

No. 20-5

**In the
Supreme Court of the United States**

RICHARD BLUMENTHAL, ET AL.,
Petitioners,

v.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES,
Respondent.

**On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the
District of Columbia Circuit**

**BRIEF OF THE NISKANEN CENTER AS
AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

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INTERESTS OF *AMICUS CURIAE*¹

Amicus Curiae The Niskanen Center is a nonpartisan 501(c)(3) think tank that works to promote a society that is open to political, cultural, and social change, as well as a government that protects individual and societal freedoms. *Amicus* is concerned about the existence of corruption at the highest levels of our government—in particular, President Trump’s well-documented violations of the Foreign Emoluments Clause that include maintaining ownership over his vast and varied business interests. Through those interests, the President has left the door open to foreign efforts to corrupt and influence our government at the highest levels. Perhaps even more concerning than these open and unapologetic violations is the decision by the court below—which essentially nullified the one potent constitutional bulwark against this unbridled corruption: the United States Congress.

For the reasons set forth below and in the Petition, *amicus* implores the Court to grant the Petition and restore the balance of power between the executive and legislative branches by finding that Petitioners have standing to cast votes to check the President’s

¹ No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel for *amicus* notified counsel for each party at least 10 days before the filing deadline of *amicus*’s intention to file this brief, and counsel of record for each party provided written consent for the filing of this *amicus* brief.

acceptance of foreign emoluments.

SUMMARY OF ARGUMENT

The Framers were passionate about safeguarding the republic against corruption, particularly from foreign governments. The threat was clear: foreign interests would try to use their wealth to tempt public servants and sway America's foreign policy decisions. Thus, the Framers gave us the Foreign Emoluments Clause. To prevent foreign powers from improperly influencing the President, the Clause provides that any largess from foreign powers will be subject to congressional scrutiny and approval.

Although the Clause was essential for the Framers, it has received little attention since the founding. Two independent and converging trends, however, have made the Clause critically important again. First, because modern presidents are more likely than ever to have wide-ranging foreign business interests, they are increasingly susceptible to attempts by foreign governments to gain favor through emoluments. Second, because modern presidents have enormous foreign-affairs power, the effect of a foreign government gaining favor with the president could be devastating. As these trends have flourished, so too has the potential for corruption, which in turn increases the need for judicial interpretation of this key constitutional provision.

Thus, the very nature of the modern presidency reaffirms the need for this Court to uphold the promise of the Foreign Emoluments Clause by allowing members of Congress to fulfill their duty to act as an essential constitutional bulwark against corruption. This Court can preserve open government that protects the many, rather than the few (or, in this case, the one) who may be in a position to benefit from foreign corrupting influences.

ARGUMENT

I. THE FOREIGN EMOLUMENTS CLAUSE IS A BULWARK AGAINST CORRUPTION.

The Framers of the new American government recognized that while structures alone could not protect the fledgling republic, simply relying on the virtue of public servants was a non-starter. “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” *The Federalist* No. 51 (James Madison). Thus, in constructing the new government, “[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.” *The Federalist* No. 68 (Alexander Hamilton).

The Framers were especially concerned about foreign corruption. “One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.” *The Federalist* No. 22 (Alexander Hamilton). The specific problem

was obvious: foreign interests would try to use their wealth to tempt public servants and ultimately sway the foreign policy decisions of the new American government. See Notes of James Madison (July 5, 1787), in 1 *The Records of the Federal Convention of 1787*, at 530 (Max Farrand ed., rev. ed. 1966); Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 361–62 (2009). It was all too easy to see that public servants might develop a sixth sense about how their work could affect a foreign king and thus work instead to keep the foreign king happy, even if doing so conflicted with the interests of the public servant’s own people. See Lawrence Lessig, *Republic, Lost* 18 (2011).

Thus, the Framers enshrined the Foreign Emoluments Clause:

[N]o Person holding any Office of Profit or Trust under them, 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.

The Foreign Emoluments Clause—including the remarkable line “of any kind whatever”—is one of the more strongly worded prohibitions in the Constitution. Zephyr Teachout, *Corruption in America* 26–27 (2014). By drafting such a strong provision, the Framers ensured that Congress would scrutinize and stand

in the way of any improper efforts by foreign powers to buy influence or access.

II. DILIGENT ENFORCEMENT OF THE FOREIGN EMOLUMENTS CLAUSE IS CRITICAL TO CHECKING THE POWER OF THE MODERN PRESIDENCY.

The Foreign Emoluments Clause was a key part of the Framers' vision for safeguarding against corruption. However, since the founding, the Clause has received little attention or scrutiny. *See* Bianca Spinosa, *Interpreting Emoluments Today: The Framers' Intent and the "Present" Problem*, 78 Md. L. Rev. 998, 998 (2019). In particular, until recently, no federal court has been required to interpret the meaning of the Clause. *See id.* at 1002.

But two trends related to the modern presidency have brought the Foreign Emoluments Clause back to the forefront: **(A)** modern presidents are more likely than ever to have wide-ranging business interests that extend outside the United States. With these interests come increased opportunities for foreign powers to attempt to gain favor with the president through emoluments; and **(B)** modern presidents have enormous foreign affairs power, and the effect of a foreign government gaining favor with the president could lead to devastating results for the country.

These trends will only proliferate with time. This Court should act to preserve the balance of power and ensure that the Foreign Emoluments Clause can

serve its intended purpose as a safeguard against corruption.

A. Modern Presidents Are Likely To Have Extensive Business And Financial Interests That Go Beyond The United States.

Foreign governments have many opportunities to use emoluments to influence a president who has sprawling business interests. This is not speculation. President Trump's experience is a case in point. Foreign governments have actively sought to curry favor with President Trump by pursuing private business transactions with companies owned by or connected to him, and even by granting favorable regulatory treatment to his business ventures. See Jonathan O'Connell & David A. Fahrenthold, *Trump's Other Ukraine Problem: New Concern about His Business*, The Washington Post (Sept. 26, 2019);² David A. Fahrenthold, *Romanian Consulate Event at Trump Hotel in Chicago Draws Scrutiny*, The Washington Post (Dec. 12, 2018);³ Jon Swaine and Julian Borger, *Trump Set to Benefit as Qatar Buys \$6.5m Apartment in New York Tower*, The Guardian (May 4, 2018);⁴ Anita Kumar, *Foreign Governments Are Finding Ways to Do Favors for Trump's Business*, McClatchy

² <https://wapo.st/2m3gZ9A>. All URLs last visited August 7, 2020.

³ <https://wapo.st/2MNitQ9>.

⁴ <https://bit.ly/2Wdyamt>.

(Jan. 2, 2018);⁵ Erika Kinetz, *China Approves 9 of Trump’s Trademarks That They Had Previously Rejected*, Associated Press (June 14, 2017);⁶ Jackie Northam, *Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions*, NPR (Feb. 25, 2017).⁷

President Trump’s situation has brought the issue to the forefront, but a president with vast business interests is something that is here to stay, in one form or another. Presidential candidates from the two major political parties (or no party at all) are now more than ever hyper-wealthy individuals who have ever larger and more complex personal business interests. See Dan Alexander, Chase Peterson-Withorn, and Michela Tindera, *The Net Worth of Every 2020 Presidential Candidate*, Forbes (Aug. 14, 2019);⁸ Kelsey Piper, *Dear Billionaires: Don’t Run for President*, Vox (Mar. 4, 2020);⁹ Dan Alexander, *Howard Schultz Explains Why His Billionaire Candidacy Would Be Different than Trump’s*, Forbes (Jan. 28, 2019);¹⁰ Brian Schwartz, *Mike Bloomberg Prepared to Spend at Least \$100 Million on a 2020 Campaign for President if He Decides to Run*, CNBC (Dec. 27, 2018);¹¹ Allan

⁵ <https://goo.gl/3SvqS5>.

⁶ <https://goo.gl/XM2Y31>.

⁷ <https://goo.gl/juNTcT>.

⁸ <https://bit.ly/2Jk6KpM>.

⁹ <https://bit.ly/2MLX1JH>.

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¹¹ <https://cnb.cx/2rW5G2q>.

Smith, *Mark Cuban Says if He Runs for President He'd Probably Run as a Republican*, Business Insider (Oct. 23, 2017);¹² Bill Scher, *The Serious Case for Oprah 2020*, Politico Magazine (Mar. 1, 2017);¹³ Agustino Fontevicchia, *Forbes' 2016 Presidential Candidate Wealth List*, Forbes (Sept. 29, 2015) (reporting that, of the top 20 contenders in the 2016 presidential race, only 3 were not millionaires).¹⁴

Recent experiences in other countries also show the increasing correlation between vast business interests and the country's executive highest office. See, e.g., Peter Walker, *MP Warns of Potential Conflicts of Interest for Boris Johnson*, The Guardian (July 27, 2019);¹⁵ Jim Zarroli, *When It Comes To Wealthy Leaders, World Abounds With Cautionary Tales*, NPR (Dec. 6, 2016);¹⁶ James B. Stewart, *Trump's Potential Conflicts Have a Precedent: Berlusconi's Italy*, N.Y. Times (Dec. 1, 2016).¹⁷

The problem associated with foreign governments seeking to influence a president with emoluments does not exist only when the president has a broken moral compass. Any president with vast business interests—regardless of their level of commitment to

¹² <https://goo.gl/mfUSRG>.

¹³ <https://goo.gl/S9NJ9A>.

¹⁴ <https://goo.gl/QdNemr>.

¹⁵ <https://bit.ly/31i0YeB>.

¹⁶ <https://goo.gl/ySNSfq>.

¹⁷ <https://goo.gl/WfUdRc>.

good government—will face pressure knowing that their foreign policy decisions can and will affect their personal business interests. The Foreign Emoluments Clause exists precisely because the republic should not depend on the righteousness of any president when it comes to avoiding foreign corruption. At the founding, “[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption[.]” *The Federalist* No. 68 (Alexander Hamilton), and the Foreign Emoluments Clause is an essential practicable obstacle when it comes to foreign corruption.

B. Modern Presidents Possess Enormous Power Over Foreign Affairs.

Not only is corruption increasingly likely to occur with modern presidents, the effects of such corruption are increasingly problematic. Modern presidents have enormous foreign affairs power, and the consequence of a foreign government influencing the president with emoluments will have far-reaching detrimental effects.

“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613 (1800)). The Constitution gives the president power to recognize foreign governments and engage in diplomacy. *See* U.S. Const. art. II, §§ 2, 3; *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 2, 11–

12 (2015). It also makes the president “Commander in Chief of the Army and Navy of the United States,” U.S. Const. art. II, § 2, cl. 1, investing him with war powers and giving him special access to “intelligence services whose reports neither are nor ought to be published to the world.” *Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). Courts have limited authority to oversee the president’s exercise of these powers. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017). And Congress has bolstered the president’s constitutional authority over foreign affairs through statutes such as the Trade Expansion Act of 1962, 19 U.S.C. § 1862, the Trade Act of 1974, 19 U.S.C. § 2483, and the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* to name a few.

The powers of the Executive Branch have substantially expanded over time. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (noting “[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life”). Republicans and Democrats alike—often due to a desire to fix the perceived errors of prior administrations—have continued to push the bounds of their power by, among other things, issuing an increasing number of executive orders and presidential memoranda affecting foreign affairs. *See* Tara L. Branum, *President or King? The Use*

and Abuse of Executive Orders in Modern-Day America, 28 J. Legis. 1, 2 (2002); Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (2014). This trend will likely continue. “All Presidents have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda[.]” *NLRB v. Noel Canning*, 573 U.S. 513, 593 (2014) (Scalia, J., concurring).

Presidents have further consolidated that power through the frequent use of executive orders and proclamations to motivate foreign nations—both with carrots and with sticks. *E.g.*, Exec. Order No. 13936, 85 Fed. Reg. 43413, 2020 WL 4016012 (July 14, 2020) (implementing a range of changes to U.S. policy toward Hong Kong in response to China’s new national security law); Exec. Order No. 13884, 84 Fed. Reg. 38843, 2019 WL 3571050 (Aug. 5, 2019) (blocking property of the Venezuelan government); Exec. Order No. 13871, 84 Fed. Reg. 20761, 2019 WL 2053982 (May 8, 2019) (imposing sanctions against the iron, steel, aluminum, and copper sectors of Iran); Exec. Order No. 13846, 83 Fed. Reg. 38939, 2018 WL 3727930 (Aug. 6, 2018) (reimposing certain sanctions against Iran); Proclamation No. 9710, 83 Fed. Reg. 13355, 13361, 2018 WL 1505922 (Mar. 22, 2018) (exempting Australia, Argentina, South Korea, Brazil, and the European Union member countries from certain tariffs); Exec. Order No. 13855, 83 Fed. Reg. 24001, 2018 WL 2332203 (May 21, 2018) (prohibiting

certain financial transactions with the Venezuelan government); Exec. Order No. 13810, 82 Fed. Reg. 44705, 2017 WL 4223124 (Sept. 20, 2017) (imposing sanctions against North Korea following intercontinental ballistic missile launches); Exec. Order No. 13761, 82 Fed. Reg. 5331, 2017 WL 168857 (Jan. 13, 2017) (President Obama) (revoking Sudan-related sanctions in recognition of positive actions by the government of Sudan).

It takes little imagination to conceive of numerous examples of how future presidents could use their broad authority to enrich themselves at the expense of American citizens and our national economy through these virtually unchecked powers. A president could demand that a foreign government change its trade rules to favor a product the president's business manufactures or issue tariffs to price out competitors. Executive agency officials might take (or not take) regulatory action to benefit an entity associated with the president (or to harm a competitor) by explicit direction from the president or internal pressure to please the chief executive. While today it is leases in Trump Tower and services at the President's hotels and golf courses, future leaders may have business interests in health care, pharmaceuticals, finance, manufacturing, and other industries, all of which could implicate Foreign Emoluments Clause issues.

These concerns, which are both real and ongoing, will only be exacerbated by this Court's silence on the

issue of whether members of Congress can seek redress in the courts for the denial of the ability to fulfill their role as a necessary check on presidential emoluments. Without such a check, “cabal, intrigue, and corruption” will become the norm, and the Framers’ vision of a society free of improper foreign influence will become a nullity.

CONCLUSION

The Court should grant the Petition.

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