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

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether individual Members of Congress who do not constitute a majority of either chamber have Article III standing to challenge the President's compliance with the Foreign Emoluments Clause.

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### OPINIONS BELOW

The opinion of the court of appeals ordering dismissal of the case (Pet. App. 3-13) is reported at 949 F.3d 14. The opinions of the district court denying a motion to dismiss (Pet. App. 15-62, 64-103) are reported at 335 F. Supp. 3d 45 and 373 F. Supp. 3d 191.

The order of the court of appeals granting interlocutory review (Pet. App. 125-126) is not published in the Federal Reporter but is available at 2019 WL 4200443. The opinion of the district court certifying an interlocutory appeal (Pet. App. 118-124) is not published in the Federal Supplement but is available at 2019 WL 3948478. The opinion of the court of appeals denying a petition for a writ of mandamus with respect to a previous order denying certification of an interlocutory appeal (Pet. App. 115-117) is not published in the Federal Reporter but is reprinted at 781 Fed. Appx. 1. The opinion of the district court previously denying certification (Pet. App. 105-114) is reported at 382 F. Supp. 3d 77.

## JURISDICTION

The judgment of the court of appeals was entered on February 7, 2020. The petition for a writ of certiorari was filed on July 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Foreign Emoluments Clause provides that "No Title of Nobility shall be granted by the United States: And no 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.

Several months after President Donald J. Trump took office, petitioners, a group of Senators and Representatives, sued him in his official capacity for alleged violations of the Foreign Emoluments Clause. According to petitioners, the President, by virtue of his financial interest in establishments that do business with foreign governments, "has accepted, or necessarily will accept, 'Emoluments' from 'foreign States.'" Pet. App. 5 (citation omitted). Petitioners assert that this conduct injures them by denying them "the opportunity to cast a binding vote that gives or withholds their 'Consent' before the President accepts any such 'Emolument.'" *Ibid.* (citation omitted). They seek a declaration that the President has violated the Foreign Emoluments Clause and an injunction prohibiting him from accepting foreign emoluments without first obtaining consent from Congress. *Id.* at 16.

2. The President moved to dismiss petitioners' complaint for lack of jurisdiction and for failure to state a

claim on which relief could be granted. The district court bifurcated its consideration of the motion.

The district court first held that petitioners had Article III standing to bring suit. Pet. App. 15-62. Relying on this Court's decision in *Coleman* v. *Miller*, 307 U.S. 433 (1939), the district court concluded that the President had "completely nullified" petitioners' votes, and thereby inflicted a cognizable injury, by allegedly accepting "prohibited foreign emoluments as though Congress had provided its consent." Pet. App. 41. The government moved to certify an interlocutory appeal of that ruling.

The district court then denied the remainder of the motion to dismiss. Pet. App. 64-103. Concluding that it could recognize an implied equitable cause of action to protect any "'right[] safeguarded by the Constitution' unless there is a reason not to do so," the court held that such a suit was warranted here to prevent the President from "defeating the purpose" of the Foreign Emoluments Clause. *Id.* at 97 (citation omitted). It then held that it could enter an injunction against the President in his official capacity on the theory that compliance with the Clause is merely a "ministerial duty." *Id.* at 102. The court also determined that petitioners' asserted injuries fall within a zone of interests protected by the Foreign Emoluments Clause because "the only way the Clause can achieve its purpose" is if Congress is permitted to vote on the acceptance of emoluments. *Id.* at 98. And it held that petitioners had pleaded a violation of the Foreign Emoluments Clause, on the view that the term "'Emolument'" means any "profit, gain, or advantage." *Id.* at 93. The government again moved to certify an interlocutory appeal.

The district court declined to certify an interlocutory appeal of either of its orders, on the theory that the case could be resolved "expeditiously" after "abbreviated discovery," Pet. App. 109-110, which, as the court was aware, could include efforts to obtain "the President's financial documents," D. Ct. Doc. 75, at 3 (May 28, 2019). The court then entered a discovery schedule providing for three months of fact discovery, and petitioners propounded 37 third-party subpoenas.

3. The government petitioned the court of appeals for a writ of mandamus directing the district court to dismiss this case or, in the alternative, to certify its orders for interlocutory appeal.

The court of appeals denied the petition without prejudice, instead remanding "for immediate reconsideration of the motion to certify." Pet. App. 117. Although the court declined to formally resolve whether it had "jurisdiction to issue a writ of mandamus to order a district court to certify an issue for interlocutory appeal," it concluded that the district court had "abused its discretion" in denying certification, in part because of "the separation of powers issues present." *Id.* at 116, 117. The court of appeals emphasized its view that the district court's orders denying the President's motion to dismiss "squarely meet the criteria for certification." *Id.* at 115.

On remand, the district court stayed discovery and certified an interlocutory appeal. Pet. App. 118-124.

4. The court of appeals granted interlocutory review, Pet. App. 125, and reversed on the ground that petitioners lacked Article III standing.

The court of appeals explained that "[t]his case is really no different from" *Raines* v. *Byrd*, 521 U.S. 811

(1997), in which this Court held that Members of Congress lacked standing to challenge the constitutionality of a federal statute. Pet. App. 9. As in *Raines*, the court of appeals explained, petitioners' "alleged injury is shared by" the rest of Congress, a majority of which "did not join the lawsuit," and "their claim is based entirely on the loss of political power." *Ibid.* The court therefore noted that it "need not * * * consider whether or how *Raines* applies elsewhere in order to determine that it plainly applies here." *Id.* at 9-10.

The court of appeals further explained that this Court's recent decision in *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945 (2019), removed "any doubt" as to petitioners' "lack of standing." Pet. App. 10. Specifically, *Bethune-Hill* confirmed that under *Raines*, "'individual members' of the Congress 'lack standing to assert the institutional interests of a legislature' in the same way 'a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.'" *Ibid.* (quoting *Bethune-Hill*, 139 S. Ct. at 1953-1954). "After *Raines* and *Bethune-Hill*," the court observed, "only an institution can assert an institutional injury." *Ibid.*

The court of appeals recognized that in *Coleman* v. *Miller*, this Court had "held that members of the Kansas legislature had standing to challenge the 'nullification' of their votes on a proposed constitutional amendment." Pet. App. 11 n.3. But the court of appeals cautioned that a "'suit between Congress and the President would raise separation-of-powers concerns absent' in litigation brought by [a] state legislature," and that the "standing inquiry is 'especially rigorous' in a case like this, where 'reaching the merits of the dispute

would force [a federal court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.' " *Id.* at 11 (brackets and citations omitted). In any event, the court observed, this Court in *Raines* held that *Coleman* "stands (at most) for the proposition that legislators *whose votes would have been sufficient* to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id.* at 11 n.3 (quoting *Raines*, 521 U.S. at 823). Because petitioners "do not constitute a majority" of either chamber of Congress and hence are "powerless to approve or deny the President's acceptance of foreign emoluments," the court of appeals concluded they lack standing under this Court's precedents. *Id.* at 11.

Petitioners did not seek rehearing en banc in the court of appeals.

5. In addition to this case, two other suits have been brought against the President alleging violations of the Foreign Emoluments Clause (as well as the Domestic Emoluments Clause, U.S. Const. Art. II, § 1, Cl. 7). Unlike this case, both of them involve plaintiffs who claim to have standing on the basis of a competitive injury.

First, in *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc), the State of Maryland and the District of Columbia sued to enforce both Emoluments Clauses, relying principally on a theory that they and their constituents are disadvantaged in competing for business from foreign and state governmental customers who may choose to patronize businesses in which the President has a financial interest in order to curry favor with him. After the district court denied a motion to dismiss

and refused to certify its orders under 28 U.S.C. 1292(b), a panel of the court of appeals granted the President's petition for mandamus; directed that the orders be certified for interlocutory appeal; and, exercising jurisdiction under Section 1292(b), held that the suit should be dismissed because the plaintiffs lack Article III standing. *In re Trump*, 928 F.3d 360 (4th Cir. 2019). In a 9-6 decision, the en banc court of appeals vacated the panel decision on the ground that the standard for mandamus relief had not been satisfied, without squarely addressing the Article III question. 958 F.3d at 282-287. The President is filing a petition for a writ of certiorari in that case contemporaneously with this brief in opposition.

Second, in *CREW* v. *Trump*, 953 F.3d 178 (2d Cir. 2019), various plaintiffs in the hospitality industry sued to enforce both Emoluments Clauses, relying on a similar theory of competitive harm. *Id.* at 184-186. A divided panel of the court of appeals held that the plaintiffs had pleaded Article III standing, and remanded for the district court to decide several other issues raised in the President's motion to dismiss. *Id.* at 189, 203. The en banc Second Circuit denied rehearing, over multiple dissents, *CREW* v. *Trump*, No. 18-474, 2020 WL 4745067 (Aug. 17, 2020), and the President also is contemporaneously filing a petition for a writ of certiorari in that case.

## ARGUMENT

Petitioners contend that the court of appeals' decision "departs from this Court's precedent" and "undermines key safeguards of our constitutional structure." Pet. 2; see Pet. 17-32. They are mistaken. The decision

below is correct and does not conflict with any decision of this Court or any other court of appeals. And in contrast to the recent decisions from the Second and Fourth Circuits addressing the Emoluments Clauses, the D.C. Circuit's decision presents a unique question of legislative standing rather than a broad range of important legal issues common to those unprecedented challenges. Further review is not warranted.

**A. The Court Of Appeals Correctly Applied This Court's Legislative-Standing Precedents**

1. Article III restricts the jurisdiction of federal courts to "Cases" or "Controversies." U.S. Const. Art. III, § 2, Cl. 1. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006). And a "'core component'" of the case-or-controversy requirement is that the plaintiff must have "standing to invoke the authority of a federal court," *id.* at 342 (citation omitted), which requires establishing (among other things) a "concrete and particularized" injury-in-fact to a "legally protected interest," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In requiring that the injury be "personal, particularized, concrete, and otherwise judicially cognizable," Article III ensures that federal courts intervene only in those disputes "'traditionally thought to be capable of resolution through the judicial process.'" *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997) (citation omitted); see *FEC* v. *Akins*, 524 U.S. 11, 24 (1998) (noting that Article III requires the "concrete specificity that characterized those controversies which 'were the traditional concern of the

courts at Westminster' ") (citation omitted); *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) (recognizing that assignee of monetary claim had injury "[i]n *some* sense," but consulting "history and tradition" to decide whether Article III was satisfied).

Consistent with these bedrock principles, this Court has repeatedly confirmed that federal legislators generally lack standing to sue to enforce the asserted institutional interests of Congress. The decision below faithfully applied those precedents.

a. In *Raines*, six Members of Congress who had unsuccessfully opposed the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, sought to challenge the Act as unconstitutional. 521 U.S. at 814-816. They claimed that the Act had injured them by "alter[ing] the legal and practical effect of [their] votes" and "divest[ing] [them] of their constitutional role in the repeal of legislation." *Id.* at 816 (citation omitted). This Court disagreed, emphasizing the "key" standing requirement that a plaintiff suffer a "'personal injury.'" *Id.* at 818-819 (citation and emphasis omitted). As this Court explained, the legislators lacked a "'personal stake'" in the litigation because they could not claim to "have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress" or the associated salary. *Id.* at 819-821.

This Court then rejected the proposition that the legislators had suffered an "institutional injury" that was "legally and judicially cognizable." *Raines*, 521 U.S. at 819, 821. It found no support in "precedent" or "historical practice" for an action like the one before it. *Id.* at 826. To the contrary, the Court observed, "[i]t is evi-

dent from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Ibid.* For example, neither Congress nor any of its Members "challenged the validity of President Coolidge's pocket veto" of an enacted bill; the legality of that veto was instead ultimately sustained in litigation brought by certain Indian tribes asserting rights under the purported law. *Id.* at 828. The fact that Congress had never resorted to the courts to resolve such interbranch disputes underscored that the legislators' challenge was not one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819 (citation omitted). Furthermore, this Court observed, the legislators had "not been authorized to represent their respective Houses of Congress"; "'members of collegial bodies'" generally "'do not have standing'" to take actions in litigation that "'the body itself has declined to take'"; and Congress's powers are "'not vested in any one individual, but in the aggregate of the members who compose the body.'" *Id.* at 829 & n.10 (citations omitted).

b. In *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945 (2019), this Court applied *Raines* to hold that one chamber of Virginia's bicameral legislature lacked standing to appeal the invalidation of a state redistricting plan even though the composition of the legislature itself was affected. *Id.* at 1952-1955. The House of Delegates argued that it had standing because Virginia's constitution allocates the authority to establish "electoral districts" to "the General Assembly." *Id.* at

1953 (citation omitted). But because "the House constitutes only a part" of the General Assembly, this Court explained, it lacked standing to sue regardless of whether the Assembly itself could establish a cognizable injury. *Ibid.* "Just as individual members lack standing to assert the institutional interests of a legislature," this Court concluded, "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953-1954 (citing *Raines*, 521 U.S. at 829).

c. As the court of appeals recognized, *Raines* and *Bethune-Hill* establish that petitioners lack standing. Petitioners do not "claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." *Raines*, 521 U.S. at 821. Rather, they claim deprivation only of alleged "institutional prerogatives," Pet. 2—the supposed diminution in *Congress*'s power to approve or disapprove the President's acceptance of foreign emoluments. But as *Bethune-Hill* explained, *Raines* made clear that "individual members lack standing to assert the institutional interests of a legislature." 139 S. Ct. at 1953 (citing *Raines*, 521 U.S. at 829). Indeed, *Bethune-Hill* establishes that even a chamber of a legislature, acting as an entity, "lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953-1954. That conclusion applies *a fortiori* to individual legislators who do not constitute a majority of even a single chamber.

2. Petitioners do not ask this Court to revisit *Raines* or *Bethune-Hill*. Nor do they deny that "a dispute involving only * * * the official interests of those[] who serve in the branches of the National Government lies

far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement." *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment). And even though clashes between Members of Congress and the President over whether the Constitution requires congressional consent for certain actions are far from novel, see, *e.g.*, *NLRB* v. *Noel Canning*, 573 U.S. 513, 531-532 (2014) (discussing 1905 dispute over recess appointments), petitioners do not identify any instance in which this Court has found standing on the part of Congress, let alone individual Members, to sue the President for acting without obtaining congressional consent. Cf. *Campbell* v. *Clinton*, 203 F.3d 19, 22-24 (D.C. Cir.) (holding that individual Members of Congress lacked standing under *Raines* to challenge the President's decision to order air strikes in Yugoslavia without further authorization from Congress), cert. denied, 531 U.S. 815 (2000).

Instead, petitioners contend (Pet. 17) that "individual legislators have standing when their votes are completely nullified" under this Court's decision in *Coleman* v. *Miller*, 307 U.S. 433 (1939). That case involved a bloc of state senators who sought review in this Court from the rejection of a suit they had brought in state court, contending that their votes in the state legislature had been "completely nullified" through an improper voting procedure that ratified a proposed federal constitutional amendment even though their votes collectively were sufficient to defeat it. *Raines*, 521 U.S. at 823; see *id.* at 821-823 (summarizing *Coleman*). Contrary to petitioners' contention, *Coleman* provides no support for their novel suit for at least three independent reasons.

a. To start, petitioners do not constitute a majority of either chamber of Congress and thus are, as the court of appeals emphasized, "powerless to approve or deny the President's acceptance of foreign emoluments." Pet. App. 11. That fact is critical because in *Raines*, this Court explained that its "holding in *Coleman* stands"—"at most"—"for the proposition that legislators *whose votes would have been sufficient to defeat (or enact)* a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823 (emphasis added). Accordingly, even if petitioners were able to identify "a specific legislative Act" that has been enacted notwithstanding their votes against it or defeated despite their votes in favor, *Coleman* would not support their bid for standing. *Ibid.*

Petitioners contend that, in describing *Coleman* as limited to suits by a group of "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act," *Raines*, 521 U.S. at 823, this Court was referring only to "scenarios like in *Coleman*, where legislators claim that votes they have already cast were unlawfully disregarded." Pet. 23. That requirement does not apply, they say, when individual legislators "are denied their right to vote entirely." *Ibid.*

Petitioner's proposed distinction has no basis in the unqualified description of *Coleman*'s holding in *Raines*—a description this Court adhered to in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787, 803 (2015), and *Bethune-Hill*, 139 S. Ct. at 1954. Furthermore, petitioners' pro-

posed distinction is flawed as a matter of first principles. Even accepting for the moment the erroneous premise that the votes of petitioners, along with all other Members of Congress, have been denied, see pp. 16-18, *infra*, petitioners' conclusion does not follow. A legislator's vote "is not personal to the legislator but belongs to the people." *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 126 (2011). Accordingly, petitioners' right to vote exists "solely because they are Members of Congress"; if any one of them "were to retire tomorrow, he would no longer have a claim" based on vote denial and "the claim would be possessed by his successor instead." *Raines*, 521 U.S. at 821. So while "Congress" has a right to vote to grant (or withhold) consent for any acceptance of foreign emoluments, U.S. Const. Art. I, § 9, Cl. 8, any purported "denial" of that right would not impose institutional injury on petitioners and each of their fellow individual legislators. Rather, it would at most constitute an institutional injury for legislative majorities that are actually aggrieved by the "denial."

That helps explain why *Coleman* itself "repeatedly emphasized" that the "legislators (who were suing as a bloc)" had suffered vote nullification because "'their votes * * * *would have been decisive* in defeating the ratifying resolution,'" *Raines*, 521 U.S. at 822-823 (quoting *Coleman*, 307 U.S. at 441) (emphasis omitted) —not merely because the votes they "already cast were unlawfully disregarded," Pet. 23. Put differently, because the legislators in *Coleman* claimed to be an effective majority of the Kansas senate for purposes of defeating the federal constitutional amendment at issue, their suit was at least arguably analogous to a suit

brought on behalf of the Kansas senate itself, asserting that its vote against the amendment had been permanently nullified. Cf. *Arizona State Legislature*, 576 U.S. at 803-804. The fact that the *Coleman* senators were not a legislative minority with respect to the legislative act in question therefore at least arguably mitigated the "mismatch between the body seeking to litigate and the body to which the relevant [legal] provision allegedly assigned" authority. *Bethune-Hill*, 139 S. Ct. at 1953.

Petitioners also rely (Pet. 24) on a footnote in *Raines* in which this Court reserved the question whether individual legislators might have standing, whether or not they constituted a majority, if "their vote was denied or nullified in a discriminatory manner (in the sense that their vote was denied its full validity in relation to the votes of their colleagues)." 521 U.S. at 824 n.7. But no such discriminatory treatment has occurred here. Unlike in this case, such situations, in which a legislator is "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," would at least arguably present a "*personal*[]" injury akin to a legislator's "exclusion from the House of Representatives (and his consequent loss of salary)." *Id.* at 821 (discussing *Powell* v. *McCormack*, 395 U.S. 486 (1969)). In any event, the fact that the Court "needed to defer questions about [such] hypotheticals" (Pet. 24) does not suggest, as petitioners contend, that *Coleman* could support standing for such claims, much less the sort at issue here. To the contrary, it makes clear that allowing legislators who constitute a minority of the legislature to sue would expand *Coleman*'s narrow exception to the rule articulated in *Raines* and *Bethune-Hill*.

b. Even if petitioners constituted a majority of either chamber or both chambers, the institutional injury they allege bears no resemblance to the sort of vote nullification at issue in *Coleman*. There, a constitutional amendment had been deemed ratified even though the state senators' votes were allegedly sufficient to defeat ratification. Here, by contrast, petitioners do not allege that the President has disregarded or nullified a vote they have taken, or even that he has treated Congress as having voted to approve his acceptance of foreign emoluments when it has not. Cf. *Bethune-Hill*, 139 S. Ct. at 1954 ("Unlike *Coleman*, this case does not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote."); see *ibid.* (explaining that in *Arizona State Legislature*, a voter initiative "*permanently* deprived the legislative plaintiffs of their role in the redistricting process" by vesting an independent commission with the exclusive authority to draw legislative districts) (citing *Arizona State Legislature*, 576 U.S. at 804).

Rather, petitioners contend (Pet. 16) that the President is "depriving [them] of the opportunity to vote on specific transactions with foreign governments." But as petitioners themselves emphasize (Pet. 31), the Foreign Emoluments Clause establishes a "default prohibition under which Congress's *failure* to act functions as a denial of consent to accept foreign emoluments." The President therefore cannot deprive petitioners of any right to deny consent to his alleged acceptance of foreign emoluments because such consent already has been effectively denied by Congress through inaction (though Congress remains free to provide such consent). Rather than preventing petitioners from denying

consent to his alleged acceptance of foreign emoluments, the President merely disputes that he is accepting foreign emoluments requiring consent in the first place.

Viewed in that light, petitioners' theory of standing —namely, that the President engages in vote nullification whenever he takes an action without consent of Congress that legislators claim requires the consent of Congress—would inflate the narrow *Coleman* exception to swallow the general rule reflected in *Raines* and *Bethune-Hill*. The Foreign Emoluments Clause's requirement of congressional consent is by no means unique. For example, the Appointments Clause and the Treaty Clause likewise mandate the Senate's consent as a condition for certain Executive actions. U.S. Const. Art. II, § 2, Cl. 2. In addition, States may not take certain actions, such as entering into "any Agreement or Compact with another State," "without the Consent of Congress" as a whole. *Id.* Art. I, § 10, Cl. 3; see also *id.* Art. I, § 10, Cl. 2 (same for "Imposts or Duties on Imports or Exports"). And neither chamber of Congress may "adjourn for more than three days" during a "Session of Congress * * * without the Consent of the other." *Id.* Art. I, § 5, Cl. 4. Under petitioners' theory, any individual Member of the relevant chamber would have standing to challenge an action allegedly taken in violation of these consent requirements.

And petitioners' theory would go further still. Aside from certain powers inherent in Article II, the Executive Branch can act only "within the bounds of its statutory authority." *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013) (emphasis omitted). In other words, the Constitution usually requires Congress to legislate before

the Executive may take action. Petitioners' theory would therefore allow any individual Member of Congress to challenge an executive action allegedly lacking statutory authority—for example, an agency's promulgation of a regulation—on the basis that the unlawful action negated the Member's right to vote on whether to authorize it. That would eviscerate the rule articulated in *Raines* and *Bethune-Hill*, and it would place the federal courts in the unprecedented position of adjudicating endless "political battle[s] being waged between the President and Congress." *Raines*, 521 U.S. at 827; see, *e.g.*, *Chenoweth* v. *Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999) (holding that individual Members of Congress lacked standing under *Raines* to challenge the President's creation of program by executive order rather than by statute), cert. denied, 529 U.S. 1012 (2000).

c. In all events, this Court has repeatedly reserved the question whether *Coleman* extends to a suit "brought by federal legislators" in light of "the separation-of-powers concerns present[ed]." *Raines*, 521 U.S. at 824 n.8; see *Arizona State Legislature*, 576 U.S. at 803 n.12 (emphasizing that "a suit between Congress and the President would raise separation-of-powers concerns absent" in a case applying *Coleman* to a claim by a state legislature). Likewise, while the four dissenting Justices in *Bethune-Hill* would have held that the Virginia House of Delegates had standing, they too recognized that "[i]f one House of Congress or one or more Members of Congress attempt[ed] to invoke the power of a federal court, the court" would need to "consider whether this attempt is consistent with the structure created by the Federal Constitution." 139 S. Ct. at 1959 (Alito, J., dissenting).

That caution is well founded, for extending *Coleman* to permit suits by federal legislators would contravene the separation of powers. Given the Framers' clearly expressed concern that Congress might "aggrandize itself at the expense of the other two branches," *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976) (per curiam), they would not have added to the congressional arsenal a powerful weapon—enlistment of the Judiciary to compel action by the Executive—without saying so explicitly. See *Barnes* v. *Kline*, 759 F.2d 21, 57 (D.C. Cir. 1984) (Bork, J., dissenting), vacated as moot, *Burke* v. *Barnes*, 479 U.S. 361 (1987). Far from doing so, the Framers gave Congress only certain "legislative Powers herein granted," U.S. Const. Art. I, § 1, subject to the "finely wrought and exhaustively considered" structural checks of bicameralism and presentment, *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). Nor can the "power to seek judicial relief * * * possibly be regarded as merely in aid of the legislative function." *Buckley*, 424 U.S. at 138. Thus, while a State may "authorize[]" a single house of its bicameral legislature (or the legislature itself) "to litigate on the State's behalf," *Bethune-Hill*, 139 S. Ct. at 1952, the Constitution does not allow Congress or either chamber to litigate on behalf of the United States, see *Buckley*, 424 U.S. at 140, much less permit individual Members to assert institutional injuries of those bodies against the President.

Confining *Coleman* to the context of state legislatures also protects the federal Judiciary from being "improperly and unnecessarily plunged" into confrontations between the political branches. *Raines*, 521 U.S. at 827. Although there "would be nothing irrational" about a system that funnels interbranch disputes into

the courts, "it is obviously not the regime that has obtained under our Constitution to date." *Id.* at 828. Instead, Article III contemplates "a more restricted role" for the federal courts—namely, the protection of "'individual citizens'" rather than "'some amorphous general supervision of the operations of government.'" *Id.* at 828-829 (citation omitted); see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."). To venture beyond that modest but critical role, as petitioners advocate, "would risk damaging the public confidence that is vital to the functioning of the Judicial Branch by embroiling the federal courts in a power contest nearly at the height of its political tension." *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment) (citations omitted).

Petitioners acknowledge that suits like theirs "raise 'separation-of-powers concerns,'" but nevertheless urge this Court to break new ground on the theory that it can "address[]" these risks by allowing federal legislators to sue only if they "'have no adequate legislative remedies.'" Pet. 19-20 (citations omitted). But the foregoing separation-of-powers problems associated with interbranch litigation do not vanish merely because legislative remedies are unavailable. By way of analogy, an individual Member's lack of adequate legislative remedies against States that enter into interstate compacts without congressional consent does not empower the Member to sue such jurisdictions.

In any event, petitioners have not established that they lack legislative remedies with respect to alleged violations of the Foreign Emoluments Clause. For example, petitioners could (by convincing their colleagues) withhold funds from the President, decline to enact legislation that the President desires, or enact legislation that the President disfavors. Aside from that, "[t]he Members can, and likely will, continue to use their weighty voices to make their case to the American people." Pet. App. 12. Using these remedies, Congress may seek to force the President to comply with its view of the law. But "Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask [the courts] to do so," much less simply acquiesce in a suit brought by outside counsel for a minority of Members. See *United States* v. *Windsor*, 570 U.S. 744, 791 (2013) (Scalia, J., dissenting). And if petitioners "fail[] to prevail in their own Houses," they cannot "repair to the Judiciary to complain." *Arizona State Legislature*, 576 U.S. at 802 (discussing *Raines*).

Petitioners insist (Pet. 20) that their legislative prerogatives are useless here because the President allegedly is violating the Foreign Emoluments Clause "through his private businesses, rather than through government agencies over which Congress could exert control." But given Congress's power to regulate commerce with foreign nations and to make laws that are necessary and proper to carry into execution the powers vested in federal officials, Congress could enact various laws that would have the effect of preventing federal officials from accepting business proceeds flowing from foreign governments. See U.S. Const. Art. I, § 8, Cls. 3,

18. Congress also has long used its control over appropriations to influence the Executive even on subjects unrelated to the appropriations. For example, when President Washington refused to produce confidential papers concerning a treaty negotiation, the House of Representatives made an "extortive demand" that it would "not appropriate [certain] required funds." *Nixon* v. *Sirica*, 487 F.2d 700, 734 (D.C. Cir. 1973) (en banc) (per curiam) (MacKinnon, J., concurring in part and dissenting in part). Unsurprisingly, petitioners never dispute their constitutional authority to enact the foregoing types of legislation, if they could persuade their colleagues to pass it.

Petitioners' objections to the adequacy of various legislative remedies do, however, underscore the sweeping nature of their theory. For example, there are arguably more legislative remedies available here than there would be if an individual Senator disputed the validity of a presidential appointment. Once the President appoints an officer, the Senate alone cannot undo the appointment, nor can Congress as a whole, save through impeachment. See *Bowsher* v. *Synar*, 478 U.S. 714, 728-729 (1986). The Senate may act only indirectly in the hopes that it might induce the President to remove the officer. But the potential difficulties associated with such remedies do not permit the Senate, much less a single Senator, to sue over every contested presidential appointment. Petitioners provide no tenable reason why the Foreign Emoluments Clause should be treated differently. Rather, the expansive reach of their erroneous conception of legislative standing is only confirmed by their refrain (Pet. 28-29) that the court of ap-

peals' decision prevents "individual members of Congress from enforcing *any* of their institutional prerogatives in court" and "closes the door on any suits by individual legislators seeking to uphold the Constitution's procedural requirements."

**B. The Court Of Appeals' Ruling Does Not Warrant Review**

Even if the court of appeals' ruling were debatable, this Court's review would be unwarranted. Petitioners make no effort to suggest that the D.C. Circuit's decision conflicts with a decision of any other court of appeals. Nor do they contend that this Court has ever held that Congress, let alone individual Members, may assert Article III standing to sue the President. Instead, petitioners rely heavily (Pet. 24) on this Court's decision in *Coleman*, while acknowledging that they seek an "extension of" *Coleman*'s rationale. See also Pet. 15 (stating that the court of appeals "[r]ecogniz[ed] that 'the standing question arises at the intersection of precedent' ") (quoting Pet. App. 116). Accordingly, even on petitioners' view of the merits, they do not identify a genuine conflict between the court of appeals' decision and this Court's precedents.

Petitioners also suggest (Pet. 30-32) that review is warranted in light of the seriousness of their allegations that the President is violating the Foreign Emoluments Clause. But of the three suits under the Emoluments Clauses brought against the President, this case alone presents, and was decided solely on, a question of legislative standing. The other two cases, from the Second and Fourth Circuits, both involve alleged business competitors and present a broader range of issues about the viability of novel attempts to enforce the Emoluments

Clauses against the President in his official capacity. Accordingly, the President has contemporaneously filed petitions for writs of certiorari in both of those cases. But because the legislative-standing issue in this case is unrelated to the issues in those petitions, even a decision in favor of the plaintiffs in either of those cases would not help petitioners here. It thus is not warranted to hold the petition here pending this Court's resolution of the other petitions.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2020