

José A. Cabranes, *Circuit Judge*, dissenting from the order denying rehearing en banc:

I respectfully dissent from the order denying rehearing of this case en banc.¹

We have missed an opportunity to address en banc a “question of exceptional importance,” Fed. R. App. P. 35(a)(2), regarding the limits of the judicial power under Article III of the Constitution in addressing a constitutional claim against a President. The exceptional importance of the case is beyond dispute and its portentousness, which made rehearing en banc appropriate, is effectively captured in Judge Walker’s “Statement” in response to the order denying rehearing en banc and Judge Menashi’s comprehensive discussion of the principles of Article III standing.

As Justice Robert H. Jackson aptly reminded us, “because our own jurisdiction is cast in terms of ‘case or controversy,’ we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute [a true case or controversy].” *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952); see also *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 135 (2011) (noting that Justice Jackson’s opinion in *Doremus* “reiterated the foundational role that Article III standing plays in our separation of powers”). We are not authorized to review a constitutional violation unless there is an adequate showing that the party bringing the lawsuit is in fact sustaining or “is immediately in danger of sustaining some direct injury,” such as a “direct dollars-and-cents injury,” as a result of

¹ I have not solicited concurrences for my opinion.

the challenged unconstitutional conduct by the President. *Doremus*, 342 U.S. at 434 (internal quotation marks omitted) (quoting *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)).

It is worth underscoring that only the threshold question of plaintiffs' constitutional standing at the pleading stage has been resolved by our Court. We are far from the finish line—the resolution of the merits of the plaintiffs' claims lies before us. On remand, the District Court will need to determine whether the operative complaint in this case states a claim upon which relief can be granted. In conducting this inquiry, the District Court likely will need to address various issues that have yet to be resolved by the Court of Appeals, including whether: (1) the Foreign and Domestic Emoluments Clauses in the Constitution create a privately enforceable right of action against the President; and (2) the plaintiffs' asserted interests fall within the zone of interests protected by the Emoluments Clauses. In carefully addressing these threshold issues on remand, at the motion-to-dismiss stage, the District Court will be able to determine in the first instance whether the case should be dismissed on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6).