Exhibit A

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

THE PEOPLE OF THE STATE OF NEW YORK, by BARBARA D. UNDERWOOD, Attorney General of the State of New York,

Plaintiff,

– against –

DONALD J. TRUMP, DONALD J. TRUMP JR., PETITION IVANKA TRUMP, ERIC F. TRUMP, and THE DONALD J. TRUMP FOUNDATION,

Defendant.

Index No. 451130/2018
(Justice Scarpulla)

BRIEF OF AMICI LAW PROFESSORS IN NEW YORK V. DONALD J. TRUMP ET AL.

Aditi Juneja (N.Y. Bar. No. 5565809)
Ian Bassin (N.Y. Bar. No. 4683439
THE PROTECT DEMOCRACY PROJECT
222 Broadway Avenue, #1898
New York, NY 10038
Telephone: (202) 599-0466

Richard Primus (N.Y. Bar No. 2975191)
University of Michigan Law School*
625 S. State St., Ann Arbor, MI 48109
Telephone: (734) 647-5543

**Affiliation provided for identification purposes only*

Attorneys for Amici Curiae Law Professors

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE PRESIDENT IS NOT IMMUNE FROM SUIT BASED ON HIS UNOFFICIAL CONDUCT 4

II. THE SUPREMACY CLAUSE DOES NOT IMMUNIZE THE PRESIDENT FROM STATE-COURT SUITS ARISING ONLY FROM UNOFFICIAL CONDUCT 5

A. Footnote 13 of *Jones*, Relied Upon by Respondent, Does Not Support Presidential Immunity from State-Court Suits Concerning Unofficial Acts 6

B. Contrary to Respondent's Arguments, the Supremacy Clause Is About the Status of Federal Law, Not Federal Officials 10

III. STATE COURTS ARE COMPETENT TO ADJUDICATE CLAIMS AGAINST FEDERAL OFFICIALS, AND NO EXCEPTION NEED BE MADE FOR PRESIDENTS 12

A. State Courts Can Manage Actions Unrelated to the President's Official Conduct 13

B. Suits in State Court Need Not Burden or Distract a Sitting President Any More Than Suits in Federal Courts 15

IV. CONGRESS COULD CHOOSE TO IMMUNIZE THE PRESIDENT OR PERMIT REMOVAL BUT HAS NOT DONE SO 18

CONCLUSION 20

APPENDIX A 21

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 15

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 15

Claflin v. Houseman, 93 U.S. 130 (1876) 14

Clinton v. Jones, 520 U.S. 681 (1997) .... passim

Cooper v. Aaron, 358 U.S. 1 (1958) 6, 11

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 20

Hancock v. Train, 426 U.S. 167 (1976) 8

In Re Tarble, 80 U.S. 397 (1871) 8

Mayo v. United States, 319 U.S. 441 (1943) 8

McCulloch v. Maryland, 17 U.S. 316 (1819) 8, 10

Nevada v. Hicks, 533 U.S. 353 (2001) 14

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 4, 5, 22

Tafflin v. Levitt, 493 U.S. 455 (1990) 1, 14

Tennessee v. Davis, 100 U.S. 257 (1879) 9

United States v. Lee, 106 U.S. 196 (1882) 4

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 14

Zervos v. Trump, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. Mar. 20, 2018) .... passim

Ziglar v. Abassi, 137 S. Ct. 1843 (2017) 15

STATUTES

28 U.S.C. § 1292 15

28 U.S.C. § 1330 19

28 U.S.C. § 1441 19

28 U.S.C. § 1442 .... 13, 14, 18, 19

28 U.S.C. § 2679 14

28 U.S.C. §§ 1602–11 19

50 U.S.C. § 3901 *et seq*. 19

CPLR 5701 15

OTHER AUTHORITIES

DAVID D. SIEGEL, NEW YORK PRACTICE § 526 (Westlaw 6th ed. 2017) 16

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 14

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 14

Robert G. Dixon, Jr., Ass't Att'y Gen., Office of Legal Counsel, *Amenability of the President, Vice-President and Other Civil Officers to Federal Criminal Prosecution While in Office*, at 28 (Sept. 24, 1973) 16

Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. OLC 222, 252 n.28 (Oct. 16, 2000) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III § 2, cl. 2. 13

U.S. Const. art. III, § 1 .... 13, 14

U.S. Const. art. VI, cl. 2 .... 2, 11, 12

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-one 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. Amici now make the same argument, this time with specific attention to state court proceedings, to address the immunity issue raised by Respondents in their motion to dismiss. Amici have also made this argument, successfully, in *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. Mar. 20, 2018) (Schecter, J.) (accepting amici's position and denying President Trump's claim of immunity from suit in New York state court).

Amici take no position on the merits of the present suit. Now as in 1997, their sole concern is the principle that the President is not immune from civil suit for 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. That is why the Supreme Court in *Jones* held that the Constitution does not immunize the President from civil suits based on conduct wholly unrelated to the execution of his office. *See* 520 U.S at 694.

It is axiomatic that state courts are competent to address any legal issue unless Congress or the Constitution affirmatively provides otherwise. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Congress has not immunized sitting Presidents from civil suits, though it clearly could do so. And despite Respondent's[1] arguments to the contrary, neither the Constitution's Supremacy Clause nor

---

[1] The present suit is brought against five respondents: four individual members of the Trump family and the Donald J. Trump Foundation. The immunity issue that is amici's sole interest in

any other constitutional principle prevents state courts from adjudicating claims brought against sitting Presidents when those claims implicate only the Respondent's unofficial acts and capacities. *See* U.S. Const. art. VI, cl. 2. The Supremacy Clause provides for the supremacy of federal *law*, not federal *officials*.

Because the Supremacy Clause does make federal *law* supreme, the *Jones* Court recognized that the Supremacy Clause prevents state courts from exercising "direct control" over federal officers in ways that interfere with the execution of federal law. 520 U.S at 691 n.13. But this concern has no relevance in cases with no connection to the execution of federal law. Acting on that principle, another Justice of this Court recently and correctly denied President Trump's claim of constitutional immunity in a civil suit having nothing to do with the President's official duties. *See Zervos*, 74 N.Y.S.3d at 446–48 (rejecting President Trump's claim to be immune from a defamation claim arising from actions before he became President), *stay denied* No. M-1699, 2018 WL 2248826 (1st Dept.), *stay denied* 31 N.Y.3d 1113 (2018). In the present case, no official action is at issue, and no remedy the Court might order would require any federal official to take or refrain from taking any action in his official federal capacity.[2] The constitutional rule that federal law is supreme over state law is accordingly not relevant.

---

this case concerns only one respondent, Donald J. Trump, in his individual capacity. In the interest of simplicity, amici in this brief accordingly use "Respondent" to refer to Respondent Donald J. Trump.

[2] The remedies sought in the present suit against President Trump, in his individual capacity, are (1) an injunction barring him, for ten years, from serving as a fiduciary for a not-for-profit charitable organization incorporated or authorized to conduct business or solicit charitable donations in New York; (2) monetary fines, damages, and restitution; (3) an accounting for his conduct in the failure to perform his duties in the management of corporate assets; and (4) an injunction limiting his exercise of the corporate powers of the Foundation, until the Foundation is dissolved. *See* Petition at 39–40. None of these remedies would require President Trump to exercise, or not exercise, any power of the Presidency.

Zervos also correctly rejected Respondent'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 447 (citing *Jones*, 520 U.S. at 709). A suit in state court need impose no greater burden on a President than a suit in federal court. And if the President must attend to a governmental or international crisis, this Court is perfectly capable of managing a case so that "federal responsibilities [can] take precedence." *See id*.

Nor is Presidential immunity necessary to protect the President from having to expend significant time on distracting lawsuits. In the four Presidential terms following *Jones*, suits against sitting Presidents in state court were either nonexistent or close to it. Respondent 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 during their combined sixteen years of service. There is accordingly no factual basis for thinking that Presidents will often be civilly sued unless immunized, and courts should not make bad constitutional law for generations simply because of the exceptional circumstances created by one President's pre-office conduct. Moreover, even in the current exceptional circumstance where a sitting President does face a civil suit in state court, the actual burden on the President's time will be minimal.

Finally, if Congress ever became concerned that private litigation against sitting Presidents might impede the execution of Presidential 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. That civil plaintiffs might try to sue sitting Presidents in state courts has been obvious since *Jones* was decided in 1997. But in the twenty-one years since *Jones*, Congress has not deemed it necessary to create a

Presidential immunity from suit in state courts. In the absence of federal legislation, this Court should not create a new and unnecessary immunity.

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

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, 220 (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 either state or federal law, based on events that occurred before the President took office. *See* 520 U.S. at 692. And another Justice of this Court recently determined that "[t]he rule is no different for suits commenced in state court[.]" *Zervos*, 74 N.Y.S.3d at 446.

In *Jones*, President Bill Clinton claimed that a sitting President enjoys temporary immunity from civil claims based on conduct occurring before he became President. *See* 520 U.S. at 692. 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*, 457 U.S. at 759 (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. And a person cannot possibly perform any official Presidential act before becoming President. *See, e.g.*, *Jones*, 520 U.S. at 686 (relevant acts occurred prior to Bill Clinton's Presidency).

Like *Jones,* this suit arises out of unofficial, pre-Presidential conduct. So the facts giving rise to this suit are beyond even the "outer perimeter" of a President's official duties. *Id.* 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 STATE-COURT SUITS ARISING ONLY FROM UNOFFICIAL CONDUCT

Respondent's insistence that the Supremacy Clause bars suits against sitting Presidents brought in state courts, *see* Mem. of Law in Supp. of Respondents' Mot. To Dismiss at 36–37 ("MTD"), has no basis in precedent and relies on the fallacy that the Supremacy Clause attaches to the President as a person. Given the holding in *Jones*, neither the Supremacy Clause nor any other constitutional principle justifies depriving state courts of jurisdiction over civil 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 state court. In a footnote, the Court noted that a state-court suit against a sitting President might raise different issues. *See* 520 U.S. at 691 n.13. But those issues cannot arise in a case like this one, which concerns only the Respondent's unofficial actions. Issues might 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 Respondent's role in executing federal law, cannot raise a problem under the Supremacy Clause.

A. Footnote 13 of *Jones*, Relied Upon by Respondent, Does Not Support Presidential Immunity from State-Court Suits Concerning Unofficial Acts

Respondent's argument rests on a misreading of footnote 13. In full, that footnote 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 (parallel citations omitted).

As *Zervos* 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*." *Zervos*, 74 N.Y.S.3d at 447 (emphasis added). In other words, the concern animating footnote 13 is not that civil suits against a President in state court *inherently* raise problems under the Supremacy Clause. It is that a certain subset of such lawsuits could raise such a problem. In particular, a Supremacy Clause issue might 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[.]" *Jones*, 520 U.S. at 691 n.13. 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 like this that has nothing to do

with the President's official role and in which no judicial order would interfere with the President's execution of any federal function.

The three authorities cited in footnote 13 make clear that the Court's Supremacy Clause 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. *See 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. *See* 319 U.S. 441, 443–45 (1943). In both instances, the problematic state behavior was the assertion of authority to control a federal officer's exercise of his 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*, 520 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.[3] The Supreme Court's concern with "direct control" is not

[3] The additional authorities that Respondent cites in support of this argument, MTD at 36, are concerned with the same specific problem of states' controlling or impeding federal policy or official federal actions. In *McCulloch v. Maryland*, the Supreme Court held that a state could not use its powers to block the operations of the Bank of the United States. 17 U.S. 316, 436 (1819) (states may not retard or control "the operations of the constitutional laws enacted by [C]ongress."). In *In Re Tarble*, the Supreme Court held that a state court could not order a federal officer to

implicated in a case, like this one, in which only unofficial conduct is in question and in which no remedy sought could compel the Respondent to take, or prevent the Respondent from taking, any official federal action.

Respondent argues that "any assertion of jurisdiction by a state court over the President will inevitably interfere with, or burden, his or her ability to exercise the President's Article II powers." *See* MTD at 36–37. That isn't true. The trial court has ample techniques for avoiding interference with the President's work, 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 691–92; *see also Zervos* at 447 ("State 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 th[e] office occupies." (quoting *Jones*, 520 U.S. at 698)).

Perhaps because Respondent knows that as a factual matter a state court can manage a civil suit so as to avoid interference with the President's work, Respondent seeks to present *McCulloch v. Maryland* as if it established a categorical rule against any sort of state jurisdiction over a President. *See* MTD at 37 ("a state court cannot exercise direct control or 'retard, impede, or in any manner control' the Executive Branch" (quoting *McCulloch*, 17 U.S. at 436)).

McCulloch doesn't say that. The passage Respondent cites as if it bore on the relationship between state courts and the federal executive branch says nothing at all about the executive branch. What *McCulloch* actually says is that a state may not "retard, impede, burden, or in any manner control, *the operations of the constitutional laws enacted by congress*[.]" *McCulloch*, 17 U.S. at

---

discharge a federal prisoner. *See generally* 80 U.S. 397 (1871). And 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, 260–62 (1879). None of these cases creates an immunity for federal officers in matters unrelated to the execution of federal policy.

436 (emphasis added). So that sentence (like *McCulloch* generally) is about the relationship between the states and *laws* passed by *Congress*, not the relationship between the states and the *person* of the *President*. *McCulloch* holds that states may not retard or control the operation of federal law. It in no way suggests that state courts may not take jurisdiction over a suit against a person who happens to be a federal official, arising from unofficial conduct, and in which nothing the state court could do would in any way interfere with federal law or policy.

Indeed, *McCulloch* actually hurts Respondent's position. That case expressly preserves the states' power to exercise legal authority when a state's action does not impede the operation of federal policy. Thus, *McCulloch* invalidated a state tax imposed on the operations of the Bank of the United States, because taxing the operation of the Bank interfered with federal policy, but it also made clear that a state tax on the Bank of the United States which did not fall on "the operations of the bank," and which was imposed as part of the state's ordinary scheme of state taxation, would be constitutionally valid. *See id*. By the same token, a state could not impose a tax on the President's executing his official functions. But even a sitting President must pay ordinary state sales taxes and income taxes. Those exercises of state authority do not impede any federal policy. And as is true of all the authorities that the Supreme Court adduced in footnote 13 of *Jones*, the Supremacy Clause concern in *McCulloch* went only to state action that might interfere with federal law or policy.

Nothing about the present suit threatens to let a state court exercise any "direct control" over the President that could lead to requiring the President to do, or refrain from doing, anything in his official federal capacity. The Supremacy Clause concerns identified by the Supreme Court in footnote 13 of *Jones* are thus not implicated.

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

Respondent's argument about the Supremacy Clause conflates the Office of the President with the person who occupies the Office. That conflation cannot be squared with the plain text of the Supremacy Clause. Under the Clause, it is federal *laws*, not federal officials, that 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").

Respondent claims that the Clause is interpreted "to limit state courts' ability to influence or burden the federal government even when a federal law is not impacted[.]" MTD at 36. But that is not so, and not one of the authorities Respondent cites supports his point.[4] As explained above, *see supra* Section II.A, each of those authorities concerns a state court's possibly requiring or blocking some official action prescribed by federal law.

By claiming that the person who happens to be the President is entitled to exemption from all state judicial authority, even in matters not related to his federal duties, Respondent 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. at 23 (quoting Massachusetts Declaration of Rights, pt. 1, art. 30 (1780)); *see also Jones*, 520 U.S. at 695 ("[I]mmunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'") (citing *Forrester v. White*, 484 U.S. 219, 229 (1988)); *id*. at 688 ([T]the

[4] Respondent also represents that more sources supporting his argument are collected in Exhibit 24 to the Futerfas Affirmation. *See* MTD at 37 n.19. Exhibit 24 is 130 pages long. It contains sources that speak to various issues related to the Presidency, some of them touching directly on issues of immunity. But Respondent does not indicate where within these 130 pages one can find either authority or argument for the proposition that there is a constitutionally significant distinction between state and federal courts such that sitting Presidents cannot be civilly sued in state courts even though they may be civilly sued in federal courts under *Jones*. Amici have been unable to locate such an argument in the Exhibit.

rationale for official immunity is inapposite where only personal, private conduct by a President is at issue" (citations and quotation marks omitted)). The President's "personal, private" capacity is distinct from his official capacity, *id.* at 688, and in his personal capacity he is not immune from suit. That distinction is a basic premise of the Supreme Court's holding in *Jones* that the President can be sued, while in office, for private actions taken before assuming office. *See id*. at 694–95.

Given the fundamental distinction between official conduct and the personal actions of people 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. To the contrary, the Supremacy Clause expressly *recognizes* the authority of state courts and 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.

Two final points are appropriate here. First, the Constitution (of which the Supremacy Clause is a part) does not require the existence of lower federal courts *at all*. Lower federal courts exist only to the extent that Congress chooses to create them. See U.S. Const. art. III, § 1 ("The

judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") If Congress had chosen not to create lower federal courts, Respondent's position would mean that a sitting President would be completely immune from civil suit by individual plaintiffs even for his unofficial actions, because no federal court would exist in which individual plaintiffs could bring such suits. The only federal court would be the Supreme Court, and the only cases the Supreme Court can hear as original rather than appellate matters are cases involving diplomats and cases to which states are parties. See U.S. Const. art. III § 2, cl. 2.

Second, given that Congress *has* created lower federal courts, and given that the President is subject to civil suit in those courts under *Jones*, Respondent'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. A plaintiff from a state other than the President's could bring his claim in federal court; only a plaintiff from the President's home state would be constitutionally barred from bringing suit. It is hard to see any reason why the Constitution would create a Presidential immunity against civil suits applicable only to suits brought by citizens of the President's home state.

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

Respondent 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 or because state courts may be prejudiced against unpopular federal officials. *See* MTD at 37. These contentions are meritless.

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

State courts are courts of general jurisdiction. *See 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*, 493 U.S. at 458 (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 expressly 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) ("[T]here is state court jurisdiction of damages actions against federal officers."). 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, 637 (1987) (adjudicating a *Bivens* claim originally filed in Minnesota state court); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (establishing a cause of action for damages against federal officials).[5] No Supremacy Clause problem prevents state courts from

---

[5] 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. § 1442(a)(1), *Bivens* actions are usually heard in federal court. But § 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

hearing *Bivens* actions, because the remedy in a *Bivens* action—damages—does not involve state courts' ordering federal officials to exercise, or refrain from exercising, the powers of their offices. And if state courts are competent to hear these civil 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 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).[6] Congress similarly has made many suits against federal officials removable to federal court if the plaintiffs are noncitizens, but not if the plaintiffs are citizens. *See* 28 U.S.C. § 1442(b). Thus, Congress has recognized that state courts are fit—indeed, often *exclusively* fit—to resolve actions by American citizens against federal officials for matters involving their unofficial conduct.

---

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.

[6] *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).

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. 520 U.S. at 697-99. But President Clinton lost that argument. *See id.* at 708. So under *Jones*, the general concern that litigation might be burdensome doesn't justify Presidential immunity. *Id.* And as *Zervos* recently held, "[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.'" *Zervos*, 74 N.Y.S.3d at 447 (citing *Jones*, 520 U.S. at 698).

The *Jones* Court stressed 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.'" *Id.* at 709 (quoting *United States v. Nixon*, 418 U.S. at 710–11). This Court can manage a case with the same considerations in mind. No less than a federal court, this 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 Respondent whose official duties properly keep him busy.[7] Indeed, a civil suit—unlike a criminal trial—can

---

[7] New York's state judicial system is in some ways *more* able to shield a Presidential Respondent 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* CPLR 5701(a)(2)(iv)-(v); 28 U.S.C. § 1292; *see also* DAVID D. SIEGEL, NEW YORK PRACTICE § 526 (Westlaw 6th ed. 2017) ("Although federal

be conducted without ever requiring a President to appear in person. *Cf.* Robert G. Dixon, Jr., Ass't Att'y Gen., Office of Legal Counsel, *Amenability of the President, Vice-President and Other Civil Officers to Federal Criminal Prosecution While in Office*, at 28 (Sept. 24, 1973) (resting the conclusion that the President is not amenable to criminal prosecution while in office substantially on the consideration that criminal prosecution would incapacitate the President from acting by requiring his physical presence throughout the trial and also potentially through resulting incarceration).[8] 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 Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. OLC 222, 252 n.28 (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). And in the event that the President must attend to a governmental or international crisis, "federal responsibilities will take precedence." *Zervos*, 74 N.Y.S.3d at 447.

Moreover, any 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* removed any doubt that that sitting Presidents may be sued, four full Presidential terms went by without any President's having to spend significant time on civil suits brought against him in

---

practice, like New York's, allows appeal from final dispositions, an appeal from an interlocutory order in federal practice is rarely allowed. This practice sits in stark contrast with the unusually generous New York attitude.").

[8] *Available at* https://archive.org/details/1973OLCAmenabilityofthePresidenttoFederalCriminalProsecution/page/n27.

his personal capacity. To be sure, it *can* happen. We are here, after all. 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, Respondent 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* MTD at 37. That contention ignores how rare the scenario involving that risk would be. A state-court action raising the risk of such local prejudice against a President would likely be an action in a state other than the President's own and therefore probably removable to federal court as a matter of diversity jurisdiction, which exists precisely to cure local prejudice. 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 Respondent should be at their lowest ebb. *See Erie 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, as suits carrying a risk of local prejudice and in which that prejudice cannot be cured by removal to federal courts, only suits that cannot satisfy the statutory amount-in-controversy requirement for diversity jurisdiction. 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 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, judges usually dismiss meritless claims quickly, as *Jones* itself noted. *See* 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 concerned that an outbreak of small-stakes state-court litigation could unduly consume Presidential time, Congress 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 infrequency of civil actions against Presidents, 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 even smaller in courts of the President's home state.

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

IV. CONGRESS COULD CHOOSE TO IMMUNIZE THE PRESIDENT OR PERMIT REMOVAL BUT HAS NOT DONE SO

If litigation against the President in state courts threatened to interfere with any President's duties, Congress could 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."). It would be inappropriate for the courts to substitute their own judgment for that of the legislature on an issue that the legislature can surely address.

The idea that Congress could create such an immunity is neither abstract nor speculative. Congress has in fact exercised its legislative authority to create immunities against state-court litigation, including in some cases for federal officers. For example, 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).

And if Congress was concerned about state-court adjudication of cases involving the President but didn't want to grant immunity, it could make such cases removable to federal court. After all, Congress has permitted federal officers to remove all litigation brought against them in connection with the execution of their offices. *See* 28 U.S.C. § 1442(a). Federal statute even permits federal officers (surely including the President) to remove suits that *do not* arise from their official federal conduct in some cases involving noncitizen plaintiffs. *See* 28 U.S.C. § 1442(b).[9] There's no reason that Congress couldn't permit the President to remove cases such as this one to federal court.

---

[9] Section 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 Respondent's own state, regardless of whether the cases implicate official conduct, *id.* § 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. *See 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.

In short, Congress is not shy about exercising its authority to create immunities or a right of removal for federal officers. But in the twenty-one years since *Clinton v. Jones*, Congress has not exercised that authority. There is no need for courts to preempt that legislative judgment by inventing an unnecessary immunity.

CONCLUSION

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 reject Respondent's claim of immunity.

Respectfully submitted,

Dated: October 5, 2018
New York, New York

/s/ Aditi Juneja
Aditi Juneja (N.Y. Bar No. 5565809)
Ian Bassin (N.Y. Bar No. 4683439)
Protect Democracy Project, Inc.
222 Broadway Avenue, #1898
New York, NY 10038
Phone: (202) 599-0466
Fax: (929) 777-8428

Richard Primus (N.Y. Bar No. 2975191)
University of Michigan Law School*
625 S. State St., Ann Arbor, MI 48109
Telephone: (734) 647-5543

Attorneys for Amici Curiae Law Professors

* Affiliation provided for identification purposes only.

FILED: NEW YORK COUNTY CLERK 10/05/2018 10:40 AM
INDEX NO. 451130/2018
NYSCEF DOC. NO. 100
RECEIVED NYSCEF: 10/05/2018

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.