Exhibit A

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

SUMMER ZERVOS, Plaintiff, – against – DONALD J. TRUMP, Defendant.	Index No. 150522/2017 IAS Part 57 (Justice Schecter)

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. Amici now make the same argument, this time with specific attention to state-court proceedings, in order to address the constitutional issue raised by defendant in his motion to dismiss the complaint (Docket No. 44).

Amici take no position on the truth or falsity of the Complaint's allegations or the merits of plaintiff's claim. Now as in 1997, their concern is with the legal principle that the President, who is not above the law, is not immune from civil suit for the actions he takes in his unofficial capacity.

PRELIMINARY STATEMENT

No one in our nation is above the law, not even the President. The Supreme Court has accordingly held that the Constitution does not immunize the President against civil suits based on conduct that is wholly unrelated to the President's execution of his office. *Jones*, 520 U.S at 694. Neither the Supremacy Clause nor any other source of constitutional authority prevents state courts from adjudicating suits against sitting Presidents in their unofficial capacities. On the contrary, by permitting injured parties to seek redress from a President under appropriate circumstances, state courts reinforce a bedrock constitutional principle: that in this nation, no one is above the law.

State courts have always been deemed competent to address any legal issue unless Congress or the Constitution affirmatively provides otherwise. There is no reason to assume that suits in state court threaten to burden Presidents any more than suits brought in federal court, and indeed history suggests that the burdens will generally be low. And if a President sued in the court

of a state not his own for some reason distrusts the state forum, he has the same right as any other party to remove the case to federal court, where the Supreme Court has already determined he is amenable to suit.

Neither the Supreme Court's decision in *Jones* nor the Supremacy Clause of the U.S. Constitution immunizes a sitting President from claims brought in state court based on allegations of unofficial conduct. The *Jones* Court explicitly declined to address whether a sitting President may be sued for civil damages in state court. And the plain text of the Supremacy Clause states that federal *laws*, not federal *officials*, are the "supreme law of the land." The only relevance of the Supremacy Clause to the issue of state court jurisdiction over federal officers is that state courts may not block federal policy by exercising "direct control" over federal officers in ways that prevent those officers from executing their federal duties. An action for money damages such as this case does not implicate such direct control: subjecting a sitting President to litigation in state court neither requires him to take particular action nor compels him to neglect his official duties.

Nor is Presidential immunity necessary in order to prevent the President from having to spend large amounts of time on distracting lawsuits. In the four Presidential terms following *Jones*, suits against sitting Presidents in state court have been infrequent. Indeed, amici are unaware of any 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. And if matters were ever to change so much that private litigation against sitting Presidents unduly impeded the President's functions, Congress could exercise its authority under Article I of the Constitution to grant Presidential immunity against claims brought in state court or to authorize the removal of all suits involving the President to federal court. But no such need has arisen, and Congress has not chosen to exempt the President from suits in state court.

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

ARGUMENT

I. NO ONE IN OUR NATION IS ABOVE THE LAW; THE SUPREME COURT HAS ALREADY HELD THAT A SITTING 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) (quoted with approval in *Butz v. Economou*, 438 U.S. 478, 506 (1978)). To be sure, the President is entitled to immunity for his or her *official* acts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). But for wrongful conduct not falling within his official duties, the President is subject to suit like any other person. Thus, in *Jones*, the Supreme Court unanimously determined that the President is amenable to civil suit, under state law, in federal court based on events that occurred before the President took office. 520 U.S. at 694-95.

In *Jones*, then-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*, 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"). It follows that no President is ever immune from suits for wrongful conduct occurring before that President assumes office, because nothing that a person does before becoming President can be an official Presidential act.

The *Jones* Court further explained that the principal rationale for Presidential immunity is to enable Presidents to perform their official functions without fear of personal liability. *Jones,* 520 U.S. at 693 (citing *Nixon,* 457 U.S. at 749, 752 & n.32). That rationale for immunity, the Court noted, "provides no support for an immunity for *unofficial* conduct." *Id.* at 694. It is wholly inapplicable to suits, like the current suit, that have nothing to do with official Presidential functions. All of the events at issue in this suit occurred before the defendant ever performed a Presidential act, and the suit itself was filed before the defendant became President. As in *Jones,* this suit arises out of a state law claim stemming from defendant's unofficial, pre-Presidential conduct. *Id.* at 684-85 (noting that the plaintiff brought claims under Arkansas law). It is therefore unquestionable that the facts giving rise to this suit are far removed from even the "outer perimeter" of a President's official duties.

To immunize the President in all cases, including even in cases having nothing to do with the President's official duties, would be to attach Presidential immunity not to an office but a *person*. And to immunize a person 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. STATE COURTS ARE COMPETENT TO ADJUDICATE CLAIMS AGAINST FEDERAL OFFICIALS, AND NO EXCEPTION NEED BE MADE FOR PRESIDENTS

State courts routinely adjudicate sensitive federal issues and can even exercise jurisdiction over claims brought against federal officials. A state court's adjudication of a claim against the President need not threaten the President's execution of his official duties any more than suits in federal court. In consequence, President Trump's contention that only federal courts can hear claims brought against a sitting President is meritless.

A. The Constitution Assumes State Courts Are Adequately Equipped to Address Nearly Every Issue That Federal Courts Can

Confidence in state courts is part of the constitutional design. Indeed, 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*, 83 U.S. 130, 136 (1876). To be sure, Congress can overcome the presumption and by statute specify exclusive federal jurisdiction over particular classes of cases. *See Tafflin*, 493 U.S. at 459 (noting that the presumption of concurrent jurisdiction is rebutted when "Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim"); *Claflin*, 83 U.S. at 136 (laying down "the general principle" that "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it"); *accord* The Federalist No. 82 (A. Hamilton) ("State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."). Only when Congress affirmatively specifies that state courts may not adjudicate a class of cases is the presumption of state court competence overcome.

The presumption of state-court competence extends to cases involving federal officers. For example, state courts can hear *Bivens* actions, which allow federal officials to 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).[1] If state courts are competent to hear damage claims against federal officials for their *official acts*, it seems clear that state courts are competent to hear claims against federal officials for their *unofficial* conduct. Indeed, Congress has implicitly recognized the propriety of state-court jurisdiction over suits against federal officers for matters not arising under the color of their offices. Under 28 U.S.C. § 1442, Congress has made many such suits removable to federal court *if the plaintiffs are aliens*. *See* 28 U.S.C. § 1442(b). But no provision is made for removal in cases where the plaintiffs are citizens. In short, in the judgment of Congress, actions by American citizens against federal officials for matters not done under the color of their offices are fit for resolution in state courts.

State court adjudication is particularly appropriate in cases that, like this one, are centrally matters of state law. After all, the courts most expert in the application of a given state's law are the courts of that state. In recognition of that expertise, federal courts regard state court interpretations on matters of state law as fully conclusive. *See, e.g., Hortonville Joint School District No. 1. v. Hortonville Education Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [state] law by the highest court of the State."); *Murdock v. City of Memphis*, 87 U.S. 590, 635 (1875).

In short, the Supreme Court has noted that "there is state court jurisdiction of damages actions against federal officers." *Wheeldin v. Wheeler*, 373 U.S. 647, 664 n.13 (1963). It follows

[1] Because Congress has chosen in 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 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 just as competent as federal courts to adjudicate *Bivens* claims and to assess damages against federal officials when the merits warrant that result.

that state courts are competent to adjudicate damage claims against federal officials for wrongful behavior not involving their official conduct. *See, e.g.*, 28 U.S.C. § 2679(d)(3) (demonstrating Congress's recognition of state court competency by requiring remand to state court in cases brought against federal officials that are subsequently removed to federal court if a district court determines a federal employee was not acting within the scope of her employment).[2]

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. But civil suits in state courts need not subject Presidents to litigation burdens meaningfully greater than the burdens of federal court litigation that the Supreme Court deemed acceptable in *Jones*. There are two reasons why. First, state courts can manage cases so as to minimize the burdens of litigation, just as federal courts can—and sometimes even better. Second, there is very little civil litigation against Presidents in their unofficial capacities—and of what little there is, a fair amount could in any event be brought in federal court.

[2] *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 Backmann Settles Suit Over Iowa E-Mail List*, StarTribune, July 15, 2013, http://www.startribune.com/june-28-bachmann-settles-lawsuit-over-iowa-e-mail-list/213609621 (suit for trespass, conversion, invasion of privacy, libel and slander filed against U.S. Rep. Michele Bachmann in Iowa state court).

In *Jones*, the Supreme Court noted that a federal district court adjudicating a suit against a sitting President should manage the case so as to accommodate the legitimate demands of the defendant's 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. 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 have given 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 Counsel, Memorandum for the Attorney General, Oct. 16, 2000 (distinguishing between civil litigation against a sitting President, deemed permissible under *Jones*, and criminal prosecution of a sitting President, deemed impermissible by the Office of Legal Counsel, partly on the ground that civil litigation does not require the President's physical presence).

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 the

expedited settlement of potentially crucial issues, and the rules of civil procedure in New York State Courts provide for interlocutory appeals more generously than the federal system does. *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.").

Finally, any concerns about the burdens on Presidential defendants should be tempered by an overriding reality about the frequency of civil litigation against sitting Presidents: it barely ever happens. Even after *Jones* prominently announced that sitting Presidents are amenable to suit, four full Presidential terms went by without any President's having to spend significant time on civil suits brought against him in his personal capacity. To be sure, it will happen sometimes, as the current case indicates. 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 in any event removable to federal court, whether on federal-question grounds or diversity grounds.[3] Considering the low rate of such suits to begin

[3] 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 Jone*s, 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.

with—we 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.

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

III. FEDERALISM DOES NOT REQUIRE PRESIDENTIAL IMMUNITY FROM STATE COURT SUITS SEEKING DAMAGES FOR A PRESIDENT'S UNOFFICIAL CONDUCT

Neither the Supremacy Clause nor any other constitutional source of authority rooted in federalism justifies a rule limiting damage actions against sitting Presidents in their unofficial capacities to federal court. *Jones* did not involve a suit in state court, so the Supreme Court in that case did not resolve the question of whether the President may claim immunity from suit in state court. 520 U.S. at 691, 691 n.13. But the Court's discussion of the state-court question in *Jones* suggests that the federalism problems that might arise in some state-court cases with Presidential defendants are of no moment in a suit like the current one, which merely seeks damages based on the defendant's pre-Presidential conduct.

A. Footnote 13 of *Jones*, Relied Upon by Defendant, Does Not Support Presidential Immunity From State Court Proceedings Challenging Unofficial Acts

The Supreme Court's decision in *Jones* establishes that a sitting President may be sued in federal court. Because the complaint in *Jones* was filed in federal court, the Supreme Court observed that it was "not necessary to consider or decide whether a comparable claim might succeed in a state tribunal." *Id*. at 691. But in footnote 13 of its *Jones* opinion, the Court took care to note that suits in state court might require a different analysis—and, in gesturing toward that analysis, showed that the federalism concerns that sometimes limit state-court jurisdiction are

not at all implicated in suits for damages based on a defendant's unofficial conduct. President Trump's argument to the contrary fails to grasp the meaning of footnote 13.

Footnote 13 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").

Id. at 691 n.13.

The concern animating footnote 13 is not that a civil suit against a President in state court would inherently raise a problem for federal supremacy. It is that a certain subset of such lawsuits could raise such a problem. Specifically, a problem could arise if a state court were to order the President to take or refrain from taking some action, or to appear personally at a specific time. 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 directly block a President from executing his office, and that would indeed raise a problem of federalism. But the possibility of direct control is the only federalism problem to which footnote 13 points.

All three authorities cited in footnote 13 make clear that this kind of interference was the Court's concern in *Jones*. In the first case cited in footnote 13, *Hancock v. Train*, the Supreme Court held that the State of Kentucky could not use its control over a permit system to prohibit the federal government from operating an official federal facility. 426 U.S. 167, 178-79 (1976). 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). Finally, the language that footnote 13 quoted from the third cited authority—a leading constitutional law treatise—reads as follows: "[A]bsent explicit congressional consent no state may command federal officials ... to take action in derogation of their . . . federal responsibilities[.]" *Jones*, 530 at 691 n.13 (citing L. Tribe, American Constitutional Law 513 (2d ed. 1988)). In short, everything about footnote 13, from its language to its choice of illustrative authorities, indicates that the only federalism concern the Supreme Court meant to flag was that state courts must not issue orders purporting to compel the President to act in his official capacity or preventing him from doing so.

The Supreme Court's concern with "direct control" is not implicated in the current case. Ms. Zervos's suit does not attempt to force a sitting President to execute or abstain from executing his duties. Indeed, this suit has nothing to do with the defendant's federal duties. Nor does the suit call upon this Court to exercise the "direct control" that would be involved if the President were required to appear in person at a particular time and place: this 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 occurred in *Jones*.

Contrary to President Trump's assertion, therefore, nothing in footnote 13 even hints that an action merely seeking damages for a defendant's unofficial conduct would raise any problem of federalism. This Court can adjudicate Ms. Zervos's defamation claim without in any way implicating the concerns about "direct control" that the Supreme Court flagged in *Jones*.

B. The Supremacy Clause is About the Status of Federal Law, not the Status of Federal Officials

President Trump also misreads the Supremacy Clause when he maintains that that Clause makes him immune from civil suit in state court. The plain text of the Supremacy Clause states 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*, the defendant attributes to the Clause a meaning that the constitutional text does not support. By then further claiming that those federal officials are thereby entitled to be exempt from non-federal legal authority even when not acting in their official capacities at all, the defendant treats the Supremacy Clause as if it subverted one of the most basic principles of our constitutional system: that legal authority attaches to laws, and as necessary to offices, but not to persons. *See, e.g.*, *Cooper*, 358 U.S. at 23 (stating that ours is "a government of laws and not of men") (quoting Massachusetts Declaration of Rights, pt. 1, art. 30 (1780)). Like other federal officials, the President has both an official capacity and a personal one. *See, e.g.*, *Jones*, 520 U.S. at 688 (noting that "the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue") (citations omitted). When a person who happens to be a federal official acts in an unofficial capacity, his or her actions do not have the status of law at all, let alone supreme law.

The Supremacy Clause does *not* state or imply (1) that sitting Presidents or any other federal officials are immune from claims brought in state court based on their unofficial conduct; or (2) that state courts are unable to hear civil suits against the President of the United States. If anything, the Supremacy Clause confers authority on state courts, rather than stripping them of that authority. After all, the Clause identifies *state* judges as the judicial guardians of the supreme law that the Constitution represents. *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 so as to uphold the law of the

land. But it plainly indicates that it expects those state judges to be up to the task, and it says nothing suggesting that federal officials in their personal capacities are immune from their authority.

The real Supremacy Clause concern when federal officials are sued in state court is merely the one to which the Supreme Court pointed in footnote 13 of *Jones*: a state court must not exercise "direct control" over federal officials in a way that interferes with, or purports to direct, their official federal duties. *Jones*, 520 U.S. at 691 n.13 (1997). To take perhaps the most classic example, the Supreme Court held long ago that a state court cannot order a federal officer to release a federal prisoner. *See In re Tarble*, 80 U.S. 397, 409 (1872) ("[T]he powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty."). All three authorities in footnote 13 of Jones point to this same "direct control" problem, and that sort of direct control would indeed raise a federalism issue. But a suit having nothing to do with a President's official duties, and in which there is no prospect of the President's being ordered to do something inconsistent with those duties, does not raise a Supremacy Clause issue at all.

Given that the Supreme Court in *Jones* took care to mark the issues that might arise in a case where a state court exercised "direct control" over a President but gave no indication that such a suit would be problematic in any other way, *Jones* should give this Court no qualms about denying the President's claim of immunity in the present case. As would be true in federal court, this Court should manage a case involving the President in a way that reasonably accommodates his need to perform important public duties. But that consideration does not bar civil suits against sitting Presidents in federal court, and nothing—neither *Jones*, nor the Supremacy Clause, nor any other consideration of federalism—suggests a different result in the courts of New York.

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

If Congress ever came to think 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. As the federal legislature, Congress is well-positioned to decide whether something is thwarting federal activity. And the Supreme Court has stated that there is no reason for courts to invent a constitutional remedy of Presidential immunity given Congress' ability to create one by statute. *See Jones*, 520 U.S. at 709 ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.").

Moreover, Congress has in fact exercised its legislative authority to create immunities against state-court litigation: it just has not done so for suits involving unofficial conduct by the President. 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 litigation that does not arise from their official federal conduct. *See* 28 U.S.C. § 1442(b). In short, Congress is not shy about exercising its authority to create immunities against state court legislation. But Congress has created no immunity applicable to cases like this one, in which the President is sued by a citizen for conduct having nothing to do with the President's official duties.

In the Servicemembers' Civil Relief Act, 50 U.S.C. § 3901 *et seq.*, Congress granted temporary immunity to military servicemembers against suits that impair their ability to focus on

their duties in service of the national defense. Without question, if Congress can provide immunity to servicemembers, Congress can do the same for the Commander-in-Chief. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2009).[4]

The congressionally created immunities for foreign sovereigns are contained in the Foreign Sovereign Immunities Act of 1976 ("FSIA"). 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–11. Notably, the FSIA establishes the scope of foreign states' immunity in state courts as well as in federal courts. 28 U.S.C. §§ 1602–11. Congress has also given foreign sovereigns sued in state court an absolute right to remove those suits to federal court. 28 U.S.C. § 1441(d). Congress could no doubt do the same with respect to suits against the President.[5] Again, Congress has not taken that step.

Finally, consider 28 U.S.C. § 1442, which 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),

[4] Congress's power to grant temporary immunity to servicemembers derives from its power to raise and support armies, U.S. Const. Art. I, sec. 8, cl. 12. That same congressional power certainly extends to granting immunity to the Commander-in-Chief of the U.S. military. Given that the rationale for temporary immunity would be to prevent interference with the President's execution of his constitutionally assigned role, Congress could also enact temporary immunity for the President under its power "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in any officer of the United States. U.S. Const. Art. I, sec. 8, cl. 18. Either way, there can be no doubt that Congress could create temporary immunity for the President if Congress saw a need for such immunity.

[5] Congress's power to provide for removal in all cases against foreign sovereigns rests on the existence of the FSIA, which makes the question of a sovereign defendant's immunity a question of substantive federal law that must be addressed in any suit against a foreign state. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-97 (1983). It follows that Congress's power to provide for removal in all cases against foreign sovereigns flows from its power to enact the FSIA. The FSIA is an exercise Congress's authority over commerce and foreign relations. *Id.* at 493. Accordingly, a parallel federal statute creating immunities against state-court litigation for the President and thereby creating a basis for the President to remove all state-court actions against him to federal court might require Congress to invoke some power other than the one that allowed it to enact the FSIA: creating immunity for the President against state-court legislation might not fall with Congress's commerce power. But, as noted above, such a statute would certainly fall within Congress's power to raise and support armies (given the President's role as commander-in-chief) as well as its power to make all laws necessary and proper for carrying into execution the various powers vested in the President.

as well as lawsuits brought by aliens 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.

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 or, as it did in the FSIA, 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 the solution of 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

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 not to reach the same conclusion with respect to parallel suits brought in state courts. This Court should reject President Trump's claim of immunity and adjudicate the claims brought against him in this case.

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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 Jr. is a Professor of Government Law at the University of Texas at Law School. He is an expert in constitutional law.