should be made available" to redress violations off the Fifth Amendment). Furthermore, Appellant's argument would create a "rigid bias in favor of regulated entities" that has no basis in law. Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 Notre Dame L. Rev. 1807, 1829 (2016). Put simply, that narrow view is not and should not be the law.

Second, Appellant asserts that even if Appellees have Article III standing, they cannot rely upon an implied remedial right to vindicate an institutional interest. Appellant asserts that private parties "sometimes" have implied rights to sue "to protect their personal property or liberty," but, according to Appellant, this lawsuit involves a "'substantial expansion'" of past practice because it does not involve a private right. Appellant's Br. 29–30 (quoting *Grupo Mexicano*, 527 U.S.

at 322, 329). This assertion is contrary to longstanding federal court precedent and practice.

Implied equitable relief has long been available to enforce institutional interests in constitutional litigation, including in cases that do not involve the assertion of a preemptive defense to an enforcement action. *See, e.g.*, *Arizona*, 567 U.S. at 415 (permitting the United States to sue a State to enforce preemptive federal law); *Sanitary Dist. v. United States*, 266 U.S. 405, 423 (1925) (permitting United States to sue municipal agency to enforce preemptive federal law); Davis, *supra*, at 3–4 (explaining that federal government's suit in *Arizona* was "one of many suits" for equitable relief brought by the United States to enforce federal law). Thus, Appellant's narrow vision of equity cannot be reconciled with the many cases in which the United States itself has successfully sued to enforce preemptive federal law. Nor can that narrow vision be reconciled with the many cases in which states have sued to enforce their governmental interests under the Constitution. *See*, *e.g.*, *Missouri v. Holland*, 252 U.S. 416, 431 (1920); Davis, *supra*, at 78–84. Finally, Appellant's argument cannot be reconciled with the cases in which this Court has permitted Members of Congress to sue to enforce their interests in discharging their legislative responsibilities (rather than property or liberty interests). *See, e.g., Kennedy v. Sampson*, 511 F.2d 430, 434, 436 (D.C. Cir. 1974); *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc),

vacated on other grounds, 444 U.S. 996 (1979). Accordingly, implied equitable relief to enforce the structural Constitution extends well beyond the rights of private litigants; it extends to governmental and institutional interests too.

Indeed, just last week the United States relied upon implied equitable relief to advance its institutional interests. In *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. Oct. 23, 2019), the United States has sued to enjoin a State from implementing a cap-and-trade agreement with a Canadian provincial government based upon its allegation that the agreement unconstitutionally encroaches on the United States' authority over foreign affairs. According to the United States' complaint, the district court "has authority to provide the relief requested . . . under its inherent legal and equitable powers." Compl. at ¶ 8, *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. Oct. 23, 2019), ECF No. 1. Appellant's suggestion that implied rights of action for equitable relief do not extend beyond private property rights and individual liberty interests cannot be reconciled with the United States' position in other contemporaneous constitutional litigation.

Third, Appellant argues that Appellees cannot rely upon an implied equitable remedy because they are Members of Congress who could introduce legislation to create an express right to sue. Appellant's Br. 30. Citing *Armstrong*, Appellant suggests that Congress intended to foreclose implied remedies under these circumstances. *See id.* (citing *Armstrong*, 135 S. Ct. at 1385). If true, this

argument would equate congressional silence with congressional preclusion of implied equitable relief. The Supreme Court's and this Court's holdings, however, establish that an implied right to sue for injunctive relief "routinely exists" to enforce the Constitution.[4] *D.C. Ass'n*, 930 F.3d at 493 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002)). Assuming that Appellees have Article III and prudential standing to sue as Members of Congress, implied-right-of-action jurisprudence does not pose an additional barrier to their obtaining injunctive relief to enforce the express prohibitions of the Foreign Emoluments Clause.

As Appellees recognize, their standing turns upon application of a "strict limiting principle," which is that "suits by federal legislators may proceed only if Congress is unable to provide the relief the plaintiffs seek." Appellees' Br. 6 (citing *Chenoweth v. Clinton*, 181 F.3d 112, 114–15, 116 (D.C. Cir. 1999);

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[4] Appellant cites *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017), for the proposition that federal courts should typically await congressional authorization rather than imply a remedy to enforce constitutional law. *See* Appellant's Br. 8, 29, 32. Unlike this case, *Ziglar* involved a claim for damages under the *Bivens* doctrine. *Id.* at 1865; *see also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). And that made all the difference. *See Ziglar*, 137 S. Ct. at 1865 ("[T]here might have been alternative remedies available here, for example, . . . an injunction requiring the warden to bring his prison into compliance [with federal law,] . . . or some other form of equitable relief."); Fallon, *supra*, at 1113 ("[T]he post-*Brown* Court, so far as I am aware, has never suggested that injunctions against ongoing constitutional violations are constitutionally problematic in the way it now believes *Bivens* actions to be.").

Campbell v. Clinton, 203 F.3d 19, 22–23 (D.C. Cir. 2000)). Contrary to Appellant's suggestion (Br. 30), the Supreme Court's and this Court's implied-right-of-action precedents do not require Appellees to show further that they sought to engage in "self-help" prior to suing. If a "self-help" requirement were to be grafted onto implied-right-of-action jurisprudence, it would work a substantial and radical change in the system of judicial enforcement of constitutional rights.

Appellees are not requesting the recognition of a novel remedial right. They have requested a familiar type of relief based upon a familiar remedial right to enforce constitutional law, one well within the "traditional equity practice" of the federal courts. *Grupo Mexicano*, 527 U.S. at 322, 327. The Supreme Court has never said that the terms of the Constitution cannot be enforced through equitable remedies simply because the Constitution did not also expressly authorize those remedies. Instead, the Court has repeatedly held that equitable relief is available in constitutional cases. This Court should affirm the district court's holding that Appellees have a right to equitable relief to enforce the Foreign Emoluments Clause.

II. THE PRESIDENT IS A PROPER DEFENDANT.

The President is a proper defendant where, as here, plaintiffs allege that he himself has violated a constitutional provision that applies to him and where relief against the President is required to redress the alleged injury. Contrary to

Appellant's suggestion that the President is not a proper defendant, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President." *Nixon v. Fitzgerald*, 457 U.S. 731, 753–54 (1982). This Court should affirm.

A. Constitutional avoidance does not require dismissing this suit.

Appellant's argument that the President is never a proper defendant unless or until Congress has expressly authorized suit against him is based on an incorrect view of the Supreme Court's holding in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). According to Appellant, *Franklin* stands for the proposition that "an express statement is at the very least required before even a generally available cause of action may be extended specifically to the President." Appellant's Br. 32. Appellant is simply wrong.

In *Franklin*, the Court held that the President is not an "agency" that can be sued under the Administrative Procedure Act. 505 U.S. at 800–801. The plurality opinion did not decide "whether injunctive relief against the President was appropriate"; instead, it held that "the injury alleged [was] likely to be redressed by declaratory relief against the Secretary [of Commerce] alone."[5] *Id.* at 803.

[5] Justice Scalia, writing for himself alone, reasoned that the federal Judiciary may not order the President or Congress "to perform particular executive or legislative acts at the behest of the Judiciary." *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in the judgment). However, the plurality expressly did not decide that (continued…)

Moreover, the plurality did not hold that constitutional avoidance requires an express statement from Congress before the Judiciary may adjudicate a claim for equitable relief against the President for violating the Constitution. Rather, addressing a question of statutory interpretation, the plurality concluded, "[w]e would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion" – that is, review arising *under the APA*. *Id.* at 801; *cf. Fitzgerald*, 457 U.S. at 748 n.27 (emphasis added) ("Our holding today need only be that the President is absolutely immune from *civil damages liability* for his official acts in the absence of explicit affirmative action by Congress.").

The plurality's resolution in *Franklin* is fully compatible with Appellees' argument that they have an implied right to relief to enforce constitutional law. Citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the plurality in *Franklin* expressly recognized that "the President's actions may still be reviewed for constitutionality" even if they are not reviewable under the APA. 505 U.S. at 801. By reaching the merits of the appellees' constitutional claims, the *Franklin* Court made clear "that the APA is not the exclusive cause of action for injunctive relief; judicially implied injunctive relief remains available." John F.

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issue, *see id.* at 803, and, moreover, it recognized that presidential actions may be reviewed for compliance with constitutional demands, *see id.* at 801.

Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 Wm. & Mary Bill Rts. J. 1, 52 (2013).

B. *Mississippi v. Johnson* does not require dismissing this suit.

Appellant next argues that courts may never enter equitable or declaratory relief against a President in his official capacity. Appellant's Br. 33. In support of this sweeping argument for a categorical bar, Appellant cites *Mississippi v. Johnson* for the proposition that the Supreme Court had "no jurisdiction of a bill to enjoin the President in the performance of his official duties." 71 U.S. at 499–501.

Here again, Appellant misconstrues the Supreme Court's precedent. *Johnson* did not hold that the President may never be subject to equitable relief in his official capacity; instead, *Johnson* was simply a political question case. *See Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496 (1971) (identifying *Johnson* as a case that sought "to embroil this tribunal in 'political questions'"). *Johnson* raised an "explosive issue: the constitutionality" of the Reconstruction Acts. David P. Currie, The Constitution and the Supreme Court: The First Hundred Years, 1789–1888, at 296 (2015). In particular, the State of Mississippi sought to enjoin the President and his generals from implementing Reconstruction. Under those circumstances, the Court concluded that "[t]he duty . . . imposed on the President is in no just sense ministerial. It is purely executive and political." *Johnson*, 71 U.S. at 499. The Court's reasoning did not turn simply upon the

authority of federal courts to constrain the President; after all, the Court also declined to issue an injunction against the military commander of the district of Mississippi and Arkansas, who was also a named defendant. *See id.* at 475. Instead, the Court concluded that the case presented political questions not fit for adjudication.[6] *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 6 n.30 (1993) ("Jurisdiction was declined, in a brief and opaque opinion, not because the President was a defendant but because the issues raised by the litigation were thought to be essentially political in nature."). Thus, the case is best understood as one in which the Court "refuse[d] to substitute [its] judgment or discretion for that of the official intrusted by the law with its execution." *Louisiana v. McAdoo*, 234 U.S. 627, 633 (1914).

Unlike the suit in *Johnson*, Appellees' suit does not present a "nonjusticiable political question [or] a constitutional challenge to a statute giving the President discretionary duties." *Nat'l Treasury Emps. Union*, 492 F.2d at 614. In such circumstances, this Court has held that *Johnson* "does not require dismissal." *Id.*

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[6] Two years after *Johnson*, the Court reached constitutional questions concerning Reconstruction when a private litigant presented them in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), suggesting that the *Johnson* Court was also concerned with what we would now call the "standing" of a state to seek judicial relief in federal court, a jurisdictional question that is not present in this case. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1916 n.30 (2015).

Several features of this case fundamentally distinguish it from *Johnson*. For one, Appellees do not seek to enjoin the President carrying out a uniquely presidential duty. Rather, they have sued to enforce an express constitutional prohibition that applies to any "Person holding any Office of Profit or Trust under [the United States]," which quite clearly includes the President, but also includes other federal officials. U.S. Const. art. I, § 9, cl. 8. The general applicability of the relevant constitutional duty distinguishes this case from *Johnson*.

Moreover, unlike *Johnson*, Appellees seek to enforce a clear constitutional duty that affords no discretion to those federal officials to which it applies, including the President. *Johnson*, by its own terms, bars a court from enjoining the President only with respect to matters that the law leaves to his discretion. Where there is "no room for the exercise of judgment" on the President's part, *Johnson*'s limitation on the court's equitable powers does not apply. *See Johnson*, 71 U.S. at 499; *cf. Franklin*, 505 U.S. at 802–03 ("We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty . . . .").

The President has such a pure and simple duty under the Foreign Emoluments Clause: He may not receive payments from foreign governments absent authorization from Congress. Whether to comply with the Foreign Emoluments Clause is not a matter left to his discretion or to the exercise of his

judgment. Appellant's alleged conduct in accepting payments to his businesses from foreign governments is illegal simply by virtue of the fact that he is a "Person holding [an] Office of . . . Trust under [the United States.]" U.S. Const. art. I, § 9, cl. 8. The fact that the Foreign Emoluments Clause prohibits the President from receiving illegal payments through his hotels and other businesses does not make the receipt of those emoluments a discretionary duty of the Presidency, and *Johnson* does not stand in the way of a remedy. *See Nat'l Treasury Employees Union*, 492 F.2d at 611 (noting that "the Judicial power, by compulsory process or otherwise," includes the ability "to prohibit the Executive from engaging in actions contrary to law"); *see also Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Mandamus is not precluded because the federal official at issue is the President of the United States.").

Appellant argues that *Johnson* applies because a President must somehow exercise discretion in determining whether his financial interests violate the Foreign Emoluments Clause. *See* Appellant's Br. 34 ("What matters is that President Trump must exercise judgment in determining whether his financial interests are compatible with the continued exercise of his office in light of the Clause . . . ."). But Appellant misconstrues the line between a ministerial duty and a discretionary one. As this Court has recognized, ministerial duties are not necessarily void of all interpretation or judgment. Quite the contrary, this Court

has held that "a ministerial duty can exist even 'where the interpretation of the controlling statute is in doubt,' provided that 'the statute, once interpreted, creates a peremptory obligation for the officer to act.'" *Swan*, 100 F.3d at 978 (quoting *13th Regional Corp. v. United States Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980)); *see also Roberts v. U.S. ex rel. Valentine*, 176 U.S. 221, 231 (1900) ("Every statute to some extent requires construction by the public officer whose duties may be defined therein. . . . But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one."). Thus, in *13th Regional Corp.*, this Court concluded that the Secretary of the Interior had a "ministerial" duty even though the Secretary had to decide between competing interpretations of a federal statute by looking to its text, structure, and legislative history. 654 F.2d at 760–63.

This Court's decision in *National Treasury Employees Union v. Nixon* is instructive. In that case, this Court held that the Federal Pay Comparability Act imposed a ministerial duty upon the President to adjust the pay of federal employees, 492 F.2d at 603, and that the Court had jurisdiction to issue a writ of mandamus directing the President to fulfill this duty, *id.* at 616. Because of the assignment of ministerial authority to the President, "[i]f plaintiff members are to be accorded a remedy," this Court reasoned, "the sole defendant they can appropriately name in asserting their claims is the President of the United States."

Id. at 615. Thus, although a federal court may issue declaratory relief and withhold the writ of mandamus, as this Court did it *National Treasury Employees' Union*, there is no categorical bar on a judicial order to hold the President accountable for violating a ministerial duty. Rather, the Court must balance "the bedrock principle that our system of government is founded on the rule of law" against the need for respect for a coequal branch of government when deciding whether to grant relief directly against the President. *See Swan*, 100 F.3d at 978 (leaving open, post-*Franklin*, the possibility that federal courts may grant injunctive relief against the President).

This case is one of those instances where judicial relief requires legal process directed to the President. In *Sirica*, this Court concluded that a federal court may order the President to produce items identified in a grand jury subpoena where the President had personal custody of them. 487 F.2d at 709; *see also United States v. Nixon*, 418 U.S. 683, 712 (1974). In reaching that holding, this Court relied on *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807), "in which Chief Justice Marshall squarely ruled that a subpoena may be directed to the President," and *Youngstown*, 343 U.S. at 579, in which Justice Black "made it clear that the Court understood its affirmance effectively to restrain the President," *Sirica,* 487 F.2d at 709. This Court held that *Burr* and *Youngstown* stand for the proposition that, "[a]s a matter of comity, courts should normally direct legal

process to a lower Executive official." *Id.* Nevertheless, where enforcement of a legal right or duty requires it, a federal court's order "must run directly to the President[.]" *Id.*

Appellees' prayer for relief by its terms does not seek to direct Appellant in his performance of a uniquely presidential duty, alter the actions of the Executive Branch, or constrain Appellant's successors in office. Although Appellant's status as President gives rise to the illegality at issue, a judicial remedy that redresses Appellees' injuries would not "curtail the scope of the official powers of the Executive Branch." *Clinton v. Jones*, 520 U.S. 681, 701 (1997). It would simply require that Appellant cease accepting prohibited emoluments from foreign governments.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Date: October 29, 2019

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici* Law Professors certify:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and D.C. Circuit Rule 32(e). This brief contains 6168 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

2. This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify the foregoing was electronically filed with the Clerk for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system on October 29, 2019. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and D.C. Circuit Rule 25(f).

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