SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SUMMER ZERVOS,	:	Index No. 150522/2017
Plaintiff,	:	Hon. Jennifer G. Schecter
v.	:	Motion Seq. No. 003
DONALD J. TRUMP,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PRESIDENT DONALD J. TRUMP'S MOTION TO DISMISS AND STRIKE THE COMPLAINT PURSUANT TO CPLR 3211 AND CAL. CODE CIV. P. § 425.16(B)(1) OR, IN THE ALTERNATIVE, FOR A STAY PURSUANT TO CPLR 2201

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Defendant President Donald J. Trump, in his individual capacity, respectfully submits this memorandum of law (a) in further support of his motion to dismiss and special motion to strike, or in the alternative, to stay and (b) in reply to plaintiff's memorandum in opposition to the motion ("Pl. Mem.") and to the amicus memorandum ("Am. Mem.") submitted by the Protect Democracy Project (Docket No. 138) ("Amicus").[1]

PRELIMINARY STATEMENT

Summer Zervos and her counsel, Gloria Allred, continue to press what they have openly proclaimed to be a purely politically-motivated lawsuit, touted as Ms. Allred's "answer" to President Trump winning the election.[2] Three weeks before the Presidential election, Ms. Zervos and Ms. Allred held a carefully choreographed press conference to publicize Ms. Zervos's false allegations "so that the public could evaluate Mr. Trump fully as a candidate for President." (Compl. ¶ 50.) After President Trump exercised his First Amendment right to defend himself during his campaign through quintessential political forums, Ms. Zervos sued him for defamation based on snippets of statements -- which are not defamatory as a matter of law and most of which do not even reference her.

What Ms. Zervos alleges occurred never happened, as confirmed by her own allegations in the Complaint. Among other things, as she admits, on the same day as Ms. Zervos's press conference, Ms. Zervos's own cousin, John Barry, voluntarily came forward to refute her false accusations, stating that he was "completely shocked and bewildered by [his] cousin," because Ms. Zervos had previously only spoke "glowing[ly]" about President Trump, going so far as to

[1] Capitalized terms used but not otherwise defined herein shall have the meaning given to them in President Trump's opening memorandum of law ("Opening Memorandum" or "Mem."). Submitted herewith in further support of the motion is the affirmation of Marc E. Kasowitz, dated October 31, 2017 ("Kasowitz Reply Aff.").

[2] As a threshold matter, as shown previously (Mem. 2-3, 10-15) and below, the Supremacy Clause bars this lawsuit from proceeding in state court during the Trump Presidency.

convert her friends and family to supporting his campaign. (Compl. ¶ 56; App. A. No. 2.) Ms. Zervos also admits that even after the purported incident she complains about, she continued to seek employment from the President and otherwise contact him. (Compl. ¶¶ 21, 35, 40, 56, App. A. No. 2.) Ms. Zervos herself alleges that she spoke with her father about the supposed incident and still decided "to go meet Mr. Trump the following day" to discuss her employment at his golf course. (Compl. ¶ 35.) She also admits that during the ensuing years she continued to seek employment from President Trump because "her dream of working for Mr. Trump might come true." (Compl. ¶ 24; *see also id.* at ¶ 40.) And, as recently as April 14, 2016 -- in the midst of the campaign and a mere six months before she held a press conference to make false accusations against the President -- she emailed the President to invite him to her restaurant. (Compl. ¶ 64; App. A. Nos. 2, 8.) Only after President Trump failed to accept her invitation, did she turn against him and level her false accusations against him. A complaint containing allegations that belie the purported claims it asserts must be dismissed. *See Morgenthow & Latham v. Bank of New York Co., Inc.*, 760 N.Y.S.2d 438, 444 (1st Dep't 2003) (dismissing complaint based on plaintiff's inconsistent allegations); *Gillies v. JPMorgan Chase Bank, N.A.*, 213 Cal. Rptr. 3d 210, 214 (Cal. Ct. App. 2017) (same).

Likewise, as shown (Mem. 23-28), Ms. Zervos cannot hold the President liable for engaging in political speech in the context of a public debate because such speech is clearly protected by the First Amendment. Political statements in political contexts are non-actionable political opinion. *See Jacobus v. Trump*, 51 N.Y.S.3d 330, 343 (Sup. Ct., N.Y. Cnty. 2017) (dismissing defamation claim against Mr. Trump on the grounds that it would be "'impossible to conclude that [his statements on Twitter during the Republican primary] . . . could subject . . . [plaintiff] to contempt . . . or reflect adversely upon [her] work,' or otherwise damage her

reputation"). Indeed, political and, in particular, campaign speech is quintessential speech protected by the First Amendment and are universally so viewed. *See, e.g., Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office") (internal quotations and citations omitted).

Ms. Zervos relies on *Davis v. Boeheim*, 24 N.Y.3d 262 (2014) (Pl. Mem. 22, 25, 31), but that case has no application here. There, unlike here, the defendant made specific and precise allegations -- in a context completely unrelated to the political sphere -- calling plaintiff a liar. In *Davis*, the defendant's statements were held actionable because he had falsely insinuated he knew undisclosed facts that gave him superior knowledge that the plaintiff had lied. Here, unlike in *Davis*, no one called Ms. Zervos a liar or made any such insinuation that there were undisclosed facts. And, again, all of the Statements were made in the context of a political campaign.

Ms. Zervos argues that California law, including its anti-SLAPP statute, which requires her to show a probability of prevailing on the merits, does not apply here. (Pl. Mem. 15-17.) But well-established case law makes clear that California law governs here because California, where Ms. Zervos resides, is the place of the alleged injury and because California has a clearly expressed interest in encouraging participation in matters of public significance and deterring its citizens from bringing suits that would punish the exercise of Constitutionally protected speech.

Moreover, as shown (Mem. 2-3, 10-20), this state court action against a sitting President is barred by the Supremacy Clause and should be dismissed (or stayed) without prejudice to its reinstatement after the Trump Presidency. *See Clinton v. Jones*, 520 U.S. 681, 691 n.13 (1997). Ms. Zervos and Amicus claim that decision should control here, but that decision involved a

federal court action not subject to the Supremacy Clause and the Supreme Court explicitly noted that a state court action would pose a "quite different" question. *Id.* Moreover, contrary to Amicus's memorandum and Ms. Zervos's repeated claims in her papers and the press (*e.g.*, Pl. Mem. 3, 8, 13-15; Am. Mem. 1, 3-4), applying the Supremacy Clause here would in no way place the President "above the law"; it would merely postpone the action. The Supreme Court aptly characterized such a claim as "rhetorically chilling but wholly unjustified." *Nixon v. Fitzgerald*, 457 U.S. 731, 756-57 & n.41 (1982) (holding that the President cannot be sued for damages in the "outer perimeter" of his official duties but that "[i]t is simply error to characterize an official as 'above the law' because a particular remedy is not available against him.").

ARGUMENT

I. Ms. Zervos's Claim Is Not Actionable As A Matter Of Law.

A. Ms. Zervos's Self-Contradictory Allegations Warrant Dismissal.

Because Ms. Zervos's politically-motivated case is based on unfounded and self-contradicting allegations, it should be dismissed. *See Morgenthow & Latham*, 760 N.Y.S.2d at 444; *Gillies*, 213 Cal. Rptr. 3d at 214. Nothing Ms. Zervos says in response to President Trump's motion to dismiss alters that conclusion. Ms. Zervos and her counsel orchestrated a highly-publicized press conference on October 14, 2016 -- just weeks before the Presidential election -- to make false accusations against the President and thereby oppose his candidacy.[3] President Trump participated in that debate, denying those false accusations. In addition, Ms.

[3] Mem. 7-8, 19-20. Ms. Allred argues that the political motivations ascribed to her in the news articles cited in the Opening Memorandum do not relate to this specific lawsuit with Mr. Trump as a defendant. (Pl. Mem. 7 n.2.) This seems to be a distinction without a difference. Regardless, she recently reaffirmed her goals as to *this* suit in a recent interview. *See* Kasowitz Reply Aff. Ex. 1. Ms. Zervos also argues that articles concerning her motives for bringing suit are inadmissible. (Pl. Mem. 7 n.2.) However, because the articles -- which far from being *ad hominem* attacks merely quote her own words -- are submitted to show motive and not for the truth of a matter, they are admissible. *See In re Salomon Analyst Winstar Litig.*, 2006 WL 510526, at *4 (S.D.N.Y. Feb. 28, 2006); *see also* Mem. 5-6 & n.3.

Zervos's own cousin, John Barry, also joined in that political debate and openly refuted her unfounded accusations on October 14, 2016, the same day as Ms. Zervos's press conference. Further, as shown (Mem. 28-30; *supra* pages 1-2), her own statements belie her claims.

B. Statements Made In The Context Of A National Political Campaign Are Routinely Treated As Non-Actionable.

As shown (Mem. 20-22, 38-40), Ms. Zervos's defamation claim should be dismissed because: (1) she has failed to state a cause of action under CPLR 3211(a)(7), and (2) she has not met her heightened burden of showing that her claim is factually substantiated and that she has a probability of prevailing on the merits under California's anti-SLAPP statute. Cal. Code Civ. P. § 425.16.[4]

Here, Ms. Zervos has not shown and cannot show that the Statements taken as a whole, from the perspective of the average person, are reasonably susceptible to a defamatory meaning. *See Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 191 (Cal. Ct. App. 2016) (courts must consider the statements "in context" from the perspective of the "average" person); *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995) (same); *Jacobus*, 51 N.Y.S.3d at 339-40. Accordingly, her Complaint must be dismissed. Indeed, an expeditious disposition of this frivolous action would avoid a protracted litigation that "risk[s] chilling the speech that breathes life into political debate," *Rosenaur v. Scherer*, 105 Cal. Rptr. 2d 674, 699 (Cal. Ct. App. 2001).[5]

This is a politically-driven action, brought against a sitting President for exercising his First Amendment right to speak on political and public matters concerning, among other things, his own qualifications for President, the media's role in the election process, and the tactics of

[4] As shown below, California's anti-SLAPP statute is a substantive law that applies here. *See, infra* Part II.

[5] *See Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 614 (Cal. 1984); *Weiner v. Doubleday & Co., Inc.*, 74 N.Y.2d 586, 594 (1989).

his opponent, Hillary Clinton. However, for "speech uttered during a campaign for political office," "the First Amendment 'has its fullest and most urgent application." *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (citations omitted); Mem. 23-25 (collecting cases).[6] In political debate "[e]ven apparent statements of fact may assume the character of statements of opinion, and thus [must] be privileged . . . ." *Jacobus*, 51 N.Y.S.3d at 338; Mem. 23-24 (collecting cases).[7]

While Ms. Zervos argues that she is not politically motivated in bringing this suit (Pl. Mem. 7, 26, 28, 30), her subjective intent does not matter. She made her false accusations at a press conference during the height of a Presidential campaign, injecting herself into a political debate, and that is context in which Mr. Trump and Mr. Barry's responsive statements were made. Moreover, it is a matter of public record of which the court can take judicial notice (Mem. 5 n.3) that Ms. Zervos and her counsel have openly admitted both in the Complaint and at press conferences, that they made accusations against Mr. Trump for political reasons: "*so that the public could evaluate Mr. Trump fully as a candidate for president.*" (Compl. ¶ 50 (emphasis added)); *see also* Mem. 7-8, 19-20; *supra*, Part I.A.)[8] In light of her own admissions, Ms.

[6] *See also Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("The candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election. . . ."); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386 (2000) ("[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

[7] *See also Matson v. Dvorak*, 46 Cal. Rptr. 3d 880 (1995); *Cook v. Relin*, 721 N.Y.S.2d 885, 898 (4th Dep't 2001) ("significantly, the communication was made in the midst of a heated and bitter political campaign. . . . [T]he inescapable conclusion . . . is that the statement would be understood by the ordinary listener for what it is: a tasteless effort to lampoon plaintiff for his actions in opposing defendant's reelection."); *Duane v. Prescott*, 521 N.Y.S.2d 459, 460 (2d Dep't 1987); *Sharpton v. Guiliani*, 1997 WL 34846668, at *3-4 (Sup. Ct., N.Y. Cnty. Oct. 9, 1997).

[8] Ms. Zervos's self-serving statements in her affidavit that this is not a politically driven lawsuit (Zervos Aff. ¶¶ 3-4) are inadmissible because they directly contradict the allegations in her Complaint. *See LeBreton v. Weiss*, 680 N.Y.S.2d 532, 532-33 (1st Dep't 1998); *Liranzo v. Astrue*, 2010 WL 626791, at *2 (E.D.N.Y. Feb. 23, 2010).

Zervos's recent protestations that she is "not political" because she "was not a political candidate or commentator," ring hollow. (Pl. Mem. 28.)[9]

Nor can Ms. Zervos refute the fact that all of the Statements occurred on political forums -- a campaign website, on Mr. Trump's Twitter account, in a presidential debate, and at campaign rallies -- where the listeners expect to hear public debate, taken as political opinion rather than a defamatory statement. *See, e.g., Brian*, 87 N.Y.2d at 52 ("a medium that is typically regarded by the public as a vehicle for the expression of individual opinion [such as a political forums] rather than the rigorous and comprehensive presentation of factual matter" suggest that a reader would anticipate "vigorous expressions of personal opinion"); Mem. 27-28.[10]

Courts consistently recognize that Internet postings -- particularly on social media like Twitter -- are on forums that an audience would understand to contain "'vigorous expressions of personal opinion,' 'rather than the rigorous and comprehensive presentation of factual matter.'" *Jacobus*, 51 N.Y.S.3d at 339; Mem. 27-28 (collecting cases).[11] This does not mean that, as Ms.

[9] For this reason, Ms. Zervos's argument that the First Amendment only protects campaign speech between political opponents (Pl. Mem. 28-29) is unavailing where she purposefully injected herself into a political debate. Her argument is also unsupported by caselaw and First Amendment principles. The decisions she cite reason only that greater latitude is given to statements in the political context to ensure "public debate will not suffer for lack of imaginative expression or rhetorical hyperbole which has traditionally added much to the discourse of our Nation." *Rosenaur*, 105 Cal. Rptr. 2d at 687 (internal quotation marks and citation omitted). Such reasoning is not restricted to political opponents.

[10] *See also Steam Press Holdings, Inc. v. Hawaii Teamsters, Allied Workers Union, Local 996*, 302 F.3d 998, 1007 (9th Cir. 2002) (at union hearings, "an audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric, or hyperbole."). The same is true when more traditional forums used by politicians for a heated debate. *See Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (candidate's remarks on television part of "a heated political debate" so "cannot reasonably be taken as anything but opinion"); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995); *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1238 (N.D. Cal. 2014); *Gisel v. Clear Channel Commc'ns, Inc.*, 942 N.Y.S.2d 751, 752 (4th Dep't 2012). (Mem. 27-28 (describing importance of Twitter for political debate and its lack of susceptibility to interpretation as fact).)

[11] *See also Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 60 (Cal. Ct. App. 2012) ("[Message] board culture encourages discussion participants to play fast and loose with facts . . . . [C]ourts . . . have recognized that [these] are places where readers expect to see strongly worded opinions rather than objective facts."); *Brown v. Marsolais*, 2012 WL 6969283, at *1 (Cal. Sup. Ct. Oct. 5, 2012) ("The appellate cases reflect that internet bulletin boards are

Zervos insinuates, Mr. Trump contends that posting something in any manner on the Internet will "immunize it" from liability in all cases. (Pl. Mem. 27.) However, each of the Twitter Statements (Compl. ¶¶ 60-61, 63, 66-70; App. A. Nos. 4-7, 10-14) are subject to the same considerations that led the Court in *Jacobus* to conclude that the public would not consider them to be defamatory. 51 N.Y.S.3d at 339. Similarly, the Statements published on Mr. Trump's campaign website (Compl. ¶¶ 55-56; App. A. Nos. 1-2), were posted on pages that visibly stated: "Be a Voter" and "Donald J. Trump for President," and "Paid for by Donald J. Trump for President, Inc." on a banner upon entering the website. Kasowitz Reply Aff. Ex. 2. As such, these are akin to political flyers and advertisements, routinely considered to be non-actionable campaign opinion. *See, e.g.*, *Matson v. Dvorak*, 46 Cal. Rptr. 3d 880, 882 (Cal. Ct. App. 1995); *Reed*, 204 Cal. Rptr. 3d at 191; *supra* page 7.[12]

Ms. Zervos insists the speech had to be "made spontaneously during a live debate" to be afforded such protection. (Pl. Mem. 26-28.) However, there is no such limitation to the First Amendment, which routinely protects "public debates" occurring in newspaper columns and editorials, advertisements, mailed campaign literature, and more.[13] Moreover, that Ms. Zervos

universally known in our society as places for ranting and emotional catharsis, and places where readers expect to see opinion and hyperbole, not verifiable facts.") (citation omitted); *Kindred v. Colby*, 2015 WL 12915686, at *5 (Sup. Ct., Monroe Cnty. 2015); *O'Mahony v. Whiston*, 2016 WL 5931368, at *3 (Sup. Ct., N.Y. Cnty. Oct. 7, 2016).

[12] Contrary to Ms. Zervos's assertions, the Internet forum need not be "anonymous" to take on the cloak of non-actionable opinion, as demonstrated by the *Jacobus*. Ms. Zervos's counsel, Ms. Wang, has herself vigorously argued as much. *See* Kasowitz Reply Aff. Ex. 3 at 11, 14 (arguing that "because the statement was made on an Internet message board. . . . taking the comment in context and considering the mores of this online everyone-has-an-opinion age, no reasonable reader would give the posting much credence, if any at all.") Nor must the forum be a "live" free-for-all. *See, supra* page 8 n.13 (collecting cases).

[13] *See Reed*, 204 Cal. Rptr. 3d at 191 (television advertisement); *Beilenson v. Superior Court*, 52 Cal. Rptr. 2d 357, 359-60 (Cal. Ct. App. 1996) (campaign literature); *Baker v. Los Angeles Herald Exam'r*, 721 P.2d 87, 91 (Cal. 1986) (newspaper); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988) (magazine article); *Mann v. Abel*, 10 N.Y.3d 271, 276-77 (2008) (op-ed); *Adelson*, 973 F. Supp. 2d at 489 (internet petition); *Roth v. United Fed'n of Teachers*, 787 N.Y.S.2d 603, 611-12 (Sup. Ct., Kings Cnty. 2004) (union resolution).

repeatedly accessed the media to voice her opinions and engage in "self-help" to refute any statements she disagreed with demonstrates the Statements were made as part of a "back and forth" public debate.[14] *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 138 (1992) (discussing importance of "self-help").

Contrary to Ms. Zervos's argument (Pl. Mem. 26), President Trump is not seeking "blanket immunity" or "*carte blanche*" for a candidate "to say what he likes" "in the midst of a political campaign[.]" As a matter of First Amendment principles, "courts shelter strong, even outrageous" political speech, which the audience would reasonably view as part of a free, political discourse, rather than defamatory. Mem. 24; *see also Adelson*, 973 F. Supp. 2d at 489.[15] However, there are limits to the "wide latitude" campaign speech is given in defamation cases. *Russell v. Davis*, 2011 WL 8907836, at *10 (Sup. Ct., N.Y. Cnty. Jul. 1, 2011). For example a candidate's specific, false allegations of criminal conduct might not be protected, as the cases Ms. Zervos cites demonstrate.[16] But this case does not come anywhere close to that. Here, Mr. Trump was merely defending his character and qualifications for office from the false attacks Ms. Zervos leveled against him just a few weeks before the Presidential election.[17]

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[14] Ms. Zervos and her attorneys continually participated in the debate, holding numerous press conferences and issuing written statements. *See, e.g.*, Kasowitz Aff. Exs. 23, 25, 26; Wang Aff. Exs. 18, 20. Indeed, Ms. Allred is known for her savvy in the realm of publicity. Kasowitz Reply Aff. Ex. 1.

[15] *See also Reed*, 204 Cal. Rptr. 3d at 191 (the audience "naturally . . . anticipate[s] the use of rhetorical hyperbole" "during the heat of a political campaign"); *Munoz-Feliciano v. Monroe-Woodbury Cent. Sch. Dist.*, 2015 WL 1379702, at *12 (S.D.N.Y. Mar. 25, 2015) (noting "more is fair in electoral politics than in other contexts" and "[n]umerous courts have acknowledged the unique rhetorical atmosphere of the political arena").

[16] *See Silsdorf v. Levine*, 59 N.Y.2d 8, 12 (1983) (specific allegations of mayor's "criminal corruption"); *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 586 P.2d 572, 576 (Cal. 1978) (specific allegations of councilman's extortion and blackmail). Ms. Zervos's cases also recognize the right of a party to "to defend himself against attacks upon his character" *Clark v. McGee*, 49 N.Y.2d 613, 620 (1980) (discussing immunity, not the First Amendment) and the "leeway" for criticism when a party injects themselves into the debate, as Zervos did. *Okun v. Superior Court*, 629 P.2d 1369, 1374 (Cal. 1981).

[17] Indeed, as shown on a statement-by-statement basis (Mem. 31-32), thirteen of the eighteen allegedly defamatory Statements are not even "of and concerning" Ms. Zervos at all, but rather address, among other things, the Hillary Clinton campaign and the media generally. Several selectively quoted Statements explicitly refer to other false

C. *Jacobus* Is Directly On Point.

Ms. Zervos attempts -- on a number of irrelevant grounds -- to distinguish this case from *Jacobus*, 51 N.Y.S.3d at 343, which found that the statements Mr. Trump made on Twitter during the Republican presidential primary were not defamatory. (Pl. Mem. 29-30.) For instance, that Ms. Zervos was not a political commentator like Ms. Jacobus is not a relevant distinction. Rather, it is relevant that Ms. Zervos both directly and through her politically-motivated counsel, continuously and readily accessed the media to debate Mr. Trump's fitness for office. Compl. ¶ 50; *supra* note 14. Ms. Zervos's heated "back and forth" exchanges with Mr. Trump, similar to Ms. Jacobus's, weigh in favor of the statements not being actionable, as *Jacobus* found. 51 N.Y.S.3d at 342.

Further, Ms. Zervos claims that *Jacobus* involved "loose, figurative, and hyperbolic" language, ignoring the allegedly false statements there that were specific: that Ms. Jacobus had approached the Mr. Trump's campaign and "begged" for a job (instead of the campaign approaching her), that Mr. Trump turned her down twice (instead of her turning him down at the end of the second meeting), and that she therefore had "zero credibility!" Nevertheless, given the greater political context and the forum in which the statements were made, the court concluded that, like here, "it is fairly concluded that a reasonable reader would recognize defendants' statements as opinion, even if some of the statements, viewed in isolation, could be found to convey facts." *Id.* at 343.

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accusers, including a woman whose story was refuted by the butler she claims witnessed the incident (Compl. ¶ 64; App. A No. 8 ("one with *People* magazine, the butler said it was a total lie")), and a woman who made false accusations of activity on a plane (Compl. ¶ 73; App. A. No. 17 ("the woman on the plane")). Ms. Zervos claims that the Statement in paragraph 64 of the Complaint refers to her, relying on a selective quote of Mr. Trump saying "total lies." Compl. ¶ 64; App. A No. 8. But taken in context, that Statement is not about Ms. Zervos, but unrelated allegations in *People* Magazine refuted by the very butler that the accuser claims witnessed the supposed incident.

D. Statements Of General Denials Are Not Actionable.

Any denials Mr. Trump made against Ms. Zervos's baseless attacks on his reputation and qualifications for office in the midst of a heated election (*see supra* note 10) are not actionable.[18] "If the law were to the contrary, the protection of the First Amendment would be unacceptably denied to persons who publicly defend themselves against what they believe to be baseless public charges . . . ." *Lapine v. Seinfeld*, 918 N.Y.S.2d 313, 329 (Sup. Ct., N.Y. Cnty. 2011); (Mem. 30.)

As shown (Mem. 5-6), this is particularly true where, as here, the plaintiff solicits the allegedly defamatory statement. *See Sleepy's LLC v. Select Comfort Wholesale Corp.*, 779 F.3d. 191, 201 (2d Cir. 2015) (statements solicited by plaintiff not actionable); *LeBreton v. Weiss*, 680 N.Y.S.2d 532, 532 (1st Dep't 1998) (same). Here Ms. Zervos made accusations in press statements and conferences, explicitly soliciting, even "challenging," Mr. Trump to participate in that debate. Mem. 5-6. Ms. Zervos claims that *Sleepy's* and *LeBreton* are inapplicable simply because they "involved 'secret' or 'pretend' shoppers or landlords sent in to record defendants and prompt them into making damning statements." (Pl. Mem. 35.) However, the doctrine is not limited to parties making secret recordings, but applies more broadly to "a person's intentional eliciting of a statement she expects will be defamatory." *Sleepy's*, 779 F.3d at 199. *See, e.g.*, *Handlin v. Burkhart*, 632 N.Y.S.2d 608, 609 (2d Dep't 1995) (plaintiff requested meeting with union representatives concerning requested resignation with "every reason to

[18] *See also Independent Living Aids, Inc. v. Maxi-Aids, Inc.*, 981 F. Supp. 124, 128 (E.D.N.Y. 1997) (remarks calling individuals liars could "only be understood as a denial of their accusations," that was therefore non-actionable "personal opinion and rhetorical hyperbole."); Kasowitz Reply Aff. Ex. 4 § 115, at 825 (The defendant "may publish, in an appropriate manner, anything which reasonably appears to be necessary to defend his own reputation against the defamation of another.").

anticipate" the explanation "would be defamatory in nature"). This is exactly what Ms. Zervos did here.

Ms. Zervos goes to great lengths to mischaracterize statements of general denial in response to politically-motivated accusations as an actionable accusation that she is a liar, and cites a litany of inapposite cases to support this theory.[19] (Pl. Mem. 2, 6, 22-25.) To be clear, President Trump never called Ms. Zervos a liar. (Compl. ¶¶ 55-56, 59-74.) However, calling someone a "liar" is not some talismanic utterance triggering an actionable defamation claim where the context dictates, as here, that the average listener would not understand the statement to be defamatory in nature. *See, e.g.*, *Independent Living Aids*, 981 F. Supp. at 128 ("calling [plaintiff] and others 'liars,' can only be understood as a denial of their accusations. . . . . [T]his cannot be construed as defamatory. Even the most careless reader must have perceived that the words . . . a vigorous epithet used by [defendant] who considered' himself unfairly treated."); *Jacobus*, 51 N.Y.S.3d at 342.[20]

[19] *First*, many of the cases cited by Ms. Zervos involve allegations of criminal activity, a key fact not present here. *See Manufactured Home Communities, Inc. v. Cnty. of San Diego*, 544 F.3d 959, 962 (9th Cir. 2008); *Gross v. New York Times*, 82 N.Y.2d 146, 153 (1993); *McNamee v. Clemens*, 762 F. Supp. 2d 584, 601 (E.D.N.Y. 2011). *Second*, other cases involve allegations of professional dishonesty directly affecting the plaintiff's business, and are far more specific than the ambiguous term "liar." *See Pentalpha Macau Commercial Offshore Ltd. v. Reddy*, 2004 WL 2738925 at *2 (N.D. Cal. Dec. 1, 2004); *Brach v. Congregation Yetev Lev D'Satmar, Inc.*, 696 N.Y.S.2d 496, 497 (2d Dep't 1999); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 185-86 (2d Cir. 2000); *Divet v. Reinisch*, 564 N.Y.S.2d 142, 143 (1st Dep't 1991); *Mase v. Reilly*, 201 N.Y.S. 470, 471-72 (1st Dep't 1923); *Cappellino v. Rite-Aid of N.Y., Inc*., 544 N.Y.S.2d 104, 105 (4th Dep't 1989); *Curry v. Roman*, 217 A.D.2d 314, 317-19 (4th Dep't 1995). *Third*, other cases Ms. Zervos cites simply do not support her argument, and either dismiss the defamation claim as non-actionable opinion or are too sparse of an opinion to draw conclusions. *See Petrus v. Smith*, 459 N.Y.S.2d 173, 174 (4th Dep't 1983) (granting summary judgment where malice was not properly alleged and defendant established qualified privilege); *Gregory v. McDonnell Douglas Corp*., 552 P.2d 425, 430 (Cal. 1976) (finding accusation was non-actionable opinion); *Kaminester v. Weintraub*, 516 N.Y.S.2d 234, 234 (2d Dep't 1987) (offering no detail as to the nature of the defamatory statement).

[20] *See also Rosenaur*, 105 Cal. Rptr. 2d at 687; *Ram v. Moritt*, 612 N.Y.S.2d 671, 672 (2d Dep't 1994); *Huse v. Auburn Assocs., Inc.*, 2011 WL 3425607, at *5 (Cal. Ct. App. Aug. 5, 2011); *Fisher v. Larsen*, 188 Cal. Rptr. 216, 229–30 (Cal. Ct. App. 1982); *Rojas v. Debevoise & Plimpton*, 634 N.Y.S.2d 358, 362 (Sup. Ct., N.Y. Cnty. 1995); *Sabratek Corp. v. Keyser*, 2000 WL 423529, at *6 (S.D.N.Y. Apr. 19, 2000); *Couloute v. Ryncarz*, 2012 WL 541089, at *6–7 (S.D.N.Y. Feb. 17, 2012) (given forum was for people to air grievances about romantic partners, "a reasonable reader would understand comments such as Plaintiff "lied and cheated all through his 40 years of life" to be opinion); *Glob. Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1269-70 (C.D. Cal. 2001).

E. Ms. Zervos's Reliance On *Davis* Is Misplaced.

Ms. Zervos relies extensively on *Davis v. Boeheim*, 24 N.Y.3d 262 (2014) to argue that calling someone a "liar" is defamatory. (Pl. Mem. 2, 22.) However, *Davis* simply does not apply here. *First*, the statements in *Davis* did not concern political speech. *Supra*, Part I.B. *Second*, the statements were not in political and Internet forums in which the audience would expect opinion statements (*supra* pages 7-8), but were in contexts in which the audience would expect factual statements, including on a university's official website and to reporters covering the allegations. 24 N.Y.3d at 273. *Third*, the defendant, on his own volition, made a number of "specific, easily understood" statements, like "I know [Davis is] lying" and "trying to get money." *See, e.g.*, *id.* at 271. Mr. Trump contributed to a political debate, speaking on various public issues, to defend his character and fitness for office only *after* Ms. Zervos initiated the debate. *See, supra*, page 11. *Fourth*, the defendant in *Davis* falsely insinuated that -- based on nonpublic information, such as a university's internal investigation -- he knew the plaintiff was motivated by money. *Id.* at 270-71, 273.[21] In contrast, Mr. Trump did not insinuate the Statements were corroborated by secret, undisclosed facts.[22]

Relying on *Davis*, Ms. Zervos further ambiguously claims that the Statements are actionable under a mixed opinion theory because the Statements imply they are based upon undisclosed facts that justify them, namely taking issue with the disclosure of Ms. Zervos's April

[21] *See also id.* at 271 (Mr. Boeheim stated: "I know [Davis is] lying about me seeing him in his hotel room. That's a lie. If he's going to tell one lie, I'm sure there's a few more of them."); *id.* (Mr. Boeheim stated: "It is a bunch of a thousand lies that [Davis] has told. . . . He supplied four names to the university that would corroborate his story. None of them did . . . there is only one side to this story. He is lying."); *id.* (Mr. Boeheim stated: "The Penn State thing came out and the kid behind this is trying to get money. He's tried before. And now he's trying again. . . . That's what this is about. Money.").

[22] In fact, the allegations that Trump "met [Zervos] at a hotel [and] greeted her inappropriately" -- which purportedly occurred 10 years in the past -- were introduced to the public by Ms. Zervos on October 14, 2016. (Compl. ¶ 53.)

2016 email to Mr. Trump inviting him to her restaurant. (Pl. Mem. 31, n.14.) But unlike *Davis*, Mr. Trump did not imply that he had unique access to undisclosed information, which he had decided to hold back, that corroborated the Statements.[23] The purported "unreleased" email that Ms. Zervos contends establishes President Trump's so-called "unique position of knowledge" was one that she herself disclosed at a public press conference, along with quoted portions of a purported subsequent email.[24] Thus, the audience had access to all relevant information to fully evaluate the Statements. Moreover, the Statements discussing Ms. Zervos inviting Mr. Trump to her restaurant, a few months before her unfounded accusations against him, are not defamatory. (Compl. ¶ 56; App. A No. 2.)

F. President Trump Is Not Liable For The Barry Statement.

The Barry Statement is not defamatory for all the reasons discussed above and as shown (Mem. 33-36). Furthermore, as shown (Mem. 33-34), Section 230 of the Communications Decency Act ("CDA") bars Ms. Zervos's claim because President Trump, as an interactive computer service user, did not provide the content of the information contained in Mr. Barry's statements posted to the Internet or the retweets. 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). Contrary to Ms. Zervos's argument (Pl. Mem. 33-35), the CDA still applies because (a) he never circulated the purported defamatory statements to a new audience as the hyperlinked content published online is continuously

[23] None of the cases Ms. Zervos cites (Pl. Mem. 31) are like the case at bar but instead, like *Davis*, involve defendants who stated that they had superior knowledge based on unique access to undisclosed facts that corroborate the defamatory statement. Ms. Zervos herself even cites a case which explicitly recognizes that broader context is key. *Steinhilber v. Alphonse*, 68 N.Y.2d 293, 294 (1986).

[24] *See, e.g.*, Wang Aff. Ex. 18. It should also be noted that the vague, apparently partially quoted, and self-serving email that she purportedly sent to his secretary on April 21, 2016 came a week after he did not respond to her April 14, 2016 email, which merely invited him to her restaurant. *Id.*

available to the public and therefore cannot be republished, *e.g.*, *Firth v. State*, 98 N.Y.2d 365, 372 (2002), and (b) as shown (Mem. 36-37), Mr. Trump did not "substantively augment" the posts he retweeted.

Recognizing her claim is barred by the CDA, Ms. Zervos makes speculative and conclusory allegations that Mr. Trump's campaign purportedly drafted the Barry Statement at Mr. Trump's alleged direction and with his supposed approval. But those speculative allegations fail as a matter of law because they are not supported by any factual allegations, including allegations that the campaign was acting within the scope of its authority when it purportedly drafted the Barry Statement as shown. (Mem. 35-36.)

Furthermore, Ms. Zervos's argument that the timing of the Barry Statement posting and its placement next to Mr. Trump's picture and an email to which Mr. Trump had access supports an inference that the Barry Statement was drafted on Mr. Trump's behalf is also meritless because it is not supported by any allegations in the Complaint -- just her unsupported briefing. (Pl. Mem. 33.)[25]

Lastly, Ms. Zervos argument that Mr. Trump purportedly "ratified" the Barry Statement by retweeting it the next morning (Pl. Mem. 33) is also unavailing, as Ms. Zervos has not specifically alleged that Mr. Trump knew the campaign wrote the Barry Statement and that he benefited from that action. *See Municipality of Bremanger v. Citigroup Global Markets Inc.*, 2013 WL 1294615, at *21 (S.D.N.Y. March 28, 2013); *Hillyer v. Deutsche Bank Nat. Tr. Co. as trustee for Hasco 2007-NC1*, 2011 WL 5041960, at *4 (Cal. Ct. App. Oct. 25, 2011).

[25] *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 275 (S.D.N.Y. 2016), cited by Ms. Zervos, does not involve anti-SLAPP or allegations made on information and belief. Rather, that court found that the numerous allegations concerning the alleged agent's authority and the way in which he was held out to the public were sufficient to raise an inference of agency. Ms. Zervos makes no such allegations here.

II. California's Anti-SLAPP Statute Applies To Ms. Zervos's Claim.

As shown (Mem. 20 n.35), because California has "the most significant" relationship to this action, its anti-SLAPP statute applies here. Ms. Zervos's futile attempt to invoke New York law fails for two reasons. (Pl. Mem. 15-17.) *First*, contrary to Ms. Zervos's insinuations (Pl. Mem. 16), New York and California's defamation laws do conflict, with California having a broader anti-SLAPP statute than New York. *See also Condit v. Dunne*, 317 F. Supp. 2d 344, 352 (S.D.N.Y. 2004); *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615, at *6 (S.D.N.Y. Aug. 20, 2014). *Compare* Cal. Code Civ. P. § 425.16 *with* N.Y. Civ. Rights Law §§ 70-a, 76-a, N.Y. C.P.L.R. §§ 3211(g), 3212(h).

Second, under well-settled New York choice of law rules, for defamation actions, "the state of plaintiff's domicile . . . is where he is presumed to have been most injured," which is therefore "usually the state with the most significant relationship to the action." *Merrill Lynch Futures, Inc. v. Miller*, 686 F. Supp. 1033, 1041 (S.D.N.Y. 1988) (citing Restatement (Second) of Conflict of Laws § 150(2) (1977)); *see also Condit*, 317 F. Supp. 2d at 355; *Cummins v. Suntrust Capital Markets, Inc.*, 649 F. Supp. 2d 224 (S.D.N.Y. 2009). Here, California clearly has the most significant relationship to the suit because California is where, among other things, (i) Ms. Zervos resides and the alleged acts underlying her claim purportedly occurred, (ii) she allegedly suffered injuries to her reputation and business, (iii) she held her press conferences to initiate a public debate about Mr. Trump's candidacy,[26] and (iv) Mr. Barry published two of the statements. (Compl. ¶¶ 14, 27-34, 81-82.) Moreover, "California has expressed a strong interest in enforcing its anti-SLAPP law to 'encourage continued participation in matters of public

[26] *See* Kasowitz Reply Aff. Ex. 5; *see also* Kasowitz Aff. Ex. 2 ("John Barry, Mission Viejo, CA").

significance,'" *Sarver v. Chartier*, 813 F.3d 891, 899 (9th Cir. 2016), and to prevent its citizens from filing suits that restrict protected speech, like here.[27] Conversely, New York has no significant relationship to this lawsuit where the Statements occurred outside of the state[28] and Ms. Zervos has no specific allegations to demonstrate otherwise. (Compl. ¶¶ 60, 63, 66-70, 72. Mem. 20 n.35.) *See Adelson v. Harris*, 973 F. Supp. 2d 467, 472, 477-79 (S.D.N.Y. 2013).

Ms. Zervos argues that because her defamation claim is a conduct-regulating rule under choice of law principles, New York law applies because, as she claims without basis, Mr. Trump's acts allegedly occurred in New York. (Pl. Mem. 15-17.) But as the Court of Appeals held when rejecting this very argument, "when the defendant's [tortious] conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred. . . . *Thus, the locus in this case is determined by where the plaintiff's injuries occurred.*" *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 195 (1985) (emphasis added).

Accordingly, California law, including its anti-SLAPP statute, which is a substantive law, applies to her claims.[29] (Pl. Mem. 37-40.) *Adelson v. Harris* is instructive on this. There, the

[27] *See, e.g.*, *Tobinick v. Novella*, 108 F. Supp. 3d 1299, 1304 (S.D. Fla. 2015) (applying California's anti-SLAPP statute because "California's interest in limiting frivolous litigation filed by its residents outweighs any interest Florida has in the dispute, where that dispute is between a California [plaintiff] corporation and a Connecticut resident [defendant]"); *Fallay v. San Francisco City & Cty.*, 2015 WL 7874312, at *3 (N.D. Cal. Dec. 4, 2015) ("California's anti-SLAPP statute is designed to discourage suits . . . brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.") (internal quotation marks omitted), appeal dismissed (Jan, 27, 2016).

[28] The Debate was in Las Vegas, Nevada. *Id.* ¶ 73. The campaign rallies were in Charlotte, North Carolina, Portsmouth, New Hampshire, Bangor, Maine, Green Bay, Wisconsin, Grand Junction, Colorado, and Gettysburg, Pennsylvania. *Id.* ¶¶ 59, 64-65, 71-72, 74.

[29] Tellingly, Ms. Zervos does not -- because she cannot -- challenge that the President satisfies the first prong of California's anti-SLAPP statute as the Statements undoubtedly arise from "protected activity." Rather, she focuses on the fact California anti-SLAPP statute is codified in the code of civil procedure (Pl. Mem. 37), which is not determinative of whether a law is substantive. *See, e.g.*, *Frankel v. Citicorp Ins. Servs., Inc.*, 913 N.Y.S.2d 254, 260 (2d Dep't 2010) (CPLR 4544 is a substantive law).

court "applie[d] New York choice of law rules" to find that Nevada's anti-SLAPP law, which is similar to California's anti-SLAPP law,[30] governed because the plaintiff was a citizen of Nevada, giving it the greatest interest in the case.[31] *Adelson*, 973 F. Supp. 2d at 476. Relying upon *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013),[32] Ms. Zervos argues that federal diversity cases have found California's anti-SLAPP statute to be substantive when analyzing under the *Erie* doctrine whether to apply state or federal law. (Pl. Mem. 38; *id.* at n.17.) Ms. Zervos is wrong. The federal court sitting in diversity -- like in *Adelson* -- first analyzes whether the foreign anti-SLAPP statute is substantive or procedural on state choice of law grounds before arriving at the second step of whether the law is substantive or procedural for *Erie* purposes. *Adelson*, 973 F. Supp. 2d at 476 (district court applies state choice of law rules, based on how the New York Court of Appeals would act). *See also Liberty*, 718 F.3d at 151-52.

Thus, it is irrelevant that *Adelson* found, in the context of an *Erie* analysis, that Nevada's anti-SLAPP statute has substantive aspects because, like California's anti-SLAPP statute, it provides for attorneys' fees, shifts the burden of proof and requires a plaintiff to make a heightened showing. *Id.* at 494 n.21. Furthermore, New York state courts recognize that statutes with similar provisions as California's anti-SLAPP are substantive. *See Rotunno v. Gruhill*

[30] *Compare* Nev. Rev. Stat. §§ 41.635-41.670 *with* Cal. Civ. Proc. Code § 425.16.

[31] Applying a variety of states' choice of law rules, courts from around the country hold with increasing uniformity that anti-SLAPP statutes are substantive. *See also Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003); *U.S. ex rel. Newsham v. Lockheed Missiles & Space, Co.*, 190 F.3d 963, 971-73 (9th Cir. 1999); *Price v. Stossel*, 2008 WL 2434137, at *6 (S.D.N.Y. June 4, 2008). Indeed, the balance of cases find similar anti-SLAPP statutes to be substantive. *See Forras v. Rauf*, 39 F. Supp. 3d 45, 53 (D.D.C. 2014); *Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir. 2010); *Williams v. Cordillera Comm'ns Inc.*, 2014 WL 2611746, at *2 (S.D. Tex. June 11, 2014); *Wynn v. Chanos*, 2017 WL 1149508, at *2 (9th Cir. Mar. 28, 2017).

[32] The holding in *Liberty Synergistics*, 718 F.3d 138, is limited to its facts, because it involved a transfer of venue from California to New York such that the court examined the issue "pretending" to be a California state court and applying California (not New York) choice of law principles. *Id.* at 153-54; *see also Ernst v. Carrigan*, 814 F.3d 116, 122 (2d Cir. 2016) (emphasizing the narrowness of *Liberty*). Indeed, *Liberty* acknowledged the substantive policy furthered by California's anti-SLAPP and determined that the anti-SLAPP rule would apply if California's state courts "required a 'substantive' choice of law analysis." 718 F.3d at 148, 155.

Const. Corp., 816 N.Y.S.2d 139, 140 (2d Dep't 2006) (statutes providing for attorneys' fees are substantive); *Rotz v. Van Kampen Asset Mgmt.*, 5 N.Y.S.3d 330, at *5-6 (Sup. Ct., N.Y. Cnty. 2014) (burden shifting statutes are substantive).

Lastly, Ms. Zervos baselessly contends that President Trump's anti-SLAPP motion is untimely (Pl. Mem. 39) but the parties agreed by stipulation to extend the deadline to "answer or move with respect to the complaint" (Dkt. Nos. 5, 18, 40, 97) -- which includes an anti-SLAPP motion. Regardless, the Court has broad discretion to allow a late-filed anti-SLAPP motion. *See Adelson*, 973 F. Supp. 2d at 495.

III. The Constitution Prohibits This Court From Exercising Jurisdiction.

A. The Supremacy Clause Bars Suits In State Court Against The President.

As established in the Opening Memorandum, this action should be dismissed without prejudice to its reinstatement after the Trump Presidency. While the U.S. Supreme Court in *Clinton v. Jones*, allowed a civil suit to proceed under the circumstances of that case in *federal* court the Court warned that actions in state court may "present a more compelling case for immunity." 520 U.S. at 691-92. Thus, Ms. Zervos's strained attempts to apply *Clinton v. Jones's* reasoning to suits in state court flies in the face of the Court's explicit caution that it does not so apply. (Pl. Mem. 2, 9-10.)

The Court's concern with a state court exercising jurisdiction over a sitting President arises from its prior holdings that the Supremacy Clause -- which makes the Constitution and federal laws and treaties made thereunder, the "supreme Law of the Land" with "Judges in every State . . . bound thereby" -- prevents state courts from interfering with high-ranking federal officials' ability to carry out their official duties. U.S. Const. art. VI, § 2. (*See* Mem. 12-14.)[33]

[33] Ms. Zervos argues that Professor Tribe's statement that "[a]n order of a state judge directing the President to

Ms. Zervos claims that the cases cited in the Opening Memorandum are distinguishable because they involve a state court's inability to interfere with lower federal officers' *official* conduct. (Pl. Mem. 11-12.) Ms. Zervos's attempted distinction ignores that the President is different from those lower federal officers. The President is the ultimate repository of the Executive branch's powers, *Clinton*, 520 U.S. at 719, and is required by the "constitution . . . to be always in function,"[34] such that any state action that burdens the President necessarily interferes with his *official* duties. Ms. Zervos's unofficial/official distinction is unavailing here, because, among other things: (i) the President is inseparable from the office he holds under the Constitutional scheme and (ii) the President's duties are so all-encompassing that they absorb any "unofficial" aspect of his life. (Mem. 13-14.)

Indeed, numerous commentators have pointed out the illusory distinction between official and unofficial conduct when it comes to the President. "'Any private lawsuit against the president is bound to become much more than a private case,'" such that "even a private lawsuit against the president should be treated legally as public (and thus functionally immune) regardless of the underlying subject matter at issue or the time when the events occurred." Kasowitz Reply Aff. Ex. 6 at 104, 108, 112. Judge Posner has repeatedly commented that "it should have been apparent to the Justices that public exposure of the details of the President's [private] life could undermine the President's authority and effectiveness." Kasowitz Reply Aff. Ex. 7 at 227; *see also* Kasowitz Aff. Ex. 35 at 319. Ms. Zervos can point to little else than

release information on pain of contempt would in all probability violate principles of federalism" is limited to state secrets (Pl. Mem. 11 n.4); however, in support, Tribe only cites footnote 13 in *Clinton v. Jones*, which is entirely unrelated to state secrets. *See* Kasowitz Aff. Ex. 38 at 780 n.66. Thus, it is clear Tribe believed that the U.S. Supreme Court would bar a civil suit in state court.

[34] *See* Mem. 13-14; Kasowitz Aff. Ex. 38 at 631; Kasowitz Aff. Ex. 42 at 7. *See also* Kasowitz Aff. Ex. 40 at 46 ("No single constitutional officer has so much power as the President, none must be on the job so continuously — administration of the laws and the handling of foreign affairs requires that the presidency be open 24 hours a day.").

Clinton v. Jones to support her argument that there is a meaningful distinction between Presidential official and unofficial conduct, which itself explicitly recognized that "quite different" questions are raised when the suit is brought in state court. (Pl. Mem. 9-10.)

Ms. Zervos further contends that it is "settled" that a federal officer can be sued for his official conduct in state court for damages. (Pl. Mem. 8 (citing *Teal v. Felton*, 1 N.Y. 537, 543-547 (1848)); Am. Mem. 5-7.) This is exemplary of the shortcomings in her position. First, it ignores the singular nature of the President: unlike the federal officers at issue in *Teal*, the President *cannot* be sued anywhere for damages even for conduct that falls within the "outer perimeter" of his official responsibility. *Nixon*, 457 U.S. at 756. Similarly, the existence of the officer removal statute, 28 U.S.C. § 1442(a) -- which allows a federal official who is sued in state court for official conduct to remove to federal court -- has no bearing on whether the *President* is amenable to suit in state court under the Constitution. (Pl. Mem. 8-9.) Second, Ms. Zervos's position ignores *Clinton v. Jones*, which explicitly recognized that the President's amenability to suits for damages in state court arising out of unofficial conduct is, at best, an open issue. 520 U.S. at 690, 691 n.13.

Similarly, Ms. Zervos and Amicus's arguments that the Supremacy Clause "is about the status of federal laws, not federal officials" and that Congressional action is necessary to shield the President from suit (Am. Mem. 12-14; Mem. 9-10) are incorrect. The Supremacy Clause makes the "Constitution," not just Congressional laws, "the supreme Law of the Land." U.S. Const. art. VI, § 2. As a result, even when a federal *law* is not impacted by state action, the Supremacy Clause prevents states and their courts, from interfering with the Constitution, or the exercise of Constitutional powers vested in the federal government. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 317, 330 (1819) (invalidating state's attempt to tax a national bank with

"powers vested in the national government"); *In re Tarble*, 80 U.S. 397, 408, 411 (1871) (state could not order a military official to discharge a solider, because the power over the military resides in the federal government under the Constitution).[35] Because the Constitution vests the President with Executive branch powers, *Nixon*, 457 U.S. at 749-50, the Supremacy Clause, even absent Congressional action, prevents this state Court from exercising jurisdiction over the President. Indeed, the Supreme Court has recognized that the President's amenability to suit is a Constitutional matter, such that it has reserved ruling on whether it would be constitutional for Congress to *create* damages liability for the President where he would otherwise be immune. *Id.* at 448 n.27. Thus, it is clear, no Congressional action is necessary to *remove* liability.

Amicus attempts to limit the *Clinton v. Jones* Court's Supremacy Clause concerns to where a state court compels the President to take specific action. Am. Mem. 11-12. However, the Court explicitly raised "the question [of] whether a court may compel the attendance of the President at any specific time or place" as a *second* unresolved concern, entirely separate from the question of "whether a comparable claim might succeed in a state tribunal." 520 U.S. at 691. Indeed, the test for whether state action violates the Supremacy Clause is not limited to control, but asks whether the state action will "retard, impede, burden, or in any manner control the operations" of the federal government. *McCulloch*, 17 U.S. at 317. And a state court retards, impedes, burdens, and also asserts "direct control" over the President simply by compelling him to participate in a lawsuit, respond to a complaint, answer discovery, or satisfy a judgment.[36]

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[35] *See also Hancock v. Train*, 426 U.S. 167, 178-79 (1976) (Supremacy Clause requires that federal functions "'be left free' of [state] regulation," *particularly* "where . . . the rights and privileges of the Federal Government at stake . . . find their origin in the Constitution"); *Feldman v. United States*, 322 U.S. 487, 491 (1944) ("[T]he sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."), *overruled on other grounds* by *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

[36] *Cf. Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (immunity "was designed to protect Congressmen 'not only

B. *Clinton v. Jones's* Holding That Federal Courts Can Appropriately Manage Cases Against The President Explicitly Does Not Extend To State Courts.

Ms. Zervos and Amicus argue that state courts can manage suits to avoid burdening the Presidency as well as federal courts, such that the reasoning in *Clinton v. Jones* should apply equally to state courts.[37] (Pl. Mem. 10; Am. Mem. 7-8.) However, the Court explicitly distinguished between the two.[38] In reserving ruling on this very question, the *Clinton* Court was responding directly to concerns raised at length in briefing concerning "'Case Management' By State Trial Courts":

> [E]ven the possibility that an incumbent President could be subject to the jurisdiction of a state court . . . demonstrates that suits against a sitting President are inconsistent with our constitutional scheme. The Framers were well aware that state governments might come into conflict with the federal government, and particularly with the Executive Branch. It would take little ingenuity to contrive a state law damages action against a President unrelated to the conduct of his office. In an atmosphere of local partisan hostility to the President, the ability to bring such a suit in state court would be a powerful weapon in the hands of state interests—one that the Framers could not possibly have intended to permit.

Kasowitz Reply Aff. Ex. 8 at *33-34; *see also* Kasowitz Reply Aff. Ex. 9 at *29. Thus, these concerns – which include concerns of inconsistent rulings from fifty different state courts and the

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from the consequences of litigation's results but also from the burden of defending themselves.'") (*quoting Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967)); *Galante ex rel. Galante v. Cty. of Nassau*, 720 N.Y.S.2d 325, 328 (Sup. Ct., Nassau Cnty. 2000), *aff'd as modified sub nom. Galante v. Cty. of Nassau*, 740 N.Y.S.2d 225 (2d Dep't 2002); *see also infra* Part III.B,C. Ms. Zervos, in fact asks the Court to order a retraction and/or apology from the President (Compl. Prayer for Relief), which would be an even clearer exercise of control.

[37] Contrary to Ms. Zervos's assertion, Mr. Trump could not have removed this action to federal court on diversity grounds to avoid these concerns (Pl. Mem. 10-11), because she only claims damages of $2,914 (Compl. ¶ 81), far below the $75,000 amount-in-controversy threshold. 28 U.S.C. § 1441(b). Indeed, if a federal court did have diversity jurisdiction, Ms. Zervos herself could have just as easily brought suit there to avoid this issue.

[38] Ms. Zervos argues that because the motion to dismiss "does not suggest[] that such [prejudice] issues are present here," there is no basis for dismissal. (Pl. Mem. 10.) However, the President was pointing to the concern over local prejudice raised by the U.S. Supreme Court, not himself. *Clinton*, 520 U.S. at 691. Further, a rule of law that could allow suits in state court would be a harmful precedent, which the Court recognized to be an important concern in its own right. *Id.* at 690-91 ("The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration.").

risk of local partisan hostility from elected judges (Mem. 15-16) -- were at the forefront of the Court's mind and occupied a substantial part of the Court's attention at oral argument.[39]

C. Civil Litigation Places A Substantial Burden On The President.

Both Ms. Zervos and Amicus argue that allowing an action would not unduly burden the President.[40] (Pl. Mem. 10; Am. Mem. 7-10.) History has proven this false. (Mem. 18-19.) As shown at length in the Opening Memorandum, it is now beyond reasonable debate that *Clinton v. Jones* -- which included claims for defamation -- occupied an inordinate amount of President Clinton's time and impeded his ability to carry out his duties.[41] This lawsuit, and the far-reaching discovery sought, appear to have the same goals. (Mem. 8-9, 19.) For example, Ms. Zervos's sweeping and overbroad subpoena already seeks information that has nothing to do with this lawsuit. Wang Aff. Ex. 8.

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[39] Mem. 11 n.16, 16; Kasowitz Aff. Ex. 41. Oral argument is relevant here, not to show that statements made by U.S. Supreme Court Justices in oral argument have some "legal effect" (Pl. Mem. 10 n.3), but rather to give context to the Court singling state court adjudication as a separate concern. *See Perry v. Merit Sys. Prot. Bd.*, 829 F.3d 760, 765-66 (D.C. Cir. 2016) (looking to justices' questions during oral argument to show their "*awareness* of the possibility of … a distinction" not that they had necessarily decided the issue), *cert. granted*, 137 S. Ct. 811 (2017), and *rev'd on other grounds*, 137 S. Ct. 1975 (2017), and *vacated sub nom. Anthony W. Perry, Petitioner V. Wilbur Ross, United States Secretary Of Commerce, Respondent*, 2017 WL 4231118 (D.C. Cir. Sept. 14, 2017).

[40] Amicus cites to an Office of Legal Counsel memorandum to argue that civil litigation may impose less of a burden than a criminal case (Am. Mem. 8); however, that "focused exclusively on federal rather than state prosecution of a sitting President." Memorandum to the Attorney General, Assistant Attorney General Randolph D. Moss, Office of Legal Counsel, Department of Justice, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000), available at https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf. at n.2. The Department of Justice has expressed concern that allowing a civil suit in state court would "enmesh state courts in the affairs of the national government" and that it would overburden the President. *See* Kasowitz Reply Aff. Ex. 9 at *7.

[41] Mem. 18 & n.28; Kasowitz Aff. Ex. 35 at 316 (referring to the suit as a "national emergency" with a "disastrous effect"); Kasowitz Aff. Ex. 43 at 26 ("[the] whole thing created chaos and took away from the ability of the U.S. government to function. The ability of the presidency and the White House to function -- it is not even arguable. . . . It had a huge effect . . . on his ability to get things done."); Kasowitz Aff. Ex. 45 at 3 (President Clinton spoke with his attorney three times on the day he was consulting about whether to attack Iraq); Kasowitz Reply Aff. Ex. 10 at 652 ("[T]he matter necessarily displaced other policy items from the agendas."); Kasowitz Aff. Ex. 38 at 765-66 ("The Court -- unwisely, hindsight would suggest -- deemed the threat that civil litigation . . . . 'impair the effective performance of [the President's] office,' to be implausible."); Kasowitz Aff. Ex. 44 at 265 ("We have learned that . . . [w]e do not need to be able to sue our Presidents during their term of office.").

Amicus argues that they are unaware of a deluge of litigation against sitting Presidents that occupied a significant amount of time, and downplays the likelihood of "many small-stakes suits against the President of the United States." (Am. Mem. 2, 9-10.) As *Clinton v. Jones* alone established, however, a single suit can cause substantial damage. Amicus also ignores that there are many incentives to sue a President. As one commentator noted, "[the *Jones* case] took on a special gleam, like valuable treasure. If played right, this case could return the Republicans to power in the White House. It lured to the treasure hunt some of the finest conservative legal talent in America.'" Kasowitz Reply Aff. Ex. 11 at 177. Further, "[t]he normal incentive structures that we have to keep civil litigation in check don't apply when the litigation is against the president" because of those "who would have enormous amounts to gain by destabilizing his presidency." *Id.* at 223. Indeed, "[o]nce discovery began in the fall of 1997 [in *Clinton v. Jones*], its intensity amounted to a virtual blitzkrieg." . . . "[T]he parties conducted 62 depositions." Kasowitz Reply Ex. 12 at 75-76.[42]

IV. Alternatively, The President Is Entitled To A Stay.

Alternatively, as shown, the Court has broad discretion to grant a temporary stay "of proceedings . . ., upon such terms as may be just," CPLR 2201, (Mem. 17-20), and such stays are not limited to promoting efficiency as Ms. Zervos suggests.[43] In fact, such a stay is not nearly as extraordinary as Ms. Zervos suggests. Lengthy stays are common in, for example: bankruptcy, even in suits against non-debtors; in civil actions where criminal prosecution are pending against the same defendant; against military personnel on active duty; and while immunity issues are

[42] *See also* Kasowitz Reply Aff. Ex. 13 at 61.

[43] None of the cases cited by Ms. Zervos involves such weighty public concerns. (Pl. Mem. 14.)

resolved.[44] The relief sought falls far short of the diplomatic immunity granted to foreign heads of state for their unofficial conduct.[45]

CONCLUSION

For the foregoing reasons, and those demonstrated in the Opening Memorandum, the Court should dismiss the Complaint, or in the alternative, stay the action pursuant to CPLR 2201, and award President Trump his costs and attorneys' fees pursuant to Cal. Code Civ. P. § 425.16(c).

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[44] 11 U.S.C. § 362; 2 Collier on Bankruptcy ¶ 105.02; *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 (5th Cir. 1979); Servicemembers' Civil Relief Act, 50 U.S.C. § 3901 *et seq.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

[45] *See, e.g.*, *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994).