To be Argued by:
BETH A. WILKINSON
(Time Requested: 30 Minutes)

No. APL-2020-00009

Court of Appeals
of the
State of New York

SUMMER ZERVOS,

Plaintiff-Respondent,

– against –

DONALD J. TRUMP,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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Plaintiff-Respondent Summer Zervos respectfully submits this brief in opposition to Defendant-Appellant's appeal from the March 14, 2019 decision and order of the Appellate Division, First Department, *Zervos v. Trump*, 171 A.D.3d 110 (1st Dep't 2019), denying his motion to dismiss or in the alternative to stay the action for as long as he is President.

PRELIMINARY STATEMENT

Nobody disputes that this precise lawsuit against Defendant, for his private conduct before taking office, would be proceeding without delay if it had been filed in federal court. As the First Department recognized, this case is "materially indistinguishable from *Clinton v. Jones*," in which the U.S. Supreme Court allowed such a lawsuit to go forward. *Zervos v. Trump*, 171 A.D.3d 110, 125 (1st Dep't 2019) ("*Zervos II*"). And Defendant does not dispute *Jones*'s holding or reasoning in any respect.

The question here is whether Ms. Zervos's decision to vindicate her rights in the courts of this State makes any difference. It does not. Defendant's entire argument rests on a footnote in *Jones* reserving—but not, as he incorrectly suggests, resolving—the question whether an identical lawsuit could proceed in state court. But as in *Jones*, a straightforward reading of the United States Constitution confirms that New York courts have jurisdiction over this lawsuit. The Framers of the Constitution maintained the plenary powers of the states, including the general

jurisdiction of their courts (as compared to the more circumscribed jurisdiction of the federal courts). The underlying defamation claim in this case falls well within that general jurisdiction and is of the kind filed in and resolved by state courts across the country every day.

Nothing in the Supremacy Clause or Article II strips state courts of authority to hear suits based on a federal officer's unofficial conduct, even when that officer is the President. Defendant cites nothing in the text or history of those provisions supporting such a radical position. On the contrary, there is a long tradition of state courts exercising jurisdiction over federal officers whose unofficial acts violate state law. Defendant's only response is to argue that the unique responsibilities of the Presidency render him uniquely incapable of participating in this suit. But *Jones* rejected those arguments, for reasons that apply equally well here.

Nor is there any reason to think, as Defendant suggests, that the courts of this State are less competent to manage this litigation in a way that minimizes burdens on the Presidency. Both state and federal courts are bound by the Constitution. And like federal courts, the New York courts are expert at managing their dockets to account for necessary considerations under the Constitution. Indeed, the trial court has already demonstrated that it can and will use that expertise to avoid any undue interference with Defendant's duties of office. Principles of comity and federalism instruct that the trial court be given the chance to do so.

Not even the dissent below adopted the sweeping arguments for *de facto* immunity while in office that Defendant now presents. Instead, the dissent contended that the mere *possibility* that Defendant could be held in contempt creates a conflict of constitutional concern sufficient to prevent Ms. Zervos's claim from going forward while Defendant is in office. But as the First Department majority recognized, the doctrines of judicial restraint and constitutional avoidance counsel against resolving this case now based on hypotheticals that may never arise. The Court in *Clinton v. Jones* applied these principles when it came to the same conclusion and refused to decide in the early stages of litigation whether a federal court could trigger a constitutional conflict that did not yet exist. So too here. Indeed, there is every reason to trust that Defendant will litigate in good faith, and certainly not engage in such egregious behavior that would merit contempt.

In the end, all of Defendant's arguments boil down to one—that in this instance, state courts are inferior to and less capable than federal courts. The Constitution and common sense say otherwise. The judgment of the First Department should be affirmed.

QUESTION PRESENTED

Can Defendant avoid liability for his private conduct before taking office simply because the woman he defamed sued him the courts of this State instead of federal court?

The answer, as the First Department correctly held, is no.

STATEMENT OF THE CASE

In 2007, Defendant sexually assaulted Ms. Zervos twice, including by groping her breasts and pushing his genitals against her, all against her will. (R. 160, 165-67 [Compl.] ¶¶ 2, 23-35). Immediately after the assaults took place, Ms. Zervos confided in a few close family members and friends, but—like many women who experience sexual assault—she said nothing publicly. (R. 161 [Compl.] ¶ 3).

In early October 2016, recordings came to light of Defendant's boasts that because of his stardom, he could grope women as he pleased, and Defendant dismissed his comments as mere "locker room talk." (R. 169 [Compl.] ¶¶ 45-48). Ms. Zervos realized that her experiences were more than isolated events and that the public deserved to know the truth. (R. 161-62 [Compl.] ¶¶ 4-6).

Days later, Ms. Zervos came forward and publicly described Defendant's assaults. (R. 170 [Compl.] ¶ 53). Defendant immediately issued a statement through his campaign falsely claiming that Ms. Zervos was lying: "To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a

person, and it is not how I've conducted my life." (R. 170 [Compl.] ¶ 55). He also shouted at a rally: "These allegations are 100% false . . . They are made up, they never happened . . . It's not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes." (R. 171 [Compl.] ¶ 59).

But Defendant did not stop there. He continued to falsely deny Ms. Zervos's statements about her assaults at every opportunity over the days that followed, claiming that statements from Ms. Zervos and other women who had come forward were "[a]ll big lies" and a "hoax" and threatening that "[a]ll of these liars will be sued after the election is over." *See, e.g.*, (R. 172 [Compl.] ¶ 65); (R. 173 [Compl.] ¶ 69); (R. 174 [Compl.] ¶ 74).

Ms. Zervos filed this lawsuit on January 17, 2017, seeking to hold Defendant accountable for defaming her. Ms. Zervos sued in New York, Defendant's home state, seeking compensatory and punitive damages for the harm Defendant's false statements caused to her business, reputation, and wellbeing. She also seeks an order directing Defendant to retract his defamatory statements. (R. 177 [Compl.]).

As soon as Ms. Zervos filed this suit, Defendant began what has now become a years-long campaign to delay this case for as long as possible. He first moved to dismiss or stay the complaint, arguing that he is entitled to "temporary immunity," that the complaint failed to state a cause of action, and that this action was barred by

California's anti-SLAPP statute. (R. 28-80 [Mot. to Dismiss]). On March 20, 2018, Justice Schecter denied Defendant's motion in its entirety.[1] *Zervos v. Trump*, 59 Misc. 3d 790 (Sup. Ct., N.Y. Cnty. 2018) (hereinafter "*Zervos I*").

On April 1, 2018, Defendant appealed Justice Schecter's ruling. (R. 5 [Notice of Appeal]). He also moved for an emergency stay pending the resolution of that appeal, which the First Department denied on May 17, 2018. *Zervos v. Trump*, 2018 WL 2248826, 2018 N.Y. Slip Op. 72636(U) (1st Dep't 2018). He then moved in this Court for leave to appeal the First Department's denial of his stay motion. At the same time, he also asked this Court for another stay pending resolution of his motion for leave to appeal the denial of the initial stay. This Court denied both motions on June 14, 2018. *Zervos v. Trump*, 31 N.Y.3d 1113 (2018).

The First Department affirmed the trial court's ruling on March 14, 2019. *Zervos II*, 171 A.D.3d 110, 113-114. The court agreed that under long-settled precedent, including *Clinton v. Jones*, Defendant is not absolutely or temporarily immune from lawsuits that seek to hold him accountable for private, pre-presidential conduct. *Id.* The court also held that the fact that this lawsuit was brought in state court does not pose an obstacle to timely resolution of Ms. Zervos's claims. *Id.* As

[1] The courts below rejected Defendant's arguments that Ms. Zervos had failed to state a cause of action for defamation, and that this action was barred by California anti-SLAAP law. Defendant has not disputed those rulings, so those challenges to Ms. Zervos's claims are abandoned. *See, e.g.*, *McConnell v. Wright*, 151 A.D.3d 1525, 1526 n.* (3d Dep't 2017); *Carey & Assoc. LLC v. 521 Fifth Ave. Partners, LLC*, 130 A.D.3d 469, 470 (1st Dep't 2015).

the court concluded, "the Supremacy Clause was never intended to deprive a state court of its authority to decide cases and controversies under the state's constitution." *Id.* at 114. In addition, the First Department affirmed the trial court's holding that Defendant was not entitled to a lengthy, categorical stay of the litigation for as long as he remains in office. *Id.* at 130.

On November 18, 2019, Defendant moved for reargument, leave to appeal to this Court, and for a stay of all proceedings pending that appeal. He also moved that day for another emergency stay pending the First Department's ruling on his reargument motion, which Justice Renwick denied on the same day it was filed. On January 7, 2020, the First Department denied Defendant's motion to reargue but granted leave to appeal and issued a stay pending the resolution of that appeal, which remains in place.[2] *Zervos v. Trump*, 2020 WL 63397, 2020 N.Y. Slip Op. 60193(U) (1st Dep't 2020). At the time the stay was ordered, document discovery was nearly complete, and the parties were scheduling depositions.

[2] Ms. Zervos unsuccessfully moved this Court to lift the temporary stay. *Zervos v. Trump*, 2020 WL 1527821 (Table), 2020 N.Y. Slip Op. 65208 (1st Dep't 2020).

ARGUMENT

I. *CLINTON V. JONES* HELD THAT A PRESIDENT MAY BE SUED FOR UNOFFICIAL CONDUCT THAT TOOK PLACE BEFORE ASSUMING OFFICE.

In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court unanimously rejected the President's claim to immunity from civil liability for his unofficial acts before taking office and allowed a defamation suit to proceed against him in federal court. *Id.* at 684, 710. The fact that Ms. Zervos brought a similar lawsuit in state rather than federal court is a distinction that makes no difference.

Indeed, *Jones* considered several of the arguments Defendant has made throughout this litigation and rejected them for reasons that apply equally well here. In *Jones*, President Clinton claimed that his status as a federal official entitled him to immunity for the duration of his time in office. *See* Brief for Petitioner at 20-21, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), 1995 WL 448096 ("Clinton Brief"). The Court disagreed, holding that neither the "President, [n]or any official, has an immunity that extends beyond the scope of any action taken in an official capacity." *Jones*, 520 U.S. at 694. And because the President's actions were far beyond the "outer perimeter" of a President's official duties, the Court left no doubt that there was simply no immunity for the President to claim. *Id.* at 686 & n.3, 694. The First Department correctly recognized that the same principle applies in this case. *See, e.g.*, *Zervos II*, 171 A.D.3d at 126 ("[B]ecause *Clinton v. Jones* held that

a federal court has jurisdiction over the kind of claim plaintiff now asserts . . . it follows that state courts have concurrent jurisdiction with federal courts over actions against the President based on *his purely unofficial acts*." (emphasis added)).

Jones also rejected President Clinton's separate argument that Article II forecloses jurisdiction over the President while in office. The Supreme Court did not dispute that, based on "the character of the office that was created by Article II of the Constitution," the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." 520 U.S. at 697. But it dismissed the contention that the burdens of a lawsuit based on the President's unofficial conduct would create a "constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.* at 702. Defendant makes virtually identical arguments here, even citing the same cases as President Clinton. *Compare* Clinton Br. at 18-27, *with* App. Br. at 10-13, 26-27.

Defendant does not dispute any of the foregoing reasoning or the holding of *Jones*; he instead claims that *Jones* does not control simply because this case was not filed in federal court. But as explained below, nothing in the text or structure of the Constitution requires a different result simply because Ms. Zervos seeks to vindicate her rights in the courts of this State.

II. DEFENDANT CANNOT ESCAPE LIABILITY FOR HIS UNOFFICIAL CONDUCT BECAUSE THIS SUIT WAS FILED IN NEW YORK STATE COURT.

Defendant's attempt to evade *Jones* relies on a constitutional fiction: that the Supremacy Clause bars this lawsuit because the fact that this suit is proceeding in state court creates a conflict with Defendant's Article II powers. In other words, Defendant suggests that *Jones* would have come out differently had the case been filed in state court instead.[3]

But as Defendant appears to acknowledge, the Supremacy Clause, standing alone, cannot help him. The Clause generally operates as a conflicts-of-law rule, not a source of immunity for federal officials. As the Supreme Court has explained, "the Supremacy Clause is not the 'source of any federal rights'. . . . It instructs courts what to do when state and federal law clash." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324-325 (2015) (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)). This conclusion stems from the text of the Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

[3] Defendant repeatedly emphasizes that state courts are bound by the Constitution, but this truism gains him no ground. Federal courts are likewise bound, and that fact alone did not suffice to create a constitutional problem in *Jones*. *See* 520 U.S. at 701 ("Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch.").

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2. By its own words, then, the Supremacy Clause is only implicated when federal law and state law conflict.

As explained below, the conflict Defendant identifies is no conflict at all. Article II of the Constitution does not strip state courts of the authority to hear lawsuits involving Defendant's unofficial conduct. On the contrary, the Framers were careful to preserve the plenary jurisdiction of state courts, who have ably exercised that jurisdiction over federal officials for centuries. There is no reason to think that the courts of this State will act any differently here.

A. State Courts Retain Broad Jurisdiction Under The Constitution.

Our constitutional system is based on the bedrock principle that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine,* 527 U.S. 706, 758 (1999). The Framers believed that federalism serves a dual purpose: it both "preserves the integrity, dignity, and residual sovereignty of the States," *Bond v. United States*, 564 U.S. 211, 221 (2011), and "secures to citizens the liberties that derive from the diffusion of sovereign power," *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks and citation omitted). *See also Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (describing these dual features of the federal-state balance). These ends can be achieved only when state power is

protected and respected. Thus, the Framers designed a system that would ensure the states "are not mere political subdivisions of the United States," *New York*, 505 U.S. at 188, but instead "retain[] 'a residuary and inviolable sovereignty,'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

This system of dual sovereignty "is reflected throughout the Constitution's text." *Id.* The Constitution gives the federal government discrete, enumerated powers, and expressly affirms in "the Tenth Amendment[] . . . that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Id.* (alteration in original). In other words, the text of the Constitution dictates both that the Federal Government has only "limited powers," and that the states "retain substantial sovereign authority." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Chief among the sovereign powers retained by states is the "power to try causes in their courts." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Tort lawsuits fall within the heartland of state court jurisdiction. *See, e.g.*, *Stewart v. Hertz Vehicles, LLC*, 18 Misc. 3d 1139(A), 2008 N.Y. Slip Op. 50373(U), *5 (Sup. Ct., Kings Cnty. 2008) ("The Tenth Amendment generally reserves to the States traditional police powers, such as the power to proscribe or punish conduct through state tort laws."). But state courts possess much broader

powers. They are presumed competent to hear *any* case a federal court can hear, including those arising under federal law. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). "State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." *Claflin v. Houseman,* 93 U.S. 130, 136 (1876). Concurrent jurisdiction extends even to cases brought against federal officials for violation of federal law under color of their *official* authority. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (entertaining a *Bivens* claim originally filed in Minnesota state court).

When consistent with its enumerated powers, Congress can limit a state court's ability to hear suits against federal officers. For example, under the federal officer removal statute, federal officers "*may* . . . remove[]" a lawsuit brought in state court "relating to any act under color of such office." 28 U.S.C. § 1442(a)(1) (emphasis added); *see also, e.g.*, 50 U.S.C. § 3901 et seq. (under the Servicemembers Civil Relief Act active duty military personnel enjoy certain temporary immunities against civil litigation in state court).

But Congress has enacted no such law allowing federal officials, including the President, to escape state court jurisdiction for suits involving their unofficial conduct. Indeed, because the federal officer removal statute applies only to official conduct, Congress implicitly *affirmed* the jurisdiction of state courts to hear claims against federal officers for *un*official conduct. Recognizing this affirmation—and

Congress's power to add new limits to state court authority—the Supreme Court in *Jones* invited Congress to provide a temporary deferral of civil suits against the President should it wish to do so. 520 U.S. at 709. And others have argued that, in light of *Jones*' holding, Congress should in fact enact such a temporal deferral. *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1460-1461 (2009). But Congress never did. In the 23 years since *Jones* was decided, Congress has never enacted a law limiting the President's civil liability in either state or federal court for unofficial conduct. There is no reason for this Court to take a different approach.

B. State Courts Have Long Exercised Jurisdiction Over Civil Lawsuits Against Sitting Federal Officers.

In light of the Constitution's preservation of broad state authority, it should come as no surprise that state courts have long exercised jurisdiction over members of the Executive Branch whose conduct violates state tort laws. Indeed, the leading treatise on federal procedure describes this jurisdictional principle as "settled." 17A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4213 (3d ed. 2007) (collecting cases). In a similar vein, Richard Arnold, a former member of the Judicial Conference of the United States—which oversees federal judicial policy—has noted that "[t]he jurisdiction [of state courts to hear civil actions against federal officers] does not even appear to have been questioned since 1852, when the

Supreme Court unanimously upheld it in *Teal v. Felton*." *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385, 1394 (1964) (collecting cases).

The seminal case confirming such jurisdiction, *Teal v. Felton*, 53 U.S. 284 (1851), involved the courts of this very State. In *Teal*, the postmaster in Syracuse, New York was sued for violating New York tort law when he refused to deliver mail for a reason not justified by his official mandate. *Id.* at 289. Defendant argued that New York did not have jurisdiction to hear a case against a federal officer. The Supreme Court disagreed, holding that a plaintiff with a "right to sue existing" could "sue in any court having civil jurisdiction of such a case," unless the Constitution or Congress has expressly placed the cause within the exclusive jurisdiction of federal courts.

In the more than 150 years since *Teal*, New York and other state courts have continued to hear cases involving federal officers' violations of state tort law, particularly when the lawsuit involves an officer's unofficial conduct. *See, e.g.*, *Fink v. Gerrish*, 149 F. Supp. 915, 917 (S.D.N.Y. 1957) (state law negligence claims against U.S. Immigration and Naturalization Service officers properly maintained in state court because the "negligent operation" of their vehicle was not "an act done under color of their office as immigration officers"); *Neu v. McCarthy*, 33 N.E.2d 570, 572 (Mass. 1941) (state court tort suit against soldier for running a red light on his superior's orders could proceed to trial because "[a] person who enters military

service is not thereby relieved from his obligation to observe the law" and "is liable for his torts as are other persons"); *Evans v. Massman Constr. Co.*, 115 S.W.2d 163, 168 (Mo. 1938) ("There is no doubt but that an officer and agent of the United States is liable to respond in damages for a tortious act . . . if he, in fact, acts outside of and in defiance of the law."), *rev'd on other grounds*, 343 Mo. 632 (Mo. 1938). As Arnold summarized, "cases in which federal officials have been sued for damages in state courts are legion." *The Power of State Courts*, 73 Yale L.J. at 1394.

C. There Is No Basis for Stripping State Courts Of Jurisdiction Over Suits Involving Defendant's Unofficial Actions.

Defendant identifies no valid reason to deprive state courts of jurisdiction they have long exercised. For starters, Defendant's reliance on cases involving *official* capacity lawsuits lends him no support. *See* App. Br. 16–17 (collecting cases). A state court's attempt to interfere with a federal officer's *official* conduct could of course have sovereign immunity implications. *See*, *e.g.*, *Jones*, 520 U.S. at 701 ("We have recognized that '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" (alteration in original) (citation omitted)). Restrictions placed on state judicial power in such circumstances ensure that federal officers can "perform their designated functions effectively without fear that a particular decision may give rise to personal liability." *Id.* at 692-693; *see also Ferri*

v. Ackerman, 444 U.S. 193, 203-204 (1979) ("The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.").

But that concern "provides no support for an immunity for *unofficial* conduct." *Jones*, 520 U.S. at 694 (emphasis in original); *see also id.* ("[T]he sphere of protected action must be related closely to the immunity's justifying purposes." (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982)). That is especially true where, as here, the underlying conduct that is at the core of the defamation lawsuit took place many years before Defendant ever assumed federal office. *See id.* at 692–693 ("The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct.").

Defendant's second argument—that Article II confers on him broader immunity from suit than other federal officials, *see* App. Br. 11–12—runs squarely into *Jones*. While no one disputes that the President has unique and serious responsibilities, "an immunity from suit for unofficial acts grounded purely in the identity of [the President's] office is unsupported by precedent." *Jones*, 520 U.S. at 695. And Defendant has provided no explanation as to how this suit would interfere

with his Constitutional duties.[4] *See id.* at 710 (Breyer, J., concurring in the judgment) ("[T]he President cannot simply rest upon the claim that a private civil lawsuit for damages will interfere with the constitutionally assigned duties of the Executive Branch . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit." (internal quotation marks omitted)); *cf. Trump v. Vance*, 941 F.3d 631, 642-643 (2d Cir. 2019) ("Nor has the President explained why any burden or distraction the third-party subpoena causes would rise to the level of interfering with his duty to 'faithfully execute[]' the laws, U.S. Const. art. II, § 3.").

Jones's rejection of any claim to Article II exceptionalism is not limited to lawsuits filed in federal court. Defendant misleadingly claims that *Jones* "made clear" that a claim of Presidential immunity in state court "may very well 'present a more compelling case.'" App. Br. at 4. *Jones* did no such thing. To the contrary, the only thing it "made clear" was that *whether* such an argument *could* present "a more compelling case" was a question it *would not decide*. *See* 520 U.S. at 691 ("Whether those concerns would present a more compelling case for immunity is a question that is not before us.").

[4] Ms. Zervos recognizes that the federal government is in the process of responding to the COVID-19 pandemic. The pandemic was underway when Defendant filed his opening brief, and he made no claim that the current public health situation justified the blanket dismissal or stay that he seeks while in office. And, as explained below, the trial court has made clear it would accommodate Defendant's schedule and Presidential responsibilities.

The fact that the *Jones* Court analyzed President Clinton's argument under the separation of powers doctrine, as Defendant here stresses, App. Br. 13, does not revitalize Defendant's Article II argument. The *Jones* Court analyzed the separation of powers because that case was pending in federal court. But the Court's rationale for rejecting a unique Presidential immunity was that the lawsuit merely required the federal courts to "exercise their core Article III jurisdiction to decide cases and controversies." 520 U.S. at 701. In other words, affirming jurisdiction was consistent with the structure of the Constitution. So too here. This lawsuit falls within the heartland of state court jurisdiction, which is one of the core features of state sovereignty preserved by the Constitution. *See United States v. Lopez*, 514 U.S. 549, 552 (1995) ("This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" (quoting *Gregory*, 501 U.S. at 458)).

Maintaining the balance of power between the state and federal governments is as critical to the integrity of the Constitution as the separation of powers. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny from either front." *Gregory*, 501 U.S. at 458. Subordinating a state court by denying it jurisdiction over a claim which it is

presumed competent to adjudicate would destroy that balance. It would also render citizens like Ms. Zervos unable to turn to state courts to resolve their disputes—a result that neither the Constitution nor Congress has sanctioned.

D. The New York Courts Are Just As Capable As The Federal Courts Of Accommodating Defendant's Interests.

For all the reasons above, there is no structural or legal obstacle to a state court's exercise of jurisdiction over Defendant for his unofficial acts prior to assuming office. But it is important to note that litigating in state court will pose no practical problems for Defendant either. Just as in *Jones*, there is every reason to think this lawsuit will be "properly managed" by the trial court, and thus "highly unlikely to occupy any substantial amount of [Defendant's] time" at all. *Jones*, 520 U.S. at 702; *cf. Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) ("There is no intrinsic reason why the fact that a [person] is a federal judge should make him [or her] more competent, or conscientious, or learned . . . than his [or her] neighbor in the state courthouse.").

Ms. Zervos and the trial court are well aware of the importance of Defendant's duties and have vowed to make all necessary accommodations. Ms. Zervos can prepare for trial without invoking or requesting any process or order from the court that would interfere with the performance of Defendant's duties. More importantly, the First Department has confirmed the trial court's awareness that it "should not compel the President to take acts or refrain from taking acts in his official capacity

or otherwise prevent him from executing the responsibilities of the presidency." *Zervos II*, 171 A.D.3d at 127. Likewise, Justice Schecter has committed to adapting to Defendant's schedule and prioritizing "important federal responsibilities." *Zervos I*, 59 Misc. 3d at 797. Principles of comity and federalism require taking those assurances seriously—despite Defendant's suggestion to the contrary, App. Br. 25. *See Younger v. Harris*, 401 U.S. 37, 44 (1971) (counseling comity, *i.e.*, the "proper respect for state functions").

The New York courts have thus shown that they are perfectly capable of understanding, "accomodat[ing]," and affording "the utmost deference to Presidential responsibilities." *Jones*, 520 U.S. at 709.

E. Defendant's Speculation That This Litigation May Somehow, Someday Conflict With His Presidential Duties Cannot Support The Sweeping Relief He Seeks.

There is likewise no basis for indefinitely delaying Ms. Zervos's day in court based on the mere possibility that Defendant may engage in conduct over the course of the litigation that would trigger contempt, as the dissent below feared.

In *Jones*, President Clinton had argued, among other things, that the possibility of being held in contempt by a federal court would violate the separation of powers. *See* Clinton Brief at 29-30; *see also Jones*, 520 U.S. at 688. But the Court rejected the notion that a *hypothetical* constitutional conflict between a President and a trial court should be decided before, if ever, it occurs. Illustrating

that general principle, the Court—following the "deeply rooted" doctrine of "avoiding the premature adjudication of constitutional questions" unless that adjudication is "absolutely necessary"—declined "to confront the question whether a court may compel the attendance of the President at any specific time or place." 520 U.S. at 690-691 & n.11 (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)). As the Court explained, "It [is longstanding] practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision." *Id.* at 691 & n.11 (quoting *Ala. State Fedn. of Labor v. McAdory*, 325 U.S. 450, 461 (1945)); *see also id*. ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (quoting *Burton*, 196 U.S. at 295)).

This Court has similarly long held that "[t]he courts do not make mere hypothetical adjudications . . . where the existence of a 'controversy' is dependent upon the happening of future events." *Prashker v. United States Guar. Co.*, 1 N.Y.2d 584, 592 (1956). As a result, this Court has repeatedly cautioned that "principles of judicial restraint" dictate that it need not, and should not, "decide questions unnecessary to the disposition of the appeal." *People v. Carvajal*, 6 N.Y.3d 305, 316 (2005); *see also, e.g.*, *Myrtle v. Essex Cnty. Bd. of Elections*, 33 Misc. 3d 1228(A), 2011 N.Y. Slip Op. 52153(U), at *6 (Sup. Ct. Essex Cnty. 2011) ("[C]ourts should abide by 'the cardinal principle of judicial restraint—if it is not necessary to

decide more, it is necessary not to decide more . . . .'" (*quoting PDK Labs., Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring))).

Where, as here, the unnecessary questions posed by a litigant are constitutional in nature, the requirement of their avoidance becomes all the stronger. *Peters v. N.Y.C. Hous. Auth.*, 307 N.Y. 519, 527 (1954) ("It is well settled that issues of constitutionality should not be decided before they need be."); *Ajay Glass & Mirror Co. v. County of Erie*, 155 A.D.2d 988, 988–989 (4th Dep't 1989) (reversing judgment in part because trial court "erred in reaching the constitutional issue unnecessarily"); *Cong. Beth Israel W. Side Jewish Ctr. v. Bd. of Estimate of City of N.Y.*, 285 A.D. 629, 633 (1st Dep't 1955) ("Of course, constitutional questions should not be decided before it is necessary to do so or when any alternative grounds of effective disposition present themselves.").

Applying these well-established principles of judicial restraint, the First Department correctly held that the purely "hypothetical concern" that Defendant *might* engage in conduct that could trigger a contempt finding does not justify denying jurisdiction now. *Zervos II*, 171 A.D.3d at 126. Indeed, there is no reason to assume Defendant will engage in such egregious misconduct that contempt—the most drastic remedy available—would even be a possibility. Instead, there is every reason to expect the opposite given the unique duty Defendant has, as President, to show respect for the legal process.

The trial court here has already made clear that it will accommodate Defendant's schedule, so the question the Court expressly reserved in *Jones* will not be implicated. There is every reason to follow a similar approach and avoid resolving a constitutional question that is even less likely to present itself.

* * *

The foregoing analysis demonstrates why Defendant's objections to state court jurisdiction have no legal or practical basis. But it also bears noting that Defendant's concern about state court jurisdiction appears to wax and wane depending on the subject matter of the lawsuit. Since the beginning of his Presidency, Defendant has actively participated in numerous lawsuits across the country, including in state court. *See, e.g.*, *Galicia v. Trump*, No. 24973/2015E (Sup. Ct. Bronx Cnty.); *Garcia v. Bayrock/Sapir Org., LLC*, No. 601495/2015 (Sup. Ct. Suffolk Cnty.). Moreover, his campaign recently has filed suit in four different courts, including in the New York Supreme Court, alleging libel and defamation claims against media corporations for their writings about the Trump Campaign and the 2016 election. *See Trump for President v. New York Times*, No. 152099/2020 (Sup. Ct. N.Y. Cnty., filed 2/26/2020); *Trump for President v. WP Company LLC*, No. 1-20-cv-00626-KBJ, (D.D.C., filed 3/3/2020); *Trump for President v. CNN Broadcasting*, No. 1:20-cv-01045 (N.D. Ga., filed 3/6/2020); *Trump for President v. Northland Television, LLC*, Case No. 2020-CV-000030 (Wis. Cir. Ct., filed

4/13/2020). Although these four lawsuits are brought in name by his campaign, he directs and controls that entity and will be a critical witness in these cases.

The jurisdiction of the courts of this State—and states throughout the country—does not turn on whether or not Defendant likes the subject matter of the lawsuit. The authority of the New York courts instead flows from fundamental principles of state sovereignty and the Constitution, which make clear that Ms. Zervos's claims should proceed.[5]

[5] In his opening brief, Defendant did not separately address whether the trial court erred in refusing to stay this litigation until he is no longer President. Because his claim to a stay while in office is functionally identical to his claim that he possesses immunity from suit for the duration of his presidency, the former should be rejected for the same reasons as the latter. The decision of whether a stay of litigation is warranted under CPLR 2201 is trusted to the sound discretion of the trial court and may be upset only for abuse as a matter of law. *See*, *e.g.*, *Lauria v. Kriss*, 147 A.D.3d 575 (1st Dep't 2017) (reviewing denial of CPLR 2201 stay for abuse of discretion); *Chaplin v. Natl. Grid*, 171 A.D.3d 691, 692 (2d Dep't 2019) (observing that a trial court has "broad discretion to grant a stay" under CPLR 2201). Here, the trial court properly held that the "lengthy and categorical stay" Defendant sought was not justified based on a hypothetical future conflict between the litigation and Defendant's "important federal responsibilities." *Zervos I*, 59 Misc. 3d at 797; *see also Zervos II*, 171 A.D.3d at 119 (noting that the stay had been denied "for the same reasons as in *Clinton v. Jones*," namely on the basis "that important federal responsibilities will be afforded precedence over the prosecution of the lawsuit"). The First Department affirmed, *Zervos II*, 171 A.D.3d at 128, 130, and this Court should do the same.

CONCLUSION

For the foregoing reasons, the First Department's decision should be affirmed.

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Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word, with a proportionally spaced typeface, as follows:

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