

No. 19-5237

**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, No. 1:17-cv-1154 (Hon. Emmet G. Sullivan)

**BRIEF FOR THE NISKANEN CENTER, REPUBLICAN
WOMEN FOR PROGRESS, DONALD B. AYER,
TREVOR POTTER, LAURENCE TRIBE, AND J.W. VERRET
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND
AFFIRMANCE OF THE DECISION BELOW**

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DISCLOSURE STATEMENTS

The following statements are made pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1:

Amicus Curiae The Niskanen Center is a 501(c)(3) entity that does not have a parent corporation, issues no stock, and accordingly there is no publicly held corporation that owns 10% or more of its stock.

Amicus Curiae Republican Women for Progress is a grassroots policy organization that does not have a parent corporation, issues no stock, and accordingly there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Foreign Emoluments Clause is an essential bulwark against the corruption of ever-growing presidential power.....	3
A. The Foreign Emoluments Clause is a vital check against corruption.....	3
B. The modern-day presidency has expansive—and growing—foreign affairs power	5
II. The Foreign Emoluments Clause is now more important than ever given the increasing likelihood that presidents will have business empires.....	7
III. The President’s interpretation of the Foreign Emoluments Clause would open the door to abuses of power and distortion of the free market	13
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chi. & S. Air Lines v. Waterman S. S. Corp.</i> , 333 U.S. 103 (1948)	6
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018)	6
<i>United States v. Curtiss-Wright Exp. Corp.</i> , 299 U.S. 304 (1936)	5
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017)	6
<i>Zivotofsky ex rel. Zivotofsky v. Kerry</i> , 135 S. Ct. 2076 (2015)	5
Constitutional Provisions	
U.S. Const. art. I, § 9, cl. 8	4
U.S. Const. art. II, § 2	5
U.S. Const. art. II, § 2, cl. 1	6
U.S. Const. art. II, § 3	5
Executive Orders	
Exec. Order No. 13761, 82 FR 5331, 2017 WL 168857 (Jan. 13, 2017)	7
Exec. Order No. 13810, 82 FR 44705, 2017 WL 4223124 (Sept. 20, 2017)	7
Exec. Order No. 13846, 83 FR 38939, 2018 WL 3727930 (Aug. 6, 2018)	7
Exec. Order No. 13855, 83 FR 24001, 2018 WL 2332203 (May 21, 2018)	7

Exec. Order No. 13871, 84 FR 20761, 2019 WL 2053982 (May 8, 2019).....	7
Exec. Order No. 13884, 84 FR 38843, 2019 WL 3571050 (Aug. 5, 2019)	6
Pres. Proc. No. 9704, 83 FR 11619, 2018 WL 1316710 (Mar. 8, 2018)	17
Pres. Proc. No. 9705, 83 FR 11625, 2018 WL 1316711 (Mar. 8, 2018)	17
Pres. Proc. No. 9710, 83 FR 13355, 13361, 2018 WL 1505922 (Mar. 22, 2018)	7
Other Authorities	
10 Annals of Cong. 613 (1800)	5
Agustino Fontevicchia, <i>Forbes’ 2016 Presidential Candidate Wealth List</i> , Forbes (Sept. 29, 2015)	13
Allan Smith, <i>Mark Cuban Says if He Runs for President He’d Probably Run as a Republican</i> , Business Insider (Oct. 23, 2017)	12
Anita Kumar, <i>Foreign Governments Are Finding Ways to Do Favors For Trump’s Business</i> , McClatchy (Jan. 2, 2018).....	10
Bill Scher, <i>The Serious Case for Oprah 2020</i> , Politico Magazine (Mar. 1, 2017)	12
Brian Klaas, <i>Trump Has Turned U.S. Foreign Policy into a Subsidiary of his Reelection Campaign</i> , The Washington Post (Oct. 4, 2019)	8
Brian Schwartz, <i>Mike Bloomberg Prepared to Spend at Least \$100 Million on a 2020 Campaign for President if he Decides to Run</i> , CNBC Politics (Dec. 27, 2018)	12

Brief of Amicus Curiae Professor Lawrence Lessig in Support of Appellee, <i>McCutcheon v. FEC</i> , No. 12-536 (U.S. July 25, 2013).....	4
Dan Alexander, Chase Peterson-Withorn, and Michela Tindera, <i>The Net Worth of Every 2020 Presidential Candidate</i> , Forbes (Aug. 14, 2019).....	12
Dan Alexander, <i>Howard Schultz Explains why his Billionaire Candidacy Would be Different than Trump’s</i> , Forbes (Jan. 28, 2019).....	12
Dan Alexander, <i>Trump’s Biggest Potential Conflict Of Interest Is Hiding In Plain Sight</i> , Forbes (Feb. 13, 2018).....	16
David A. Fahrenthold, <i>Romanian Consulate Event at Trump Hotel in Chicago Draws Scrutiny</i> , The Washington Post (Dec. 12, 2018).....	10
Erika Kinetz, <i>China Approves 9 of Trump’s Trademarks That They Had Previously Rejected</i> , Associated Press (June 14, 2017).....	9
<i>The Federalist</i> No. 68 (Alexander Hamilton)	4
The Global Anticorruption Blog, <i>Tracking Corruption and Conflicts in the Trump Administration</i> (original May 2, 2017; updated Sept. 27, 2019)	9, 16
Jackie Northam, <i>Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions</i> , NPR (Feb. 25, 2017)	9
James B. Stewart, <i>Trump’s Potential Conflicts Have a Precedent: Berlusconi’s Italy</i> , N.Y. Times (Dec. 1, 2016).....	12
Jim Zarroli, <i>When It Comes To Wealthy Leaders, World Abounds With Cautionary Tales</i> , NPR (Dec. 6, 2016).....	11
Jon Swaine and Julian Borger, <i>Trump Set to Benefit as Qatar Buys \$6.5m Apartment in New York Tower</i> , The Guardian (May 4, 2018).....	10

Jonathan O’Connell & David A. Fahrenthold, <i>As Tariffs Near, Trump’s Business Empire Retains Ties to China</i> , The Washington Post (July 5, 2018)	16
Jonathan O’Connell & David A. Fahrenthold, <i>Trump’s Other Ukraine Problem: New Concern about his Business</i> , The Washington Post (Sept. 26, 2019)	11
Josh Dawsey & David A. Fahrenthold, <i>Near the Airport, Ample Parking: Why Trump Says His Florida Golf Club Should Host the Next G-7</i> , The Washington Post (Aug. 26, 2019)	8
Kelsey Piper, <i>Tom Steyer Shouldn’t be Running for President</i> , Vox (Oct. 15, 2019)	12
Max Boot, <i>Let’s Count the Ways Donald Trump Has Gone Where no President Has Gone Before</i> , L.A. Times (Apr. 4, 2017)	9
Nicole Narea, <i>A Year in Trump Corruption</i> , Washington Monthly (Jan.-Mar. 2018)	9
Norm Ornstein, <i>American Kakistocracy</i> , The Atlantic (Oct. 9, 2017)	9
Notes of James Madison (July 5, 1787), in 1 <i>The Records of the Federal Convention of 1787</i> (Max Farrand ed., rev. ed. 1966) (1937)	4
Peter Walker, <i>MP Warns of Potential Conflicts of Interest for Boris Johnson</i> , The Guardian (July 27, 2019).....	11
Philip J. Cooper, <i>By Order of the President: The Use and Abuse of Executive Direct Action</i> (Univ. Press of Kansas 2014)	6
Shelby Hanssen & Ken Dilanian, <i>Reps of 22 Foreign Governments Have Spent Money at Trump Properties</i> , NBC News (June 12, 2019).....	8

Tara L. Branum, <i>President or King? The Use and Abuse of Executive Orders in Modern-Day America</i> , 28 J. Legis. 1 (2002)	6
Transparency International, <i>Corruption in the USA: The Difference a Year Makes</i> (Dec. 12, 2017)	15
Transparency International, <i>US Drops Out of Global Corruption Index Top-20, Scores Four Points Lower than 2017</i> (Jan. 29, 2019)	15
<i>Trump Team’s Conflicts and Scandals: An Interactive Guide</i> , Bloomberg (updated Mar. 14, 2019)	9
U.S. Dep’t of State, <i>U.S. Anti-Corruption Efforts</i> (Jan. 20, 2017)	15
Zephyr Teachout, <i>The Anti-Corruption Principle</i> , 94 Cornell L. Rev. 341 (2009)	4
Zephyr Teachout, <i>Gifts, Offices, and Corruption</i> , 107 Nw. U. L. Rev. Colloquy 30 (2012)	4

INTEREST OF *AMICI CURIAE*¹

Amici are organizations and individuals² representing various ideological perspectives who are committed to responsible constitutional governance and are concerned about President Donald J. Trump's private business interests and whether they comply with the strict mandate of the Constitution's Foreign Emoluments Clause. *Amici* are even more concerned about the particular arguments the President has ad-

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *Amici* state that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or counsel for a party contributed money intended to fund the preparation or submission of this brief; and (3) no persons or entities other than *Amici*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. Pursuant to Rule 29(a)(2) and Circuit Rule 29(b), the parties to this appeal have consented to the filing of this brief, and accordingly, this brief may be filed without leave of court.

² 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. Republican Women for Progress is a grassroots policy organization for Republican women. Donald B. Ayer is a former United States Attorney in the Eastern District of California, Principal Deputy Solicitor General under President Reagan, and Deputy Attorney General under President George H.W. Bush. Trevor Potter is a former Commissioner and Chairman of the Federal Election Commission appointed by President George H.W. Bush. Laurence Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard Law School. J.W. Verret is an Associate Professor of Law at Antonin Scalia Law School at George Mason University who has served as Chief Economist and Senior Counsel to the U.S. House Committee on Financial Services.

vanced in this action. If accepted, his arguments could lead to dangerous abuses of already expansive executive branch powers, and harmful consequences to the free market and the nation's broader interests.

For the reasons set forth below and in Appellees' brief, *amici* urge the Court to affirm the district court's ruling on the proper interpretation of the Foreign Emoluments Clause, a ruling that is grounded firmly in precedent, history, and sound public policy.

SUMMARY OF ARGUMENT

1. The Foreign Emoluments Clause is an essential bulwark against the corruption of the presidency. The Framers were seriously concerned that foreign interests would try to use their wealth to sway the foreign policy decisions of the new American government, and thus included the Foreign Emoluments Clause to preclude presidents from accepting profits or gifts of any kind from a foreign state absent congressional consent. The Clause thus enshrines a critical safeguard against the corruption of executive power, which is vast—especially in foreign affairs—and keeps expanding.

2. This President's persistent refusal to obtain congressional consent before accepting financial benefits from foreign governments makes this a watershed moment for the Foreign Emoluments Clause. Never before has our country been required to confront a president with such extensive private business interests abroad. Since even before his inauguration, foreign governments have actively sought to curry favor

with the President by pursuing private business transactions with companies owned by or connected to him, and even by granting favorable regulatory treatment to the President's businesses.

3. The President advances an interpretation of the Foreign Emoluments Clause that would allow for even more dangerous business entanglements by a future president. If this occurs, it will become increasingly difficult to walk back practices that will have become the new normal. This Court can prevent this disaster by following constitutional text, settled precedent, and historical evidence. As the Plaintiffs make clear, these sources point towards affirmance of the decisions below.

ARGUMENT

I. The Foreign Emoluments Clause is an essential bulwark against the corruption of ever-growing presidential power

The Framers adopted the Foreign Emoluments Clause to check presidential profiteering from foreign governments. Especially given the broad expansion of executive power, and the President's extensive business interests, this Court should reject the President's cramped reading of the Clause.

A. The Foreign Emoluments Clause is a vital check against corruption

When the Framers constructed our 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 that foreign interests would try to use their wealth to tempt public servants and 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) (1937); Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 361–62 (2009).

The Constitution itself reflects the Framers’ “structural commitment to fighting corruption.” Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 *Nw. U. L. Rev. Colloquy* 30, 30 (2012); Brief of Amicus Curiae Professor Lawrence Lessig in Support of Appellee, *McCutcheon v. FEC*, No. 12-536 (U.S. July 25, 2013). In particular, the Framers enshrined the Foreign Emoluments Clause, which provides:

[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. This deliberately capacious language bars the president and other federal officeholders from accepting any profits or gifts of any kind from any foreign state absent congressional consent. The rule holds whether the profits or gifts are handed directly to the officeholder by a representative of the foreign government, or funneled to the officeholder through affiliated businesses. As Plaintiffs have demon-

strated, this construction of the Foreign Emoluments Clause flows not only from its plain text but also from the Framers' clear purpose of preventing corruption and improper foreign influence. (Appellees' Br. at 1–5, 9.)

B. The modern-day presidency has expansive—and growing—foreign affairs power

Institutional checks on the separated branches of government are essential features of our constitutional republic. But even with checks on the executive, the presidency today is possessed of enormous power—especially in foreign affairs. And that power continues to grow, making the need to enforce the Constitution's constraints on the president all the more pressing.

“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*, 135 S. Ct. 2076, 2085 (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 superintend 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.* just to name a few.

These expansive powers have grown substantially over time. Often due to a desire to fix the perceived errors of prior administrations, modern presidents—Republicans and Democrats alike—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); Philip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Univ. Press of Kansas 2014). Presidents also frequently use executive orders and proclamations to motivate foreign nations—both with carrots and with sticks. *E.g.*, Exec. Order No. 13884, 84 FR 38843, 2019 WL 3571050 (Aug. 5, 2019) (blocking property of the Venezuelan government); Exec. Order No. 13871, 84 FR 20761, 2019 WL 2053982 (May 8, 2019) (imposing sanctions against the iron, steel, aluminum, and copper sectors of Iran); Exec. Order No. 13846, 83 FR

38939, 2018 WL 3727930 (Aug. 6, 2018) (reimposing certain sanctions against Iran); Pres. Proc. No. 9710, 83 FR 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 FR 24001, 2018 WL 2332203 (May 21, 2018) (prohibiting certain financial transactions with the Venezuelan government); Exec. Order No. 13810, 82 FR 44705, 2017 WL 4223124 (Sept. 20, 2017) (imposing sanctions against North Korea following intercontinental ballistic missile launches); Exec. Order No. 13761, 82 FR 5331, 2017 WL 168857 (Jan. 13, 2017) (President Obama) (revoking Sudan-related sanctions in recognition of positive actions by the government of Sudan).

The significant (and ever-expanding) scope of presidential power is all the more reason to ensure that constitutional checks against abuse of that power are effective and enforced.

II. The Foreign Emoluments Clause is now more important than ever given the increasing likelihood that presidents will have business empires

This is the moment to determine, for now and for the future, whether the Foreign Emoluments Clause should be enforced as an essential safeguard for the people against corruption and kleptocracy, or instead should be consigned—as the President contends—to the realm of constitutional irrelevancy.

Never before has our country been required to confront a president with such extensive private business interests, both at home and abroad. As the complaint in this case details, foreign governments have been actively attempting to curry favor with the President by engaging in private business transactions with companies owned by or connected to him, and by granting favorable regulatory treatment to the President's businesses. See J.A. 167–180, Sec. Am. Compl. ¶¶ 34–67; see also Brian Klaas, *Trump Has Turned U.S. Foreign Policy into a Subsidiary of his Reelection Campaign*, The Washington Post (Oct. 4, 2019);³ Josh Dawsey & David A. Fahrenthold, *Near the Airport, Ample Parking: Why Trump Says His Florida Golf Club Should Host the Next G-7*, The Washington Post (Aug. 26, 2019);⁴ Shelby Hanssen & Ken Dilanian, *Reps of 22 Foreign Governments Have Spent Money at Trump Properties*, NBC News (June 12, 2019);⁵ The Global Anticorruption Blog, *Tracking Corruption and Conflicts in the Trump Administration* (original May 2, 2017; updated Sept. 27, 2019);⁶ *Trump Team's Conflicts and Scandals: An Interactive Guide*, Bloomberg (updated Mar. 14, 2019);⁷

³ <https://wapo.st/2oyi1Ml>. All URLs last visited Oct. 29, 2019.

⁴ <https://wapo.st/2zmefHx>.

⁵ <https://nbcnews.to/2BknARi>.

⁶ <https://goo.gl/FNtcH1>.

⁷ <https://goo.gl/7SGFaS>.

Nicole Narea, *A Year in Trump Corruption*, Washington Monthly (Jan.-Mar. 2018);⁸ Norm Ornstein, *American Kakistocracy*, The Atlantic (Oct. 9, 2017);⁹ Max Boot, *Let's Count the Ways Donald Trump Has Gone Where no President Has Gone Before*, L.A. Times (Apr. 4, 2017).¹⁰

To illustrate with just a few examples:

- After President Trump's election, the Kuwaiti Embassy canceled a "save the date" for an independence celebration with the Four Seasons Hotel and moved the event to the Trump International Hotel. See Jackie Northam, *Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions*, NPR (Feb. 25, 2017).¹¹
- In June 2017, the Chinese government granted preliminary approval for nine Donald Trump trademarks it had previously rejected, in whole or in part. See Erika Kinetz, *China Approves 9 of Trump's Trademarks That They Had Previously Rejected*, Associated Press (June 14, 2017).¹²
- In January 2018, the Trump Organization was developing a luxury resort on the Indonesian island of Bali. The Bali local government provided public land for the project, granted numerous licenses and permits, and is planning to build (at government expense) a toll road extension that will substantially shorten the drive from the airport to the Trump resort. See

⁸ <https://goo.gl/puCbui>.

⁹ <https://goo.gl/PkNYqf>.

¹⁰ <https://goo.gl/kvr3Ww>.

¹¹ <https://goo.gl/juNTcT>.

¹² <https://goo.gl/XM2Y31>.

Anita Kumar, *Foreign Governments Are Finding Ways to Do Favors For Trump's Business*, McClatchy (Jan. 2, 2018).¹³

- In January 2018, Qatar bought a \$6.5 million condominium at Trump World Tower, giving Qatar four units in the building, for which it paid \$16.5 million. Qatar's new acquisition coincided with the Qatari government's intense lobbying campaign in Washington amid a regional crisis that pitted Qatar against Saudi Arabia and the United Arab Emirates. See Jon Swaine and Julian Borger, *Trump Set to Benefit as Qatar Buys \$6.5m Apartment in New York Tower*, The Guardian (May 4, 2018).¹⁴
- In November 2018, the Romanian Consulate held its national day of celebration at the Trump International Hotel & Tower in Chicago after holding the event at the Chicago Cultural Center for the previous five years. Ethics groups have stated that no foreign governments held events at the Trump International Hotel & Tower before the venue's namesake became president. See David A. Fahrenthold, *Romanian Consulate Event at Trump Hotel in Chicago Draws Scrutiny*, The Washington Post (Dec. 12, 2018).¹⁵
- In July 2019, Ukrainian President Volodymyr Zelensky informed Donald Trump that he stayed at Trump Tower in an attempt at currying favor with President Trump through his business. See Jonathan O'Connell & David A. Fahrenthold, *Trump's Other Ukraine Problem: New Concern about his Business*, The Washington Post (Sept. 26, 2019).¹⁶

¹³ <https://goo.gl/3SvqS5>.

¹⁴ <https://bit.ly/2Wdyamt>.

¹⁵ <https://wapo.st/2MNitQ9>.

¹⁶ <https://wapo.st/2m3gZ9A>.

It takes little imagination to conceive of numerous other examples of how this and future presidents, and others holding “Office[s] of Profit or Trust” who also are subject to the Foreign Emoluments Clause’s commands, could use their broad authority to enrich themselves at the expense of American citizens and our national economy. A president could demand, for example, that a foreign government change its trade rules to favor a product her business manufactures over those of her domestic competitors.

While our presidents—prior to President Trump—have not typically had far-reaching business interests that involve engaging in financing transactions with foreign governments, the integration of our global economy and the experiences of other countries show that this possibility is becoming more and more likely and cannot be discounted. *See, e.g.,* Peter Walker, *MP Warns of Potential Conflicts of Interest for Boris Johnson*, *The Guardian* (July 27, 2019);¹⁷ Jim Zarroli, *When It Comes To Wealthy Leaders, World Abounds With Cautionary Tales*, *NPR* (Dec. 6, 2016);¹⁸ James B. Stewart, *Trump’s Potential Conflicts Have a Precedent: Berlusconi’s Italy*, *N.Y. Times* (Dec. 1, 2016).¹⁹

¹⁷ <https://bit.ly/31i0YeB>.

¹⁸ <https://goo.gl/ySNSfq>.

¹⁹ <https://goo.gl/WfUdRc>.

Presidential candidates from the two major political parties—or no party at all—are increasingly drawn from the ranks of 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);²⁰ Kelsey Piper, *Tom Steyer Shouldn't be Running for President*, Vox (Oct. 15, 2019);²¹ Dan Alexander, *Howard Schultz Explains why his Billionaire Candidacy Would be Different than Trump's*, Forbes (Jan. 28, 2019);²² Brian Schwartz, *Mike Bloomberg Prepared to Spend at Least \$100 Million on a 2020 Campaign for President if he Decides to Run*, CNBC Politics (Dec. 27, 2018);²³ Allan Smith, *Mark Cuban Says if He Runs for President He'd Probably Run as a Republican*, Business Insider (Oct. 23, 2017);²⁴ Bill Scher, *The Serious Case for Oprah 2020*, Politico Magazine (Mar. 1, 2017);²⁵ Agustino Fontevicchia, *Forbes' 2016 Presidential Candidate Wealth List*, Forbes

²⁰ <https://bit.ly/2Jk6KpM>.

²¹ <https://bit.ly/2MLX1JH>.

²² <https://bit.ly/2E4nkYQ>.

²³ <https://cnb.cx/2rW5G2q>.

²⁴ <https://goo.gl/mfUSRG>.

²⁵ <https://goo.gl/S9NJ9A>.

(Sept. 29, 2015) (reporting that, of the top 20 contenders in the 2016 presidential race, only 3 were not millionaires).²⁶

Given all this, ensuring that presidential power is exercised only for legitimate purposes has become even more critical for the well-being of the American political system. The Foreign Emoluments Clause thus must be properly enforced.

III. The President's interpretation of the Foreign Emoluments Clause would open the door to abuses of power and distortion of the free market

Plaintiffs have properly explained why the district court was correct to hold that Plaintiffs have standing to challenge the President's actions (*see* Appellees' Br. at 9–37), but mere judicial willingness to wade into Emoluments-Clause waters would itself be unavailing were courts to accept the President's cramped construction of the Foreign Emoluments Clause. Accordingly, this Court should reject the President's flawed construction of the Foreign Emoluments Clause and adopt Plaintiffs' reading, which is consistent with the Clause's text, as well as its history and purpose. (*See id.* at 47–55.)

According to the President, the Foreign Emoluments Clause prohibits only “compensation accepted from a foreign government for services rendered by an officer in either an official capacity or employment-

²⁶ <https://goo.gl/QdNemr>.

type relationship.” (Appellant’s Br. at 39.) The President’s view makes no allowance for certain destructive forms of corruption. Accepting this interpretation would permit the President and his successors to elevate their interests over those of the nation. The Foreign Emoluments Clause would not apply to benefits resulting from private commercial transactions between a President’s business and foreign governments. Examples already abound, from diplomatic delegations that spend exorbitant amounts to stay at the President’s hotels, to the Trump brand’s receipt of trademark protection from China. *See supra* 9–11. It strains credulity to believe the Foreign Emoluments Clause—intended to protect against undue foreign influence—does not cover this form of self-dealing.

The recurrence of these incidents (and the prospect of them occurring in the future) represents a substantial risk to the effective functioning of our system of governance and the free market. There is no question that corruption “saps economic growth, hinders development, destabilizes governments, undermines democracy, and provides openings for dangerous groups like criminals, traffickers, and terrorists.” U.S. Dep’t of State, *U.S. Anti-Corruption Efforts* (Jan. 20, 2017).²⁷

Although the United States—with its separation of powers and checks and balances—has long avoided the type of corruption that drags

²⁷ <https://bit.ly/36dOyIo>.

down many of the world's economies, the perception of corruption in the United States is on the rise. According to Transparency International, less than a year after President Trump took office, nearly 6 out of 10 people expressed the belief that corruption in the United States had risen in the past twelve months, up from around a third who said the same in January 2016. *See Corruption in the USA: The Difference a Year Makes* (Dec. 12, 2017).²⁸ Respondents saw the Office of the President as most corrupt. *Id.* Almost 7 out of 10 people expressed the belief that the government is failing to fight corruption, up from half in 2016. *Id.* The most recent Transparency International Corruption Perceptions Index, which ranks countries based on perceived levels of public sector corruption, shows that the United States has dropped out of the top (cleanest) 20 countries worldwide since 2016. *See* Transparency International, *US Drops Out of Global Corruption Index Top-20, Scores Four Points Lower than 2017* (Jan. 29, 2019).²⁹ Zoe Reiter, the acting representative to the United States at Transparency International, noted that “[a] four point drop in the CPI score is a red flag and comes at a time when the US is experiencing threats to its system of checks and balances, as well as an erosion of ethical norms at the highest levels of power.” *Id.*

²⁸ <https://goo.gl/wqM7eG>.

²⁹ <https://bit.ly/2MYponZ>.

A president with significant private business interests has the ability to use his title, power, and broad executive authority to favor his business interests over those of others. Repeated headlines over the past few years reveal the extent to which the President's business interests create significant conflicts between his duty as President and his personal business interests. See Jonathan O'Connell & David A. Fahrenthold, *As Tariffs Near, Trump's Business Empire Retains Ties to China*, The Washington Post (July 5, 2018);³⁰ Global Anticorruption Blog, *supra*; Dan Alexander, *Trump's Biggest Potential Conflict Of Interest Is Hiding In Plain Sight*, Forbes (Feb. 13, 2018).³¹ And, as discussed, concerns about the distortive effect of presidential business interests promise to become more acute as even wealthier tycoons try to follow President Trump's lead.

The President's ability to affect the free market should not be underestimated. In March 2018, for instance, President Trump used the power to issue and retract tariffs under the Trade Expansion Act of 1962 and the Trade Act of 1974 to select particular countries on which to place steep tariffs on imported steel and aluminum. See Pres. Proc. No. 9705, 83 FR 11625, 2018 WL 1316711 (Mar. 8, 2018); Pres. Proc. No. 9704, 83 FR 11619, 2018 WL 1316710 (Mar. 8, 2018). What if a

³⁰ <https://wapo.st/2nR94x8>.

³¹ <https://bit.ly/31mN7DU>.

president with a steel empire like Andrew Carnegie's had done this while, ostensibly wearing a "businessman" hat, he was negotiating with foreign countries to see which would provide favorable treatment of his products?

If something is not done, widespread corruption may no longer be something that plagues only far-flung countries. And if corruption proliferates, it will become increasingly difficult to walk back practices that will have become the new normal. This Court can prevent all of this, simply by following where settled precedent, constitutional text, and historical evidence lead it—affirmance of the decisions below. To do otherwise would permit the President and future presidents unfettered latitude to combine their expansive official powers with their personal businesses to create an unmatched profit-making machine—and thereby assail our very way of constitutional governance.

CONCLUSION

Amici respectfully submit that this Court should affirm the district court's orders.

Respectfully submitted,

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Dated: October 29, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 3,601 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

Dated: October 29, 2019

/s/ Colin E. Wrabley

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed using the Court's CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished via CM/ECF system.

/s/ Colin E. Wrabley

Dated: October 29, 2019