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New York Supreme Court

Appellate Division - First Department

SUMMER ZERVOS,

Plaintiff-Respondent,

-against-

DONALD J. TRUMP

Defendant-Appellant.

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*

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INTEREST OF AMICI CURIAE

This amicus curiae brief is respectfully submitted by three law professors—experts in civil procedure, jurisdiction, and constitutional law—who twenty years ago submitted an amicus curiae brief in the Supreme Court of the United States in connection with the then-pending case of *Clinton v. Jones*, 520 U.S. 681 (1997). That brief argued that the President of the United States was not immune from civil suit. As they did before the New York Supreme Court (the "trial court") in this case, amici now make the same argument, this time with specific attention to state court proceedings, to address the constitutional issue raised by appellant in his brief appealing the trial court's denial of his motion to dismiss.

Amici take no position on the truth of the allegations in respondent's complaint (the "Complaint") or the merits of respondent's underlying claim. Now as in 1997, their sole concern is the proposition that the President, who is not above the law, is not immune from civil suit for the actions he takes in his unofficial capacity.

INTRODUCTION AND SUMMARY OF ARGUMENT

No one in our nation is above the law, not even the President. The Supreme Court in *Jones* clearly held that the Constitution does not immunize the President from civil suits based on conduct wholly unrelated to the execution of his office. 520 U.S at 694. Despite appellant's arguments to the contrary, neither the

Supremacy Clause nor any other constitutional principle prevents state courts from adjudicating claims brought against sitting Presidents when those claims implicate only the defendant's unofficial acts and capacities. *See* U.S. Const. art. VI, cl. 2. It is axiomatic that state courts are competent to address any legal issue unless Congress or the Constitution affirmatively provides otherwise. Congress has not immunized sitting Presidents from civil suits, though it clearly could do so. And contrary to appellant's thesis, the Constitution's Supremacy Clause does not oust state courts of jurisdiction over suits against a sitting President. The Supremacy Clause provides for the supremacy of federal *laws*, not federal *officials*.

Because the Supremacy Clause does make federal *laws* supreme, the *Jones* Court recognized that the Supremacy Clause may prevent state courts from exercising "direct control" over federal officers in ways that interfere with the execution of federal authority. 520 U.S at 691. But this concern has no relevance in suits involving only the unofficial actions of people who happen to be federal officers. In a suit involving only unofficial conduct—like this one—state-court jurisdiction cannot create a supremacy problem, because the court will not do anything requiring a federal official to take or refrain from taking any official action.

The trial court correctly rejected appellant's premise that state courts are less able than federal courts "to accommodate the President's needs or [to give] 'the utmost deference to Presidential responsibilities[.]'" *Id.* at 12–13 (citing *Jones*, 520

U.S. at 709). With respect to case management, a suit in state court need impose no greater burden on a President than a suit in federal court. And the trial court fully acknowledged that to the extent that the President must attend to a governmental or international crisis, "federal responsibilities will take precedence." *Id.* at 13.

Appellant argues that Presidential immunity is necessary to protect the President from having to expend significant time on distracting lawsuits. *See* Brief for Appellant-Defendant ("App. Br.") at 15. History does not support that assertion. In the four Presidential terms following *Jones*, suits against sitting Presidents in state court were either nonexistent or close to it. Appellant has identified no instance in which either President George W. Bush or President Barack Obama was required to spend time dealing with a lawsuit in a private capacity at any time during their combined sixteen years of service. Moreover, *Jones* authorizes suits against sitting Presidents in federal court, and there is no basis for believing that state court litigation involving unofficial acts would interfere with the President's duties any more than the same litigation in federal court would. Finally, if private litigation against sitting Presidents ever began to unduly impede the President's functions, Congress could exercise its authority under Article I of the Constitution to grant the President immunity against claims brought in state court or to authorize the removal of all suits involving the President to federal court. Yet, in the twenty years following *Jones*, Congress has not deemed it necessary to pass such a law. Thus,

the trial court properly concluded that "[t]here are no compelling reasons for delaying plaintiff's day in court here." Trial Court Op. at 14.

For all these reasons and others discussed below, the Court should reject appellant's argument that he is immune from suit in state court.

PROCEDURAL HISTORY

On January 17, 2017, respondent commenced this defamation action in the trial court. Trial Court Op. at 8. Three days later, appellant became the 45th President of the United States. *Id.* On July 7, 2017, appellant moved to dismiss or in the alternative stay this action until he leaves office. Appellant argued that the Supremacy Clause of the Constitution prevents the trial court from hearing this action. *See* Memorandum of Law in Support of President Donald J. Trump's Motion to Dismiss and Strike the Complaint ("Def. Br.") (Doc. No. 44) at 10-12. Appellant further argued that respondent failed to state a claim for defamation. *Id.* at 20-22.

On March 20, 2018, the trial court denied appellant's motion to dismiss. The trial court held that the rule articulated by the Supreme Court in *Jones*—that the President is not immune from a suit that relates entirely to his unofficial conduct—applies with equal force to state-court suits. *Id.* at 9–10. The trial court reasoned that "[n]othing in the Supremacy Clause of the United States Constitution even suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal executive responsibility."

Id. at 10. When only unofficial conduct is at issue, "[t]here is no possibility that a state court will compel the President to take any official action or that it will compel the President to refrain from taking any official action." *Id.*[1]

With respect to the merits of respondent's allegations, the trial court held that the Complaint sufficiently stated a claim for defamation. *Id.* at 18. The trial court therefore denied appellant's motion to dismiss. *Id.*

ARGUMENT

I. THE PRESIDENT IS NOT IMMUNE FROM SUIT BASED ON HIS UNOFFICIAL CONDUCT

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 218 (1882). To be sure, the President is entitled to immunity for his *official* acts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). But with respect to wrongful conduct outside of his official duties, the President is subject to suit like any other person. Accordingly, the Supreme Court in *Jones* unanimously determined that the President is amenable to civil suit in federal court, for alleged violation of state law, based on events that occurred before the President

[1] Adopting the reasoning in *Jones*, the Trial Court recognized that "important federal responsibilities will take precedence" in the event of conflict with the court's case management, but that such a possibility could not justify a categorical rule of immunity. Trial Court Op. at 13.

took office. 520 U.S. at 694–95. The trial court correctly determined that "[t]he rule is no different for suits commenced in state court related to the President's unofficial conduct." Trial Court Op. at 10.

In *Jones*, President Bill Clinton claimed that a sitting President enjoys temporary immunity from civil claims based on conduct that occurred before he became President. *Id.* Rejecting this contention, the Supreme Court noted that Presidential immunity applies only to a President's official acts. *Id.* at 694 ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity."); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 759 (1981) (Burger, C. J., concurring) (noting that "a President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties"). A President thus enjoys no immunity from suit based on his unofficial conduct. Nothing that a person does before becoming President could be an official Presidential act. *See, e.g.*, *Jones*, 520 U.S. at 685 (relevant acts occurred prior to Bill Clinton's presidency).

As the trial court observed, all of the events at issue in this suit occurred before appellant ever performed a Presidential act. Trial Court Op. at 1–8. Like *Jones,* this suit arises out of a state-law claim stemming from unofficial, pre-Presidential conduct. *See Jones* at 684-85 (noting that the plaintiff brought claims under

Arkansas law). It is therefore clear that the facts giving rise to this suit are beyond even the "outer perimeter" of a President's official duties. *Id.* at 685. To immunize the President in all cases, including cases having nothing to do with the President's official duties, would be to attach Presidential immunity not to the federal office but to a *person*. That would violate the principle that ours is "a government of laws and not of men." *Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (quoting Massachusetts Declaration of Rights, pt. 1, art. 30 (1780)).

II. THE SUPREMACY CLAUSE DOES NOT IMMUNIZE THE PRESIDENT FROM SUIT IN STATE COURT INVOLVING UNOFFICIAL CONDUCT

Appellant's insistence that the Supremacy Clause bars suits against sitting Presidents brought in state courts, *see* App. Br. at 10, has no basis in precedent and relies on the fallacy that the Supremacy Clause attaches to the President as a person. Neither the Supremacy Clause nor any other constitutional principle would justify limiting to federal courts the jurisdiction *Jones* upheld over damages actions against sitting Presidents in their unofficial capacities.

Because *Jones* did not involve a state court suit, the Supreme Court did not resolve the question of whether the President may claim immunity from suit in that forum. In a footnote, the Court noted that a state-court suit against a sitting President might raise different issues. 520 U.S. at 691, 691 n.13. But those issues cannot arise in a case like this one, which concerns only the appellant's unofficial actions.

Problems would arise under the Supremacy Clause, footnote 13 indicates, if state courts were to intrude into federal government *operations*. *Id.* But a suit like the present one, which has no connection to the appellant's role in executing federal law, cannot raise a problem under the Supremacy Clause.

A. Footnote 13 of Jones, Relied Upon by Appellant, Does Not Support Presidential Immunity From State Court Suits Concerning Unofficial Acts

Because the entirety of appellant's argument rests on his misreading footnote 13, that footnote bears repeating in full. It reads as follows:

> Because the Supremacy Clause makes federal law 'the supreme Law of the Land,' Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, §3, may implicate concerns that are quite different from the interbranch separation of powers questions addressed here. *Cf., e.g., Hancock v. Train*, 426 U.S. 167, 178 -179 (1976); *Mayo v. United States*, 319 U.S. 441, 445 (1943). See L. Tribe, American Constitutional Law 513 (2d ed. 1988) ('[A]bsent explicit congressional consent no state may command federal officials . . . to take action in derogation of their . . . federal responsibilities').

Jones, 520 U.S. at 691 n.13.

As the trial court recognized, "each and every one of the concerns that the United States Supreme Court raised [in footnote 13] implicates unlawful state intrusion into federal government *operations*." Trial Court Op. 11 (emphasis supplied). In other words, the concern animating footnote 13 is not that any civil suit against a President in state court would *inherently* raise problems under the Supremacy Clause. It is that a certain subset of such lawsuits could raise such a

problem. A Supremacy Clause problem would arise if a state court ordered the President to take or refrain from taking some official action, or to appear personally at a specific time and place in a manner that would interfere with the President's execution of his official duties. Those forms of judicial conduct are what the footnote means by "direct control by a state court over the President[.]" *Id.* A state court exercising such "direct control" might issue an order that would block a President from executing his office, and that would indeed raise a problem under the Supremacy Clause. But no such problem arises in a suit that merely seeks damages for conduct having nothing to do with the President's official role.

The three authorities cited in footnote 13 make clear that the Court's Supremacy concern in *Jones* went only to the possibility of a state's asserting control over federal officers in ways that would interfere with their execution of federal law. In the first case cited in footnote 13, *Hancock v. Train*, 426 U.S. 167 (1976), the Supreme Court held that Kentucky could not force federal facilities located within the State to obtain state permits in order to operate. *Id.* at 178–79. In the second case cited in footnote 13, *Mayo v. United States*, the Supreme Court ruled that the Florida Commissioner of Agriculture could not order the cessation of a federal fertilizer distribution program. 319 U.S. 441, 443-45 (1943). In both instances, the state was asserting authority to control a federal officer's exercise of his official federal responsibilities. Footnote 13's quotation of a leading constitutional law

treatise is to the same effect: it states that "absent explicit congressional consent no state may command federal officials . . . to *take action in derogation of their . . . federal responsibilities*[.]" *Jones*, 530 U.S. at 691 n.13 (citing L. Tribe, American Constitutional Law 513 (2d ed. 1988)) (emphasis added). In short, everything about footnote 13, from its language to its choice of illustrative authorities, supports the conclusion that the Court had a specific federalism concern in mind: state courts may not compel the President to take or refrain from taking acts in his official capacity or otherwise prevent him from executing his office.[2] The trial court correctly held that the Supreme Court's concern with "direct control" is not directly implicated in a case, like this, in which "only unofficial conduct is in question," Trial Court Op. at 12, and in which the respondent seeks only damages rather than any sort of injunctive relief.

Appellant insisted below, however, that any state court action necessarily violates the Supremacy Clause because it presumes the state court's authority to "compel the attendance of the President at any specific time or place." *See*

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[2] The additional authorities that appellant cites, Def. Br. at 12-13, are concerned with the same specific problem of states' controlling official federal actions. In *Tennessee v. Davis*, the Supreme Court upheld a federal statute authorizing removal of state actions against federal officials *engaged in federal duties*. 100 U.S. 257, 267 (1879). In *Tarble's Case*, the Supreme Court held that a state court could not order a federal officer to discharge a federal prisoner. *See generally* 80 U.S. 397 (1871). Finally, in *McClung v. Silliman*, the Court held that a state court could not issue a writ of mandamus compelling federal officers *to take governmental actions*. 19 U.S. 598, 605 (1821).

Defendant's Reply Brief ("Reply Br.") at 22 (citing *Jones*, 520 U.S. at 691); *see also* App. Br. at 10-11. That isn't true: adjudicating the present suit need not require the President to appear in person at any particular time and place that might interfere with his official federal duties. The trial court has ample techniques for avoiding such impositions on the President, including accommodation of the President's schedule and the ability to permit the President to testify remotely, as the Court noted in *Jones*. *See* 520 U.S. at 692. The concerns identified by the Supreme Court in footnote 13 are thus not implicated.

B. Contrary to Appellant's Arguments, the Supremacy Clause is About the Status of Federal Law, Not Federal Officials

The full breadth of appellant's argument is revealed by the assertion that "[b]ecause the President alone is vested with the entire executive authority … *he is inseparable from the office* he holds." App. Br. at 12 (emphasis added). Although appellant protests that this position "in no way place[s] the President 'above the law'" because "the Supremacy Clause itself [is] part of the law," *id.* at 16, even this assertion betrays appellant's fundamental confusion, which is to conflate the Office of the President with the person who occupies the Office. That argument cannot be squared with the text of the Supremacy Clause, nor with *Jones* itself.

Appellant's argument founders first on the plain text of the Supremacy Clause, which dictates that federal *laws*, not federal officials, are the "supreme law of the land." U.S. Const. art. VI, cl. 2 (stating that "laws of the United States . . . shall be

the supreme law of the land"). By claiming that a constitutional provision securing supreme status for federal *law* actually confers supreme status on federal *officials*, appellant attributes to the Clause a meaning that the constitutional text does not support. See App. Br. at 12-13. By then claiming that those federal officials are thereby entitled to exemption from non-federal legal authority even when not acting in their official capacities at all, appellant treats the Supremacy Clause as though it were in tension with the fundamental principle of our constitutional system: that ours is "a government of laws and not of men." *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (quoting Massachusetts Declaration of Rights, pt. 1, art. 30 (1780)).

Appellant contends that the distinction between official and unofficial conduct is "illusory" when it comes to the President. *See* Reply Br. at 20. But the Supreme Court says precisely the opposite. The *Jones* Court made clear that "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it,'" 520 U.S. at 695 (citing *Forrester v. White*, 484 U.S. 219, 229 (1988)), and that "the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue," *id.* at 688 (citations omitted). In other words, the President's "personal, private" capacity is distinct from his official capacity, and in his personal capacity he is not immune from suit. For that reason, the Supreme Court expressly held that the President could be sued, while in office, for private actions taken before assuming office. *Id.* at 684. Further, Appellant's

position would mean that whether a plaintiff with a valid state-law claim arising from a President's unofficial conduct could obtain relief for his or her injuries would depend on the happenstance of whether that plaintiff could invoke the federal courts' diversity jurisdiction. This view is illogical, as there is no reason the Constitution would create immunity only for non-federal civil legal violations that were committed against citizens of the President's home state.

Given the fundamental distinction between the official conduct of federal officeholders and the personal actions of persons who happen to occupy federal office, the Supremacy Clause does not imply that sitting Presidents, any more than other federal officials, are immune from claims brought in state court based on their unofficial conduct. Trial Court Op. at 10. To the contrary, the Supremacy Clause expressly *recognizes* the authority of state courts, rather than stripping them of that authority. After all, the Clause identifies *state* judges as the judicial actors who will implement "the supreme law of the land." *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, *and the judges in every state* shall be bound thereby.") (emphasis added). To be sure, the Clause indicates that state judges must exercise their authority consistently with federal law. But it expects those state judges to be up to the task, and it says nothing suggesting that the individual persons who hold federal office are immune in their personal capacities

from state judicial authority any more than it says that such persons are immune in their personal capacities from state regulatory authority. Even the President must pay his state income taxes, for example: state-law authority binds him, with no Supremacy problem whatsoever. The status of state judicial authority is no different.

III. STATE COURTS ARE COMPETENT TO ADJUDICATE CLAIMS AGAINST FEDERAL OFFICIALS, AND NO EXCEPTION NEED BE MADE FOR PRESIDENTS

Appellant asserts that state courts may not exercise jurisdiction over a sitting President because state courts are somehow less equipped than federal courts to manage suits to avoid burdening the Presidency. *See* App. Br. at 12. But a state court's adjudication of a claim against the President in his personal capacity need not threaten the President's execution of his official duties any more than a suit in federal court. Appellant's contention that only federal courts can hear state law claims brought against a sitting President is meritless.

A. State Courts Can Manage Actions Unrelated to the President's Official Conduct

As the trial court recognized, resolution of this defamation action—an action unrelated to the President's official conduct—"is the responsibility of the state court and is not impermissible 'direct control . . . over the President.'" Trial Court Op. at 13 (citing *Jones*, 520 U.S. at 691, n.13). State courts are courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 366 (2001). It has long been settled that state courts are presumed competent to adjudicate any case that federal courts

can hear, except for those few categories of cases in which the Constitution grants original jurisdiction to the United States Supreme Court. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (noting that the Supreme Court "ha[s] consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Indeed, the Constitution contemplated that state courts might be the *only* lower courts. *See* U.S. Const. art. III, § 1 (authorizing Congress to create lower federal courts, but not requiring it to do so). Only when Congress affirmatively specifies that state courts may not adjudicate a class of cases is the presumption of state court competence overcome. *See Tafflin*, 493 U.S. at 459.

The presumption of state court competence extends to cases involving federal officers. See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647, 664 n.13 (1963) ("there is state court jurisdiction of damages actions against federal officers."). Indeed, state courts can hear *Bivens* actions, in which federal officials can be held liable for civil damages for violating the U.S. Constitution under the color of federal authority. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (upholding a *Bivens* claim filed in Minnesota state court); *see also Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971) (establishing a cause of action against federal officials).[3] If

[3] Because Congress has chosen to create a right of removal to federal court for federal officers sued for actions taken under the color of their offices, *see* 28 U.S.C.

state courts are competent to hear civil money damages claims against federal officials for their *official acts*, it follows *a fortiori* that state courts are competent to hear claims against federal officials for their *unofficial* conduct. Indeed, Congress itself has recognized the propriety of state court jurisdiction over suits against federal officers for matters not arising under the color of their offices. For example, in the Westfall Act, Congress authorized removal to federal court of certain suits against federal officials, but required remand to state court if a district court determines the federal employee was not acting within the scope of her employment. 28 U.S.C. § 2679(d)(3).[4] Congress similarly has made many suits against federal officials removable to federal court if the plaintiffs are noncitizens, but not if the plaintiffs

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§ 1442(a)(1), *Bivens* actions are usually heard in federal court. But section 1442(a)(1) does not oust state courts of jurisdiction over *Bivens* actions; state courts are still competent to hear such cases. To be sure, it is difficult under current doctrine for plaintiffs to prevail on the *merits* of *Bivens* actions, especially in areas where the courts have not already vindicated such claims. *See Ziglar v. Abassi*, 137 S. Ct. 1843, 1860 (2017) (largely limiting *Bivens* suits to the specific contexts where such actions have previously been permitted, such as suits under the Fourth Amendment). But the Supreme Court has never questioned the idea that state courts are equally competent to federal courts to adjudicate *Bivens* claims and to assess damages against federal officials when the merits warrant that result.

[4] *See also* Henry C. Jackson, *Man Suing Ill. Rep. Over Burns Suffered in Prank*, SAN DIEGO UNION-TRIBUNE, June 10, 2011, http://www.sandiegouniontribune.com/sdut-man-suing-ill-rep-over-burns-suffered-in-prank-2011jun10-story.html (negligence suit filed against U.S. Rep. Bobby Schilling in Illinois state court); Kevin Diaz, *Rep. Michele Bachmann Settles Suit Over Iowa E-Mail List*, STAR TRIBUNE, July 15, 2013, http://www.startribune.com/june-28-bachmann-settles-lawsuit-over-iowa-e-mail-list/213609621 (describing suit for trespass, conversion, invasion of privacy, libel and slander filed against U.S. Rep. Michele Bachmann in Iowa state court).

are citizens. *See* 28 U.S.C. § 1442(b). Thus, Congress has recognized that state courts are fit to resolve actions by American citizens against federal officials for matters involving their unofficial conduct.

B. Suits in State Court Need Not Burden or Distract a Sitting President Any More Than Suits in Federal Courts

In *Jones*, President Clinton argued that sitting Presidents should enjoy temporary immunity from all civil suits because litigation would unduly distract a President from the duties of his office. *Jones,* 520 U.S. at 697–699. The Supreme Court rejected that argument. *Id.* at 708. Under *Jones*, the general concern that the burdens of litigation might interfere with the President's duties is not sufficient to require that the President be immune from suit while in office. *Id.* Because the suit in *Jones* was filed in federal court, the Supreme Court had no occasion to rule on the question of Presidential immunity in state courts. However, the trial court properly concluded that "[s]tate courts can manage lawsuits against the President based on private unofficial conduct just as well as federal courts and can be just as mindful of the 'unique position in the constitutional scheme that the office occupies.'" Trial Court Op. at 13 (citing *Jones*, 520 U.S. at 698).

In *Jones*, the Supreme Court noted that a federal district court adjudicating a suit against a sitting President could manage the case so as to accommodate the legitimate demands of the office. 520 U.S. at 707. "Although scheduling problems may arise, there is no reason to assume that the district courts will be either unable

to accommodate the President's needs or unfaithful to the tradition—especially in matters involving national security—of giving 'the utmost deference to Presidential responsibilities.'" *Jones*, 520 U.S. at 709 (quoting *United States v. Nixon*, 418 U.S. at 710–711). A state trial court can manage a case with the same considerations in mind. No less than a federal court, a state court can set the calendar for its proceedings, both with respect to pretrial matters like discovery and with respect to in-court testimony, so as to minimize the imposition on a defendant whose official duties properly keep him very busy.[5] Indeed, a civil suit can be conducted without ever requiring a defendant-President to appear in person. The President's own testimony might not be needed, and if it is, arrangements can be made for him to testify remotely, as Presidents have done in such circumstances in the past. *See Jones*, 520 U.S. at 704-05 (describing instances in which Presidents gave videotaped testimony and also instances in which Presidents gave depositions as witnesses, both voluntarily and under court order); *see also* U.S. Dep't of Justice, Office of Legal

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[5] Indeed, New York's state judicial system is in some ways more able to shield a Presidential defendant from unnecessary litigation burdens than the federal system is. One of the most powerful judicial devices for reducing litigation burdens is interlocutory appeal, which permits expedited resolution of potentially dispositive issues. New York's rules of civil procedure permit interlocutory appeals more generously than the federal system. *See, e.g.*, CPLR 5701(a)(2)(iv)-(v); see also DAVID D. SIEGEL, NEW YORK PRACTICE § 526 (5th ed. 2017) ("Although federal practice, like New York's, allows appeal from final dispositions, an appeal from an interlocutory order in federal practice is rarely allowed, in contrast with the unusually generous New York attitude.").

Counsel, Memorandum for the Attorney General, Oct. 16, 2000 (distinguishing between civil and criminal proceedings against a sitting President partly on the ground that civil litigation does not require the President's physical presence). Of course, in the event that the President must attend to a governmental or international crisis, "federal responsibilities will take precedence." Trial Court Op. at 13.[6]

Appellant also argues that allowing *Jones* to proceed was erroneous because it disrupted and impaired President Clinton's ability to discharge his Article II responsibilities. *See* Def. Br. at 18. The first thing that must be said about this argument is that appellant cannot prevail by arguing that the United States Supreme Court erred in *Jones*. This Court is bound by the view expressed in *Jones*, not by a contrary view now expressed by appellant in litigation.

Moreover, the concern that permitting civil litigation against sitting Presidents will impair their ability to discharge their responsibilities should be tempered by a basic reality about the *in*frequency of civil litigation against sitting Presidents: it almost never happens. Even after *Jones* prominently announced that sitting Presidents are amenable to suit, four full Presidential terms went by without any

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[6] To the extent "the tradition—especially in matters involving national security—of giving 'the utmost deference to Presidential responsibilities[]'" *Jones*, 520 U.S. at 709 (quoting *United States v. Nixon*, 418 U.S. at 710–711), is a substantive rule of federal law, it would also bind state courts. *See, e.g.*, *Cannaday v. Sandoval*, 458 Fed. Appx. 563, 566 (7th Cir.2012) (applying federal common law doctrine of "qualified immunity" to state courts).

President's having to spend significant time on civil suits brought against him in his personal capacity. To be sure, it *can* happen, as the current case indicates.[7] But if the past is any guide, such cases will be exceptional: there is simply no evidence that permitting plaintiffs to file civil suits against sitting Presidents brings on floods of burdensome litigation. And even within the small number of significant civil suits that might be brought, some—perhaps most—will be removable to federal court, whether on federal question grounds or diversity grounds. Considering the low rate of such suits to begin with—amici are aware of none in four terms—and the frequent possibility of removal, the total volume of cases in which Presidents will be required to spend time defending against civil litigation in state court should be very small.

Finally, appellant argues that there should be significant concern about "local prejudice" that could exist at the state level arising from partisan hostility toward a sitting president. *See* App. Br. at 14-15. That contention ignores how rare the scenario involving that risk would be, given the infrequency of litigation against Presidents and the likelihood that any state-court action raising the risk of such local prejudice against a President would be removable to federal court.

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[7] The unique circumstances underlying the suits identified by appellant, *see* Br. 15 n.10, do not support a conclusion that they reflect a more general trend or concern. Moreover, the President is not actually a named defendant in many of the cases cited and most of the cases cited are in federal court and thus not relevant here.

If a case is not removable because the plaintiff and the President are citizens of the same state, or because an out-of-state plaintiff sues the President in the President's home state, concerns about state prejudice against the President as a defendant should be at their lowest ebb. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (noting that diversity jurisdiction was created to prevent "discrimination in state courts against those not citizens of the state."). That leaves only suits that cannot satisfy the amount-in-controversy requirement. It seems unlikely that plaintiffs with good-faith claims will bring many small-stakes suits against the President of the United States: suing a powerful person comes with costs, and if the damages sought are modest, litigation will not likely be worth the effort.

To be sure, there remains the possibility of bad-faith, frivolous litigation in the President's home state. But it is probably not necessary to worry much about that prospect. For one thing, there is no history of groundswells of meritless local litigation against sitting Presidents at any time in our history, including in the two decades since *Jones*. For another, competent judges will usually dismiss meritless claims quickly, as *Jones* itself noted. *See Jones*, 520 U.S. at 708 ("Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant."). Finally, if Congress were to conclude that a rash of small-stakes state-court litigation were unduly consuming Presidential time, it could by statute waive the amount-in-controversy requirement

for federal diversity jurisdiction in suits against the President, much as it has done for many cases brought by aliens against federal officers for matters not involving their official conduct. *See* 28 U.S.C. 1442(b); *see also* infra, Part IV.

Considering the low rate of civil actions against Presidents to begin with (none in four terms), the proportion of such actions that would be brought in federal court in the first place, and the high likelihood of removability in the rest, the total volume of cases raising the risk of local prejudice against Presidents in state courts should be vanishingly small. And especially small in cases in courts of the President's home state.

For these reasons, there is no basis for concluding that subjecting appellant to claims in state court will unduly distract him from the execution of his Presidential duties.

IV. CONGRESS COULD CHOOSE TO IMMUNIZE THE PRESIDENT AGAINST SUIT IN STATE COURT BUT HAS NOT DONE SO

If Congress ever decided that litigation against the President in state courts did threaten interference with the President's duties, it could easily remedy the situation with a statutory grant of immunity. *See Jones*, 520 U.S. at 709 ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."); *see also* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1460-61 (2009) (noting that Congress could, but has not, legislated Presidential

immunity from civil suit). In fact, Congress has exercised its legislative authority to create other immunities against state court litigation, including in some cases for federal officers. Under federal statutes, uniformed military personnel and foreign sovereigns enjoy certain immunities against litigation in state court. *See, e.g.*, 50 U.S.C. § 3901 *et seq* (military personnel); 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–11 (foreign sovereigns). Federal statute also grants all federal officers the right to move to federal court all litigation brought against them in connection with the execution of their offices. *See* 28 U.S.C. § 1442(a). In some cases involving noncitizen plaintiffs, a federal statute even permits federal officers (surely including the President) to remove to federal court suits that *do not* arise from their official federal conduct. *See* 28 U.S.C. § 1442(b).[8] In short, Congress is not shy about exercising its authority to create immunities against state court legislation. But as the trial court pointed out, "[e]ven after *Clinton v. Jones*, decided more than 20 years

[8] 28 U.S.C. § 1442 creates special rights of removal in suits against federal officers. In this statute, Congress has authorized federal officers to remove to federal court all state court cases "for or relating to any act under color of such office," 28 U.S.C. § 1442(a)(1), as well as lawsuits brought by noncitizens against federal officers in the courts of states other than the defendant's own state, regardless of whether the cases implicate official conduct, 28 U.S.C. § 1442(b). The President has no need of the right of removal granted in § 1442(a)(1), because he is categorically immune from suits arising from his official actions. *Nixon*, 457 U.S. at 749. The immunity granted in § 1442(b) attaches to the President as to all other federal officers, but it has no applicability in a case like the current one, in which the plaintiff is a U.S. citizen and the state in which the President is sued is the President's own home state.

ago, Congress has not suspended proceedings against the President of the United States[.]" Trial Court Op. at 13-14.

If state court litigation by U.S. citizens or suits in the courts of Presidents' home states were one day perceived to interfere with the President's duties, Congress could enact a relevant immunity. Alternatively, Congress could provide for the removal of all cases against the President to federal court, where the propriety of litigation against the President has already been settled by *Jones*. In short, any problem that might require Presidential immunity from suit in state court is fully addressable by Congress. There is no need for courts to preempt legislative judgment by inventing such an immunity themselves.

CONCLUSION

As the trial court held, no one in our nation is above the law. In *Jones*, the Supreme Court unanimously held that sitting Presidents are not immune from civil lawsuits in federal court for their unofficial acts. There is no reason grounded in Supreme Court precedent, the Constitution, public policy, or logic to reach a different conclusion with respect to suits brought in state courts against sitting Presidents based on their unofficial conduct. This Court should uphold the trial court's decision and allow the trial court to adjudicate the claims against appellant.

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APPENDIX
A

List of Amici Curiae Law Professors

(Affiliations provided for identification purposes only.)

1. **Stephen B. Burbank** is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. He is a recognized expert in the fields of civil procedure and judicial administration.

2. **Richard D. Parker** is the Paul W. Williams Professor of Criminal Justice at Harvard Law School, where he has taught constitutional law since 1974.

3. **Lucas A. Powe Jr.** holds the Anne Green Regents Chair in Law and is also a Professor of Government Law at the University of Texas at Law School. He is an expert in constitutional law.