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 of America,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 1:17-cv-1154
(Hon. Emmet G. Sullivan)

Brief of *Amici Curiae* Scholars of Standing, Federal Jurisdiction, and Constitutional Law in Support of Plaintiffs-Appellees

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INITIAL BRIEF: October 29, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties and amici who appeared before the district court appear in the appellee's brief. The parties and amici appearing in this Court include the parties listed in appellee's brief and the amici listed in this brief and other amicus briefs that may be filed.

B. Ruling Under Review

Appellant's brief accurately references the ruling at issue.

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/*Ruthanne M. Deutsch*
Ruthanne M. Deutsch

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and publish in the areas of standing, federal jurisdiction, and constitutional law. They have a professional interest in the coherent development of the law of legislative standing. *Amici* seek to assist the Court by bringing to bear their unique perspective, informed by 751 combined years of teaching, research, and writing on the issues here. *Amici* are listed in Appendix A. *Amici* write only on Article III standing and take no position on the merits.

SUMMARY OF ARGUMENT

I. Article III's standing requirements are not abstract philosophical inquiries; rather, standing is context-dependent and "turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Legislative standing, at issue here, looks to "the relevant constitutional provision" invoked to ascertain where it "assign[s] authority." *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019). And because individual legislators rarely possess any legislative prerogatives apart from the power accorded by law to their institution as a whole, granting them standing is rarely appropriate. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997).

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel contributed money that was intended to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). *Amici* filed their notice of its intent to participate as *amici curiae* on October 28, 2019. All parties have consented to the filing of this brief.

This case is one of those rare exceptions. When a party "treat[s] a vote that did not pass as if it had," *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000), then the votes of the affected legislators are nullified and deprived of legal effect, *see Raines*, 521 U.S. at 822 (citing *Coleman v. Miller*, 307 U.S. 433, 436-38 (1939)). In this case, Plaintiffs (twenty-nine members of the United States Senate and 186 members of the United States House of Representatives) bring claims under the Foreign Emoluments Clause, which states that "no Person holding any Office of Profit or Trust under [the United States], shall, *without the Consent of the Congress*, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

With this unique provision, the Framers flipped the burdens of legislative inertia and rendered congressional inaction a potent safeguard against foreign powers influencing federal officials. This inversion of the normal legislative process means that the President cannot accept any prohibited emolument *unless and until* (1) each chamber of Congress holds a specific vote on it and (2) a majority of members in each chamber vote to approve specific terms of consent. As the district court correctly held, this gives each individual Member of Congress a right to vote on each emolument before the President accepts it. J.A. 12.

By allegedly accepting "Emolument(s)" from foreign governments without first seeking and obtaining these votes, the President acts as if acceptance has already

been authorized and nullifies the right to cast specific, identifiable votes entrusted to Plaintiffs by the Constitution. *See Campbell*, 203 F.3d at 22. This deprives Members of Congress of the constitutionally mandated legal effect of congressional inaction. *See Raines*, 521 U.S. at 822 (legislator standing is proper when a measure is "deemed ratified" contrary to procedure defined by law because it nullifies a specific vote). That harm constitutes a concrete, particularized, and cognizable injury-in-fact that supports Article III standing.

II. Given the structure of the Foreign Emoluments Clause, this injury is directly traceable to the President's unconstitutional action. Unlike many legislator-standing cases (in which the alleged "injuries" are actually caused by the plaintiffs' own congressional colleagues), here the vote-denial injury is not caused by any action or lack of action by Congress itself. Instead, the harm occurs when the President accepts a foreign benefit without submitting it for congressional approval.

III. Finally, a court order granting the requested relief would—indeed, is the most appropriate way to—redress the alleged injuries in the manner prescribed by the Constitution. Demanding that Congress engage in "legislative self-help" would turn the text of the Clause on its head and defeat its vital purposes. The Cases and Controversies Clause cannot be interpreted in a way that reads the Foreign Emoluments Clause out of the Constitution altogether.

ARGUMENT

THE UNIQUE STRUCTURE OF THE FOREIGN EMOLUMENTS CLAUSE GIVES MEMBERS OF CONGRESS ARTICLE III STANDING

Article III of the Constitution "confines the federal courts to adjudicating actual 'cases' and 'controversies'" and "defines [for] the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted). To establish standing and invoke judicial power, plaintiffs must allege a cognizable injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

This inquiry "often turns on the nature and source of the claim asserted," *Warth*, 422 U.S. at 500, making universal principles of application difficult and "[g]eneralizations about standing . . . largely worthless as such," *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970). The same holds true for legislative standing. While the Supreme Court and this Court alike have been understandably hesitant to accord standing to individual Members of Congress, neither has held that individual Members *categorically* lack standing. *See, e.g.*, *Raines*, 521 U.S. at 829-30; *Campbell*, 203 F.3d at 23-24. In all cases, the contours of standing remain claim- and context-dependent. Thus, cases like this one—

involving an unusual and infrequently litigated constitutional provision—warrant careful attention.

Ultimately, the unique requirements, structure, and function of the Foreign Emoluments Clause resolve the legislative-standing question in Plaintiffs' favor. By prohibiting the President from accepting an emolument without an affirmative vote by majorities in both chambers of Congress, the Clause demands a particularized voting opportunity for each Member of Congress.

I. PRESIDENTIAL ACCEPTANCE OF AN EMOLUMENT WITHOUT THE PRIOR CONSENT OF CONGRESS INJURES INDIVIDUAL MEMBERS OF CONGRESS BECAUSE IT NULLIFIES THE RIGHT TO A SPECIFIC, IDENTIFIABLE VOTE REQUIRED BY THE CONSTITUTION

A. In legislative-standing cases, the injured party is the person, bloc, or entity whose authority has been negated.

To present a justiciable case or controversy, Plaintiffs must suffer an "injury in fact"—"'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Thus, standing requires "a 'personal stake in the outcome,' or a 'particular, concrete injury,' or 'a direct injury'; in short, something more than 'generalized grievances.'" *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (internal citations omitted).

"[G]eneralized grievances" are "not only widely shared, but . . . also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940)). Such nebulous complaints are better suited to resolution in the political process as they typically concern policy preferences rather than the deprivation of defined rights. *See id*. For this reason, lawmakers who fail to spur action in their own branch cannot press their preference in a pleading; the power to enact legislation belongs to Congress as a whole. *See Raines*, 521 U.S. at 818-19.

Yet, not every claim by a lawmaker involves a power residing solely with the body as a whole. In evaluating legislative standing, courts should ask what "specific prerogative or power [has been] eliminated by the defendant." Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 26 (2016) [hereinafter, Hall, "*Legislative Standing*"]. In general, "legislative standing to litigate over a prerogative is derived from, and coextensive with, the authority to exercise that prerogative." *Id*. at 28.

For example, a legislature has standing to sue over an injury to a power belonging to that body. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*), the Arizona Legislature could challenge the constitutionality of an initiative that "strip[ped] the Legislature of its alleged

prerogative to initiate redistricting." 135 S. Ct. 2652, 2663 (2015). Pointing to a well-defined constitutional source for the prerogative, the Legislature argued that "the Elections Clause vests in it 'primary responsibility' for redistricting." *Id.* (citation omitted). "[T]he Arizona Legislature, having lost [that] authority . . . ha[d] standing to contest the constitutionality of [the initiative]." *Id.* at 2659.

The Supreme Court reaffirmed this principle last term in *Virginia House of Delegates v. Bethune-Hill*, holding that "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." 139 S. Ct. at 1953-54. Unlike in *AIRC*, in which "the Arizona House and Senate—*acting together*—[challenged] a referendum that . . . allegedly usurp[ed] the legislature's authority under the [Elections Clause]," the Virginia House of Delegates in *Bethune-Hill* lacked standing to challenge an alleged interference with a redistricting authority that the Virginia Constitution lodged in the "'General Assembly,' of which the House constitute[d] only a part." *Id.* at 1953 (quoting VA. CONST., art. II, § 6). When there is a "mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assign[s] . . . authority," then standing must be denied. *Id*.

In legislative-standing cases, Article III's functional inquiry thus examines the source of the relevant authority and asks what person(s) or entity is expected to exercise that authority. In *INS v. Chadha*, the Supreme Court considered the

constitutionality of a law that conferred "legislative veto" power upon the House and Senate over certain decisions by the Immigration and Naturalization Service. 462 U.S. 919, 939-40 (1983). Because the statute "granted *each* Chamber of Congress an *ongoing* power," each chamber was independently permitted to defend its claimed authority in court. *Bethune-Hill*, 139 S. Ct. at 1954 n.5.[2] If the legislative veto required *both* chambers to act, it would require both chambers to participate in litigation. *See* Hall, *Legislative Standing*, *supra*, at 28 (citing *Consumers Union of U.S. v. FTC*, 691 F.2d 575, 577-78 (D.C. Cir. 1982)).

In *Raines v. Byrd*, on the other hand, six Members of Congress attempted to challenge the constitutionality of the Line Item Veto Act—which Congress had passed over their nay votes—by alleging that the Act diluted their institutional power and changed the "meaning" and "effectiveness" of their votes. *See* 521 U.S. at 814, 821, 825-26. The Supreme Court held that any alleged institutional injury would be to Congress itself, not the Members in their official capacities. *See id.* at 821-26; *see also* Hall, *Legislative Standing*, *supra*, at 30 ("Because the plaintiffs could not

[2] "*Chadha* is generally understood to recognize legislative injury in the threatened elimination of legislative powers, but not in the threatened invalidation of general federal statutes." Hall, *Legislative Standing*, *supra*, at 16. *See also United States v. Windsor*, 133 S. Ct. 2675, 2700 (2013) (Scalia, J., dissenting) (describing *Chadha* as a case in which "the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers").

exercise the legislative power, they could not establish standing by showing an injury to the legislative power.").[3]

Likewise, in *Chenoweth v. Clinton*, four Members of Congress challenged an Executive Order establishing the American Heritage Rivers Initiative (AHRI) on the grounds that it "exceeded [the President's] statutory and constitutional authority" and "diminished their power as Members of the Congress." 181 F.3d 112, 112-13 (D.C. Cir. 1999). Yet, the President had done nothing to deprive Congress of its constitutional authority by ignoring legislation or stopping Congress from legislating. *See id.* at 116 ("It is uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined."). The plaintiffs introduced a bill to terminate the AHRI, but "[t]he bill never came to a vote." *Id.* at 113. The plaintiffs had no right as individuals to have their *preferred* legislation pass, and this Court accordingly held that they lacked individual standing. *Id.* at 116.

In short, injuries to a legislative body can be asserted by that body (under *Bethune-Hill*, *AIRC*, and *Chadha*), but not by individual members of that body (under *Raines*). *See* Hall, *Legislative Standing*, *supra*, at 22. But when *legislators*

[3] In the end, even the purported injury to the institution itself was ethereal: Congress remained free to exempt any bill from the Line Item Veto Act or repeal the Act altogether. *See Raines*, 521 U.S. at 824.

are denied the exercise of a prerogative that is particularized to the individual, then standing becomes not only appropriate but necessary.

In *Coleman v. Miller*, for instance, a resolution to ratify an amendment to the U.S. Constitution came before the Kansas Senate, and the vote split 20 in favor, 20 opposed. 307 U.S. at 435-36. The Lieutenant Governor then cast a vote in favor, breaking the tie, and the senators who had voted against the resolution challenged the Lieutenant Governor's right to cast the deciding vote on the ratification measure. *Id.* The plaintiffs alleged that their "votes against ratification ha[d] been overridden and virtually held for naught." *Id.* at 438.

Paying careful attention to the "nature and source of the claim asserted," *Warth*, 422 U.S. at 500, the Supreme Court recognized standing, *Coleman*, 307 U.S. at 438. The plaintiffs' claims "arose under Article V of the Constitution, which alone conferred the power to amend *and determined the manner in which that power could be exercised*." *Id.* (emphasis added). If the legislators were correct on the merits—and the Lieutenant Governor was not allowed to vote in the amendment-ratification process—then the challenged executive action deprived the individual legislators' votes of their required legal effect. *See Raines*, 521 U.S. at 822-24. When their votes were improperly "deemed defeated" based on the contrary interpretation, *id.*, the legislators' particularized prerogative "to have their votes given effect" was

nullified, *Coleman*, 307 U.S. at 438. Thus, the plaintiffs "ha[d] a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.*

Similarly, in *Raines* the Supreme Court noted that "if state law authorized a school board to take action only by unanimous consent, if a school board member voted against a particular action, and if the board nonetheless took the action," then the lone dissenting board member could have standing to challenge the action. *See* 521 U.S. at 823 n.6 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 536, 544-45, n.7 (1986)).

In other words, the legislative-standing inquiry is always context specific. One must look to the governing law to determine (1) whether there is a well-defined prerogative provided by the relevant provision; (2) what individual, bloc, or entity is functionally entitled to exercise that power; and (3) whether that authority has been denied. When the constitutional authority vested in a legislator or legislators is denied by "treating a vote that did not pass as if it had," that constitutes a quintessential "vote nullification" injury to individual legislators. *See Campbell*, 203 F.3d at 22.

B. Accepting a foreign emolument without consent gives rise to a vote-nullification injury that is particularized to individual legislators.

In this case, a functional inquiry into the Foreign Emoluments Clause—where it lodges power, who may exercise that power, and how—reveals that the actions allegedly taken by the President deny each individual Member of Congress a

prerogative to vote on each proposed emolument before its acceptance. That vote-nullification injury confers standing.

In the normal legislative process, true "vote nullification" is rare because bills are taken up and enacted at the *body's* initiative. Members have no right to vote on any specific piece of legislation that the body has declined to put on the calendar. *Amici* thus agree that "*[g]enerally speaking*, members of collegial bodies do not have standing" to litigate legislative-power impairments that "the body itself has declined" to litigate. Def. Br. at 15 (quoting *Raines*, 521 U.S. at 829 n.10) (emphasis added).

This case, however, does not arise from the normal legislative process. Because Plaintiffs ground their cause of action in the Foreign Emoluments Clause, the source of their claims inverts the outcome of the standing analysis. By prohibiting officials from accepting foreign benefits unless and until Congress holds a specific vote and passes terms of consent, the Clause flips the consequences of legislative inaction and vests individual legislators with a right to vote on any emolument offered to the President before he accepts it. If no vote is held, the official is constitutionally barred from accepting the benefit. The Framers' decision to flip the burden of persuasion for foreign emoluments should not be taken lightly.

The Framers recognized that "[o]ne of the weak sides of republics . . . is that they afford too easy an inlet to foreign corruption." THE FEDERALIST NO. 22

(Alexander Hamilton) (1787); *see also id.* ("[H]istory furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments."). To thwart this threat, the Framers put the onus of disclosing benefits and requesting consent on the official seeking to accept a foreign emolument. This requirement precludes the need for Congress to undertake a perpetual, roving investigation into all U.S. officials, and it explicitly requires that the requesting official—not Members of Congress—contend with the beast of legislative inertia.

Our legislative process makes action purposefully difficult: "The House and the Senate, representing their different interests and with different time horizons, . . . both have to agree to the passage of any law." Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1291 (2017). Every bill must survive numerous "veto gates" in the legislative process "where one group or another has the ability to derail a bill." Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV 1401, 1404 n.11 (2016). This creates a powerful status-quo bias. *See* David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 201, 212 (2017). "[E]ven majority coalitions frequently fail to enact legislative changes," *id.*, because "congressional inaction and obstruction does not require the broad consensus . . . of legislative action," Sant'Ambrogio, *supra*, at 1302.

The Foreign Emoluments Clause leverages these dynamics to ensure that foreign benefits pose no threat of improper influence. Any proposed "consent bill" or "consent resolution" would need to contend with other pressing legislative priorities, withstand public scrutiny, and garner the votes of lawmakers who would be forced to go on record supporting the measure. This accountability is a *feature* of our Constitution's design, and it is consistent with—not counter to—the separation-of-powers considerations that animate standing doctrine. *See Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance."); *cf. New York v. United States*, 505 U.S. 144, 182 (1992) (upholding structural provisions is most critical when "powerful incentives might lead . . . officials to view departures from the [Constitution's] structure to be in their personal interests"). The Framers' design ensures that any emolument must be above reproach to receive consent—and that every official is insulated from foreign influence in the interim.

If the President has accepted foreign benefits before submitting them to Congress, then he has nullified a prerogative belonging to individual Members: the right to cast a vote and have it given effect in accordance with the Constitution. As in *Coleman*, *AIRC*, and *Bethune-Hill*, the specific provision establishes the locus of authority, procedural requirements, and injury. Here, the structure of the Clause

means "any federal officer wishing to accept a foreign emolument must first petition Congress for consent, and each member of Congress is entitled to cast a vote on whether to grant consent." *See* Matthew I. Hall, *Who Has Standing to Sue the President Under the Emoluments Clause?*, 95 WASH. U. L. REV. 757, 769 (2017).

Vote nullification "mean[s] treating a vote that did not pass as if it had." *Campbell*, 203 F.3d at 22. Here, the President, by allegedly accepting foreign emoluments without the consent of Congress, has done just that. Although no vote has yet been held, the President has allegedly conducted himself as though votes have been held and consent granted. *See Raines*, 521 U.S. at 822 (legislator standing is proper when a measure is "deemed ratified" contrary to procedure defined by law because it nullifies a specific vote). This is precisely what the Clause prohibits.

Appellant's superficial parallels to *Bethune-Hill* miss the point of the Foreign Emoluments Clause. The President contends that because the Clause requires the consent of "Congress" the relevant authority rests with Congress as a whole. *See* Def. Br. at 7, 12, 18. And if the Clause stated, "Congress shall have the power to regulate the acceptance of any present, Emolument, Office, or Title, of any kind whatever," then the President would be correct. What he ignores, however, is the logic of the Clause itself: because the Clause bars receipt *unless* Congress completes an action, each Member with authority to vote on a consent resolution has standing to challenge the nullification of that voting opportunity. The President cannot, for

example, accept an emolument if only the House *or* Senate consents. Thus, each body independently possesses the relevant authority under the Clause. Similarly, neither chamber can provide "consent" unless a vote is held. Thus, each individual in each chamber is vested by the Clause with authority to vote prior to any official's acceptance of any emolument. As the district court below observed, "the body can give its consent only through a majority vote of its individual members" in each chamber. J.A. 13 (quoting *United States v. Ballin*, 144 U.S. 1, 7 (1892)).[4]

The President also overreads *Raines* to stand for sweeping (and unsupported) propositions. To start, *Raines* does not bar every legislator lawsuit filed without institutional approval. The *Raines* Court "attach[ed] some importance to the fact that appellees ha[d] not been authorized to represent their respective Houses of Congress," 521 U.S. at 829, but it did not establish a flat rule requiring such authorization, *see Campbell*, 203 F.3d at 21 n.3. Were that true, the opinion would have been notably shorter.

Indeed, both chambers "actively oppose[d]" the lawsuit in *Raines*. 521 U.S. at 829. This drove home that the *Raines* plaintiffs sought to vindicate the interests of Congress as a whole rather than any individual voting right. Here, neither the

[4] Given the structure of the Clause, the failure to hold a vote (or a refusal by a Chamber's leadership to hold a vote) is the functional equivalent of a majority vote against the receipt of an emolument. Thus, Plaintiffs here have been deprived of the benefit of the constitutionally mandated effect of Congress's inaction.

House nor the Senate institutionally oppose the lawsuit—a revealing dynamic given that the Foreign Emoluments Clause would require the consent of a majority of members in both chambers.

Nor does *Raines* hold that *all* suits brought by legislators in their institutional capacities are barred. The decision's validation of *Coleman* forecloses such a reading. *See* 521 U.S. at 821-24. As the *Coleman* decision noted (and as Justice Souter pointed out in *Raines*), decades of Supreme Court cases recognize that injuries suffered in an official capacity can be cognizable under Article III. *See Coleman*, 307 U.S. at 444-45; *Raines*, 521 U.S. at 830-32 (Souter, J., concurring).[5]

In all standing determinations, context matters. And for legislative standing, the inquiry turns on an analysis of what person(s) or entity is empowered to exercise the relevant prerogative. *See Raines*, 521 U.S. at 821-26 & 824 n.6. If a legislator seeks to challenge nullification of his or her authority to vote, *Coleman*, *Raines*,

[5] The "certain" existence of a private plaintiff capable of bringing suit may also weigh against judicial intervention. *See Raines*, 521 U.S. at 829-30. Here, the standing of private plaintiffs has been vigorously contested. Yet, even if such plaintiffs have standing to vindicate *some* emoluments-clause injuries (such as economic harm from unlawful competition), *see, e.g.*, *Citizens for Responsibility and Ethics in Washington v. Trump*, 939 F.3d 131, 160 (2d Cir. 2019), such plaintiffs could not address the full gamut of harms the Foreign Emoluments Clause was drafted to prevent. Receiving "a gold snuff-box" from France poses no threat to American businesses but still raises the risk of foreign influence. 5 Annals of Cong. 1582, 1589 (1798) (Joseph Gales ed., 1834) (Bayard). The Clause prevents this risk by imposing a unique duty on federal officeholders and conferring a unique power upon Plaintiffs.

AIRC, and *Bethune-Hill* support finding standing. Whether that legislator wishes to vote for or against consent is beside the point.[6]

The Framers' deliberate inversion of the normal legislative order—giving congressional inaction a specific legal effect with respect to emoluments—gives rise to a vote-nullification injury that is particularized to individual legislators. Presidential acceptance of foreign benefits with no prior congressional consent "treat[s] a vote that [has] not pass[ed] as if it had," *Campbell*, 203 F.3d at 22, and deprives Plaintiffs of a distinct prerogative guaranteed by the Constitution. This constitutes a cognizable injury that supports Article III standing.

II. PLAINTIFFS' INJURIES ARE DIRECTLY TRACEABLE TO THE CHALLENGED EXECUTIVE ACTION

To satisfy Article III standing, Plaintiffs must show that their injury is "fairly . . . trace[able] to the challenged action of the defendant." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). This criterion merits close attention in the legislative-standing context because many such claims are not truly "caused by" the

[6] Not every injury that "damage[s] all Members of Congress and both Houses of Congress equally" is for that reason necessarily "derivative" or "indirect." *Raines*, 521 U.S. at 821. Unlawfully interfering with voting rights injures all voters in the relevant jurisdiction equally, but the harm is individualized and direct. *See Akins*, 524 U.S. at 24-25 (citing *Shaw v. Hunt*, 517 U.S. 899, 905 (1996)). Similarly, unlawfully interfering with corporate voting rights may injure all shareholders equally, but that does not make the harm derivative. *See, e.g.*, *Avacus Partners, L.P. v. Brian*, No. 11011, 1990 Del. Ch. LEXIS 178, at *21-*22 (Ch. Oct. 24, 1990). The standing of such voters and shareholders does not turn on *how* they wish to vote or whether they constitute a "bloc" sufficient to prevail.

defendant. Here, however, the procedures set out in the Emoluments Clause make the Plaintiffs' injuries directly traceable to the President's allegedly unlawful action.

In many cases, efforts to establish legislative standing fail to establish both injury and traceability because the relevant harm is to the legislative body rather than the individual members. If the legislature itself ceded its authority (as in *Raines*) or the legislature declines to take action in response to executive action (as in *Chenoweth* and *Campbell*), then the alleged "harm" to the individual member is caused by the decisions of the member's colleagues rather than the defendant. *See Raines*, 521 U.S. at 830 n.11.

In *Raines*, the plaintiffs exercised their individual legislative right to vote on the Line Item Veto Act; the plaintiffs "simply lost that vote" and the body as a whole enacted the challenged measure. *Id.* at 824. Such "self-inflicted injuries are not fairly traceable to . . . purported [unlawful action]." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). When legislators challenge the constitutionality of a law passed by the legislature itself, it's "far from clear" that the injury can be described as "fairly traceable" to the party executing that law rather than the plaintiffs' "own colleagues in Congress." *See Raines*, 521 U.S. at 830 n.11. This deficiency strikes at the core of Article III: if a legislator's "dispute appears to be primarily with his fellow legislators . . . separation-of-powers concerns [with judicial intervention] are

most acute." *Riegle v. Fed. Open Market Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981).

Similarly, in *Chenoweth* and *Campbell*, the plaintiffs were permitted to exercise their individual prerogatives as legislators; the legislature as a whole simply decided against the members' desired course of action. The *Chenoweth* plaintiffs were permitted to introduce their bill, but the body declined to bring it to the floor. 181 F.3d at 113. Because the plaintiffs did not have "the necessary majorities in the Congress . . . to block the [executive order]," they "[could not] claim their votes were effectively nullified by the machinations of the Executive." *Id.* at 117. The *Campbell* plaintiffs, meanwhile, voted on various measures that were considered by Congress as whole—and the plaintiffs' desired measures failed. 203 F.3d at 20, 23. In neither instance did the plaintiffs possess any individualized prerogative that was denied by the *defendant's* action.

Such traceability concerns are not implicated here. Plaintiffs' injuries are not caused by any action (or lack of action) by Congress. Rather, it is the President's alleged acceptance of emoluments without seeking or obtaining a prior affirmative vote by Congress that deprives Plaintiffs of their constitutional prerogative. A statute parroting what the Foreign Emoluments Clause already commands could hardly be any more effective than the Clause itself, and there is nothing Congress can do consistent with the design of the Clause to force compliance with its terms.

As the district court held, "[t]he alleged injury is therefore directly traceable to the President's alleged failure to seek Congressional consent." J.A. 57.

III. PLAINTIFFS' INJURIES WOULD BE REDRESSED BY A COURT ORDER AND CANNOT BE REMEDIED THROUGH "LEGISLATIVE SELF-HELP" WITHOUT OVERRIDING THE TEXT AND PURPOSE OF THE FOREIGN EMOLUMENTS CLAUSE

Finally, to establish standing "it must be 'likely,' as opposed to merely 'speculative,' that the injury would be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 38, 43). In the legislative-standing context, courts also consider whether "legislative remedies" or judicial intervention would be more appropriate given the separation-of-powers considerations at play. *See Campbell*, 203 F.3d at 23; *Chenoweth*, 181 F.3d at 116. In this case, Plaintiffs' prayer for relief would redress their injuries, and separation-of-powers considerations weigh *in favor* of the very narrow judicial intervention requested.

On redressability, the central question here is the meaning of the word "emoluments," and resolving that issue "require[s] no more than an interpretation of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 548 (1969). "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Id.* at 549. There is nothing improper (or even particularly unusual) about a court doing so.

Injunctive relief would also remedy the harm of which Plaintiffs complain. Plaintiffs do not ask this Court to "enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). Not every duty owed by the President as a federal official is owed by the President as President. Here, the duty owed by the President is common to every covered federal official, *see infra* note 7, making the lessons of *Johnson* largely inapposite, 71 U.S. at 498-99. Plaintiffs only ask the Court to enforce the terms of this non-discretionary "ministerial duty" that the Clause imposes on all federal officials. *See id.* Such a remedy is limited, appropriate, and constitutional, involving no more than a prohibition on receipt prior to congressional consent.

As for the separation of powers, this case provides a rare example where respect for the Constitution's own checks-and-balances weighs in favor of judicial intervention. In most legislator-standing cases, resorting to judicial process threatens to short-circuit a dispute that is "fully susceptible to political resolution." *See Chenoweth*, 181 F.3d at 116. In *Chenoweth*, the challenged executive action did not eliminate any specific voting opportunity and Congress remained free to displace the initiative *in the way prescribed by the Constitution*: passing legislation. *See id.* ("Congress could terminate the AHRI were a sufficient number in each House so inclined."). The same was true in *Campbell*. *See* 203 F.3d at 23 ("Congress . . . could have passed a law forbidding the use of U.S. forces . . . [and] Congress always

retains appropriations authority and could have cut off funds for the American role in the conflict."). The President attempts to make similar arguments here, claiming that "Congress can withhold funds from the Executive, decline to enact legislation that the Executive desires, or enact and override vetoes of legislation that the Executive disfavors—including on the subject of emoluments." Def. Br. at 23.

But here, the Foreign Emoluments Clause shifts the burden of action. The plain text of the Constitution makes congressional *inaction* an absolute prohibition on foreign benefits received by any federal officeholder in any branch of government.[7] That Congress remains free to legislate "on the subject of emoluments" is as true as it is irrelevant. Congressional action is ponderous, and the Framers used that to their advantage: no constant investigations, no slow and serial subpoena processes, and no need to enact new legislation every time a foreign government seeks to curry favor in a new way. The Clause requires "any present, Emolument, Office, or Title*, of any kind whatever*" to run the gauntlet of our legislative process—it does not rely on Congress to play catch-up.

Demanding that Congress undertake affirmative "legislative self-help" would fail to cure the alleged violation *as prescribed by the Constitution*. Requiring

[7] That the Clause applies to every holder of an 'Office of Profit or Trust' (*i.e.*, not just executive branch officials) also distinguishes this case from *Raines*, *Chenoweth*, and *Campbell*, which were by their very nature about the boundaries of Executive power vis-à-vis the Legislature's power.

positive legislative steps as a matter of standing doctrine under the Cases and Controversies Clause would effectively override the duty imposed—and the rights provided—by the Foreign Emoluments Clause itself. Any judicial construction that risks functionally altering the bargains struck at the Convention in this manner must be approached with great caution.[8]

Simply put, there is no way for Congress to take legislative *action* to ensure that its *inaction* is accorded proper constitutional effect. "The Clause . . . places the burden on the President to convince a majority of Members of Congress to consent. The [approach] suggested by the President flips this burden, placing the burden on Members of Congress to convince a majority of their colleagues to enact the suggested legislation." J.A. 46. As the district court rightly held, "This is not what the Clause requires." *Id.*

Moreover, any attempt to retroactively deem certain benefits to be emoluments would raise its own complex questions: Would such a law constitute a bill of attainder or a taking? Could a successive Congress unwind a receipt two years

[8] The incongruity of the President's proposed construction is compounded by the fact that he could veto any affirmative measure enacted by Congress. The President's construction would permit him to accept emoluments so long as he could muster one-third of the votes in one chamber, and thereby prevent override of his veto. Construing the Cases and Controversies Clause in this way "would effectively nullify the Convention's decision" to prohibit the acceptance of emoluments in the absence of affirmative consent by majorities of both Chambers. *See Powell*, 395 U.S. at 548.

hence? The President fails to explain how such proposed "remedies" do not render the Clause a dead letter.

Nor does the fact that Congress always retains "the [power] of impeachment," *Campbell*, 203 F.3d at 23, counsel against finding standing here. First, *Campbell* cannot be read to establish such a categorical rule, which would foreclose congressional standing in every case. Such a cudgel is irreconcilable with the nuanced and measured treatment found in *Raines*. Second, "[i]mpeachment should not be the congressional response to a sincere presidential belief [about a simple question of constitutional interpretation]." Sant'Ambrogio, *supra*, at 1305. It remains "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and there seems little reason for the nation to endure a traumatic political upheaval rather than a routine exercise of judicial power.

Article III does not demand that impeachment be the first, last, and only mechanism to correct Foreign Emoluments Clause violations. It would hardly serve separation-of-powers purposes or the purposes of the Clause to claim that Congress must jump directly to impeachment any time any federal official believes the foreign benefit they have received does not constitute an "emolument" under the Constitution. The very limited type of judicial intervention sought in this case would help remedy alleged violations of the Foreign Emoluments Clause in a manner

consistent with the text, design, and purpose of that Clause—all without repeatedly and unnecessarily pushing our government to the brink.

* * *

"Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it [spoil for one]." *Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982). Legislator standing raises intricate questions about this constitutional structure. The Cases and Controversies requirement of Article III "is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787," *id.* at 476, but so too is the demanding procedural mechanism found in the Foreign Emoluments Clause of Article I. Neither can be read to the exclusion of the other.

Amici believe Plaintiffs have established Article III standing and the Court is therefore obligated to hear their case. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (The Judicial Branch "ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). No doubt, the present case may have serious political consequences. But "courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Chadha*, 462 U.S. at 943). "[T]he

Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Id.* at 194-95 (quoting *Cohens*, 19 U.S. at 404).

CONCLUSION

For these reasons, the district court's holding with respect to standing should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This *amici curiae* brief is in 14-point Times New Roman proportional font and contains 6,427 words as counted by Microsoft Word, excluding the items that may be excluded. The brief thus complies with the type-face, style, and volume limitations set forth in Rule 29(a)(5) and 32(a)(5)–(7)(B) of the Federal Rules of Appellate Procedure.

/s/ *Ruthanne M. Deutsch*
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October 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I served the foregoing *amici curiae* brief upon all registered counsel by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ *Ruthanne M. Deutsch*
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APPENDIX A

APPENDIX A
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