**[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 SEPARATION OF POWERS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES RICHARD BLUMENTHAL, ET AL. AND IN SUPPORT OF AFFIRMANCE

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Dated: October 29, 2019

## CORPORATE DISCLOSURE STATEMENT & REPRESENTATION OF CONSENT TO FILE

Separation of Powers Scholars state that no signatory to the brief is a nongovernmental corporate party, nor do they issue any stock, thus they are not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of this Court.

Pursuant to Circuit Rule 29(b), Separation of Powers Scholars represent that all parties have consented to the filing of this brief.

Respectfully submitted,

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**A. Parties and *Amici*:**

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

**B. Ruling Under Review:**

References to the rulings at issue appear in Appellees' brief.

**C. Related Cases:**

All related cases of which counsel is aware are identified in Appellees' brief.

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## CERTIFICATE REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel for the Separation of Powers Scholars state that a separate brief is necessary to provide their unique perspective and expertise on the separation of powers legal issues raised in this case. They submitted an *amici* brief below before the United States District Court for the District of Columbia. *See Blumenthal v. Trump*, 373 F. Supp. 3d 191, 210-211 (D.D.C. 2019) (citing Separation of Powers Scholars' *amici* brief). Separation of Powers Scholars are aware of other planned amici briefs in support of Respondent in this case, but they believe that the breadth of the issues presented and the expertise of the other amici and anticipated topics to be covered warrant separate briefing. Separation of Powers Scholars submit this brief specifically concerning the vital check-and-balance role of the Foreign Emoluments Clause under the Constitution. A joint brief is not feasible because other *amici* have interests and opinions regarding other issues raised in this case that go beyond providing the constitutional and historical framework of the separation of powers concerns at issue here, which is the focus of the Separation of Powers Scholars' brief. Counsel for Separation of Powers Scholars worked to avoid duplication or other burdens on the Court.

Respectfully submitted,

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October 29, 2019

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page**

## FEDERAL COURT CASES

**FEDERAL COURT RULES**



**OTHER AUTHORITIES**

## IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

Amici curiae—Harold H. Bruff, Peter M. Shane, Peter L. Strauss, and Paul R. Verkuil—are distinguished professors of administrative and constitutional law who are experts in separation of powers issues.[1] They have a strong interest in ensuring that the Court's decision in this case upholds the separation of powers principles and the checks and balances found in the Constitution. They thus file this *amici* brief to urge the Court to affirm the district court's decisions denying the President's motion to dismiss. All parties have consented to the filing of this brief.

## RULE 29(a)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Separation of Powers Scholars represent that their counsel drafted this brief. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

## SUMMARY OF ARGUMENT

The Constitution does not provide merely for an "abstract generalization" of the separation of powers. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Rather, it establishes a structure of government consisting of specific processes that enable

[1] Further biographical information is provided in the attached appendix.

concrete checks and balances. These elements reflect the founders' belief that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). And in that structure, it is the fundamental role of the courts "to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and to safeguard the "enduring structure" of the Constitution, *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment). At issue in this case is the integrity of one of the Constitution's critical checks and balances: the Foreign Emoluments Clause.

This clause addresses the founders' profound concerns about foreign influence and corruption. It imposes a duty on all federal officials not to accept foreign emoluments of any kind and allocates to Congress the sole authority to provide exceptions to this absolute prohibition.

Despite the President's suggestions to the contrary, the true danger to the structure and processes set forth in the Constitution lies not in permitting this case to proceed, but in dismissing it. Accepting the President's arguments here would require Congress to take affirmative action to reject specific disfavored foreign emoluments when a President has acted to accept these emoluments absent congressional consent. Such an outcome would turn the Foreign Emoluments Clause on its head, undermining the President's duty to comply with his Constitutional obligations and abrogating the judiciary's duty to safeguard the

structure of the Constitution. This Court should not allow the President to deprive members of Congress of their constitutional duty to guard against foreign influence and corruption by selectively consenting to the acceptance of only those foreign emoluments it deems appropriate. The district court's orders should be affirmed.

## ARGUMENT

### I. ENSURING THE INTEGRITY OF THE FOREIGN EMOLUMENTS CLAUSE BOLSTERS, NOT UNDERMINES, THE CONSTITUTION'S SEPARATION OF POWERS.

"The[] provisions of Art. I," which include the Foreign Emoluments Clause, "are integral parts of the constitutional design for the separation of powers." *INS v. Chadha*, 462 U.S. 919, 946 (1983). As the Supreme Court explained in *Chadha*, "'[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)). So too was a commitment to using the Constitution's structures to enforce a general principle of anti-corruption. *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. Univ. L. Rev. Colloquy 30, 30 (2012) (noting the Constitution's "structural commitment to fighting corruption"). Indeed, the Foreign Emoluments Clause relies on separation of powers as a means of preventing corruption in the Offices of the United States.

### *A. The congressional consent element of the Foreign Emoluments Clause is a critical separation of powers mechanism to prevent corruption.*

Among the Constitutional Convention delegates, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 181 (1994). According to James Madison's notes on the convention, the term "corruption" was mentioned by 15 delegates "no less than 54 times" and "[e]ighty percent of these references were uttered by seven of the most important delegates, including Madison, Morris, Mason, and Wilson," *id.* at 177 (referencing James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (1987)), with Mr. Mason arguing that "if we do not provide against corruption, our government will soon be at an end." 1 *The Records of the Federal Convention of 1787*, at 392 (Max Farrand ed., 1911).

Anti-corruption concerns were likewise prominent in the public advocacy efforts to garner support for the Constitution's ratification. Four of the first five Federalist Papers addressed the "Dangers from Foreign Force and Influence." *The Federalist Nos. 2-5* (John Jay). The Office of the President was not considered

immune from the danger. As Alexander Hamilton argued in *The Federalist No. 68* regarding the "mode of electing the President":

> [n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils.

*The Federalist No. 68* (Alexander Hamilton).

The Foreign Emoluments Clause was a crucial measure intended to insulate the political system from foreign influence. As Governor Randolph observed during the Virginia Ratification Convention:

> All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. . . . It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.

3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465 (Jonathan Elliot ed., 1827). The clause was inserted into the Constitution by a motion of Charles Pinckney, who "urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external

influence." 2 *The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., 1911). The measure passed unanimously. *Id.*[2]

The Foreign Emoluments Clause grants Congress the "exclusive authority to permit the acceptance of presents from foreign governments by persons holding offices under the United States." 4 John Bassett Moore, *A Digest of International Law* 579 (1906) (quoting Letter from James Madison, Secretary of State, to David Humphreys (Jan. 5, 1803)); *see also Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 17-18 (1994) ("The decision whether to permit exceptions that qualify for the Clause's absolute prohibition or that temper any harshness it may cause is textually committed to *Congress* . . . .") (emphasis in original). As now-Supreme Court Justice Alito observed while he was Deputy Assistant Attorney General at the Office of Legal Counsel of the Department of Justice ("OLC"), "the Emoluments Clause is 'directed against every kind of influence by foreign

[2] The clause in the Constitution mirrors a similar clause contained in the Articles of Confederation, the country's original governing document. Under the Articles of Confederation of 1781, art. VI, the clause stated that "nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever, from any king, prince, or foreign state." That version of the clause lacked an express reference to the consent of Congress; however, even under the Articles of Confederation, the accepted interpretation of the clause allowed for congressional consent. *See* Teachout, *supra*, at 36.

governments upon officers of the United States,' (24 Op. A.G. 116, 117 (1902)), unless the payment has been expressly consented to by Congress." Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA from Samuel A. Alito Jr., Deputy Assistant Attorney General, *Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales*, 1986 OLC Lexis 67 at *2 (May 23, 1986).

By allocating to Congress the broad power to determine whether to grant an exception to this prohibition, the framers of the Constitution imbued the clause with two related purposes. It serves both to guard against corruption, and to establish a congressional check on persons holding offices of profit or trust under the United States. The Foreign Emoluments Clause, like other provisions of the Constitution, protects "against a gradual concentration of the several powers" and "control[s] the abuses of government" by having one branch serve as a constitutional check against members of another branch. *The Federalist No. 51* (James Madison). During the first recorded circumstance of Congress considering application of the clause, Representative Harrison Gray Otis explained that:

> [w]hen every present to be received must be laid before Congress, no fear need be apprehended from the effects of such presents. For, it must be presumed, that the gentleman who makes the application has done his duty, as he, at the moment he makes the application, comes before his country to be judged.

8 *Annals of Cong.* 1585 (1798) (Statement of Rep. Otis).

Ultimately, as one professor has described:

> Congressional acquiescence is not a minor check. It takes power from the executive branch and gives Congress oversight responsibility to make sure that officers . . . are not being seduced from their obligations to the country. The congressional requirement leads to a radical transparency and interrogation that could chill quiet transfers of wealth for affection.

Teachout, *supra,* at 36.

Accordingly, the President's characterization of Congress's "weaker" interest as "merely concerning consent to foreign 'emoluments'" (Appellant's Br. 18) is fundamentally inconsistent with the founders' structuring of the Constitution. The founders were deeply concerned with preventing foreign influence and corruption and enshrined in the Constitution the duty of Congress as gatekeepers over the acceptance of *any* foreign emolument.

### *B. Requiring Plaintiffs to address foreign emoluments through "self-help" remedies is contrary to the Constitution.*

The Foreign Emoluments Clause places the burden on persons holding offices under the United States, including the President, to disclose emoluments and obtain the consent of Congress before accepting any emolument. It does not require Congress to discover foreign emoluments or take affirmative actions to prevent their acceptance. Nevertheless, the President argues that "[b]ecause the Members have ample self-help remedies, they must proceed in their own chambers

and not in the federal courts." Appellant's Br. 8. This reasoning is contrary to the text of the Foreign Emoluments Clause and the structure of the Constitution.

The President states 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." Appellant's Br. 23. This is true for any disagreement between the branches. The Constitution, however, does not treat foreign emoluments as a routine political disagreement. Had the founders intended that Congress dissuade officials from accepting foreign emoluments through individual pieces of legislation or by withholding funds, there would be no need to include the Clause in the Constitution.

The President's misplaced reliance on Congress's "self-help" remedies is highlighted in the citation to Justice Scalia's dissent in *United States v. Windsor*, 570 U.S. 744 (2013). Appellant's Br. 22-23. Justice Scalia emphasized the "crucial" condition for these non-judicial remedies: "Congress must care enough to act against the President itself." *Windsor*, 570 U.S. at 791 (Scalia, J., dissenting). But with respect to the specific issue of foreign emoluments, the Constitution does not say that Congress "must care enough to act against" an official's acceptance of foreign emoluments. It says precisely the opposite: the acceptance of foreign

emoluments is prohibited, unless Congress cares enough to affirmatively allow the acceptance of a particular foreign emolument.

### *C. The Court should not make impeachment the sole remedy to address violations of the Foreign Emoluments Clause.*

The Foreign Emoluments Clause gives Congress the discretionary authority to grant an official permission to accept a foreign emolument, but it does not vest in Congress the power or duty to invalidate an official's acceptance of a foreign emolument after the fact. Preventing this case from proceeding, however, would effectively interpret the Foreign Emoluments Clause as enforceable against the President only through impeachment.[3] Such a ruling would itself raise separation of powers concerns; moreover, it would be potentially derailing and destabilizing in ways courts should consider.

Any decision that renders impeachment the sole remedy for a violation of law would leave Congress with no remedy save a "nuclear bomb." *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974) ("*NTEU I*"). In *NTEU I*, the D.C. Circuit addressed the serious nature of impeachment, explaining that "the Constitution should not be construed so as to paint this nation into a corner which

[3] Again, while the "self-help" remedies discussed above would be available to Congress, that is true for any dispute with the President. Treating foreign emoluments as an ordinary political dispute is contrary to the Constitution's clause expressly prohibiting any acceptance of foreign emoluments absent the consent of Congress.

leaves available only the use of the impeachment process to enforce the performance of a perfunctory duty by the President." *Id.* As discussed in more detail below, courts have declined to dismiss cases brought against the President when such suits were the only means available to obtain judicial relief, even though impeachment is also always available as a potential alternative source of relief. *See id.*; *Minn. Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973).

As this Court has explained, "[u]nder our system of law, the judiciary has a duty envisioned by the constitutional principle of checks and balances to keep both the Executive and Congress within their respective constitutional domains in order to prevent that concentration of power which the Founding Fathers so feared." *NTEU I*, 492 F.2d at 612 (footnote omitted) (citing *The Federalist No. 51* (James Madison)). In order to ensure the President's compliance with the constitutional duties and obligations under the Foreign Emoluments Clause, and fulfill the role of the judiciary in enforcing the Constitution's structure of checks and balances, the Court should allow this case to proceed.

## II. ADJUDICATION OF THIS CASE IS CONSISTENT WITH PRECEDENT AND PRINCIPLES OF SEPARATION OF POWERS.

### *A. This case is well within both the competence and authority of the judiciary.*

That this case implicates the separation of powers—in that it implicates a clause of the Constitution requiring congressional consent to the otherwise

prohibited conduct of a member of the executive branch—does not remove it from the realm of justiciability. It is the "'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. at 177). To reach "[a]ny other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (citing *The Federalist No. 47*, at 313 (James Madison) (Sherman Mittell ed. 1938)). As such, in *United States v. Nixon*, the Court reached the conclusion that it is the province of the judiciary to "say what the law is" with respect to the claim of executive privilege presented in that case. Here, too, it is the province of the judiciary to say what the law is with respect to the Foreign Emoluments Clause.

Courts regularly address disputes that focus on the constitutional boundary between the legislative and executive branches. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court considered justiciable the question of whether Congress could limit an executive officer's removal by the President for cause. In *Bowsher*, 478 U.S. at 726, the Court concluded that "Congress cannot reserve for itself the power of removal of an [executive] officer charged with the execution of the laws except by impeachment." In *Myers v. United States*, 272 U.S. 52 (1926), the Court considered whether Congress could reserve the right to consent to removal of a

postmaster during his term, and in *Buckley*, 424 U.S. 1, whether Congress could appoint members of the Federal Election Commission. *See also INS v. Chadha*, 462 U.S. 919 (striking down a one-house legislative veto); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (considering whether nationalization of the steel mills constituted law making); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (considering for-cause restrictions on removal of Federal Trade Commissioners).[4]

The President suggests that "equity counsels restraint in abrogating a centuries-long tradition of resolving emoluments-related issues through . . . political processes rather than suits before the federal judiciary." Appellant's Br. 30. The President, however, cites no examples of Congress's alleged tradition of engaging in "self-help" to resolve "emoluments-related issues." Consistent with the Constitution, it has instead been customary for past Presidents to seek and

[4] The Import/Export Clause and the Tonnage Clause, both of which lay prohibitions on the actions of states that have not obtained such consent, are regularly litigated and certainly found justiciable—indeed, their justiciability appears to be unchallenged. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009); *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *La. Land & Expl. Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990).

obtain the consent of Congress. *See* Appellees' Br. 10-11 (citing letters from past Presidents to Congress).[5]

Moreover, the President's argument ignores the history and practice of the courts in interpreting the constitutional duties of each branch. It is the duty of members of the executive branch, in the first instance, to ensure that they do not violate applicable constitutional prohibitions. However, this duty does not, as the President suggests, mean that such members operate free of any check from coordinate branches. The Supreme Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). This is the natural result of the interdependence—expressed in part as a system of checks and balances—of the three branches of government. As Justice Burger stated in *United States v. Nixon*, 418 U.S. at 707, "[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *See*

[5] If there is any question as to whether an item or intangible falls within the scope of the clause, the President has the resources of the Office of Legal Counsel available. *See, e.g.*, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1 (2009); *Proposal That the President Accept Honorary Irish Citizenship*, 1 Op. O.L.C. Supp. 278 (1963).

*Buckley*, 424 U.S. at 121 (explaining that the founders did not, in creating the Constitution, provide for the "hermetic sealing off of the three branches of Government from one another"). It is the province and duty of the courts to say what the law is—and the Foreign Emoluments Clause does not constitute an exception to that duty. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

Importantly, Plaintiffs' claims here cannot be viewed as a dispute with other members of Congress because nothing has been laid before Congress for its consideration. The President has not informed Congress of foreign emoluments before accepting them, and Congress cannot fulfill its constitutional duty if it has not been made aware of what foreign emoluments are being accepted.

This case presents a clear legal question—whether the President has violated the Foreign Emoluments Clause—that the judiciary is both authorized and well-suited to handle. The "mere fact that there is a conflict between the legislative and executive branches" has never been sufficient to remove a case from justiciability. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976). And

indeed, here there is not even a conflict. This case does not interfere with Congress's internal affairs, and, as discussed below, adjudicating this case does not interfere with the President's constitutional duty to ensure that the laws are faithfully executed. To the contrary, allowing this case to proceed ensures that the President's judgment in undertaking that duty is not compromised through violation of another constitutional mandate. And only judicial resolution of this case will ensure that Congress is asked for its consent, as the Constitution requires. The district court's orders should be affirmed. Doing so will effectuate the checks and balances established by the Constitution.

### *B. This case represents a valid exercise of judicial power against the President.*

That this action is brought against the President only heightens the need for this Court to affirm the district court's orders and preserve the specific checks and balances in the Constitution. The concerns regarding foreign influence and corruption that underlie the Foreign Emoluments Clause are of even greater importance when applied to the President as compared to lower officials. Moreover, while injunctive or declaratory relief against the President may be unusual, they are not prohibited by the Constitution. And such relief is the only way to address the claims raised here (absent the more extraordinary and disruptive remedy of impeachment, discussed above).

Indeed, the Members of Congress who brought this case lack alternative means to press their Foreign Emoluments Clause claims in court. This Court has noted that "[i]n most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328, 1331 n.4 (D.C. Cir. 1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)). This is not like "most cases." Here, relief cannot be obtained by an injunction against subordinate officials, and declaratory or injunctive relief against the President is the only way to ensure the rule of law.

The President cites *Mississippi v. Johnson*, 71 U.S. 475 (1866) and *Franklin*, 505 U.S. 788 to claim that equitable relief against the President in his official capacity would be unconstitutional (Appellant's Br. 33), but neither case requires dismissal here. In both of those cases, there were alternative ways by which the courts could address plaintiffs' injuries. *Mississippi v. Johnson* involved Mississippi's challenge to the Reconstruction Acts, and although the Supreme Court dismissed that case, Mississippi subsequently brought suit against the Secretary of War and two other defendants challenging the same two

Reconstruction Acts. *Mississippi v. Stanton*, 154 U.S. 554 (1868).[6] In *Franklin*, although a plurality of the Court suggested that "the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable," even the plurality did not address this question because the injury could be redressed through declaratory relief against the Secretary of Commerce. *Franklin*, 505 U.S. at 803.

In situations similar to the one in this case, where there was no other remedy, courts have allowed suits against the President to go forward. In *NTEU I*, this Court issued a declaratory judgment against the President. Ultimately, this decision resulted in "some 3 1/2 million employees ultimately receiv[ng] retroactive salary payments ranging from $69 to more than $450." *Nat'l Treasury Emps. Union v. Nixon*, 521 F.2d 317, 319 (D.C. Cir. 1975) (abrogated on other grounds by *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993)) (describing the result of *NTEU I*). The statutory language at issue provided that the President "shall" adjust pay rates according to Section 5305(a)(2) unless he submitted an alternative plan by a certain date. *NTEU I*, 492 F.2d at 601. The D.C.

[6] Although that latter case was dismissed for presenting a nonjusticiable political question, "*Mississippi v. Stanton* indicates that even assuming *Mississippi v. Johnson* was dismissed solely because the President was a defendant, that result probably did not leave the State of Mississippi without any proper defendant to sue to test the constitutionality of the Reconstruction Acts." *NTEU I*, 492 F.2d at 614.

Circuit found that "the President failed to submit an alternative plan . . . he was required to submit if he desired to change or delay the otherwise required pay adjustments mandated by Section 5305(a)(2)." *Id.* In that case, as here, the President relied on *Mississippi v. Johnson* to argue that "the complaint should be dismissed . . . because to permit the President to be sued in this case would violate the separation of powers doctrine," and this Court rejected that argument. *Id.* at 606. Similarly, in *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973, the court noted that suits against the President are generally unsuccessful, but explained one of the important differentiating factors present: "it appears that plaintiffs' only remedy is to sue the President directly," as the President had neither appointed members of the National Advisory Council on Indian Education nor delegated his power to do so. *Id.* at 976; *see also id.* at 975-76 (noting that while "the President clearly has discretion to choose whom to appoint to the Council, he apparently has no discretion to decide if the Council should or should not be constituted").

Here, the President concedes that the Supreme Court in *Mississippi* suggested that the President may be required by a court to perform a ministerial duty of law. Appellant's Br. 33. This Court similarly has explained that:

> this Court should be extremely reluctant in light of the fundamental constitutional reasons for subjecting Executive actions to the purview of judicial scrutiny to hold that the federal judiciary lacks power to compel the

> President to perform a ministerial duty in accordance with the law.

*NTEU I*, 492 F.2d at 612.[7] The President attempts to circumvent these cases by claiming 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, and thus his 'performance of [that] official dut[y]' is not ministerial under *Mississippi*." Appellant's Br. 34 (quoting *Mississippi*, 71 U.S. at 501). As explained above—and as is clear on the face of the Clause itself—the Constitution provides that *Congress*, not the office holder in question, is to exercise judgment with respect to whether particular circumstances warrant exception from the general prohibition on accepting foreign emoluments. *See Blumenthal v. Trump*, 373 F. Supp. 3d 191, 212 (D.D.C. 2019) ("[S]eeking congressional consent prior to accepting prohibited foreign emoluments is a ministerial duty.") (citing *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996)).[8]

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[7] The D.C. Circuit in *NTEU I* declined to issue a writ of mandamus, finding that a declaratory decree was most appropriate in that situation. *Id.* at 616. Here, there also is the option of ordering the more limited remedy of declaratory relief. However, the question of what remedy is most appropriate is not necessary to address on interlocutory appeal of the district court's orders on the President's motion to dismiss.

[8] The President is likewise wrong to argue that adjudication of this matter raises separation of powers concerns because "the Constitution itself vests 'enforcement powers' concerning compliance with federal law in the Executive, not the Legislative, branch." Appellant's Br. 18 (citations omitted). The issue here is not the execution of congressionally-enacted laws; it is about Executive compliance

Finally, although the Supreme Court has noted that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties," *Loving v. United States*, 517 U.S. 748, 757 (1996), no risk of such impairment is present here. This case does not involve the constitutional duties of the executive branch; it involves a mandatory constitutional duty imposed on all officeholders, whether in the executive or another branch, that the founders included in the Constitution to prevent undue foreign influence. The President does not identify any particular laws the execution of which could be impaired by this suit. Thus, this case is again distinguishable from *Mississippi v. Johnson*, in which the relief sought by the plaintiff against the President would have interfered directly with the President's ability to take care that the Reconstruction Acts were faithfully executed. *See Mississippi v. Johnson*, 71 U.S. at 499.

It should also be clear that, far from distracting the President from his official duties, "any Presidential time spent dealing with, or action taken in response to" a case clarifying the scope of the Foreign Emoluments Clause is actually "part of a President's official duties." *Clinton v. Jones*, 520 U.S. 681, 718 (1997) (Breyer, J., concurring in the judgment). "Insofar as a court orders a

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with the Constitution's absolute prohibition on the acceptance of foreign emoluments absent the consent of Congress.

President, in any [separation of powers] proceeding, to act or to refrain from action, it defines, or determines, or clarifies the legal scope of an official duty." *Id.*

In addition to imposing an independent constitutional duty, the Foreign Emoluments Clause is a critical check and balance on the President's Article II powers. It protects against foreign influence over and corruption of the President, as with inferior officers. Compliance with the Foreign Emoluments Clause bolsters the resistance of the executive branch to corruption and foreign influence and thus enhances, rather than interferes with, his ability to take care that the laws are faithfully executed. By adjudicating this case, this Court would effectuate one of the checks and balances found in the Constitution, and thus be acting precisely in line with how the separation of powers was intended to function.

## CONCLUSION

For these reasons, the Court should affirm the district court's orders.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headers, quotations, and footnotes, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the rules of this Court, contain 5,170 words, as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

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# APPENDIX A
# BIOGRAPHIES OF SEPARATION OF POWERS SCHOLARS

**Harold H. Bruff** is the Rosenbaum Professor of Law Emeritus at the University of Colorado School of Law, where he was Dean from 1996-2003. His numerous writings on constitutional and administrative law include *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press 2006), and *Untrodden Ground: How Presidents Interpret the Constitution* (University of Chicago Press 2015), examining how presidents have interpreted their constitutional powers. He has served in the Office of Legal Counsel in the U.S. Department of Justice and has testified before Congress many times on public law issues.

**Peter M. Shane** is the Jacob E. Davis Chair and Jacob E. Davis II in Law at the Ohio State University's Moritz College of Law. Among his many writings, he has co-authored or edited eight books, including *Separation of Powers Law: Cases and Materials* (Carolina Academic Press, 4th ed. 2018) and *Madison's Nightmare: How Executive Power Threatens American Democracy* (University of Chicago Press 2009), and he is a former public member of ACUS. Before entering full-time teaching in 1981, Professor Shane served as an attorney-adviser in the Office of Legal Counsel in the U.S. Department of Justice and as an assistant general counsel in the Office of Management and Budget.

**Peter L. Strauss** is the Betts Professor of Law Emeritus at Columbia Law School. His many influential articles bearing on separation of powers issues include *Overseer or "The Decider"?: The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007), and *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984). An editor of *Gellhorn and Byse's Administrative Law: Cases and Comments* since its Seventh Edition and author of Administrative Justice in the United States (1989, 2002, 2016), he served as the first general counsel to the U.S. Nuclear Regulatory Commission while on leave from Columbia, and as an attorney in the Office of the Solicitor General before his joining the Columbia faculty in 1971. Professor Strauss was elected in 2010 to the American Academy of Arts & Sciences.

**Paul R. Verkuil** is a Senior Fellow at the Center for American Progress and President Emeritus of the College of William & Mary. He is the last Senate-confirmed Chairman of ACUS (2010-2015). ACUS is the federal agency devoted to matters of administrative procedure and policy that has long produced recommendations of value to the judiciary, Congress, and the executive. Mr. Verkuil is a well-known administrative law scholar and the co-author of the treatise *Administrative Law and Process* (Foundation Press, 6th ed. 2014). He has served as special master to the U.S. Supreme Court in the original jurisdiction case of *New Jersey v. New York*, 523 U.S. 767 (1998).

## CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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