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Movants, law professors who also submitted an amicus brief in *Clinton v. Jones* (“Law Professors”), submit this memorandum of law and the accompanying Affidavit of Justin G. Florence, along with Exhibit A attached thereto, in support of their motion to appear as amici curiae in this action for the limited purpose of addressing the federal constitutional issue raised by the defendant in his motion to dismiss filed on July 7, 2017.

PRELIMINARY STATEMENT

Movants are professors of law and experts in the fields of civil procedure, jurisdiction, and constitutional law. Twenty years ago, movants filed a brief as amicus curiae 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. The Supreme Court agreed with movants’ position and permitted the pending suit against the President to proceed. Movants now write again to make the same point: that the President is not above the law, and that the demands of his office do not require him to be immune from civil litigation.

Movants respectfully submit that their brief, which was prepared with the assistance of leading constitutional scholar Richard Primus at the University of Michigan Law School and Protect Democracy (a non-profit committed to promoting lawfulness and accountability from the Executive Branch), will substantially assist the Court’s consideration of the issue of Presidential immunity raised in the motion to dismiss. For this and other reasons discussed herein, the Court should exercise its discretion to grant movants leave to appear as amici curiae.

BACKGROUND

The plaintiff, Summer Zervos, alleges in her Complaint that defendant Donald J. Trump, the President of the United States, is liable for defamation based on comments he allegedly made about plaintiff in the wake of her public claims that defendant engaged in unwanted sexual touching of plaintiff.

On July 7, 2017, defendant filed a motion to dismiss the Complaint in which he argues, among other things, that a sitting President is immune from private litigation in state court. Plaintiff's opposition to the motion currently is due on September 19, 2017. Plaintiff's counsel has advised movants' counsel that plaintiff consents to movants' participation as amici curiae in this action for the purpose of opposing the defendant's Presidential immunity argument. Defendant's counsel has advised that they will take no position as to movants' participation as amici curiae in this action.

ARGUMENT

“An amicus curiae—friend of the court—is a person appearing in a judicial proceeding to assist the court by giving information or otherwise . . . [and] is heard only by leave of the court.” *Empire State Ass'n of Assisted Living, Inc. v. Daines*, 26 Misc. 3d 340, 342-43 (Sup. Ct. Albany Cty. 2009) (citation omitted). Although neither the CPLR nor the Rules of this Court address the submission of amicus curiae briefs at the trial court level, a New York trial court may exercise its discretion to grant amicus curiae status.¹ *See Kruger v. Bloomberg*, 1 Misc. 3d 192, 195 (Sup. Ct.

¹ Other courts in New York have set out specific guidelines for the submission of amicus briefs. *See, e.g.*, 22 NYCRR § 500.23(a)(4) (outlining procedures in the New York Courts of Appeal: “A motion for amicus curiae relief shall demonstrate that: [i] the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency; [ii] the amicus could identify law or arguments that might otherwise escape the Court's consideration; or [iii] the proposed amicus curiae brief otherwise would be of assistance to the Court.”); *see also* 22 NYCRR § 670.11(a) (specifying procedures in the New York Supreme Court's Appellate Division, Second Department: “Permission to file an amicus curiae brief shall be obtained by persons who are not parties to the action or proceeding by motion on notice to each of the parties.”); 22 NYCRR, § 1000.13(k) (describing procedures in the New York Supreme Court's Appellate Division, Fourth Department: “A person who is not party to an appeal or proceeding may make a motion to

N.Y. Cty. 2003) (internal quotations omitted) (permitting the submission of an amicus curiae brief in the New York Supreme Court). Where, as here, a case implicates “questions of important public interest, leave is generally granted to file a brief as amicus curiae.” *Id.* at 196 (citation omitted).

In *Kruger*, Justice Ling-Cohan reasoned that leave to appear as amicus curiae is particularly appropriate where: (1) the affidavit/affirmation in support indicates the movant’s interest in the issues to be briefed and sets forth the issues, with a proposed brief attached; (2) the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; (3) movant would invite the court’s attention to the law or arguments which might otherwise escape its consideration, or; (4) that its amicus curiae brief would otherwise be of special assistance to the court. *Id.* at 198.

In addition, the court identified as relevant factors whether the case concerns a question of important public interest and whether granting leave to appear as amicus curiae would prejudice the rights of the parties to the action. *Id.*

In the wake of *Kruger*, other New York trial courts have exercised their discretion to allow the submission of amicus curiae briefs. *See Anschutz Expl. Corp. v. Town of Dryden*, 35 Misc. 3d 450, 454 (Sup. Ct. Thompkins Cty. 2012) (granting amicus status where there “[was] no prejudice to [the parties] in permitting the proposed amici to be heard on [a] case of first impression involving a matter of important public interest”); *see also Steglich v. Bd. of Educ. of N.Y.C.*, No. 104300/2011, 2011 N.Y. Slip Op. 51159(U), at *8 (Sup. Ct. N.Y. Cty. May 20, 2011) (granting amicus curiae status where the issue was “a matter of public importance” and there was no substantial prejudice to the rights of any of the parties).

serve and file a brief amicus curiae. An affidavit in support of the motion shall briefly set forth the issues to be briefed and the movant’s interest in the issues. The proposed brief may not duplicate arguments made by a party to the appeal or proceeding.”).

Here, the Court should exercise its discretion to grant movants leave to appear as amici curiae because, among other reasons, this case presents a constitutional question of important public interest and movants' brief, which was prepared with the assistance of distinguished law professors with extensive expertise in the areas of constitutional law and civil procedure, almost certainly will assist the Court's consideration of that question. As to other factors identified in *Kruger*, movants' proposed brief discusses points and authorities that might otherwise escape the Court's consideration. Additionally, granting this motion will not delay resolution of this action or otherwise prejudice the parties to the action in any respect.

CONCLUSION

For all of the foregoing reasons, the Court should exercise its discretion to grant this motion so as to permit movants to appear as amici curiae to address the constitutional issues raised by the motion to dismiss.

Dated: New York, New York
September 19, 2017

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