No. 23-719

In the
Supreme Court of the United States

Donald J. Trump, *Petitioner*,

v.

Norma Anderson, et al., *Respondents*.

On Writ of Certiorari to the Supreme Court of Colorado

Motion of Professor Seth Barrett Tillman for Leave to Participate in Oral Argument as *Amicus Curiae* and for Divided Argument

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Josh Blackman
Josh Blackman LLC
Counsel of Record
1303 San Jacinto Street
Houston, TX 77002
202-294-9003
josh@joshblackman.com

Professor Seth Barrett Tillman respectfully seeks leave to participate in oral argument under Rule 28.7, as *amicus curiae* in support of Petitioner, for fifteen minutes (or for such time as the Court deems proper) in *addition* to the time allocated to the parties. Granting this motion would materially assist the Court by providing adversary presentation of alternate grounds of resolving this case. The Petitioner and Respondents have not consented to this motion. (Petitioner consented to *Amicus*'s motion for leave to participate in oral argument before the Colorado Supreme Court,[1] which was granted.[2])

1. *Amicus* has explained that Chief Justice Chase's decision in *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5815), is consistent with the deeply rooted sword-shield dichotomy in federal courts' jurisprudence. "In our American constitutional tradition there are two distinct senses of self-execution. First, as a *shield*—or a *defense*. And second, as a *sword*—or a *theory of liability* or *cause of action supporting affirmative relief*." Tillman Amicus Br. at 8. The dissent below, citing *Amicus*'s scholarship, applied the sword-shield dichotomy. Co.Sup.Ct.¶300 (Samour, J., dissenting). And the dissent observed that the Fourth Circuit "aptly adopted this distinction … thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence." Co.Sup.Ct.¶301 (Samour, J., dissenting). *Cale v.*

[1] Motion available at https://perma.cc/BBQ7-E6XE.
[2] Order available at https://perma.cc/2MQW-3UM2.

Covington, which discussed *Griffin's Case*, recognized "the protection the Fourteenth Amendment provided of its own force as a shield under the doctrine of judicial review." 586 F.2d 311, 316 (4th Cir. 1978) (emphasis added). The Fourth Circuit held "that the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Id.* (emphasis added).

2. Relying on *Amicus*'s scholarship, counsel for Petitioner advanced the sword-shield argument in the lower court proceedings.[3] However, the Petitioner's Supreme Court merits brief makes no mention of this dichotomy, and provides only a brief treatment of *Griffin's Case* "in passing." *See* Resp. Br. at 42.

3. The sword-shield dichotomy reconciles *Griffin's Case* with the Supreme Court's other Fourteenth Amendment jurisprudence. Any ruling based on the dichotomy is likely to have collateral consequences on this Court's implied causes of action jurisprudence as well as the *Bivens* doctrine.

4. *Amicus* would present adversarial argument on the sword-shield doctrine, which would dispositively resolve this case.

5. In lower court proceedings, and in a brief submitted to this Court, *Amicus* argued that the President is not an "Officer of the United States," but took no position on whether the presidency is an "Office … under the United States" for purposes of Section 3. This has been *Amicus*'s express position since 2012.

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[3] Motion to Dismiss at 8, https://perma.cc/HUL4-HB4J.

6. In the lower court proceedings, and before this Court, the Respondents-voters argue *both* that the President is an "Officer of the United States," and that the presidency is an "Office … under the United States." The Respondents see no difference between these phrases. Resp. Br. at 36.

7. In the lower court proceedings, Petitioner argued *both* that the President is not an "Officer of the United States," and that the presidency is not an "Office … under the United States." From their briefing, Petitioner seems to argue that these phrases have the same meaning. If the Court determines that the presidency is an "Office … under the United States," Petitioner's approach may preclude the Court's finding that the Presidency is not an "Officer of the United States."

8. *Amicus*'s position would allow the Court to split the difference: find that the President is not an "Officer of the United States," independent of whether the presidency is or is not an "Office … under the United States" for purposes of Section 3. Tillman Amicus Br. at 14. *Amicus*'s position in this way is different from Petitioner's position. And the downstream consequences of this more-narrowly drafted decision would be less.

9. Respondents' merits brief faults Petitioner for not addressing several questions about how the phrase "Officers of the United States" is used in the Constitution of 1788. Respondents charge that Petitioner's interpretation of the Appointments Clause "cannot account" for the phrase "whose Appointments are not

herein otherwise provided for." Resp. Br. at 40. Respondents charge that under Petitioner's reading of the Article VI Oath Clause, "the Vice President would be exempt from the oath." *Id.* at 41. Respondents charge that the President is listed separately in the Impeachment Clause to "avoid any uncertainty engendered by the fact" that the President is *both* a military officer and a civil officer. *Id.* These issues were not addressed by the Petitioner's merits brief, but were explained by *Amicus*'s brief and scholarship.

10. *Amicus* understands that leave is rarely granted, as the Court can usually rely on the parties' presentation of the issues. And the parties are represented by able counsel. Here, however, the Court is confronted with a complex case on a compressed time frame that involves adjudicating the meaning of either or both the phrases "Officer of the United States" and "Office … under the United States" as used in the Constitution of 1788 and in the Fourteenth Amendment, and the relationship (if any) between these two phrases. Any ruling on what this language means is likely to have collateral consequences for other provisions of the Constitution and federal law.

11. *Amicus* and his counsel would bring to the Court significant expertise about the Constitution's "office"- and "officer"-language that stretches back more than a decade, long before the present legal and political controversies arose. In fact, prior to the start of active Section 3 litigation, Tillman published his personal correspondence with the late Justice Scalia touching on the issues now before this

Court,[4] which was cited by the Respondents. Respondent Br. at 40. *Amicus* is in the best position to explain the context of that letter, and how it affects this litigation.

12. Indeed, almost all of the arguments in this litigation involving the phrase "Officers of the United States" in Petitioner's briefs, as well as in supporting amicus briefs, were raised and developed in *Amicus*'s scholarship—albeit, Tillman, in fact, was putting forward what had been first announced and developed in the 18th and 19th courts, including this Court, and scholarly commentary.

13. The Court may also have questions about this vast corpus of law that counsel are unable to fully answer due to the limitations of their clients' position. *Amicus*, as a friend of the Court, would face no such constraints. For example, *Amicus* can explain how the position in the respondents' brief would call into question the constitutionality of every presiding officer of the House and the Senate since 1789. Furthermore, *Amicus* can also explain how the position in the Respondents' brief would have disqualified past Vice Presidents, and a leading presidential candidate. *Amicus* is unsure if Respondents even recognized the consequences of their position.

Amicus respectfully submits that, under these circumstances, the Court would benefit from adversarial oral argument.

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[4] Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution: Part III, The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 444–48 (2023) (addressing 2014 letter that Justice Scalia wrote to Tillman and the phrase "whose Appointments are not herein otherwise provided for").

Respectfully submitted,

/s/ *Josh Blackman*

Josh Blackman
Josh Blackman LLC
Counsel of Record
1303 San Jacinto Street
Houston, TX 77002
202-294-9003
josh@joshblackman.com

Dated: January 29, 2024