UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, ET AL., Plaintiffs, v. KENNETH L. MILLER, ET AL., Defendants.	Docket No. 2:12-cv-00184

DEFENDANTS LIBERTY COUNSEL AND RENA M. LINDEVALDSEN'S MOTION TO CERTIFY INTERLOCUTORY APPEAL AND TO STAY PROCEEDINGS PENDING RESOLUTION OF INTERLOCUTORY APPEAL

Pursuant to 28 U.S.C. 1292(b) and Fed. R. Civ. P. 26(c), Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen hereby move this Court for an order certifying this Court's Order on Defendants' Motion to Dismiss (dkt. 277) for an interlocutory appeal and staying the proceedings pending resolution of the interlocutory appeal. The grounds for such motion are fully set forth in Defendants' Memorandum of Law in Support of the instant motion, filed simultaneously herewith.

Dated: October 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, ET AL.,	)	
Plaintiffs,	)	
v.	)	Docket No. 2:12-cv-00184
KENNETH L. MILLER, ET AL.,	)	
Defendants.	)	

DEFENDANTS LIBERTY COUNSEL AND RENA M. LINDEVALDSEN'S MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY INTERLOCUTORY APPEAL AND TO STAY PROCEEDINGS PENDING RESOLUTION OF INTERLOCUTORY APPEAL

Pursuant to L.R. 7(a)(2), Defendants Liberty Counsel, Inc. ("Liberty Counsel") and Rena M. Lindevaldsen ("Lindevaldsen") hereby file this Memorandum in Support of their Motion to Certify Interlocutory Appeal and to Stay Proceedings Pending Resolution of Interlocutory Appeal.

INTRODUCTION

This Court has concluded (1) that Vermont would recognize a predicted tort for custodial interference, (2) that the custodial interference claim survives despite Jenkins not having superior custodial rights during the period in which Liberty Counsel and Lindevaldsen are alleged to have committed certain acts, (3) that this Court has personal jurisdiction over Lindevaldsen and Liberty Counsel, (4) that Jenkins' claims are not time barred and relate back to the original pleading, (5) that Jenkins' conclusory allegations of conspiracy state a claim, (6) that, despite not alleging the requisite substantial assistance, Jenkins' aiding and abetting claim survives dismissal, (7) that Section 1985 does not require state action, (8) that Section 1985 covers claims brought based on

sexual orientation, and (9) that Section 1985 does not require that Jenkins allege discriminatory animus directed at her individually. (Dkt. 277, Opinion and Order, "Order"). The Court's Order involves many novel, pivotal, and controlling questions of law as to which there is a substantial difference of opinion. The resolution of these seminal questions on interlocutory appeal will terminate this litigation as to Liberty Counsel and Lindevaldsen, or at minimum, dramatically alter its scope. Certification of an interlocutory appeal is therefore warranted and should be granted by this Court. Good cause exists for staying the proceedings pending resolution of the interlocutory appeal, as it will protect the cherished constitutional liberties of Liberty Counsel and Lindevaldsen.

LEGAL ARGUMENT

I. THIS COURT SHOULD CERTIFY ITS ORDER ON DEFENDANTS' MOTION TO DISMISS FOR INTERLOCUTORY APPEAL.

While denials of a motion to dismiss are generally not appealable, federal law provides for discretionary review of certain non-final orders when justice would be served by such appeals. *See Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013). Section 1292 provides that a district court may certify an order not otherwise appealable when its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "When a ruling satisfies these criteria and 'involves a new legal question or is of special consequence,' then the district court **should not hesitate to certify an interlocutory appeal**." *Balintulo*, 727 F.3d at 186 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (emphasis added)). A court need not determine that its ruling was erroneous to certifying an order for an interlocutory appeal. *See, e.g.*, *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009). Thus, even if this Court is convinced of the correctness of its ruling, it may still certify it for interlocutory appeal. This Court should certify its order for interlocutory review.

A. The Issues Presented In This Court's Order Present Controlling Questions of Law.

"[I]t is clear that a question of law is controlling if reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Acille Lauro in Amministrazione Straordianiria*, 921 F.2d 21, 24 (2d Cir. 1990); *Century Pac., Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 372 (S.D.N.Y. 2008) ("A question of law is controlling if reversal of the district court's order would terminate the action."). However, "resolution of the issue need not necessarily terminate an action in order to be controlling." *Klinghoffer*, 921 F.2d at 24. "[C]ontrolling means serious to the conduct of the litigation, either practically or legally." *Katx v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). Indeed, "[a] question of law may be deemed controlling it its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996); *Ryan, Beck & Co., LLC v. Fakih*, 275 F. Supp. 2d 393, 396 (E.D.N.Y. 2003) (question is considered controlling if it "would either result in dismissal, significantly affect the conduct of the case, or have precedential value for a large number of cases"); *N.Y. Racing Ass'n, Inc. v. Perimutter Publ'g Ins.*, 959 F. Supp. 578, 583 (N.D.N.Y. 1997) (question of law is controlling if "central to the Court's analysis" and would materially and significantly impact the litigation); *Phillip Morris Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (question of law controlling if is resolution would "significantly alter" the course of the litigation).

Here, there can be no dispute that the questions of law at issue are controlling. A finding that Jenkins' claims are all time barred and do not satisfy the requirements for relation back would entirely terminate the litigation as to Liberty Counsel and Lindevaldsen (and potentially numerous other defendants), as this Court would have no jurisdiction to entertain such claims. (*See* Dkt. 240,

"MTD Memo" at 14-20). Indeed, such questions concerning the Court's subject matter jurisdiction are appropriate for interlocutory review. *Klinghoffer*, 921 F.2d at 24 ("we have granted certification when the order involved issues of . . . subject matter jurisdiction"); *In re Heddenhorf*, 263 F.2d 887, 888 (1st Cir. 1959) (whether a district court lacks subject matter jurisdiction is a quintessential controlling legal question); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 7 (1st Cir. 2005) (granting interlocutory appeal when controlling legal question of district court's subject matter jurisdiction was in question).

Additionally, a finding that this Court lacks personal jurisdiction over Liberty Counsel and Lindevaldsen would also terminate the litigation as to these Defendants. Importantly, the Second Circuit has noted on several occasions that questions involving personal jurisdiction are controlling and appropriate for interlocutory review. *See, e.g.*, *Klinghoffer*, 921 F.2d at 24 ("we have granted certification when the order involved issues of in personam [jurisdiction]"); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.3d 1326, 1330 (2d Cir. 1972) (granting interlocutory appeal over questions involving personal jurisdiction). Moreover, questions going to whether Jenkins can state a claim under any of her purported causes of action are certainly controlling, as they are likely to "significantly affect the conduct of the action." *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000). The questions of law at issue in this Court's Order are controlling and warrant certification to the Second Circuit for interlocutory review.

B. There Is Substantial Ground For Difference Of Opinion With This Court's Legal Conclusions.

As the Second Circuit has recognized, questions of first impression are the quintessential matters in which there can be substantial grounds for difference of opinion. *Klinghoffer*, 921 F.2d at 25; *see also Edo Corp. v. Newark Ins. Co.*, No. CIV H-90-951 AHN, 1996 WL 684395, *3 (D. Conn. May 22, 1996) ("Substantial difference of opinion may arise, where, as here, the issue is

difficult and of first impression."); *In re Heddendorf*, 263 F.2d at 889 (certification proper when "the proposed appeal presents a difficult central question of law which is not settled by controlling authority"). Indeed, in the absence of controlling authority, "[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case." 16 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3930 (2d ed. 1996). Therefore, **if "proceedings that threaten to endure for several years depend on an initial question of jurisdiction, . . . certification may be justified at a relatively low threshold of doubt**." *Id.* (emphasis added). Indeed, "it can be concluded that there is a 'substantial ground for difference of opinion' about an issue when the matter involves 'one or more difficult and pivotal questions of law not settled by controlling authority.'" *Philip Morris Inc.*, 957 F. Supp. at 330 (quoting *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984)).

In determining whether there is substantial ground for disagreement over this Court's opinion, the Court is obligated to analyze "the strengths in opposition to the challenged ruling." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996); *N.Y. Racing*, 959 F. Supp. at 583 (same). Here, the amount of legal support for Liberty Counsel and Lindevaldsen's arguments necessitate a finding of substantial grounds for disagreement. This is especially true in light of the fact that many of the issues decided in this Court's Order are matters of first impression. Moreover, this Court need not conclude that its Order is erroneous to certify it for interlocutory appeal. Instead, the Court need only acknowledge that the Order involves at least one controlling question as to which there is substantial ground for difference of opinion. *See, e.g.*, *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (certifying interlocutory appeal "although [the] Court believe[d] that its conclusions [were] correct"); *Brown v. Tex. & Pac. R.R.*, 392 F. Supp. 1120, 1126 (W.D. La. 1975)

(certifying order for appeal even though "in the [c]ourt's mind there does not exist the strong possibility that the Memorandum Ruling was incorrect").

1. There is Substantial Ground for Disagreement on this Court's Novel Findings on Jenkins' Custodial Interference Claim.

As the Second Circuit made clear, substantial grounds for disagreement are likely in matters involving cases of first impression. *Klinghoffer*, 921 F.2d at 25. There can be no dispute that this Court's findings on all aspects of Jenkins' purported custodial interference claim are matters of first impression. Indeed, to even permit Jenkins to assert such a novel claim, heretofore wholly foreign to Vermont law, this Court needed to "predict that were the Vermont Supreme Court presented with the precise question today it would agree that the elements of a Vermont common law claim of custodial interference are consistent with section 700." *Jenkins v. Miller*, 983 F. Supp. 2d 423, 451 (D. Vt. 2013). There was not before, and there is not now, any such claim recognized in Vermont. Thus, the basis for this Court's opinion was entirely novel and is the only opinion of its kind in this jurisdiction. This alone warrants a finding of substantial grounds for disagreement.

However, the novelty of this Court's predicted tort and its findings concerning it are not the only basis for substantial disagreement. As Liberty Counsel and Lindevaldsen pointed out in their MTD Memo, several courts have refused to recognize such a tort. (MTD Memo at 63) (citing *Zaharias v. Gammill*, 844 P.2d 137 (Okl. 1992); *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990); *Whitehorse v. Critchfield*, 494 N.E.2d 743 (Ill. App. Ct. 1986); *Matthaeus v. Matthaeus*, No. C.A. 99C-05-177 WCC, 2003 WL 1826285 (Del. Superior Ct. Apr. 7, 2003)). Thus, there is grounds for disputing whether such a tort even exists in Vermont. (*See also* MTD Memo at 63-66) (discussing why Vermont is unlikely to recognize such a tort, were the Supreme Court of Vermont to consider it today).

Moreover, the Court's application of the predicted tort is inconsistent with numerous jurisdictions that have recognized such a tort. (Order at 25-30) (refusing to recognize the **unanimous** conclusion of jurisdictions that have adopted this tort that superior custodial rights are requisite to a claim of custodial interference). As Liberty Counsel and Lindevaldsen pointed out, superior custodial rights are **universally** recognized as requisite to a custodial interference claim, and Jenkins could not allege acts on behalf of Liberty Counsel and Lindevaldsen after the time at which Jenkins acquired such rights. (MTD Memo at 67-70) (discussing the universally recognized requisites to custodial interference claims). This Court's refusal to follow the unanimous conclusion of the jurisdictions to have considered this tort mandates a finding that there are substantial grounds for disagreement as to this Court's conclusions. Indeed, there is universal and unanimous rejection of this Court's conclusion.

Additionally, this Court's refusal to recognize that custodial interference claims cannot be brought against another parent having custodial rights mandates a finding that there is substantial ground for disagreement. Indeed, the binding authority of the Second Circuit suggests this Court's conclusion was in error. *See Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998) (suggesting that "custodial interference by or at the behest of a parent who had joint custody would not have been viewed as tortious" (citing Restatement (Second) of Torts § 700 cmt. c)). (*See also* MTD Memo at 70-76).

2. There is Substantial Ground for Disagreement on this Court's Findings of Personal Jurisdiction.

This Court devotes **two sentences** out of a 109-page order to any analysis of Liberty Counsel and Lindevaldsen's jurisdictional challenges. (Order at 91). In that cursory treatment of the bedrock protections of due process afforded to Liberty Counsel and Lindevaldsen, this Court expresses the belief that Liberty Counsel and Lindevaldsen "reiterate many of the arguments they

previous made." (*Id.*). But, Liberty Counsel and Lindevaldsen have never presented **any arguments whatsoever** to this Court. Indeed, until now, they were not parties and could not respond to anything. Liberty Counsel and Lindevaldsen's motions to dismiss were therefore the first opportunity they have had to raise any defense in this action, including the substantial constitutional questions concerning the exercise of jurisdiction over them. Their substantial arguments concerning such fundamental protections enshrined in the Constitution should be certified for interlocutory review.

Asserting jurisdiction over these Defendants based on an incomplete analysis violates due process. Indeed, regardless of the substance of any proceedings that occurred in this matter before Liberty Counsel and Lindevaldsen were joined as defendants, these Defendants have a fundamental right to appear and be heard on their defenses before binding adjudications can be made against them. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This Court's previous findings concerning jurisdiction do not and cannot bind these **new** Defendants. *See, e.g.*, *Griffin v. Griffin*, 327 U.S. 220, 227 (1946) (court does not have jurisdiction to enter findings against a defendant prior to defendant being given notice and an opportunity to be heard); *id.* ("to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him . . . there was a want of judicial due process and hence a want of jurisdiction over the person"); *Mullane*, 339 U.S. at 314 (court cannot make binding jurisdictional findings unless defendant is given an "opportunity to present their objections"); *United States v. Casciano*, 124 F.3d 106, 112 (2d Cir. 1997) (before a court can make any findings concerning a defendant, due process requires that defendant be given notice and an opportunity to be heard); *Mariash v. Morrill*, 496 F.2d 1138,

1143 (2d Cir. 1974) (due process requires that a defendant be given "the opportunity to be heard in his defense" concerning a court's jurisdiction over him); *In re Verit Indus.*, 7 F. App'x 743 (9th Cir. 2001) (reversing a district court's findings against a defendant that "did not have its day in court . . . to challenge the court's exercise of personal jurisdiction"); *see also Nat'l Sch. Reporting Serv., Inc. v. Nat'l Sch. of Cal., Ltd.*, 924 F. Supp. 21, 23 (S.D.N.Y. 1996). The Court's conclusion to the contrary is therefore subject to substantial grounds for disagreement.

The Court's exercise of personal jurisdiction based upon the alleged "effects test" is also subject to substantial disagreement because of the substantial narrowing of that test in *Waldon v. Fiore*, 134 S. Ct. 1115 (2014), the Supreme Court's further explanations of that test in *Bristol-Myers Squibb v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017), and the overwhelming majority of jurisdictions, including the Second Circuit, that have issued opinions contrary to this Court's understanding of *Walden*. (MTD Memo at 27-34); (Dkt. 273, "MTD Reply" at 16-18).

3. There are Substantial Grounds for Disagreement on this Court's Section 1985 Findings.

There are also substantial grounds for disagreement over this Court's numerous findings concerning Jenkins' purported Section 1985(3) claim. This Court's conclusions therefore warrant certification of an interlocutory appeal.

a. There is substantial ground for disagreement on this Court's finding regarding the requisite state action.

First, this Court found that no state action is required under the Hindrance Clause. (Order at 42-49). But, this conclusion is contrary to Supreme Court precedent, rules of statutory construction, and numerous circuit court decisions. (MTD Memo at 108-112); (MTD Reply at 43-47). Indeed, this Court's conclusion to the contrary is not only subject to substantial disagreement, it has been **explicitly rejected** by numerous courts. *See also Bray v. Alexandria Women's Health*

Clinic, 506 U.S. 263 (1993) (Section 1985(3)'s plain language and Supreme Court precedents reflect an understanding "clearly contrary to the dissent's [and this Court's] view" that state action is not required under the Hindrance Clause"); *Magnum v. Archdiocese of Philadelphia*, 253 F. App'x 224 (3d Cir. 2007) (state action required under the Hindrance Clause); *Tilton v. Richardson*, 6 F.3d 683 (10th Cir. 1993) (state action required under all clauses of Section 1985); *Friends of Falun Gong v. Pac. Cultural Enter., Inc.*, 288 F. Supp. 2d 273, 281 (E.D.N.Y. 2003) (noting that *Tilton* held "that claims under the hindrance clause must be based upon rights protected against both private and official interference").

b. There is substantial ground for disagreement on this Court's finding regarding requisite membership in a suspect class.

Second, this Court found that a plaintiff need not allege membership in a suspect class to state a claim under Section 1985(3). (Order at 57). That finding is subject to substantial disagreement and has been explicitly rejected by binding precedent. *See, e.g.*, *Enquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 607 (2008) (rejecting plaintiff's claim that she "need not claim discrimination on the basis of membership in some class or group" to state an equal protection claim); *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988) (affirming dismissal of complaint under the Civil Rights Act because it fails to claim that plaintiffs are **all members** of the alleged suspect class); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 292 (2d Cir. 1992) (noting that plaintiffs cannot bring Section 1985(3) claim unless they can allege that **all** plaintiffs are **members** of the purported racial class). These authorities from the United States Supreme Court and the Second Circuit demonstrate that this Court's contrary conclusion is, at the very least, subject to substantial disagreement, and should be certified for interlocutory review.

This Court's finding that plaintiffs may bring a claim under Section 1985(3) based on sexual orientation is subject to substantial disagreement. (MTD Memo at 103-108); (MTD Reply at 39-42).

4. There is Substantial Ground for Disagreement on this Court's Findings on Timeliness.

This Court found that a plaintiff needs to have notice of a defendant's alleged **liability** for tortious conduct, rather than notice of her **injury** in order for the statute of limitations to accrue. There is substantial ground for disagreement with this conclusion because it is clearly contrary to settled law in this jurisdiction. *See, e.g.*, *Eaton v. Prior*, 58 A.3d 200, 204 ("An action accrues so as to trigger the statute of limitations 'when a plaintiff discovers or reasonably should discover the injury, its cause, and the existence of a cause of action.") (quoting *Lillicrap v. Martin*, 591 A.2d 41, 47 (1989)). "**The law does not require absolute certainty for the statute to run**." *Id.* at 255 (emphasis added). Indeed, the statute begins to run as soon as a reasonable plaintiff should have discovered the alleged **injury** and its purported cause. *See, e.g.*, *id.* (noting that the statute of limitations begins to run under Section 512(4) as soon as a plaintiff should have "suspected" that an injury occurred); *Bull v. Pinkham Eng'g Assocs.*, 752 A.2d 26, 31 (Vt. 2000) (statute of limitations commences when plaintiff should have suspected injury). This Court's finding to the contrary is at odds with Vermont courts and certification is appropriate. (*See also* MTD Memo at 14-18); (MTD Reply at 2-9).

C. Interlocutory Review Will Facilitate and Accelerate The Termination Of This Litigation as to Liberty Counsel and Lindevaldsen.

Whether an interlocutory appeal has "the potential for accelerating the disposition of the litigation" is "the critical requirement" in determining whether certification is appropriate. *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978). Indeed, it is critical because "Congress

passed § 1292(b) to avoid protracted litigation" on issues where substantial questions are involved and there is doubt as to their proper adjudication. *Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007); *Ryan, Beck & Co., LLC v. Fakih*, 275 F. Supp. 2d 393, 396 (E.D.N.Y. 2003) (same). If an interlocutory appeal would "result in the saving of judicial resources and otherwise avoid protracted litigation," certification is warranted. *Century Pac., Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 372 (S.D.N.Y. 2008). Where, as here, some of the questions involve matters of the Court's jurisdiction, interlocutory appeals are appropriate because they "greatly assist in the ultimate termination of the litigation." *Klinghoffer*, 921 F.2d at 25.

Here, a finding that Jenkins' claims are time barred and do not relate back would terminate the litigation against Liberty Counsel and Lindevaldsen, as well as other defendants. A finding that this Court lacks personal jurisdiction over Liberty Counsel and Lindevaldsen would also terminate the litigation as to these Defendants. Also, a finding that Jenkins has no ability to state a claim on any of her causes of action would necessarily end the litigation. These factors show that interlocutory certification is appropriate and warranted here. As terminating the litigation is the "critical factor, *In re Duplan Corp.*, 591 F.2d at 148 n.11, the fact that even one finding, among the many questions to be raised in the interlocutory appeal, in Liberty Counsel and Lindevaldsen's favor would conclude the litigation against them warrants certification here.

II. GOOD CAUSE EXISTS FOR A STAY OF THE PROCEEDINGS.

A stay is appropriate pending an interlocutory appeal when (1) the stay applicant has made a strong showing that he is likely to succeed on appeal, (2) the stay applicant will be irreparably injured absent a stay, (3) the other parties will not be substantially injured by the stay, and (4) the public interest favors a stay. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); *Nyen v. Holder*, 556 U.S. 418, 426 (2009) (same). "While stated in these terms, the test

contemplates that a movant may be granted relief even if it demonstrates something less than a likelihood of success on the merits of its appeal." *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 640 (S.D.N.Y. 2012). If the stay applicant can demonstrate that "serious questions going to the merits of the appeal" are present, and irreparable injury will occur absent a stay, then a stay pending appeal is appropriate. *Id.* Moreover, the test implies a balancing analysis where the stronger the showing on a likelihood of success or serious questions diminishes the requirement of demonstrating irreparable injury, and vice versa. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002). Here, Liberty Counsel and Lindevaldsen easily satisfy these four factors, and therefore a stay is appropriate.

A. Liberty Counsel and Lindevaldsen Have Demonstrated Substantial And Serious Questions Going To The Merits Of Their Interlocutory Appeal.

"The necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors." *Mohammed*, 309 F.3d at 101. Thus, a stay pending appeal is merited when "the likelihood of success is not high but the balance of the hardships favors the applicant" or "where the probability of success if high." *Id.* (quoting *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). Here, as demonstrated *supra* Section I, there are significant and substantial questions concerning many critical aspects of this Court's Order.

B. Liberty Counsel and Lindevaldsen Will Suffer Irreparable Injury Absent a Stay.

Forcing Liberty Counsel and Lindevaldsen to submit to discovery and further litigation in a forum in which there are substantial questions concerning the constitutionality of this Court's exercise of jurisdiction over them would work irreparable injury on these Defendants. It is axiomatic that a defendant should not and cannot be forced to litigate in a forum in which he lacks

sufficient minimum contacts. *See, e.g.*, *Fox v. Boucher*, 794 F.2d 34, 37 (2d Cir. 1986). Indeed, it is black letter law that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). Forcing a defendant to submit to discovery in a forum where personal jurisdiction is constitutionally suspect and the subject of merited dispute would violate this basic principle of due process and impose irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the loss of constitutional rights "unquestionably constitutes irreparable injury"). Indeed, submitting to discovery always imposes irreparable injury when one should be absolved of that burden by constitutional protections. *In re World Trade Ctr.*, 503 F.3d at 170. A stay is appropriate here.

C. Jenkins Will Not Be Harmed By A Stay.

Jenkins will not be harmed by a stay of proceedings when potentially dispositive questions are at issue in the appeal. *See, e.g.*, *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367 (S.D.N.Y. 2002) (staying discovery pending resolution of potentially dispositive issues does not prejudice plaintiff); *Rivera v. Heyman*, No. 96 Civ. 4489(PKL), 1997 WL 86394, *2 (S.D.N.Y. Feb. 27, 1997) ("A stay pending a determination of a dispositive motion that potentially eliminates the entire action will neither substantially nor unduly delay the action, should it continue"). Jenkins cannot put forward any affirmative demonstration that a stay of the proceedings against Liberty Counsel and Lindevaldsen will cause her undue injury. *Niv v. Hilton Hotels Corp.*, No. 06 Civ. 7839(PKL), 2007 WL 510113, *2 (S.D.N.Y. Feb. 15, 2007). A stay is thus appropriate.

D. The Public Interest Favors A Stay.

Ensuring that defendants are protected by the constitutional defenses to which they are entitled is always in the public interest. *In re World Trade Ctr.*, 503 F.3d at 170. Indeed, protecting constitutional rights is "always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012). A stay is warranted.

CONCLUSION

For the foregoing reasons, this Court should certify its Order for interlocutory appeal and issue a stay of proceedings against Liberty Counsel and Lindevaldsen pending resolution of that interlocutory appeal.

Dated: October 13, 2017

Respectfully submitted,

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