No. 20-330

In the
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES,
Petitioner,

v.

CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF PROFESSOR LAWRENCE A. HAMERMESH IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF NEITHER PARTY

Pursuant to Supreme Court Rule 37, Professor Lawrence A. Hamermesh moves for leave of court to file a brief as *amicus curiae* in support of neither party at the petition stage of this case.

Notice of intent to file this brief was not timely provided as required by Rule 37.2(a), but the parties have both advised they do not oppose the filing. Moreover, Respondents have already sought and obtained an extension of time within which to file their brief in opposition, so despite the untimely notice, they will have full opportunity to consider the arguments contained in this brief.

The underlying claims in this case involve whether ordinary profits from normal business dealings between foreign individuals or entities and a corporation in which the President of the United States is a shareholder violates the Emoluments Clauses of the Constitution. *See* U.S. Const. Art. I, § 9, cl. 8 & art. II, § 1, cl. 7. Professor Hamermesh, the proposed amicus, is Executive Director of the Institute for Law and Economics at the University of Pennsylvania Carey Law School, and Professor Emeritus at the Widener University Delaware Law School. He has also been the Reporter for the Model Business Corporation Act since 2013. He believes this brief will highlight for the Court the need to consider questions of corporate and other entity law in the event that the Court grants the petition for writ of certiorari and determines to examine the underlying merits of the challenges under the Foreign Emoluments Clause.

Therefore, Professor Hamermesh moves this Court for leave to file the accompanying *amicus curiae* brief in support of neither party at the petition stage.

October 14, 2020

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Professor Hamermesh is Executive Director of the Institute for Law and Economics at the University of Pennsylvania Carey Law School, and Professor Emeritus at the Widener University Delaware Law School. He has also been the Reporter for the Model Business Corporation Act since 2013. He submits this brief in support of neither party at the petition for writ of certiorari stage in this matter, in order to ensure that, if the Court determines to examine the merits of the claims under the Foreign Emoluments Clause, questions of corporate and other entity law implicated by those claims are adequately briefed, argued and resolved.

SUMMARY OF ARGUMENT

The Foreign Emoluments Clause[2] that is central to the merits of this case addresses acceptance of an "Emolument" by a person holding an office – *i.e.*, an

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[1] Pursuant to Rule 37.2(a), all parties were notified of (although with less than the requisite 10 days) and have advised they do not oppose the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

[2] The Foreign Emoluments Clause provides:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8.

individual – from "a King, Prince, or foreign state." Because that Clause does not expressly encompass receipt of an Emolument by a corporation or other business entity owned or controlled by an individual office holder, or from such an entity owned or controlled by "a King, Prince, or foreign state," resolution of the merits of this case, should the Court wish to reach them, will require that the Court evaluate whether and under what circumstances receipt of or grant by a business entity should be attributed to the office holder or "King, Prince, or foreign state," respectively, for purposes of the Clause.[3]

REASONS FOR GRANTING THE WRIT

There is no case law determining whether the Emoluments Clause applies to receipt of an emolument by a private commercial entity owned or controlled in whole or in significant part by a federal officeholder, or to a grant of an emolument to the President by a commercial entity owned or controlled by a foreign state. There are substantial arguments on both sides of these two similar and novel questions. On one hand, the law of the United States has long emphasized the distinct legal status of corporations and other commercial entities, both for purposes of liability to third parties and interpretation of commercial documents. *See e.g.*, *United States v. Bestfoods*,

[3] The Presidential Emoluments Clause, U.S. Const. art. II, § 1, cl. 7 ("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.") poses a similar question of attribution to a State.

524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries"); Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 CORNELL L. REV. 1036, 1039 (1991) ("A fundamental principle of corporate law is that shareholders in a corporation are not liable for the obligations of the enterprise beyond the capital that they contribute in exchange for their shares. A corollary of this principle is that the corporation is an entity separate from its shareholders, directors, or officers."); *In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 534 (Del. Ch. 2001) (provision prohibiting the corporation from repurchasing its shares did not apply to purchases of its shares by its subsidiaries, because "the act of one corporation is not regarded as the act of another merely because the first corporation is a subsidiary of the other, or because the two may be treated as part of a single economic enterprise for some other purpose."); Seth Barrett Tillman, Business Transactions and President Trump's "Emoluments" Problem, 40 HARV. J. L. PUB. POLICY 759, 765-66 n. 18 (2017) ("American law has a rich tradition recognizing the independent or separate legal personality of corporations and other commercial entities."). That legal tradition emphasizing the distinct legal status of business entities would support a literal, narrow reading of the Clause, and preclude its application to indirect receipt, through owned or controlled business entities, of the benefits of an Emolument.

On the other hand, in appropriate circumstances a statute or contractual provision can be construed to apply to both a business entity and a person owning

or controlling that entity. *See, e.g.*, *Bestfoods*, 524 U.S. at 71-72 (for purposes of CERCLA liability, a parent corporation may "control" a facility owned by a subsidiary, where the parent's agents engage in control of the facility in a manner outside "norms" of parent involvement in subsidiary affairs). Moreover, misconduct by corporate fiduciaries that adversely affects the corporation is actionable by its shareholders even if the misconduct is implemented at the level of, and adverse effects are visited directly only upon, corporate subsidiaries. *See In re Sunstates Corp. S'holder Litig.*, 2001 Del. Ch. LEXIS 38, *2 (Apr. 18, 2001), quoting *Grace Brothers, Ltd. v. Uniholding Corp.*, 2000 Del. Ch. LEXIS 101, *41 (July 12, 2000) (if fiduciaries "purposely permit a wholly-owned subsidiary to effect a transaction that is unfair the parent company on whose board they serve," "[i]t is irrelevant … that the transactions those defendants authorized were later implemented through one or more subsidiaries," even if "[t]hose subsidiaries may, conceptually, have separate claims against their directors."). In any event, it may be debatable whether or to what extent modern conceptions of distinct entity status and limited liability were understood and accepted by the Framers of the Clause. *See* Thompson, 76 CORNELL L. REV. at 1039 ("limited liability was not always the rule in American law, [b]ut it has been accepted in most American jurisdictions since the mid-nineteenth century," well after the Clause was drafted and adopted).

Resolution of the questions of attribution noted above will no doubt be dictated by considerations of the language and purpose of the Clause, as opposed to general considerations of business entity law. That resolution cannot be oblivious, however, to the business entity legal framework which governed some,

many or even all of the transactions ultimately underlying the merits of this case. Any attempt to articulate questions to address on the merits should take that framework into account.

CONCLUSION

Should the Court wish to reach the merits of this case, it will be necessary to evaluate whether and under what circumstances receipt of or grant by a business entity should be attributed to a "Person" holding an "Office" or to a "King, Prince, or foreign state," respectively, for purposes of the Clause.

October 2020

Respectfully submitted,

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