No. 18-2486

United States Court of Appeals for the Fourth Circuit

In Re: DONALD J. TRUMP, President of the United States of America, in his official capacity and in his individual capacity,

Petitioner.

On Petition for a Writ of Mandamus to the United States District Court for the District of Maryland, No. 17-cv-1596 (Hon. Peter J. Messitte)

BRIEF OF THE NISKANEN CENTER, REPUBLICAN WOMEN FOR PROGRESS, CHERI JACOBUS, TOM COLEMAN, EMIL H. FRANKEL, AND JOEL SEARBY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 18-2486 Caption: In Re: Donald J. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Niskanen Center
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Colin E. Wrabley Date: February 13, 2019

Counsel for: The Niskanen Center

CERTIFICATE OF SERVICE

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I certify that on February 13, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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February 13, 2019
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-2486 Caption: In Re: Donald J. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Republican Women for Progress
(name of party/amicus)

who is Amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Colin E. Wrabley Date: February 13, 2019

Counsel for: Republican Women for Progress

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INTEREST OF *AMICI CURIAE*[1]

When do a president's private business interests trigger constitutional scrutiny under the Emoluments Clauses of the U.S. Constitution? And when may individual states, in their sovereign, non-sovereign, or *parens patriae* capacities, challenge the constitutionality of those interests? These are not mere academic concerns—rather, they lie at the core of our constitutional republic and the need, enshrined by the Framers, to ensure that no president might be compromised or corrupted in carrying out his solemn oath of fidelity to the Constitution. Given the gravity of the legal issues presented in this case, *amici curiae* believe that the precedent this Court sets will be critical to preserving the shared American ideal that government is supposed to work for the common good of the people, not for the private profit of those few that hold public office.

Amici are right-of-center organizations and individuals[2] concerned about President Donald J. Trump's private business interests and

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[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), the parties to this appeal have consented to the filing of this brief, and accordingly, this brief may be filed without leave of court.

whether they comply with the strict mandate of the Constitution's Emoluments Clauses. *Amici* are even more concerned about the particular arguments the President has advanced in this action. If accepted, his arguments on standing and the merits 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 Respondents' brief, *amici* urge the Court to affirm the district court's rulings on standing and the proper interpretation of the Emoluments Clauses, rulings that are

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[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. Cheri Jacobus is a nationally-recognized political strategist, pundit, and writer who frequently offers political opinion and analysis from the Republican perspective. Tom Coleman is a former Republican member of Congress from Missouri. Emil H. Frankel is a lawyer who has served in both appointed and elected public service in Connecticut for over thirty years. Among other positions, he has served as commissioner of the Connecticut Department of Transportation and as Assistant Secretary for Transportation Policy of the U.S. Department of Transportation under President George W. Bush. Joel Searby is the owner of the Sycamore Land Company and a leader in the realms of faith, new politics and race relations.

grounded firmly in precedent, history, sound public policy, and proper constitutional interpretation.

SUMMARY OF ARGUMENT

1. The Emoluments Clauses are an essential bulwark against the corruption of the presidency and the distortion of our free market economy. The executive power is vast—both in foreign affairs and domestic policymaking—and it keeps growing. The need to enforce the Emoluments Clauses as originally intended thus has taken on ever greater importance.

The President's refusal to relinquish his substantial business interests makes this a watershed moment for the Emoluments Clauses. The many reported examples of governments attempting to curry favor with the President by engaging in business transactions with his companies are, of course, disconcerting in their own right. But the specific arguments the President advances in this case would allow even more dangerous business entanglements by a future president holding perhaps greater executive power in one hand and more extensive business interests in the other. The precedent this case sets thus will be critically important in preventing precisely the kind of corruption that has driven other nations toward kleptocracy.

2. Assuming the Court permits the President's attempt to use the extraordinary mandamus writ to bypass Congress's narrowly tailored appeal-by-certification procedure in 28 U.S.C. § 1292(b) (and it should

not), the Court should affirm the district court's refusal to dismiss the claims in this case. Specifically, the Court should affirm the district court's construction of the Emoluments Clause and, if it considers the district court's standing ruling, affirm that as well.

As Plaintiffs amply demonstrate, an "emolument" within the meaning of the two Emoluments Clauses consists of any "profit," "gain," or "advantage." The President's far narrower construction—that the Clauses proscribe only payments overtly based on official position or framed as compensation for services that the President himself has personally rendered—has little to commend it. Indeed, it runs counter to the constitutional text itself, as well as contemporary dictionary definitions, centuries of historical practice, and the longstanding views of executive-branch bodies. And, if accepted, the President's construction would allow presidents—through their private businesses—to elevate their personal interests over those of the nation. The Emoluments Clauses, however, serve more broadly to bar such monetization of the presidency, and this Court should so hold.

As for Plaintiffs' standing to bring this action, it is firmly grounded in controlling precedent and fundamental principles of constitutional standing. It also accords with the need—so apparent here and now—to ensure robust enforcement of the Emoluments Clauses against an increasingly powerful executive branch. Neither the Department of Justice ("DOJ") nor Congress is institutionally suited to

remedy the President's well-documented Emoluments Clause violations, and neither has shown any interest in doing so—even after more than two years of this and related Emoluments-Clause challenges. The judiciary should fulfill its responsibility to redress the clear injuries sustained by Plaintiffs, both to their proprietary interests and to the interests of the citizens for whom Plaintiffs exist to protect.

ARGUMENT

I. The Emoluments Clauses Are An Essential Bulwark Against The Corrupt Use Of Presidential Power And The Distortion Of Our Free Market Economy

The Framers intended the Emoluments Clauses to check presidential profiteering of the kind at issue in this case. Especially given the vast nature of the executive power and the extensive business interests that this President has, and future presidents may have, the Emoluments Clauses should be given their broad and intended meaning.

A. The Emoluments Clauses Are Vital Checks 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 Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 361–62 (2009) (citing Notes of James Madison (July 5, 1787), in 1 *The Records of the Federal Convention of 1787*, at 526, 530 (Max Farrand ed., rev. ed. 1966) (1937)).

The Constitution reflects the Framers' "structural commitment to fighting corruption." Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. Univ. L. Rev. Colloquy 30, 30 (2012). In particular, the Framers first 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. This deliberately capacious language bars the president and other federal officers 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—most clearly, an entity that he owns and that bears his name. As Plaintiffs have demonstrated, 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. (Respondents' Br. at 27.)

The Framers also were concerned about corruption from within. They worried that the nation's new, powerful chief executive would be tempted to use his office to enrich himself, and that other parts of the government could seek to "corrupt his integrity by appealing to his avarice." *The Federalist* No. 73 (Alexander Hamilton). To ensure that the president would not put his own financial interest above the good of the nation, the Framers added the Domestic Emoluments Clause, which provides:

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

U.S. Const. art. II, § 1. This provision applies—just like the Foreign Emoluments Clause—when the president accepts profits directly and when he does so through an affiliated business.

B. The Modern-Day Presidency Has Expansive—And Growing—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—both in foreign affairs and domestic policymaking. And that power continues to grow, making the need to enforce the Constitution's constraints on the president all the more pressing.

Begin with foreign affairs. "'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, 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). 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.*

The president also possesses broad domestic policymaking authority. He holds the veto power, U.S. Const. art. I, § 7, and the powers to propose legislation and commission officers of the United States, U.S. Const. art. II, § 3. He also has authority over the enormous administrative state—executive agencies and departments with not

only those powers expressly granted by their organic statutes but also the power to "formulat[e] … policy and … mak[e] … rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

These expansive powers are not static and have grown substantially over time. To tell an obvious truth, the government is *much* larger than it was when the Constitution was ratified. *See* Peter H. Lindert, GROWING PUBLIC: SOCIAL SPENDING AND ECONOMIC GROWTH SINCE THE EIGHTEENTH CENTURY (Cambridge Univ. Press 2004). 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 both the foreign and domestic realms. *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).[3] While there may be debate about whether the

[3] The president frequently uses executive orders and proclamations to motivate foreign nations—both with carrots and with sticks. *E.g.*, Exec. Order No. 13810, 82 FR 44705, 2017 WL 4223124 (Sept. 20, 2017) (President Trump) (imposing additional sanctions against North Korea

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government has too much power over individual lives, it is clear that its growth is all the more reason to ensure that checks against abuse of that power are effective and enforced.

C. Ensuring That Presidential Power Is Exercised Only For Legitimate Purposes Has Become All The More Important Given Increases In Executive Power And In The Likelihood Of Presidents With Business Empires

Happily, there has been little need since 1787 to think about the Emoluments Clauses. Unfortunately, the time to do so has now arrived. This is the moment to determine, for now and for the future, whether the Clauses 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—to this extent—a president with vast power who also has extensive private

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following recent 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); Pres. Proc. Nos. 9710, 9711, 83 FR 13355, 13361, 2018 WL 1505922 (Mar. 22, 2018) (President Trump) (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. 13846, 83 FR 38939, 2018 WL 3727930 (Aug. 6, 2018) (reimposing certain sanctions against Iran).

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* Norm Ornstein, *American Kakistocracy*, The Atlantic (Oct. 9, 2017), https://goo.gl/PkNYqf; Nicole Narea, *A Year in Trump Corruption*, Washington Monthly (Jan.-Mar. 2018), https://goo.gl/puCbui; The Global Anticorruption Blog, *Tracking Corruption and Conflicts in the Trump Administration* (updated Feb. 5, 2019), https://goo.gl/FNtcH1; Max Boot, *Let's Count the Ways Donald Trump Has Gone Where no President Has Gone Before*, L.A. Times (Apr. 4, 2017), https://goo.gl/kvr3Ww; *Trump Team's Conflicts and Scandals: An Interactive Guide*, Bloomberg (updated Jan. 25, 2019), https://goo.gl/7SGFaS.

And on the domestic side, the President's businesses have had dealings with the federal government and state and local governments that likewise bespeak the appearance, at least, of improper attempts to enrich the President personally. *See id.* To illustrate with just a few examples on the foreign and domestic fronts:

- 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), https://goo.gl/juNTcT.

- 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), https://goo.gl/XM2Y31.

- The Trump Organization is currently 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* Anita Kumar, *Foreign Governments Are Finding Ways to Do Favors For Trump's Business*, McClatchy (Jan. 2, 2018), https://goo.gl/3SvqS5.

- In March 2018, lawyers for one of the President's companies wrote the president of Panama asking him to intervene in a commercial dispute involving a Trump hotel in Panama. *See* Ana Cerrud & David A. Fahrenthold, *Warning of 'Repercussions,' Trump Company Lawyers Seek Panama President's Help*, Washington Post (Apr. 9, 2018), https://wapo.st/2HEM7Gf.

- Six days after the election, the President received all-but final approval from the National Park Service for a $32 million historic preservation tax credit for the Trump International Hotel. *See* Eric Levitz, *Trump Won the Presidency, Then Approval on a Tax Subsidy for His Hotel*, New York Magazine (Nov. 30, 2016), https://goo.gl/FUjJ23.

- Maine Governor Paul LePage, his staff, and security detail spent four nights and dined at the Trump International Hotel in the spring of 2017, at a time when the governor met with top administration officials and testified before Congress. *See* Kevin Miller, *Luxury Hotels, Fine Dining for LePage on*

Taxpayers' Dime, Portland Press Herald (July 23, 2017), https://goo.gl/HrQdMY.

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. A president could order executive agencies to take (or not take) regulatory action directed toward an entity he owns, or a competitor. Or a president could pressure agencies she supervises to award government contracts to her businesses.

While our presidents—prior to President Trump—have not typically had far-reaching business interests, current events and the experiences of other countries show that this possibility is becoming more and more likely and cannot be discounted. *See, e.g.*, James B. Stewart, *Trump's Potential Conflicts Have a Precedent: Berlusconi's Italy*, N.Y. Times (Dec. 1, 2016), https://goo.gl/WfUdRc; Jim Zarroli, *When It Comes To Wealthy Leaders, World Abounds With Cautionary Tales*, NPR (Dec. 6, 2016), https://goo.gl/ySNSfq. Presidential hopefuls 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* Agustino Fontevecchia, *Forbes' 2016 Presidential Candidate Wealth List*, Forbes (Sept. 29, 2015), https://goo.gl/QdNemr (reporting that, of the top 20 contenders in the 2016 presidential race, only 3 were not millionaires); Kelsey Piper, *Dear Billionaires: Stop Running for President*, Vox (Jan. 29, 2019), https://bit.ly/2MLX1JH (discussing the rash of recent hyper-wealthy individuals considering running for president, including Mark Zuckerberg, Mark Cuban, Michael Bloomberg, and Howard Schultz); *see also* Dan Alexander, *Howard Schultz Explains why his Billionaire Candidacy Would be Different than Trump's*, Forbes (Jan. 28, 2019), https://bit.ly/2E4nkYQ; 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), https://cnb.cx/2rW5G2q; Allan Smith, *Mark Cuban Says if He Runs for President He'd Probably Run as a Republican*, Business Insider (Oct. 23, 2017), https://goo.gl/mfUSRG; Bill Scher, *The Serious Case for Oprah 2020*, Politico Magazine (Mar. 1, 2017), https://goo.gl/S9NJ9A.

The possibility of presidents and others holding "Office[s] of Profit or Trust" pursuing policies or making decisions that will personally enrich themselves and their private interests thus is real indeed. This gives to a palpable risk of corruption and a blurring of public and

private interests, as what is beneficial to the president's financial portfolio may be detrimental to the common good.

The specter of corruption threatens in particular to disrupt our free market economy. 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. Anti-Corruption Efforts, U.S. Dep't of State, https://goo.gl/PsjjAG; Augusto Lopez-Claros, *Nine Reasons why Corruption is a Destroyer of Human Prosperity*, The World Bank Future Development Blog (Mar. 31, 2014), https://bit.ly/1pPDRjR.

Although the United States—with its separation of powers and checks and balances—has long avoided the type of corruption that drags down many of the world's economies, the perception of corruption in the United States is on the rise. According to Transparency International, 44 percent of Americans believe that corruption is pervasive in the White House, up from 36 percent in 2016, and almost 7 out of 10 people believe the government is failing to fight corruption, up from half in 2016. *See* Transparency International, *Corruption in the USA: The Difference a Year Makes* (Dec. 12, 2017), https://goo.gl/wqM7eG. The 2018 Corruption Perceptions Index reflects that the United States has dropped out of the top 20 countries worldwide. Transparency International, *Corruption Perceptions Index 2018*, https://bit.ly/2B7SAEu. 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." Transparency International, *US Drops Out of Global Corruption Index Top-20, Scores Four Points Lower than 2017* (Jan. 29, 2019), https://bit.ly/2MYponZ.

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 and economy. The Emoluments Clauses thus must be properly enforced.

II. This Court Should Affirm The District Court's Interpretation Of The Emoluments Clauses And Its Ruling That Plaintiffs Have Standing In This Action

The district court's finding that Plaintiffs have standing is well-supported by settled precedents. And its interpretation of the Emoluments Clauses and its conclusion that Plaintiffs have stated cognizable violations of the Clauses by the President are grounded firmly in a careful exegesis of the Clauses' text and history, construed in light of contemporary definitions of "emolument."

Plaintiffs persuasively explain the substance of why these rulings are correct, as have other *amici curiae*. *See* Brief of *Amici Curiae* Professor Clark D. Cunningham and Professor Jesse Egbert on Behalf of Neither Party, Doc. 27 (Jan. 29, 2019). For our part, *amici* wish to

underscore the dangerous consequences that will follow if this Court were to reverse.

A. The District Court's Standing Analysis Ensures Optimal Enforcement Of The Emoluments Clauses

By finding that Plaintiffs have standing to pursue remedies for violations of the Emoluments Clauses, the district court's ruling ensures that the Clauses are enforced robustly and helps to deter the severe market distortions that would follow from such violations.

1. The Political Branches Are Ill-Equipped To Police Violations Of The Emoluments Clauses

The restrictive view of standing the President has advanced would lead to severe under-enforcement of the Emoluments Clauses. The very individuals covered by the Clauses—the President and any other "person holding any Office of Profit or Trust"—cannot be entrusted with enforcing their own compliance with the Clauses. Put simply, the foxes should not be guarding the henhouse when it comes to policing the receipt of personal profit or gain (particularly in the context of a closely-held business interest).

Subordinate officials in the executive branch certainly are in no position to curb the President's violations of the Emoluments Clauses. Although DOJ's Office of Legal Counsel (OLC) has articulated a view of the Clauses that is faithful to their text, history, and purpose—a view consistent with Plaintiffs' position (*see* Respondents' Br. at 5 (recognizing the "'settled practice' of the Executive branch, reflected in a

body of opinions from the [OLC] and the Comptroller General")))—OLC has no authority to force the President to accept its view. And it is difficult to imagine executive branch officials willing to risk their careers by turning against their ultimate superior, especially one with a reputation for being quick to part ways with those he views as disloyal. *Cf.* Denise Lu & Karen Yourish, *The Turnover at the Top of the Trump Administration is Unprecedented*, N.Y. Times (updated Jan. 14, 2019), https://goo.gl/TDkMVM.

Unsurprisingly, DOJ has historically eschewed enforcement of the Clauses in the courts against the President and other executive branch officials during both Democratic and Republican administrations. Indeed, DOJ has come to the President's defense in this very case and taken a position that is particularly favorable to the person at the head of the executive branch.

Amici hasten to note that Congress and the Executive's reluctance to enforce the Clauses has been bipartisan. Beginning in 2016, Senate Judiciary Committee Chairman Senator Charles Grassley wrote a series of letters to DOJ and Department of State officials regarding conduct by then-Secretary of State Hillary Clinton. *See generally* Letters of Sen. Charles Grassley, available at https://bit.ly/2HGOVzf. Those letters detailed at length conduct by Secretary Clinton and her husband, former President Bill Clinton, which appears to have violated

the Foreign Emoluments Clause, by virtue of the couple's receipt of speaking fees from numerous foreign governments. *Id.* at 1–5.

DOJ offered a lukewarm response to Senator Grassley's inquiries, stating that "[a]t present, no statute provides a criminal penalty or civil remedy for receipt of emoluments from a foreign government without the consent of Congress," *id.* at 6 (May 2, 2016 Letter from Assistant Attorney General Peter J. Kadzik to Sen. Charles Grassley); and that "Congress has not given [DOJ] a law enforcement role in identifying or remedying alleged violations of the Emoluments Clause," *id.* at 16 (May 2, 2017 Letter from Acting Assistant Attorney General Samuel R. Ramer to Sen. Charles Grassley). When presented with the same evidence of violations by both Secretary Clinton and former President Clinton, the State Department similarly declined to refer the matter to the Inspector General, citing a "close[] review[]" of "each financial disclosure report [Sec. Clinton] submitted." *Id.* at 20–21 (June 19, 2017 Letter from Joseph E. Macmanus to Sen. Charles Grassley).

These communications are unsurprising given that both DOJ and the State Department fall within the ambit of the executive branch. Both are institutionally ill-suited to call into question the President's and other high executive branch officials' potential departure from the strictures of the Emoluments Clauses.

Enforcement by Congress also appears to be a non-starter. Gridlock or a political incentive to protect a president of the party that

holds a majority of either house of Congress could prevent action even in the face of acknowledged violations of the Emoluments Clauses. Congress could "h[o]ld hearings, require[] full disclosure of Trump's tax returns, consider[] everything Trump owed and owned and then determine[] which if any foreign emoluments would be acceptable," but appears unwilling or unable to do so. Jennifer Rubin, *A Responsible Congress Would Uncover Trump's Foreign Emoluments*, Washington Post (Feb. 27, 2018), https://wapo.st/2HpHhN6; *see also* Jennifer Rubin, *Republicans in Congress Retreat in the Trump Era*, Kansas City Star (Apr. 24, 2017), https://bit.ly/2HUkcis (noting that congressional Republicans have "entirely abandoned their constitutional obligations"). But Congress has done nothing of the sort to date, and more harm to our core national beliefs promises to follow absent prompt and decisive action to check the President's actions.

That leaves the courts as the last bastion of defense against the dangerous presidential excesses alleged in this case. And rightly so, since the Judiciary is the "ultimate interpreter of the Constitution" (*Baker v. Carr*, 369 U.S. 186, 211 (1962)) and is charged with enforcing it against all who are subject to its dictates—even the president. *See Zivotofsky*, 566 U.S. at 196 (noting that this "duty will sometimes involve the 'resolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility") (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983));

Nixon v. United States, 506 U.S. 224, 237-38 (1993) ("courts possess power to review . . . executive action that transgresses identifiable textual limits"). Indeed, there is little doubt that the courts have "the authority to determine whether [the President] has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

But the President's exceedingly narrow conception of standing in these circumstances, coupled with the political branches' institutional limitations, would threaten drastic under-enforcement of the Clauses, further weakening their deterrent effect on corruption in the Presidency. So, too, would the President's contention that Plaintiffs have no vehicle in the courts to vindicate the harms caused by the President's Emoluments Clause violations. Neither position has much to commend it—in law, in policy, or in common sense.

2. A President With Expansive Personal Business Interests Distorts The Free Market When He Accepts Unconstitutional Emoluments

A lack of effective enforcement mechanisms for blatant violations of the Emoluments Clauses can and will lead to a substantial distortion of the free market economy. A president (like President Trump) 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* Global Anticorruption Blog, *supra*; Joy Crane & Nick Tabor, *501 Days in Swampland*, New York Magazine (Apr. 1, 2018), https://goo.gl/CNAAyq (discussing examples of the President's "official corruption, from small-time graft and brazen influence peddling to full-blown raids on the federal Treasury"); Presidential Profiteering: Trump's Conflicts Got Worse in Year Two, Citizens for Responsibility and Ethics in Washington (Feb. 11, 2019), https://www.citizensforethics.org/presidential-profiteering-trumps-conflicts-got-worse/. 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 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?

Given the stakes at issue, effective enforcement of the Clauses is vital. Fortunately, settled law confirms Plaintiffs' standing—as sovereign states or districts—to protect their citizens by acting as *parens patriae*, and in their own proprietary capacities as owners of hotel and event spaces—to challenge the President's alleged violations of the Clauses. (*See* Respondents' Br. at 41–50.) With respect to Plaintiffs' standing to protect their proprietary interests, that follows as a matter of basic economics—an "increase in competition" in a market presumptively harms the participants in that market, Plaintiffs included. *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010), *vacated*, 644 F.3d 388 (D.C. Cir. 2011); *see also Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008) (pointing out that "it is *presumed* (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors").

Recognizing such competitor standing is particularly appropriate in Emoluments-Clause cases given the powerful market-distorting effect a President's actions can have in light of his political title, access to power, and ability to influence world and domestic events. It goes without saying that market participants able to influence the President through his vast personal business interests are on an "unequal footing" with other market participants. *Cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 665–66 (1993) (recognizing, in the context of an Equal Protection challenge to

government "set-aside" programs, that "'injury-in-fact' is the inability to compete on an equal footing"); *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1248 (4th Cir. 1996) (finding standing where constitutional violation resulted in plaintiffs "not competing on a level playing field").

Where, as here, the Constitution provides a clear check on executive power that cannot be fully or meaningfully enforced by either the executive or the legislative branches, the Judiciary should fulfill its responsibility to redress a clear harm to those who would otherwise be forced to compete in an unfair and distorted market.

B. The President's Permissive Interpretation Of The Emoluments Clauses Would Open The Door Wide To A Range Of Corruption And Abuses Of Executive Power

The Court also should reject the President's flawed construction of the Emoluments Clauses and adopt Plaintiffs' reading, which is consistent with the Clauses' text, as well as their history and underlying purposes. (*See* Respondents' Br. at 8–9.) To do otherwise would give license to corruption and other corrosive abuses of executive power, unchecked by judicial oversight and uprooted from the national interest that should guide executive branch decisionmaking. As the district court put it, it simply cannot be that the President can "receive unlimited 'emoluments' from foreign and state governments without the least oversight and with absolute impunity." *Dist. of Columbia v. Trump*, 291 F. Supp. 3d 725, 757 n.18 (D. Md. 2018).

As noted, federal courts are the ultimate arbiters of constitutional meaning, and they must carry out that highest of responsibilities no matter the parties in the cases that come before them. *Supra* at 20–21. When it comes to the Emoluments Clauses in particular, this duty is at its zenith because neither the executive branch nor the legislative branch is equipped to properly police violations of the Clauses. *Id.* at 19–20.

But mere judicial willingness to wade into Emoluments-Clause waters and consider challenges to the President's conduct would itself be unavailing were courts to accept the President's cramped construction of the Clauses. On his reading, the Clauses apply only to payments made overtly on the basis of the President's official position or framed as compensation for services that he has personally rendered—but not to the provision of benefits through businesses in transactions like those Plaintiffs have detailed. As the district court concluded and Plaintiffs demonstrated in their opening brief, however, that interpretation is manifestly unmoored from the text of the Clauses, their original meaning, and more than two centuries of interpretation.

Moreover, as shown below, taken to its logical conclusion, the President's reading of the Emoluments Clauses would permit him and future presidents unfettered latitude to combine their expansive official powers with their personal businesses and create an unmatched profit-making machine. This would render the Clauses a patently inadequate

means to the Framers' end of addressing corruption. And it would threaten to undermine our country's most deeply-held values and institutions.

According to the President, the Foreign Emoluments Clause prohibits only "the receipt of compensation for services rendered by an official in an official capacity or in an employment (or equivalent) relationship with a foreign government, and the receipt of honors and gifts by an officeholder from a foreign government." (Def. Mot. to Dismiss, Dkt. 21-1, at 31). And the Domestic Emoluments Clause, the President contends, prohibits only benefits "aris[ing] from the President's service as President." *Id.* at 33. Put another way, the Emoluments Clauses prohibit only "profit arising from office or employ." (Petition for Writ of Mandamus at 21). The President's view that the Clauses proscribe payments overtly based on official position or framed as compensation for services that he has personally rendered, but not transactions like those Plaintiffs have detailed, makes no allowance for more subtle—and potentially more destructive—forms of corruption.

Accepting this interpretation would permit the President and his successors to elevate their interests over those of the nation. The Clauses would not apply to benefits resulting from private commercial transactions between a President's business and state or foreign governments. Foreign 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* Global Anticorruption Blog, *supra*. It strains credulity to believe that the Framers ignored this type of self-dealing when they conceived of and adopted the Clauses. It strains credulity even further to believe that states and the federal government could make direct cash payments to the President so long as they did not rise to the level of bribery. That cannot be right—but under the President's reading of the Clauses, it would be perfectly acceptable.

The President's interpretation would also permit states or the federal government to provide lucrative benefits to the President's businesses in the form of subsidies, tax incentives, or other favorable regulatory treatment. This practice already has become commonplace during the Trump presidency. *See* Crane & Tabor, *supra* (detailing, *inter alia*, the various ways in which the President's business interests have benefitted from government action). Under the President's reading, this too could be entirely legal—even if the President later takes some action favorable to the state or federal government agency that provided the benefit.

And these scenarios may be just the beginning. Federal executive agencies—ultimately answerable to the president—could, at the president's behest or not, make regulatory determinations favorable to the president's business interests. For example, the President benefited after he ordered his treasury secretary to roll back regulation on banks,

id., and has retained a substantial subsidy from the Department of Housing and Urban Development for a New York City property in which he owns an interest, *id.* If left unchecked, the President can wield the vast administrative state as a tool to benefit himself and his personal business interests.

While some might think these particular actions insignificant in isolation, they represent a much greater risk to the effective functioning of our free market system, and our system of governance. If something is not done, widespread corruption may no longer be something that plagues far-flung countries. And if corruption proliferates and spreads, 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.

CONCLUSION

Amici respectfully submit that this Court should affirm the district court's rulings that Plaintiffs have standing to bring their claims for violations of the Emoluments Clauses and that Plaintiffs have adequately pleaded those claims.

Respectfully submitted,

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Dated: February 13, 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 6,408 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.

/s/ Colin E. Wrabley

Dated: February 13, 2019

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: February 13, 2019