IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ROY COCKRUM, et al.,

Plaintiffs,

v.

DONALD J. TRUMP FOR PRESIDENT, INC.,

Defendant.

Case No. 3:18-cv-484-HEH

Date: November 16, 2018

BRIEF OF LAW PROFESSORS ERWIN CHEMERINSKY AND RICH SCHRAGGER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

Victor Glasberg (VA Bar No. 16184)
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
703.684.1100
Fax: 684.1104
vmg@robinhoodesq.com

Vincent Levy (*pro hac vice* pending)
Gregory Dubinsky (*pro hac vice* pending)
Evan H. Stein (*pro hac vice* pending)
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue, 14th Floor
New York, NY 10017
646-837-5151
vlevy@hsgllp.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTERESTS OF *AMICI CURIAE*

Amici submit this brief in support of Plaintiffs.[1] *Amici* are Erwin Chemerinsky, Dean and Jesse E. Choper Distinguished Professor of Law at Berkeley Law, and Rich Schragger, Perre Bowen Professor of Law at the University of Virginia School of Law. As professors who teach and write on constitutional law, they have an interest in the correct application of First Amendment law.

Amici take no position on the plausibility of Plaintiffs' claim that Defendants engaged in the conduct alleged in the complaint, or that the alleged facts, if true, state plausible claims under state and federal law. Instead, although *Amici* maintain various views on the scope of the First Amendment, they submit that the Court should reject Defendant's assertion that the Constitution immunizes the various conspiracies alleged in the complaint.

[1] *Amici* affirm that no person, other than *amici* and their counsel, authored this brief in whole or in part; and that no person, other than *amici* and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

The Free Speech Clause of the First Amendment embodies "the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It was adopted to safeguard the right to speak truth to power without fear of censorship, retribution, or punishment, even where the government disagrees with the speaker's views.

The Trump Campaign asserts that these fundamental protections accord it immunity from liability here because then-candidate Donald J. Trump and others acting on the Campaign's behalf are being sued for words spoken during an election. Mere words, the Campaign maintains, cannot give rise to liability under the First Amendment if the words are truthful.

With respect, there is no First Amendment right to conspire with a foreign government to influence elections. Or to conspire with foreign agents to steal and disseminate a political opponent's confidential information. Or to conspire to intimidate members of an opposition party. Or to intentionally injure a rival's supporters on account of their electoral preferences.

The Campaign's arguments to the contrary warp the meaning of the First Amendment. Most fundamentally, there is no support for the Campaign's assertion that the First Amendment shields its conduct because words are at issue. Criminal and tort laws can be valid even where the alleged wrongdoer used words to commit the offense: "[I]t has never been deemed an abridgment of freedom of speech," the Supreme Court has held, "to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

And the Campaign fails in its effort to manufacture a constitutional immunity to conspire with foreign powers to influence elections or harm private citizens. *Bartnicki v. Vopper*, the primary case upon which the Campaign relies, concerned a unique set of facts involving the publication of stolen information; the Court held that the publisher of information was immune from liability because (a) the disseminator was "not involved" and "played no part" in the "illegal" theft of information, and (b) the information at issue was of paramount public concern, while "the speakers' legitimate privacy expectations [were] unusually low." *Bartnicki v. Vopper*, 532 U.S. 514, 525, 529 (2001); *id.* at 540 (Breyer, J., concurring). The Court stressed these unique facts repeatedly, as did Justice Breyer, joined by Justice O'Connor, when he explained in a separate opinion why the two were supplying the votes needed to form a majority. *Id.* at 525, 528-30, 535; *see id.* at 535-41 (Breyer, J., concurring); *see also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) ("[I]f a newspaper *lawfully obtains* truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." (emphasis added)).

Plaintiffs' allegations remove this case from *Bartnicki*'s protections. Unlike the *Bartnicki* defendants — who "found out about the interception only after it occurred," "never learned the identity of the persons or persons who made the interception," and obtained "access to the information on the tapes . . . lawfully," 532 U.S. at 525 — the Campaign allegedly conspired with Russia and WikiLeaks to disseminate emails obtained by Russia in a then-ongoing hack so as to intimidate and threaten supporters of the Campaign's rival, among other misconduct. The Campaign, it is alleged here, directed Russian operatives' dissemination of unlawfully obtained information to WikiLeaks as part of a *quid pro quo* deal with Russia. Plaintiffs' allegations,

accepted as true for purposes of the First Amendment analysis, take the Campaign far outside of *Bartnicki*'s immunity for the "law-abiding possessor of information." 532 U.S. at 529.

That should be enough to take this case out of *Bartnicki*'s ambit. But there is more. *Bartnicki* reflects the Constitution's "core" protections for speech of public concern, while the torts here involved the alleged dissemination of private information. Meanwhile, the Campaign makes no argument that the Campaign's alleged co-conspirators (WikiLeaks and Russian intelligence) — the only persons who actually disclosed any information here — themselves had First Amendment rights. That is unsurprising, because the First Amendment does not protect the efforts of foreign powers, or their agents, to influence elections. *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012).

If the Court reaches the First Amendment questions presented here, it should hold, without any trepidation, that the First Amendment does not immunize the conduct alleged in the complaint.

ARGUMENT

Amici evaluate the First Amendment immunity urged by the Campaign's motion by taking Plaintiffs' allegations as true and by assuming they plausibly allege a violation of state and federal tort and criminal law. The core allegations here are that the Campaign entered into a conspiracy with the Russian Government and WikiLeaks (a) to intimidate voters from "support or advocacy" for electors for President and to "injure" such voters "on account of such support or advocacy," in violation of 42 U.S.C. § 1985(3); (b) to interfere with or obstruct the lawful electoral functioning of the government, in violation of 18 U.S.C. § 371; and (c) to commit various state torts, including public disclosure of private facts. Per Plaintiffs, the Campaign, in furtherance of that conspiracy, itself violated various provisions of federal and state law,

including by accepting information known to have been obtained through unauthorized access to a computer network, 18 U.S.C. § 1030(a)(2); and by violating the ban on contributions or donations by foreign nationals in federal elections and by soliciting, assisting, or accepting such contributions and donations, 52 U.S.C. § 30121(a); 11 C.F.R. § 110.20(h). *Amici* are of the view that there is no First Amendment immunity to engage in the conduct alleged here.

I. THE CONSTITUTION DOES NOT PROTECT SPEECH INTEGRAL TO CRIMINAL ACTIVITY

At the outset, it is well-settled that the First Amendment does not protect "speech integral to criminal conduct." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (collecting authorities). The federal and state governments may lawfully prohibit injurious misconduct, and provide a civil or criminal remedy, even where a defendant's speech is implicated. *New York v. Ferber*, 458 U.S. 747, 761-62 (1982); *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) ("First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-39 (2010) (material support of terrorism may be made a crime consistent with the First Amendment).

Thus, the government may constitutionally punish and criminalize conduct even where speech is "the very vehicle of the crime itself." *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970). The Constitution does not immunize "advocacy intended, and likely, to incite imminent lawless action," "obscenity," "defamation," "speech integral to criminal conduct," "fighting words," "child pornography," "fraud," "true threats," and "speech presenting some grave and imminent threat the government has the power to prevent." *Alvarez*, 567 U.S. at 717 (plurality opinion). And so, federal law has long made it a crime to engage in fraud, blackmail,

perjury, intimidation, and coercion, among other misconduct effectuated through words.[2] Federal law also bars the disclosure of all sorts of protected information, such as the leaking of classified information.[3]

It is also established that conspiracies, although they also may be effectuated through speech, can be punished consistently with the First Amendment. *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990) ("Appellants were convicted of the act of conspiracy . . . . Their conduct was not protected by the First Amendment merely because, in part, it may have involved the use of language."). Thus, the common law has long prohibited all sorts of illicit agreements, and federal law likewise prohibits conspiracies although they may be evidenced by or formed with words. *E.g.*, 18 U.S.C. §§ 241 (conspiracy against exercise of civil rights) 371-72 (conspiracy to commit offense against the United States or to impede officers); 1030(b) (conspiracy to commit computer fraud).

As a result, the First Amendment does not protect the Campaign from liability for conduct that violates federal law or that is tortious under state law merely because the Campaign's illegalities were effectuated with words.

---

[2] *E.g.*, 18 U.S.C. §§ 35 (conveying categories of false information); 115 (threats of violence against public officials and their families); 157 (fraudulent representations in bankruptcy); 201(c) (bribery of public officials and witnesses); 210-11 (offers, and acceptance of offers, to procure appointive public office); 224 (bribery in sporting contests); 226 (bribery affecting port security); 550 (false claim for refund of duties); 594 (intimidation of voters); 610 (coercion of political activity); 793-798 (espionage); 872 (extortion by federal officers); 873 (blackmail); 878 (threats and extortion against foreign officials); 1001 (false statements to government officials); 1027 (false statements in relation to ERISA documents); 1343 (wire fraud); 1621 (perjury).

[3] *E.g.*, 18 U.S.C. §§ 605 (barring "furnish[ing] or disclos[ing]" for "political purpose" any "list of names" of persons receiving funds for work relief to political candidates); 798 (disclosure of classified information); 1831 (dissemination of trade secrets for benefit of foreign governments); 1832 (dissemination of trade secrets); 1902 (disclosure of crop information); 1905-07 (certain types of confidential information); 2710 (disclosure of video tape rental or sale records); 42 U.S.C. § 1320d-6 (criminal penalties for disclosing "individually identifiable health information" without authorization); 7 U.S.C. § 8791(b)(2) (information provided by agricultural operations to the Department of Agriculture); 29 U.S.C. § 2008 ("information obtained during a polygraph test").

II. *BARTNICKI* DOES NOT IMMUNIZE THE CAMPAIGN'S CONDUCT

Bartnicki announced a narrow constitutional immunity to publish newsworthy information lawfully obtained by the publisher, even where a third party had previously and unlawfully obtained the later-published information. The Supreme Court did not create an immunity to conspire with foreign actors to steal and disclose harmful private information, to influence elections, or to engage in any of the other misconduct alleged here.

A. *Bartnicki* Turned On The "Special Circumstances" In That Case

In *Bartnicki*, an "unidentified person" intercepted and recorded a telephone call describing plans of violence by two people involved in negotiations between a teachers' union and a school board. 532 U.S. at 518. Yocum, a person opposed to the union, but with no connection to the interception, found a tape of the recorded conversation in his mailbox and relayed it to Vopper, a radio commentator, who played it on air. *Id.* at 519. Both individuals "found out about the interception only after it occurred" and "never learned the identity of the person or persons who made the interception." *Id.* at 525. Nor did either individual know how the tape had come to be in Yocum's mailbox. *Id.* at 519-20. The allegations in the complaint stated only that the radio commentator (and others) "knew or had reason to know" that the conversation had been illegally recorded. *Id.* It was undisputed that "their access to the information was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." *Id.* at 525.

Thus, the "narrow" question addressed in *Bartnicki* was whether the First Amendment permits punishment of "a law-abiding possessor of information" on a matter of public concern who discloses that information, where the disseminator had *absolutely no* involvement with, knowledge of, or connection to the wrongdoer — where the disseminator is "a stranger" to the

wrongdoer and the illegal conduct. *Id.* at 529, 535. Stressing the "limited principles that sweep no more broadly than the appropriate context of the instant case," the Court held that it would violate the First Amendment to punish the publication in that case. *Id.* at 528-29. The Court emphasized not only the unique circumstances through which the publisher had obtained the information, but also the public interest in the information disclosed.

In providing the dispositive votes for the Court's 6-3 decision in *Bartnicki*, Justices Breyer and O'Connor also went out of their way to stress the very "special circumstances" of that case:

> (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely, a threat of potential physical harm to others.

Id. at 535-36 (concurring op.). Thus, they emphasized that "the broadcasters here engaged in *no unlawful activity* other than the ultimate publication of the information another had previously obtained" and "neither encouraged nor participated *directly or indirectly* in the interception." *Id.* at 538 (emphasis added). They stressed the unique nature of the information disclosed. *Id.* at 540. And they explained, in closing, that they "would not extend th[e] [Court's] holding beyond" the facts of that case, for members of the media or anyone else. *Id.* at 541.

B. The Campaign's Alleged Involvement In The Wrongful Theft Of Information Takes This Case Out Of *Bartnicki*'s Protections

Plaintiffs' allegations, which *Amici* assume to be true for purposes of evaluating the First Amendment immunity claimed by the Campaign, thus remove this case from any conceivable proximity to *Bartnicki*'s protections. That is so for the simple reason that the complaint alleges that the Campaign *was* involved in, knew about, and participated in the illegal scheme as it was ongoing and violated laws unrelated to publication. That means the first of the two "special circumstances" on which *Bartnicki* turned is entirely absent.

Thus, Plaintiffs allege that the Campaign — "alerted" by the Kremlin "that it was in possession of stolen DNC emails" as the Russian hacks were ongoing — "agreed that Russia would release the stolen emails in order to help the Campaign and the Campaign would provide political benefits to Russia in return." Amended Complaint, Dkt. 8, ¶ 2 ("Compl."). "At the direction of" Russia and the Campaign, allegedly, "the emails were then released by WikiLeaks, which joined the conspiracy." *Id.* ¶ 2. In return, the Campaign allegedly "followed through on its promise to provide benefits to the Russian regime." *Id.*

Unlike the defendants in *Bartnicki*, therefore, the Campaign is alleged to have conspired with those who stole the information that was disclosed while the theft was ongoing. The Campaign, to paraphrase *Bartnicki*, allegedly "played [a] part" in the unlawful gathering of information; "found out about the interception" *before* "it occurred"; "learned the identity of the person or persons who made the interception"; "encouraged," "participated directly or indirectly"; and "ordered, counseled, . . . or otherwise aided or abetted the interception [and] the later delivery of the [stolen information] by the interceptor to an intermediary." *Bartnicki*, 532 U.S. at 519, 525; *id.* at 538 (Breyer, J., concurring). The Campaign, in other words, is alleged to be a joint tortfeasor and co-conspirator, not an innocent bystander. The Campaign's conduct is therefore not privileged under the First Amendment.

Quigley v. Rosenthal is instructive. 327 F.3d 1044 (10th Cir. 2003). There, the Tenth Circuit declined to immunize the Anti-Defamation League's ("ADL") publication of conversations, which the ADL had obtained from the intercepting party (the Aronsons), even though the ADL had done "*nothing* to 'procure'" them. *Id.* (emphasis added). *Bartnicki* was inapposite, the Tenth Circuit held, because the ADL was not a stranger to the interception:

> the ADL, from the time of its first contacts with the Aronsons in late October 1994, *knew* that the Aronsons were the persons responsible for recording the

> Quigleys' telephone conversations. Further, it was uncontroverted that the ADL *knew*, during November and early December 1994, that the Aronsons were *continuing* to record the Aronsons' telephone conversations.

Id. at 1067 (emphasis added). The Tenth Circuit distinguished *Bartnicki* on the ground that the disclosing party in *Bartnicki* had learned of the interception *after* it had occurred and never learned the interceptor's identity. Here, to repeat, the Campaign is alleged to have learned about the hacking from the Russians while it was ongoing, agreed to participate in a conspiracy to use the hacked emails to its advantage, and facilitated the disclosure of emails by a third party only after providing the Russian government with assurances. Compl. ¶¶ 149, 154-55, 261.

C. *Bartnicki* Provides No Protection For The Public Disclosure Of Private Facts

The second "special circumstance" on which *Bartnicki* turned is also absent. Unlike *Bartnicki* — which involved the "publication of intercepted information of a special kind" about the threatened use of violence in a public negotiation between a union and a government body, 532 U.S. at 540 (Breyer, J., concurring) — this case concerns the dissemination of private information not alleged to be important to the political or social discourse in any respect.

Bartnicki's immunity was rooted in a long line of cases reflecting the "overriding importance" of "our profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." *Id.* at 534 (emphasis added) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Those cases recognize that civil remedies and criminal statutes must sometimes yield when paramount First Amendment rights and interests are at stake. For example, *New York Times v. Sullivan*, on which *Bartnicki* relied, famously requires a showing of "actual malice" before subjecting a publisher to liability for libel in "an action brought by a public official against critics of his official conduct" on a "major public issue[]." 376 U.S. at 268, 271, 281. To hold otherwise, the Court reasoned, would be to

significantly curtail political and social discourse and to disregard the Framers' concern that the government ought not be able to impose punishment for seditious libel.

In line with those precedents, *Bartnicki* sought to carefully balance and apply to the facts of that case two "interests of the highest order — on the one hand, the interest in the full and free dissemination of information *concerning public issues*, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech." 532 U.S. at 518 (emphasis added). The Supreme Court's animating concern was, accordingly, to protect speech regarding "matter[s] of public concern" — that is, the kind of speech that "implicates the core purposes of the First Amendment" — while balancing competing interests. *Id.* at 525, 533-34.

Similarly, the two concurring Justices emphasized "the special kind" of information at issue in *Bartnicki*, stressing that "the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high." *Id.* at 540 (Breyer, J., concurring). Indeed, the participants in the conversation in *Bartnicki* did not have a significant interest in keeping their threats of physical harm private, while withholding the information from the public would significantly curtail the public discourse. *Id.*[4]

Bartnicki thus "does not stand for the proposition that anyone who has lawfully obtained truthful information of public importance has a First Amendment right to disclose that information." *Boehner v. McDermott*, 484 F.3d 573, 577 (D.C. Cir. 2007) (en banc). And where only *private* information is at stake, *Bartnicki* has no application at all.

[4] In turn, the dissenting Justices in *Bartnicki* (Chief Justice Rehnquist, joined by Justices Scalia and Thomas) would have allowed punishment of "the involuntary broadcast of personal conversations." *Id.* at 554. The dissent emphasized the "significant privacy concerns" raised by the fact that "millions of important and confidential conversations [now] occur through a vast system of electronic networks." *Id.* at 541.

Again, therefore, Plaintiffs' allegations take this case outside of *Bartnicki*'s protections. In contrast to *Bartnicki*, this case concerns the disclosure of "private information" that allegedly did not "involv[e] any public policy matter at issue in the [2016] campaign"; the disclosed information includes Plaintiffs' social security numbers, home addresses, and private correspondence, including correspondence about personal health matters. Compl. ¶ 26; *see id.* at ¶¶ 10, 11, 18-27. In *this* case, "[a]lthough a handful of the released emails unrelated to Plaintiffs received a significant amount of news coverage, the vast majority of the tens of thousands of emails and attachments dumped on the Internet in furtherance of the conspiracy were not of public interest." Compl. ¶ 26. That is, again, enough to make *Bartnicki* entirely inapplicable.

Amici will not repeat Plaintiffs' persuasive explanation why the Campaign is wrong to focus solely on the "aggregate" in ascertaining newsworthiness, Pltfs. Br. 7-8, 13-15, but *Amici* do pause to note that the Campaign's proposed approach is highly concerning in an era when, with the click of a mouse, any person can blast unlimited amounts of data to the world. If one drop of newsworthiness in a vast batch of information suffices to immunize the release of the most private and intimate facts of innocent bystanders, then "the fear of public disclosure of private conversations might well have a chilling effect on private speech," in a manner deleterious to the "privacy of communication [that] is essential if citizens are to think and act creatively and constructively." *Bartnicki,* 532 U.S. at 533 (quotation marks omitted); *see also id.* at 554 (Rehnquist, C.J., dissenting) (concerned that Court's holding would chill private speech of the "millions of people" who, in 2001, "communicate[d] electronically on a daily basis"). The First Amendment does not mandate that result, and there is every good reason to require publishers of important information to take care to omit unnecessary private details that may injure private bystanders.

D. The Involvement Of Foreign Actors Is Another Reason Not To Apply *Bartnicki*

Finally, Plaintiffs' allegations of a conspiracy with hostile foreign actors provide another reason not to immunize the Campaign's conduct. Plaintiffs allege (and *Amici* assume) that WikiLeaks — described by the U.S. Secretary of State as "a non-state hostile intelligence service often abetted by state actors like Russia," Compl. ¶ 176 — obtained and disclosed the private emails at issue here as part of a conspiracy with Russia and the Campaign, and was acting as Russia's agent in so doing. The Campaign is not alleged to have itself disclosed the information forming the basis of the suit.

The Campaign does not argue, nor could it under the prevailing case law, that Russia or its foreign agents, acting outside the United States, had a First Amendment right to obtain unlawfully and disclose publicly the private information at issue in this case. Nor can the Campaign plausibly argue that a computer hack by agents of a foreign power to unlawfully obtain and disclose information from the Democratic National Committee (as is alleged here) furthers "the core purposes of the First Amendment." *Bartnicki*, 532 U.S. at 533-34.

As then-Judge Kavanaugh explained in a case involving the First Amendment rights of foreign citizens present in the United States, "the government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections." Indeed, "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of [U.S.] democratic self-government." *Bluman*, 800 F. Supp. 2d at 288. "It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political

process." *Id.*[5]; *see Citizens United v. FEC*, 558 U.S. 310, 423 (2010) (Stevens, J., dissenting) (without contradiction from majority opinion, explaining that "we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals").

* * * *

In short, *Bartnicki* is facially inapposite because the complaint alleges that the Campaign was a co-conspirator and joint tortfeasor; it was not an innocent bystander. Further, the complaint alleges torts based on the disclosure of private facts — the privacy interests at stake cut strongly against the disseminator, as every member of the *Bartnicki* Court recognized, 532 U.S. at 518; *id.* at 540 (Breyer, J., concurring); *id.* at 541-42 (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.). And the allegations implicate the most compelling interests in favor of regulation in our constitutional order — "national security" and the prevention of "foreign influence over the U.S. political process," *Bluman*, 800 F. Supp. 2d at 283-84, 288.

On the other side of the constitutional ledger, First Amendment immunity for the Campaign's alleged involvement in a conspiracy to disseminate confidential personal information by foreign actors would not further the fundamental interest in the "*national* commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 532 U.S. at 534 (emphasis added) (quoting *Sullivan*, 376 U.S. at 270). Evaluating the constitutional interests at issue as *Bartnicki* instructs, the Court should reject the Campaign's attempt to use the First Amendment as a shield against Plaintiffs' allegations.

[5] The Supreme Court unanimously affirmed the *Bluman* judgment granting the Federal Election Commission's motion to dismiss against a suit filed by foreign citizens seeking to become involved in "political contributions and express-advocacy expenditures." 565 U.S. 1104; 800 F. Supp. 2d at 288.

III. PERMITTING THIS CASE TO PROCEED DOES NOT THREATEN LEGITIMATE PRESS FUNCTIONS

The Campaign would have the Court believe that allowing this case to proceed would threaten the very foundation of the First Amendment. There is no such risk.

The existing regime gives the press no license to steal information,[6] and yet it ensures that the press has the breathing room needed to protect the core values enshrined in the First Amendment. Thus, so long as the press lawfully obtains information, even if that information was illegally obtained by a third party, it cannot be held liable when it publishes newsworthy information. Nothing about this case threatens to alter that firmly established regime. Although a "fundamental purpose of the First Amendment is to foreclose governmental control or manipulation of the sentiments uttered to the public," *Main Rd. v. Aytch*, 522 F.2d 1080, 1087 (3d Cir. 1975), that purpose is furthered — not hindered — by punishing those who engage in a conspiracy with the thief to disseminate stolen information to injure specific persons.

It is important to remember that this case is *not* about a prior restraint. *Cf. New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (upholding publication of information on a matter of public interest in the face of a prior restraint). The information at issue in this case has already been disclosed to the public. Whether the Campaign, through WikiLeaks, could have been stopped from disclosing the information in the first place consistent with the First Amendment is simply not the question here. *See Latino Officers Ass'n, N.Y., Inc. v. City of New York*, 196 F.3d 458, 465 (2d Cir. 1999) (drawing distinction between prior restraint and punishment "after the fact"); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1332

[6] *See Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct . . . .").

(11th Cir. 2001) (same). The only question is whether a domestic actor can be held liable for conspiring with a foreign power that unlawfully acquires private information to disseminate that information for the purpose of injuring political opponents. Punishing this conduct is fully consistent with the Supreme Court's careful instructions and will not discourage press organizations from undertaking legitimate, legal fact gathering or from disclosing important, newsworthy information that is the lifeblood of our open political discourse.

CONCLUSION

The appropriate balance is the one the Supreme Court struck in *Bartnicki*. Organizations that wish to disclose truthful information on matters of public interest, where that information was unlawfully obtained by others, may do so without fear of punishment so long as (1) they are "strangers" to the malefactors who acquired the information, (2) they obtain access to that information without themselves breaking the law, and (3) the information is important to the public discourse. Taking the allegations in the complaint as true, the Campaign fails on all counts. There is even further reason not to apply *Bartnicki* here, where Plaintiffs allege that the Campaign conspired with hostile foreign actors who themselves stole and disclosed the information.

Dated: November 16, 2018

Respectfully submitted,

By: /s/ Victor Glasberg

Victor Glasberg (VA Bar No. 16184)
VICTOR M. GLASBERG & ASSOCIATES
121 S. Columbus Street
Alexandria, Virginia 22314
Telephone: (703) 684-1100
Facsimile: (703) 684-1104
Email: vmg@robinhoodesq.com

Vincent Levy (*pro hac vice* pending)
Gregory Dubinsky (*pro hac vice* pending)
Evan H. Stein (*pro hac vice* pending)
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue, 14th Floor
New York, New York 10017
Telephone: (646) 837-5151
Facsimile: (646) 837-5150
Email: vlevy@hsgllp.com

Attorneys for Amici Curiae