No. 20-331

IN THE SUPREME COURT OF THE UNITED STATES

IN RE DONALD J. TRUMP

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File Brief and Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* Supporting Petitioner

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October 14, 2020

Motion for Leave to File Brief as *Amici Curiae* Supporting Petitioner

Amici curiae Scholar Seth Barrett Tillman and the Judicial Education Project respectfully move for leave to file a brief explaining why this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Notice of intent to file this brief was provided to Respondents on October 6, 2020 with less than ten days' notice. Respondents granted consent that same day. Notice of intent to file this brief was provided to Petitioner on October 8, 2020, six days before the filing deadline. The Petitioner did not respond to *Amici*'s request for consent. These requests were untimely under Supreme Court Rule 37(a)(2).

Scholar Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University Department of Law, Ireland. Tillman is one of a very small handful of academics who has written extensively on the Constitution's "office"-language, including the Foreign Emoluments Clause. Since 2008, Tillman has consistently written that the Foreign Emoluments Clause's "Office . . . under" the United States language does not encompass the presidency.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation.

Amici curiae can provide the Court with additional grounds on which part of the judgment below should be reversed. Specifically, the President is not subject to the Foreign Emoluments Clause.

The Petitioner and Respondents would suffer no prejudice if the Court permitted this brief to be filed, particularly because the Respondents were granted a 47-day extension to file their responsive brief. Therefore, Scholar Seth Barrett Tillman and the Judicial Education Project respectfully request that the Court permit this brief to be filed.

Respectfully submitted,

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Questions Presented

The Court should grant certiorari and supplement the questions that the Petitioner presented with an additional question:

> Whether elected federal officials, including the President, hold an "Office of Profit or Trust under [the United States]," and are subject to the Foreign Emoluments Clause.

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Interest of *Amici Curiae*[1]

Scholar Seth Barrett Tillman, an American national, is a member of the regular full-time faculty in the Maynooth University Department of Law, Ireland. Tillman is one of a very small handful of academics who has written extensively on the Constitution's "office"-language, including the Foreign Emoluments Clause. Since 2008, Tillman has consistently written that the Foreign Emoluments Clause's "Office . . . under" the United States language does not encompass the presidency.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation.

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[1] Rule 37 statement: As noted in the motion for leave to file this brief, timely notice of intent to file was not provided to the parties. The Respondents consented. The Petitioner did not respond to *Amici*'s request. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

Summary of Argument

The Solicitor General's petition presents two questions about whether a writ of mandamus is warranted. The overwhelming majority of the brief focuses on jurisdictional and other threshold issues. There is only a single paragraph devoted to a single merits question: what is the meaning of the word "emolument" in the Foreign and Domestic Emoluments Clauses.[2] Such brevity was prudent. The Court is unlikely to address this issue within the narrow confines of a mandamus proceeding.

But the Court may still address another threshold issue—one on which there will likely be no briefing by the parties: Is the President subject to the Foreign Emoluments Clause? Without question, the President is subject to the Domestic Emoluments Clause.[3] That provision expressly references the President. But the Foreign Emoluments Clause does not expressly identify the positions it covers.[4] Rather, this provision applies to those who hold an "Office of Profit or Trust under [the United States]."[5]

The Supreme Court has not addressed whether the elected President holds an "office . . . under the United States," and is therefore subject to the Foreign

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[2] Petition at 28–29.

[3] U.S. Const. art. II, § 1, cl. 7 ("[The President] shall not *receive* within that Period any other Emolument from the United States, or any of them.") (emphasis added).

[4] U.S. Const. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them [the United States], 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.") (emphasis added).

[5] *Id.*

Emoluments Clause. Indeed, the Court has never held that any elected federal official is subject to this provision.

The Solicitor General's petition, if granted, would afford the Court an opportunity to address this issue. But a statement that the elected President holds an "Office of Profit or Trust under [the United States]" would not be limited to this case. Rather, this finding—even in dicta—would have two destabilizing consequences.

First, the Court may suggest that all federal positions—whether appointed or elected—are "offices" and "officers." If that premise is correct, then members of Congress would be subject to the Impeachment Clause, which applies to "all civil Officers of the United States."[6] The Court, without the benefit of any briefing, potentially and perhaps unintentionally would lend its imprimatur to the House of Representatives impeaching the elected Senate Majority Leader.[7]

To avoid this destabilization of longstanding intrabranch relations, the Court may be inclined to limit its holding: (1) positions in the Executive and Judicial Branches are "officers," but (2) positions in the Legislative Branch are not "officers." That pivot would lead to a second, far more destabilizing consequence. The Succession Clause authorizes Congress to declare "what Officer shall . . . act as President" in the event of a double vacancy.[8] Under the Presidential Succession Act of 1947, the Speaker

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[6] U.S. Const. art. II, § 4.
[7] *Cf. Lamar v. United States*, 241 U.S. 103, 113 (1916).
[8] U.S. Const. art. II, § 1, cl. 6.

of the House is next in line after the Vice President.[9] If elected positions in the Legislative Branch are not "officers," then this statute is unconstitutional.[10] In our present moment, the Supreme Court should avoid casting doubt, without the benefit of briefing, on the constitutionality of this statute.

Of course, the Court could try to simply limit its analysis to the Foreign Emoluments Clause, and not address any other provisions of the Constitution. Unfortunately, the Supreme Court cannot easily print tickets good for one ride only.[11] Even a hint that the elected President holds an "Office of Profit or Trust under [the United States]" would "resonate well beyond the particular dispute at hand" and "will be cited in diverse contexts, including those presently unimagined."[12]

Generally, the Court is extremely careful to reconcile its precedents and to avoid addressing unnecessary constitutional questions. But the Court's practice has been uneven when a case involves a provision of the Constitution that references different types of "offices" and "officers." In the past six years, the Court has made statements in three cases that quietly decided never-before-resolved constitutional issues, and did so without the benefit of any briefing: *NLRB v. Noel Canning* and *Lucia v. SEC* stated that

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[9] 3 U.S.C. § 19(a)(1).

[10] *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 136 (1995).

[11] *But cf. Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances . . . .").

[12] *See NLRB v. Noel Canning*, 573 U.S. 513, 615 (2014) (Scalia, J., concurring).

the Appointments Clause was simultaneously the "exclusive" and the non-exclusive means of appointing "officers of the United States."[13] Furthermore, *Noel Canning* stated that Recess Appointees are "officers of the United States," suggesting that they could be impeached.[14] But the *PROMESA* case held that certain territorial officers were not "officers of the United States," implying that they could not be impeached.[15] The Court did not receive briefing on any of these issues.

The stakes in the instant petition are far too high to simply assume, in the absence of any briefing, that the President, and other elected officials, are subject to the Foreign Emoluments Clause. Therefore, the Court should add a supplemental question presented:

> Whether elected federal officials, including the President, hold an "Office of Profit or Trust under [the United States]," and are subject to the Foreign Emoluments Clause.

In light of the lack of adversity, the Court should appoint an *amicus curiae* to argue that the President is not subject to the Foreign Emoluments Clause.

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[13] *Id.* at 522; *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).
[14] *Noel Canning*, 573 U.S. at 522.
[15] *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649, 1665 (2020).

Argument

I. The Supreme Court Has Interpreted the Phrase "Officers of the United States" in the Appointments Clause, Without Considering How Those Interpretations Affect Related Provisions of the Constitution.

There are more than twenty provisions of the 1788 Constitution that refer to different types of "offices" and "officers." Most of these provisions are fairly obscure, and will seldom be subject to judicial review. One provision, however, stands out in *U.S. Reports*: the Appointments Clause. It provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such *inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[16]

The Court often decides whether an appointed position is a *principal* "officer of the United States," an *inferior* "officer of the United States,"[17] or a mere "employee of the United States."[18] But none of these decisions involved elected officials. Indeed, two recent

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[16] U.S. Const. art. II, § 2, cl. 2 (emphases added).
[17] *Morrison v. Olson*, 487 U.S. 654 (1988).
[18] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976).

cases implied that the phrase "officer of the United States" is limited to appointed positions.[19]

If the phrase "officers of the United States" in the Appointments Clause is limited to appointed positions, it is reasonable to conclude that the phrase "officers of the United States" in the Impeachment Clause refers to the same category of appointed positions.[20] The Impeachment Clause provides, "[t]he President, Vice President and all civil *Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[21] In short, excluding a position from the scope of the Appointments Clause excludes that position from the scope of the Impeachment Clause.

Last Term, the Court implied such an exclusion. *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC* held that certain territorial officers were not "officers of the United States," and thus were not subject to the requirements of the Appointments Clause.[22] As a result, certain presidentially-appointed territorial officers would not be considered "officers of the United States," and thus could not be impeached for bribery, treason, or for any high crime or misdemeanor. The *PROMESA* case effectively narrowed the scope of the Impeachment Clause. The Court reached this issue

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[19] *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497–98 (2010) (citing Hamilton's *Federalist* No. 72); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 n.3 (2020).

[20] *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).

[21] U.S. Const. art. II, § 4 (emphasis added).

[22] 140 S. Ct. 1649, 1665 (2020).

without any briefing. Moreover, the Court did not address how distinguishing territorial officers from "officers of the United States" affects the scope of the Impeachment Clause.[23] Indeed, this holding is in tension with a 1796 Attorney General Opinion, which concluded that territorial judges could be impeached.[24]

The Constitution's "office"- and "officer"-language has a Newtonian quality to it. Removing an office from the scope of one clause will necessarily remove it from the scope of other clauses using the same "office"- and "officer"-language. Likewise, subjecting an office to the scope of one clause will necessarily subject it to other clauses.

The Court also failed to consider the relationship among related provisions in two other recent decisions. First, *Lucia v. SEC* held that "[t]he Appointments Clause prescribes the *exclusive* means of appointing 'Officers.'"[25] Second, *NLRB v. Noel Canning* stated that "the Recess Appointments Clause sets forth a *subsidiary*, not a primary, method for appointing officers of the United States."[26] If the Appointments Clause is the "exclusive means" of appointing "Officers," how can the Recess Appointments Clause be a "subsidiary" method for

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[23] *See* Josh Blackman & Seth Barrett Tillman, *Justice Breyer made it impossible for Congress to impeach territorial officers for accepting bribes*, BALKINIZATION (July 14, 2020), https://perma.cc/UTL2-9VBY.

[24] Letter from Attorney General Charles Lee to the U.S. House of Representatives (May 9, 1796), *in* 1 *American State Papers: Miscellaneous Series* 151, 151 (Washington, Gales & Seaton 1834), https://bit.ly/3nMhEXY.

[25] *Lucia*, 138 S. Ct. at 2051 (emphasis added).

[26] 573 U.S. 513, 522 (2014) (emphases omitted).

appointing "officers of the United States"? It is difficult to reconcile these two statements.

In light of these precedents, recess appointees can be impeached, but certain territorial officers cannot be impeached. These issues were not squarely addressed by parties before the Court. Yet, the Court incidentally decided these questions, without the benefit of any briefing.

Fortunately, the consequences of these intratextualist errors are likely minimal. *Amici* are not aware of any recent efforts to impeach recess appointees or territorial officers. And the conflict between *Lucia* and *Noel Canning* will most likely remain an academic debate. However, similar intratextualist errors in the context of the Foreign Emoluments Clause could have far more destabilizing consequences.

II. The District Court Held That the Phrase "Office . . . under the United States" Applies to All Appointed and Elected Federal Positions, Without Considering How That Holding Affects Related Provisions of the Constitution.

The Foreign Emoluments Clause does not use the same language—"officers of the United States"—that appears in the Appointments and Impeachment Clause. Rather, the Foreign Emoluments Clause applies to those who hold an "Office of Profit or Trust under [the United States]."[27]

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[27] U.S. Const. art. I, § 9, cl. 8.

The Supreme Court has never interpreted the scope of this provision. Indeed, before the instant litigation began in 2017, no Article III court had decided that any elected federal official is subject to the Foreign Emoluments Clause. The U.S. District Court for the District of Maryland was the first. It held that the President holds an "Office of Profit or Trust under [the United States]," and is thus subject to the Foreign Emoluments Clause.[28] The court posited that that the phrase "under the United States" "is used in the Constitution to distinguish between" officers in "the federal and state governments."[29] That is, a "federal office holder" including the "President holds his office 'under the United States.'"[30]

The U.S. District Court for the District of Columbia found "persuasive" the Maryland federal District Court's analysis.[31] The U.S. District Court for the Southern District of New York, which dismissed the case for lack of standing, had no occasion to decide this question.[32]

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[28] *District of Columbia and Maryland v. Trump*, 315 F. Supp. 875, 882–886 (D. Md. 2018).

[29] *Id.* at 884.

[30] *Id.*

[31] *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 196 n.3 (D.D.C. 2019), vacated, 949 F.3d 14 (D.C. Cir.), cert. denied (2020). ("The parties do not dispute that the [Foreign Emoluments] Clause applies to the President. . . . The Court therefore declines to reach the question despite the argument to the contrary of one *amicus* brief and based on Judge Peter J. Messitte's persuasive analysis of that argument and conclusion that the Clause does indeed apply to the President in the only other judicial opinion construing the Clause." (citations omitted)).

[32] *CREW v. Trump*, 276 F. Supp. 3d 174, 181–82 & n.2 (S.D.N.Y. 2017) ("That clause provides that certain federal government officials shall not receive any form of gift or compensation from a

The Maryland federal court's analysis was not entirely clear; it can be read in two different ways. First, the District Court may have suggested that *all* federal positions—whether appointed or elected—are "federal office holder[s]." Second, the District Court may have suggested that *all* Executive and Judicial Branch positions—whether appointed or elected—are "federal office holder[s]." But, under this second reading, positions in the Legislative Branch would not be "federal office holder[s]." Both readings would lead to destabilizing consequences.

A. If all federal positions—whether appointed or elected—are officers, then members of Congress could be impeached.

The District Court held that the President holds a federal "office." This conclusion is inconsistent with two recent separation of powers decisions. These cases implied that the phrase "officer of the United States" is limited to appointed positions. First, *Free Enter. Fund v. PCAOB* explained that "[t]he people do not vote for the 'Officers of the United States.'"[33] Second, *Seila Law LLC v. CFPB* reaffirmed this dichotomy:

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foreign government without Congress's approval. . . . For purposes of this motion, Defendant *has conceded* that he is subject to the Foreign Emoluments Clause.") (emphasis added).

[33] *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497–98 (2010) (citing Hamilton's *Federalist* No. 72); *see also United States v. Mouat*, 124 U.S. 303, 307 (1888) (Harlan, J.) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, an officer of the United States.").

"Article II distinguishes between two kinds of officers—principal officers (who *must be appointed* by the President with the advice and consent of the Senate) and inferior officers (whose *appointment* Congress may vest in the President, courts, or heads of Departments)."[34]

The District Court seemed to imply that elected Representatives and Senators are also federal office holders. This implication would be destabilizing. The Impeachment Clause extends to "all civil Officers of the United States."[35] Under this reading of the District Court's opinion, members of Congress could be impeached. If the District Court were correct, the Speaker of the House could immediately file articles of impeachment against the Senate Majority Leader.[36] Even if the charges result in an acquittal, the House could still clog up the Senate's calendar, preventing meaningful votes. This dynamic would irreparably alter the separation of powers.

B. If positions in the legislative branch cannot be officers, then the Presidential Succession Act of 1947 is unconstitutional.

Perhaps the Maryland District Court meant that only elected and appointed positions in the Executive and Judicial Branch are officers, but elected positions in the Legislative Branch are not officers. This

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[34] *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 n.3 (2020) (emphases added).
[35] U.S. Const. art. II, § 4.
[36] *Cf.* Lamar v. United States, 241 U.S. 103, 113 (1916).

alternate reasoning leads to another destabilizing consequence.

The Succession Clause authorizes Congress to declare "what Officer shall . . . act as President" in the event of a double vacancy.[37] Under the Presidential Succession Act of 1947, the Speaker of the House is next in line after the Vice President.[38] If elected positions in the Legislative Branch are not "officers," then this statute is unconstitutional.[39] In our present moment, the Supreme Court should avoid casting doubt, without the benefit of briefing, on the constitutionality of this statute.

C. The Phrase "Office . . . under the United States" in the Foreign Emoluments Clause refers to a category of appointed positions

This Court should not hold, or even suggest, that all federal positions—whether appointed or elected—are officers, without the benefit of briefing. This Court also should not hold that, or even suggest, without the benefit of the briefing, that positions in the legislative branch cannot be officers. *Noel Canning*, *Lucia*, and the *PROMESA* case demonstrate how the Court has failed to consider the relationship between the phrase "officers of the United States" in the Appointments and Impeachment Clauses. In the absence of briefing, the Court risks making a similar mistake with respect to the phrase "office . . . under the United States" in

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[37] U.S. Const. art. II, § 1, cl. 6.
[38] 3 U.S.C. § 19(a)(1).
[39] Amar & Amar, *supra* note 10, at 136.

the Foreign Emoluments, and several related provisions.

There is a straightforward line of reasoning that avoids all these negative consequences. The line recognized in *PCAOB* and *Seila Law* is the correct line: the phrase "officers of the United States" refers to appointed positions in the Executive and Judicial Branches, but not elected positions. And the phrase "office . . . under the United States" refers to a broader category of appointed positions. And this meaning is the original public meaning of the phrase "office . . . under the United States" in the Constitution. This position is supported by the weight of evidence from British and early American materials, particularly from President Washington's administration and the First Congress.

Amici have submitted briefs in three District Courts and three Circuit Courts recounting this historical evidence.[40] The Office of Legal Counsel and Congressional Research Services initially disagreed with *Amici*. But they have modified their position in light of Tillman's scholarship.

III. The Department of Justice and the Congressional Research Service Have Shifted Their Positions on Whether the Foreign Emoluments Clause Applies to Elected Positions, Including the President

In 2009, the Office of Legal Counsel ("OLC") stated that the Foreign Emoluments Clause "surely" applies

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[40] All of *Amici*'s filings can be accessed at http://bit.ly/EmolumentsLitigation.

to the President.[41] This conclusion was reached without any analysis. Three years later, the Congressional Research Service ("CRS") reached a similar conclusion: "The President and all federal officials are restricted by the" Foreign Emoluments Clause.[42] Yet, in 2016, CRS hedged a bit. The office stated that the Foreign Emoluments Clause "might technically apply to the President."[43]

In 2019, CRS shifted its position yet again. Now, CRS declined to take a position on whether the President is subject to the Foreign Emoluments Clause. CRS cited the "significant academic debate about whether OLC's conclusion [in its 2009 memorandum] comports with the original public meaning of the Foreign Emoluments Clause."[44]

CRS devoted several pages of analysis, with two dozen footnotes, to the "important threshold issue" about who "is subject to" the Foreign Emoluments Clause.[45] This debate largely centered around Tillman's scholarship on the Constitution's "office"-

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[41] *See Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 O.L.C., 2009 WL 6365082, at *4 (Dec. 7, 2009).

[42] Jack Maskell, Cong. Research Serv., Memo., Gifts to the President of the United States at 4 (Aug. 16, 2012), http://bit.ly/2s7AVZu.

[43] Jack Maskell, Cong. Research Serv., Memo., Conflict of Interest and "Ethics" Provisions That May Apply to the President at 2 (Nov. 22, 2016), http://bit.ly/2teGovc.

[44] Michael A. Foster & Kevin J. Hickey, Cong. Research Serv., Report, R45992, The Emoluments Clauses and the Presidency: Background and Recent Developments 6 (2019), https://bit.ly/3iUY6x7.

[45] *Id.* at 5–8.

and "officer"-language—a subject he has written on continuously since 2008.

At the outset, CRS cited Tillman's textualist taxonomy, in which "the Foreign Emoluments Clause does not apply to any *elected* officials such as the President, but only applies to certain appointed federal officers."[46] Moreover, beyond Tillman's "textual and structural arguments," CRS also cited three categories of "Founding-era historical evidence" raised by Tillman "[t]o support the view that the Foreign Emoluments Clause does not apply to the President."[47] First, CRS referenced a 1793 "list produced by Alexander Hamilton of 'every person holding any civil office or employment under the United States' [that] did not include elected officials such as the President and Vice President."[48] Second CRS referenced the fact that "George Washington accepted gifts from the Marquis de Lafayette and the French Ambassador [Ternant] while President without seeking congressional approval."[49] Third, CRS referenced the fact that President "Thomas Jefferson similarly received and accepted diplomatic

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[46] Foster & Hickey, *supra* note 44, at 6; *see also* Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1: The Constitution's taxonomy of officers and offices*, Volokh Conspiracy (Sept. 25, 2017), http://bit.ly/2nchNJY.

[47] Foster & Hickey, *supra* note 44, at 6.

[48] Foster & Hickey, *supra* note 44, at 6 (citing Tillman publication); *see also* Adam Liptak, *'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm*, N.Y. Times, Sept. 26, 2017, at A19, https://nyti.ms/2jWJy6N.

[49] Foster & Hickey, *supra* note 44, at 6 (citing Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180, 188–90 (2013)).

gifts from Indian tribes and foreign nations, such as a bust of Czar Alexander I from the Russian government, without seeking congressional approval."[50]

CRS also cited evidence and arguments that the Plaintiffs have relied upon to support the contrary view.[51] CRS, however, did not adopt one side of this debate over the other; rather, it flagged legitimate arguments which exist on both sides of the issue. In doing so, CRS has now cast doubt on OLC's 2009 conclusory assertion that the Foreign Emoluments Clause "surely" applies to the President.

Indeed, the Civil Division of the Department of Justice has also cast some doubt on OLC's 2009 opinion.[52] In April 2018, DOJ wrote that the applicability of the Foreign Emoluments Clause to the President presented a "novel question."[53] The Civil Division brief also raised a red flag by contending that OLC reached its 2009 conclusion "without discussion."[54] These statements reflect a conflict within the Justice Department.

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[50] Foster & Hickey, *supra* note 44, at 6 (citing Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 2: The Practices of the early presidents, the first Congress and Alexander Hamilton*, Volokh Conspiracy (Sept. 26, 2017), http://bit.ly/2n4Ab7t).

[51] Foster & Hickey, *supra* note 44, at 6–8.

[52] Defendant's Supplemental Brief in Support of his Motion to Dismiss and in Response to the Briefs of *Amici Curiae* at 21, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018), ECF No. 51, http://bit.ly/3aTF33C.

[53] *Id.* at 22.

[54] *Id.* at 21.

The Civil Division also made a series of "observations" about the "historical evidence" that Tillman had advanced—the very same evidence that CRS found persuasive.[55] First, DOJ discussed the relevance of certain gifts President Washington accepted. The brief recounted that President Washington "recei[eved] . . . a [framed] portrait of King Louis XVI from the French ambassador and the key to the Bastille from a French officer, the Marquis de Lafayette."[56] DOJ observed, "[i]n the absence of any evidence of congressional consent, Washington's acceptance of these gifts may suggest that he did not believe he was subject to the Clause."[57] But, "[o]n the other hand, it is also possible that he accepted the gifts believing that he was doing so on behalf of the American people."[58] Still, "the fact that the key to the Bastille is now at Mount Vernon . . . could undermine the view that Washington accepted the key on behalf of the American people."[59]

Here, DOJ was truly wrestling with the evidence. These objections are reasonable, but ultimately, are rebuttable. The gift from Lafayette was not a private gift; this gift was discussed in a contemporaneous diplomatic communication from the French government's representative in the United States to his superiors in the French ministry of foreign

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[55] *Id.* at 23–26.
[56] *Id.* at 24. *See William* B. Adair, *A Masterpiece of Artisanship*, Picture Framing Mag., Aug. 2010, at 28 (describing the framed portrait as a valuable "masterpiece").
[57] Defendant's Supplemental Brief, *supra* note 52, at 24.
[58] *Id.*
[59] *Id.* at 24–25.

affairs.[60] Moreover, DOJ did not address the more important of the two gifts: a framed full-length portrait of Louis XVI. This obvious diplomatic gift was given by the French ambassador to President Washington.[61]

Second, DOJ discussed President Jefferson's acceptance of a bust of Czar Alexander I from the Russian government.[62] DOJ described this gift as "a curious episode."[63] There is no indication that Jefferson felt his decision concerning the bust was controlled by the Foreign Emoluments Clause. As with Washington, there is no evidence Jefferson ever sought or received congressional consent to keep the bust. DOJ also failed to mention other diplomatic gifts Jefferson accepted from Indian Tribes.

Third, DOJ discussed evidence that CRS did not cite. In 1790, the First Congress prohibited a person who was convicted of bribing a federal judge from holding "any office of honor, trust, or profit under the United States."[64] DOJ explained *Amici*'s position: "the First Congress would not have enacted such a statute if it thought that elected officials hold 'offices under the United States' because the First Congress presumably knew that only the Constitution could set

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[60] *See* Letter from Louis Guillaume Otto to Armand Marc de Montmorin (Aug. 3, 1790), available in Centre des Archives Diplomatiques du Ministere des Affaires Etrangeres, Correspondances Politiques, 39CP, Volume 35, Microfilm P5982, pages 147–149.

[61] Letter from George Washington to Ambassador Ternant (Dec. 22, 1791), https://perma.cc/A4RW-5N3A.

[62] Defendant's Supplemental Brief, *supra* note 52 at 25.

[63] *Id*.

[64] Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (1790).

the qualifications of elected offices and the Office of the President."[65] And the Civil Division seemed to agree with *Amici*: "the 1790 Act enacted by the First Congress would" likely be unconstitutional "if applied to Members of Congress or the President, if such officials hold 'offices under the United States.'"[66]

Tillman has published even more evidence that was not discussed by OLC or CRS. First, Tillman's position is consistent with Justice Story's position.[67] In his *Commentaries on the Constitution*, Story explained the President is not an "officer of the United States."[68] In the very same passage, Story also indicated that the same interpretive position applied to the Constitution's "office . . . under the United States" language.[69] In other words, the phrase "officers of the United States" and "office . . . under the United States language" do not reach the presidency.[70]

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[65] Defendant's Supplemental Brief, *supra* note 52 at 23.
[66] *Id.* at 23.
[67] Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of the Defendant (Sept. 19, 2017) at 11, https://bit.ly/2XqZEpQ (discussing Story's position).
[68] 2 Joseph Story, *Commentaries on the Constitution of the United States* § 791, at 260 (Boston, Hilliard, Gray, and Co. 1833), http://bit.ly/2RlUwhX.
[69] *Id.*
[70] *See* David A. McKnight, *The Electoral System of the United States* 346 (Philadelphia, J.B. Lippincott & Co. 1878) ("It is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'"); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of government.").

Second, this result is consistent with modern doctrine. Under the so-called clear statement rule, courts require express language to extend a statute to elected officials, including the President. "[T]extual silence is not enough to subject the presidency to the provisions" of a statute; rather, an "express statement by Congress" is required before the President's authority can be restricted.[71] This conclusion was not novel. In 1969, Future-Chief Justice William H. Rehnquist observed that federal courts do not extend the word "officer" in a statute to the President, "unless there is a specific indication that Congress intended to cover the Chief Executive."[72] Five years later, future-Justice Antonin Scalia also embraced this position. He wrote, "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President."[73]

Third, foreign judicial and scholarly authorities discuss language analogous to "office . . . under the United States," such as *officer under the Crown* and *office under the Commonwealth*.[74] These authorities

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[71] *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).
[72] Mem. from William H. Rehnquist, Asst. Att'y Gen., Re: Closing of Government Offices, OLC, at 3 (1969), https://bit.ly/3c2dlRn.
[73] Mem. from Antonin Scalia, Asst. Att'y Gen, Re: Applicability of 3 C.F.R. Part 100 to the Pres. and V.P., OLC, at 2 (1974), https://bit.ly/3enxkM8.
[74] *See* Mem. of the U.K. Att'y Gen., at 135–36 (1941), https://bit.ly/2Iq9RiA ("If the Crown [the Executive Government] has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is *one under the Crown*. . . . If the duties are duties under and controlled by the Government, then the office is, *prima facie* . . . an office under the Crown . . . ." (emphasis added)); Anne Twomey, *The Constitution of New South Wales* 438 (2004) ("As [the public position at issue] is an elective office, and not generally subject

agree that elected positions do not fall within the aegis of the longstanding "Office . . . under" drafting convention.[75]

Tillman has published still more evidence. Yet, the District Court did not address any of these points. Perhaps this silence can be explained. There was a lack of adversity between the Plaintiffs and the Defendant on this issue. It is unsurprising, then, that in the absence of adversity, the District Court failed to engage fully with *Amici*'s submission. But the stakes are much higher on appeal. And this Court should request briefing on these important questions to avoid inadvertently stumbling into a destabilizing ruling.

IV. The Court Should Add a Supplemental Question Presented, and Appoint an *Amicus Curiae* to Argue That Elected Officials, Including the President, Are Not Subject to the Foreign Emoluments Clause

The Plaintiffs in this case, and in parallel litigation, contend that the President is subject to the Foreign Emoluments Clause. The Department of Justice in this case, and others, does not disagree—nor does it agree. In the U.S. District Court for the District of Maryland, the Department of Justice stated, "[w]e assume for purposes of this Statement that the President is subject to the Foreign

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to the direction or supervision of the government, one would assume that it is not an office held 'under the Crown'.").

[75] Notice of Supplemental Authority, District of Columbia & State of Maryland v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018), ECF No. 97, https://bit.ly/2TBPFNw (citing *Re Lambie* [2018] High Court of Australia 6, 2018 WL 1282055, [33]–[36]).

Emoluments Clause."[76] DOJ took the same position in the U.S. District Court for the District of Columbia: "the President has assumed that he is subject to the Foreign Emoluments Clause on the assumption that he holds an 'Office of Profit or Trust' within the meaning of the [Foreign Emoluments] Clause."[77] And in the U.S. District Court for the Southern District of New York, DOJ stated it "has not conceded that the President is subject to the Foreign Emoluments Clause."[78]

The government's position here emulates Schrödinger's Cat: *maybe the Foreign Emoluments Clause applies to the President; maybe it doesn't; don't ask; we won't tell*.

The parties are not adverse on the question of whether the President is subject to the Foreign Emoluments Clause and its "office"-language. And the Court's disposition of the Solicitor General's petition may turn on this question. Therefore, if certiorari is granted, the Court should supplement an additional question presented:

> Whether elected federal officials, including the President, hold an "Office of Profit or Trust under [the United States]," and are subject to the Foreign Emoluments Clause.

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[76] President of the United States' Statement of Interest at 4 n.2, *District of Columbia & State of Maryland v. Donald J. Trump*, 291 F. Supp. 3d 725 (D. Md. Mar. 28, 2018), ECF No. 100, https://bit.ly/2ZwxSuX.

[77] Defendant's Supplemental Brief, *supra* note 52 at 21.

[78] Letter from Department of Justice Counsel to Judge Daniels at 1, CREW v. Trump, Civ. A. No. 1:17-cv-00458-GBD (S.D.N.Y. Oct. 25, 2017), ECF No. 98, http://bit.ly/37QdEgI.

And the Court should appoint an *amicus curiae* to argue that elected federal officials, including the President, are not subject to the Foreign Emoluments Clause. There are many potential destabilizing consequences that would result from stating, or even suggesting, that the President and members of Congress are officers. An *amicus curiae* can ensure that the Court is presented with the full range of arguments to make an informed decision.

Conclusion

The petition for a writ of certiorari should be granted. The Court should add a supplemental question about whether elected officials, including the President, are subject to the Foreign Emoluments Clause. Because the parties are not adverse on this question, the Court should appoint an *amicus curiae* to present these alternate grounds for reversing the decision below.

Respectfully submitted,

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