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

REPLY BRIEF IN SUPPORT OF DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S MOTION TO DISMISS

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TABLE OF CONTENTS

Page

ARGUMENT

Plaintiffs lack a persuasive response to the legal arguments made in support of the Campaign's motion to dismiss. Most importantly, Plaintiffs fail to overcome the Campaign's First Amendment public-concern defense and fail to show that their claims comport with Virginia's choice-of-law rules. The Court should therefore dismiss their claims.

I. Plaintiffs' Claims Warrant Dismissal Under *Bartnicki v. Vopper*

Under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the First Amendment protects a speaker's right to disclose stolen information if (1) the speaker did not participate in the theft and (2) the information deals with matters of public concern. The Campaign satisfies both elements. (Mem. 4–9.) Plaintiffs try to distinguish *Bartnicki*, but each distinction they offer is meritless.

First, Plaintiffs assert that the First Amendment public-concern defense protects the disclosure of a "single" communication about a public issue, but does not protect the disclosure of "thousands of communications." (Opp. 7.) But this distinction contradicts precedent. In *New York Times Co. v. United States*, 403 U.S. 713 (1971)—the Pentagon Papers Case—the Supreme Court held that the First Amendment protected the right of *The New York Times* to publish a "vast" amount of stolen material—"47 volumes" of stolen government documents, to be exact. *Id.* at 759 (Blackmun, J., dissenting). In *Bartnicki*, the Court cited and relied on the Pentagon Papers Case, explaining that it "upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party." 532 U.S. at 514. Both the Pentagon Papers Case and *Bartnicki*'s reliance on it show that the First Amendment protects the right to protect "thousands" of stolen documents no less than the right to publish one stolen document.

In addition, Plaintiffs' theory would imperil longstanding and commonplace journalistic practices. Newspapers have published large collections of stolen documents for hundreds of years. In 1773, Benjamin Franklin and Samuel Adams published a collection of stolen letters be-

longing to the Governor of Massachusetts Bay in a Boston newspaper. *See* John Alexander, *Samuel Adams: The Life of an American Revolutionary* 150–52 (2011). In 1971, *The New York Times* and *The Washington Post* published the Pentagon Papers—thousands of stolen government documents about the Vietnam war. *New York Times*, 403 U.S. 713. In 2015, the International Consortium of Investigative Journalists published the Panama Papers—over ten million stolen documents revealing the financial dealings of public officials and rich private citizens. https://bit.ly/2DWWBKl. And in 2018, *The New York Times* published a story about President Trump's finances, drawing from "tens of thousands of pages of confidential records" that were improperly obtained. https://nyti.ms/2xSIq8K. On Plaintiffs' theory, these disclosures would lose constitutional protection just because they involve large numbers of documents.

Plaintiffs worry that protecting large-scale disclosures "would declare open season on the private communications of any political, public interest, media, and corporate organization in existence." (Opp. 8.) *Bartnicki* already put that concern to rest: "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it" (*i.e.*, the person who actually steals the private communications). 532 U.S. at 529. Indeed, multiple statutes—including the Wiretap Act (18 U.S.C. §§ 2511 *et seq.*) and Stored Communications Act (18 U.S.C. §§ 2701 *et seq.*)—already make such theft illegal. The only question in this case is whether, *after* someone else has already stolen the information, an innocent third party may be prohibited from publishing that information even though it had no hand in the initial illegality. *Bartnicki* answers that question: No. *See* 532 U.S. at 529–30. Accordingly, there is nothing to Plaintiffs' counterintuitive notion that the *more* speech is at issue, the *less* protection it receives.

Second, Plaintiffs assert that *Bartnicki* protects speech only where each individual disclosed fact has "some substantial relevance to a matter of legitimate public interest." (Opp. 14.)

The Campaign has already explained, however, that this approach contradicts controlling precedent. (Mem. 6–7.) The Supreme Court and Fourth Circuit have ruled that the public-concern test turns on "the overall thrust and dominant theme" of the speech, not on the character of each individual statement. *Snyder v. Phelps*, 562 U.S. 443, 454 (2011); *see, e.g.*, *Florida Star v. BJF*, 491 U.S. 524, 536 (1989) ("the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import"); *Snyder v. Phelps*, 580 F.3d 206, 225 (4th Cir. 2009) (speech is protected if the disclosure's "general message" concerns public matters).

Moreover, Plaintiffs' test would undermine vital First Amendment values. "To require the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public." *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 475 (Tex. 1995).

Plaintiffs claim that this holistic analysis is appropriate only when the disclosures "concern a common subject." (Opp. 7). That is not so. In *Snyder*, protesters put up signs addressing "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy"—as well as the fate of an individual fallen soldier. *Snyder*, 562 U.S. at 454. These signs did not "concern a common subject," yet the Court evaluated them holistically. *See id.* Anyway, the disclosures here did concern a "common subject": the DNC's activities during the 2016 election campaign.

Plaintiffs also say that a holistic approach would enable speakers to "avoid liability" by including "*something*" of public concern in an "enormous" disclosure. (Opp. 8.) That is mistaken. The public-concern test asks whether the "dominant theme" of the disclosure addresses public

issues—not just whether there is something, somewhere, addressing public issues. *Snyder*, 562 U.S. at 454. The Campaign has shown that the WikiLeaks disclosure is *predominantly* public—not just that there is something political tucked away somewhere in one of the emails. (Mem. 8.)

In all events, the Campaign wins even under Plaintiffs' incorrect standard. Mr. Cockrum and Mr. Schoenberg complain about the release of the DNC's "correspondence with donors." (Am. Compl. ¶ 18.) But *The New York Times* reported that the DNC's correspondence with donors revealed "the elaborate, ingratiating, and often bluntly transactional exchanges necessary to harvest hundreds of millions of dollars from the party's wealthy donor class." (Mem. Ex. 5.) Mr. Comer complains about the release of "[his] emails." (Am. Compl. ¶ 11.) But news outlets have reported that Mr. Comer's emails showed DNC staffers asking the White House "to reward donors with slots on boards and commissions" (https://bit.ly/2atzrlB), bowing to the influence of "lobbyists" (https://bit.ly/2KglBBc), and "appearing to mock a black executive assistant's name" (https://bit.ly/2QWYZYQ). In short, it is not just the disclosure as a whole that addresses public issues; Plaintiffs' specific emails do so, too.

Third, Plaintiffs assert that the public-concern defense protects speakers with good motives, but not speakers who disclose information for the "purpose of political intimidation." (Opp. 6.) This intent-based distinction contradicts *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), in which the Supreme Court squarely held that the public-concern test turns on the character of the speech, not the motives of the speaker. The Court explained that, "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Id.* at 880. Even though "a bad motive may be deemed controlling for purposes of tort liability in other areas of the law," "the First Amendment prohibits such a result" in the area of debate about matters of public concern. *Id.* at 881.

Plaintiffs' intent-based test also contradicts the broader principle that First Amendment protection turns on the nature of the speech rather "the intent of the speaker." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.) (*WRTL*); *see Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993); Eugene Volokh, *The Freedom of Speech & Bad Purposes*, 63 UCLA L. Rev. 1366 (2016). "An intent-based standard blankets with uncertainty whatever may be said, and offers no security for free discussion." *WRTL*, 551 U.S. at 468. It "open[s] the door" to discovery and trial about the speakers' motives; it "puts the speaker wholly at the mercy of the varied understanding of his hearers"; and it "could lead to the bizarre result that identical [disclosures] could be protected speech for one speaker, while leading to [civil liability] for another." *Id.* at 468–69.

In any event, the Campaign would prevail even under a motive-based test, since it had *no* motive, illicit or otherwise, to harm Plaintiffs. Indeed, Plaintiffs' own allegations show that the conspirators made the disclosure for a lawful, campaign-related purpose: "help[ing] the Trump Campaign" and "harm[ing] the DNC and … Hillary Clinton" by disclosing "'dirt' on Secretary Clinton." (Am. Compl. ¶¶ 2, 15.) The "timing of the DNC email release"—"just prior to the DNC convention"—confirms that the disclosure served "to benefit the Trump Campaign." (Am. Compl. ¶ 181.) In addition, the Amended Complaint alleges that Mr. Trump subsequently highlighted the disclosures "in the last months of the campaign"—for example, by discussing "the horrible things that have come out about Hillary" and the ways in which the DNC "was so bad to Sanders." (Am. Compl. ¶¶ 188–89.) Plaintiffs do not allege that the Campaign had ever heard about Mr. Cockrum, Mr. Schoenberg, or Mr. Comer; that the Campaign was even aware that the released emails included their personal information; that the Campaign in any way timed the release to harm those three individuals; or that Mr. Trump ever spoke about those three individuals'

details on the campaign trail. Nor is it plausible to allege that Russia, WikiLeaks, and the Trump Campaign entered into a complex and far-reaching global conspiracy for the purpose of harming these three individuals. Plaintiffs' own allegations thus establish that the disclosure was at the core of the First Amendment: The disclosure served to reveal negative information about an opposing political candidate, not to "intimidate" Mr. Cockrum, Mr. Schoenberg, or Mr. Comer.

Fourth, Plaintiffs next claim that "*Bartnicki* does not apply" because the Campaign allegedly violated bribery laws, sanctions laws, and campaign-finance laws by publishing the stolen documents. (Opp. 8.) Even if that were so, it would hardly distinguish *Bartnicki*, because the disclosure there also violated "federal and state statutes." 532 U.S. at 525. Indeed, the whole point of that case is that the punishment of a disclosure of public-concern information violates the First Amendment if the speaker "played no part in the *illegal interception*" and was "not involved in the *initial illegality*." *Id.* at 525, 529 (emphasis added). In other words, a plaintiff must show that the speaker helped obtain the stolen documents illegally. Yet Plaintiffs do not allege that the Campaign was involved in the initial illegal acquisition of their emails (*i.e.*, the hack). Rather, they claim merely that it was involved in other allegedly illegal behavior during the course of the later publication of those emails. Again, that is plainly inadequate, because *Bartnicki* requires participation in the *illegal acquisition*. It does not, as Plaintiffs maintain, create an "active wrongdoer" exception to First Amendment protections. (Opp. 8.)

In addition, Plaintiffs have sued only for public disclosure of private facts, intentional infliction of emotional distress, and violation of § 1985(3). They have not sued for—and do not have standing to sue for—violation of bribery laws, sanctions laws, and campaign-finance laws. So all that matters is whether *Bartnicki* applies with respect to the particular legal claims that Plaintiffs have asserted in this case. There is no serious question that it does.

Finally, Plaintiffs assert that "*Bartnicki* does not govern the constitutionality of § 1985(3)" because the statute is a "content-neutral regulation." (Opp. 29.) This characterization of § 1985(3) makes no difference, because the statute in *Bartnicki* was "a content-neutral law of general applicability. … The statute d[id] not distinguish based on the content of the intercepted conversations, [but rather on] the fact that they were illegally intercepted." 532 U.S. at 526. *Bartnicki* thus applies irrespective of whether § 1985(3) is content-neutral.

II. Plaintiffs Fail To Plead Valid Tort Claims

A. Virginia's choice-of-law rules foreclose Plaintiffs' tort claims

The Campaign has shown that Virginia's choice-of-law rules require the Court to apply the law of the place of the wrong (*i.e.*, the place where the alleged wrongdoing occurred), that the alleged wrongdoing here occurred in New York, and that New York rejects each of the tort theories on which Plaintiffs rely. (Mem. 11–14.) Plaintiffs' sole response is that Virginia defines the place of the wrong as the "jurisdiction where the plaintiff suffered the greatest injury, usually his domicile." (Opp. 10). That response is meritless and conflicts with binding precedent.

In *Milton v. IIT Research Institute*, 138 F.3d 519 (4th Cir. 1998), the Fourth Circuit squarely held that the place of the wrong is the place of the wrongful act, not (as Plaintiffs would have it) the place where the plaintiff suffered the greatest injury. The court explained that "the word 'tort' has a settled meaning in Virginia": a tort is "a wrongful act." *Id.* at 522. As a result, "Virginia's choice of law rule selects the law of the state *in which the wrongful act took place*, wherever the effects of that act are felt." *Id.* (emphasis added). For example, "when Virginia residents are victims of out-of-state torts, the Virginia courts routinely apply the law of other states, even though the physical pain or economic impact caused by the tort injury may be experienced by the Virginia plaintiffs within the boundaries of the Commonwealth." *Id.* Further, "the Virginia Supreme Court has declined the invitation to … focu[s] on the parties' domicile," but an ap-

proach that concentrates on the place of the harmful effect would "effectively" require "default application of the law of plaintiff's domicile" anyway. *Id.* For these reasons, the Fourth Circuit concluded, "Virginia clearly selects the law of the place *where the wrongful act occurred*, even when that place differs from the place where the effects of injury are felt." *Id.* (emphasis added).

This Court has consistently followed this blackletter rule since *Milton* was decided. For example, it has ruled that "this inquiry looks at where the allegedly tortious conduct took place, not where the effects of that conduct may be felt." *JTH Tax, Inc. v. Williams*, 310 F. Supp. 3d 648, 657 (E.D. Va. 2018). Again: "Virginia clearly selects the law of the place where the wrongful act occurred, even when that place differs from the place where the effects of injury are felt." *Hilb Rogal & Hobbs Co. v. Rick Strategy Partners, Inc.*, 2006 WL 5908727, at *6 (E.D. Va. Feb. 10, 2006). And again: "Virginia law selects the [law of the place] where the wrongful act occurred and not … the place where the injury was suffered … Given this, [the plaintiff] is incorrect in asserting that the place of the injury, rather than the place of the wrong, controls the application of Virginia choice-of-law rules … [C]laims are governed by the law of the place where [the defendant's] allegedly tortious conduct took place, irrespective of where [the plaintiff] sustained the injury." *Gen. Assur. of Am., Inc. v. Overby-Seawell Co.*, 893 F. Supp. 2d 761, 777–78 (E.D. Va. 2012). *See also Kylin Network (Beijing) Movie & Culture Media Co. Ltd. v. Fidlow*, 2017 WL 2385343, at *3 n.2 (E.D. Va. June 1, 2017) (Hudson, J.) (expressing "skepticism" that Virginia law would apply to a Virginia resident's defamation claim based on internet posting elsewhere).

Since Plaintiffs have no way of distinguishing this on-point precedent, they simply ignore it. The Campaign cited and quoted *Milton* in its opening brief (Mem. 11), but Plaintiffs have not even discussed it, much less attempted to distinguish it. Instead, Plaintiffs assert that *other* jurisdictions define the place of the wrong as the place of the injury. (Opp. 10.) But "Virginia courts

differ" from courts of other states "in their discussion of the [place-of-the-wrong] doctrine." *Gen. Assur.*, 893 F. Supp. 2d at 778. The question here is what Virginia does, not what other states do.

Plaintiffs also ask this Court follow the First Restatement of Conflict of Laws, which purportedly supports their rule. (Opp. 10.) But the Restatement is neither supportive nor relevant. First, the Restatement defines the place of the wrong as the place "where the … statement is communicated"—in other words, where the audience "hear[s]" the statement. Restatement (First) of Conflict of Laws § 377 n.5 (1934). In contrast, Plaintiffs define the place of the wrong as "the place where *the plaintiff* suffered the greatest injury, usually his domicile" (Opp. 10 (emphasis added))—*not* the place where *the audience* heard the statement communicated. Second, the Restatement is beside the point. Plaintiffs' own case says that Virginia courts follow the Restatement "absent clear authority … adopting a different approach." *Insteel Indus., Inc. v. Costanza Contr. Co.*, 276 F. Supp. 2d 479, 486 (E.D. Va. 2003). In this case, there *is* clear authority—in fact, binding Fourth Circuit precedent—establishing that the place of the wrong is the place of the wrongful act, not the place of the injury. There is no need to turn to the Restatement. That is all the more so because the Restatement's eighty-year-old definition—the place of the wrong is the place "where the … statement is communicated"—is unworkable when applied to a statement that is published on the internet and that is accordingly "communicated" in all fifty states.

Finally, Plaintiffs cite a single case, *Hatfill v. Foster*, 415 F. Supp. 2d 353 (S.D.N.Y. 2006), that interprets Virginia law to define the place of the wrong as the place of the injury rather than the place of the wrongful act. (Opp. 10.) But the Fourth Circuit's controlling decision in *Milton* and this Court's decisions in *JTH*, *Hilb Rogal & Hobbs*, and *General Assurance* clearly take precedence over a solitary case from the Southern District of New York. In addition, *Hatfill* is unpersuasive on its own terms. The court there relied on a Fourth Circuit case "interpreting

Maryland law" (415 F. Supp. 2d at 364–65), but, in doing so, overlooked the "critical" "differ[ences]" between "Maryland and Virginia" on this issue (*Gen. Assur*, 893 F. Supp. 2d at 778). "It is under Maryland law, *not Virginia law*, that the place of the tort is considered to be the place where the injury was suffered, not where the wrongful act took place." *Id.* (emphasis added).

In sum, this case is governed by the law of the place of the alleged wrongful act. Plaintiffs never contest that the place of the alleged wrongful act is New York. They also never contest that New York rejects all of their tort theories. Their tort claims should therefore be dismissed.

B. The Constitution forecloses Plaintiffs' tort claims

The Campaign has shown that the First Amendment prohibits the imposition of public-disclosure and intentional-infliction liability for truthful speech. (Mem. 14–15.) In response, Plaintiffs say that the First Amendment merely precludes the imposition of tort liability for speech about matters of public concern, but permits liability for other truthful speech. (Opp. 21.) As already discussed, however, the speech in this case *is* about matters of public concern. *Supra* 1–6. In addition, quite apart from affording special protection to speech about public issues, the First Amendment separately prohibits the Government from "punishing truthful publication in the name of privacy," except where liability is "narrowly tailored to a state interest of the highest order." *BJF*, 491 U.S. at 540. Plaintiffs' tort theories are not narrowly tailored to any state interest in protecting privacy, because there is less restrictive means of achieving that interest: punishing the hackers themselves. (Mem. 14–15.)

The Campaign has likewise shown that Plaintiffs' tort theories violate the vagueness doctrine by relying on terms such as "outrageous" and "offensive." (Mem. 15–16.) Plaintiffs' only response is that "tort law routinely uses such terms." (Opp. 22.) Plaintiffs cite no examples to support this claim. And tort law ordinarily regulates *conduct*, but this case involves *speech*. Courts must apply "a heightened vagueness standard … to restrictions upon speech." *Brown v.*

Ent. Merchs. Ass'n, 564 U.S. 786, 793 (2011). A state may not use terms such as "outrageous" and "offensive" in regulating speech, whatever it may do in regulating conduct. "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Falwell*, 485 U.S. at 55.

C. Plaintiffs fail to state a valid public-disclosure claim

The Campaign has explained that the public-disclosure tort does not protect the types of facts that are at issue in this case. (Mem. 25–26.) Plaintiffs' responses are meritless.

1. The Campaign has shown that the public-disclosure tort does not protect the disclosure of social security numbers, because social security numbers are not embarrassing. (Mem. 25–26.) Plaintiffs claim that "the standard is 'highly offensive to a reasonable person,' not 'embarrassing.'" (Opp. 11.) But that misstates the law. "This cause of action requires the plaintiff to prove … that the publicized information contains *highly intimate or embarrassing facts* about a person's private affairs, *such that* its publication would be highly objectionable to a person of ordinary sensibilities." *Johnson v. Sawyer*, 47 F.3d 716, 731 (5th Cir. 1995) (*en banc*) (emphasis added). "Names, birth dates, and social security numbers, do not fall into this category"; they are "not the type of 'private facts,' the disclosure of which would be 'highly offensive to a reasonable person.'" *In re Barnes & Noble Pin Pad Litig.*, 2016 WL 5720370, at *7 (N.D. Ill. Oct. 3, 2016); *see also Dolmage v. Combined Ins. Co.*, 2015 WL 292947, at *9 (N.D. Ill. Jan. 21, 2015) (holding that "social security numbers," unlike "facts regarding family matters" or "sex lives," "do not constitute private facts"); *In re Zappos.com, Inc.*, 2013 WL 4830497, at *3 (D. Nev. Sep. 9, 2013) ("distinguishing 'personal' information such as a social security number that is not objectionable or embarrassing in and of itself, from 'private facts'"); *Herec v. AT&T Corp.*, 2008 WL 11409061, at *14 (N.D. Ga. Aug. 12, 2008) (explaining that a "social security number"

"does not involve information embarrassing to [its owner] or details that could cause shame or humiliation"); *McConnell v. Dep't of Labor*, 814 S.E. 2d 790, 682–83 (Ga. Ct. App. 2018) (holding that publication of "social security numbers" is not an "invasion of privacy" because it does not involve "embarrassing private facts"); *Cooney v. Chicago Pub. Schs.*, 943 N.E. 2d 23, 32 (Ill. Ct. App. 2010) ("distinguish[ing] personal information, such as names and social security numbers, from private facts, which are facially embarrassing and highly offensive if disclosed").

Plaintiffs cite a string of decisions that supposedly support their position. (Opp. 12 & nn. 10–11.) These cases do no such thing. Four cases deal with a different legal claim, not public disclosure. *See Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 710 (D.C. 2009) (intrusion); *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1008–09 (N.H. 2003) (same); *Progressive Animal Welfare Soc. v. Univ. of Washington*, 884 P.2d 592, 598 (Wash. 1994) (state statute); *Moncier v. Harris*, 2017 WL 946350, at *6 (Tenn. Ct. App. 2017) (same). One holds that the disclosure of "banking records" can be tortious, without specifically addressing social security numbers. *Pontbriand v. Sundlun*, 699 A.2d 856, 864 (R.I. 1997). Four more did not address the issue here, seemingly because the defendant did not raise it. *See Daniel v. DTE Energy*, 2012 WL 12925071, at *10 (E.D. Mich. Aug. 30, 2012) (addressing argument that the fact was not made public); *Pinero v. Jackson Hewitt Tax Serv., Inc.*, 594 F. Supp. 2d 710, 721 (E.D. La. 2009) (same); *Nation v. Idaho Dep't of Corr.*, 158 P.3d 953, 964 (Idaho 2007) (same); *Mandelbaum v. Arseneault*, 2017 WL 4287837, at *11 (N.J. Ct. App. Sep. 28, 2017) (addressing argument that plaintiff had failed to keep the fact private); *Shqeirat v. U.S. Airways Grp., Inc.*, 515 F. Supp. 2d 984, 998 (D. Minn. 2007) (addressing argument that the allegations of injury were insufficient).

That leaves just one case supporting Plaintiffs' position: *Tomblin v. Trevino*, 2002 WL 32857194 (W.D. Tex. June 17, 2002). This Court should not follow *Tomblin*, because it rests on

the unpersuasive premise that a social security number is "an intimate … private fact." *Id.* at *4. In addition, this solitary case cannot outweigh the many cases cited above squarely holding that a social security number is *not* the kind of private fact that the public-disclosure tort addresses.

Plaintiffs emphasize the "egregious harm" that the disclosure of a social security number can cause. (Opp. 11.) But this harm—creating a risk of identity theft—has nothing to do with *embarrassment*, and it is in any event addressed by *other* laws. For example, hacking a computer to gain access to a social security number is covered by the separate tort of intrusion. *See Randolph*, 973 A.2d at 710. And some jurisdictions have passed statutes specifically addressing disclosure of social security numbers. *See, e.g.*, N.J. Stat. § 56:8–164. But such a disclosure simply does not constitute a public disclosure of private facts, the tort asserted here.

2. The Campaign has also shown that Mr. Comer may not make a public-disclosure claim on the basis of disclosure of interoffice gossip. (Mem. 26.) Plaintiffs, in response, fail to cite a single case recognizing public-disclosure liability for revealing another's gossip. They instead baldly assert that "interoffice gossip fall[s] within the scope of the tort." (Opp. 12.) It does not. First, the tort protects "fact[s] concerning *the plaintiff's* private life" (Restatement (Second) of Torts § 652D cmt. a (1977)), but gossip, by definition, consists of facts concerning third parties. Second, the tort protects facts about one's "private life" (*id.* § 652D), but office gossip, by definition, concerns one's professional rather than private life. Finally, the tort protects information that the plaintiff "keeps entirely to himself or at most reveals only to his family or to close friends" (*id.* § 652D cmt. b), but office gossip, by definition, is shared with one's colleagues.

3. The Campaign has shown, last of all, that public-disclosure liability does not cover Mr. Comer's communications with his colleague about his stomach flu. (Mem. 26.) Plaintiffs assert that intimate medical details are private facts. (Opp. 12.) But public-disclosure liability is re-

served for the disclosure of "humiliating illnesses," such as sexually transmitted diseases (Second Restatement § 652D cmt. b); stomach flu does not fit into that category. Besides, even "intimate details" lose legal protection if the plaintiff "voluntarily disclose[s] the private facts" to "business" colleagues. *Weiss v. Lehman*, 713 F. Supp. 489, 504 (D.D.C. 1989). The emails attached to the Amended Complaint show that Mr. Comer disclosed his illness to at least three work colleagues. (*See* Am. Compl. Ex. at 9 (May 17, 2016 email to Jordan Kaplan); *id.* (May 15 email to Jordan Kaplan); *id.* at 29 (May 16 email to Jordan Vaughn); *id.* at 70 (May 16 email to Nick Seminerio).) If Mr. Comer really thought that his common ailment was in any way "humiliating," he obviously would not have casually volunteered this information to his co-workers.

The Court should, therefore, dismiss the public-disclosure claims.

D. Plaintiffs fail to state a valid intentional-infliction claim

The Campaign has explained that Mr. Comer's intentional-infliction claim fails because the conduct in this case was not directed at him. (Mem. 27.) Plaintiffs deny that this tort includes a "directed at" element. (Opp. 16.) But the Campaign has already cited Maryland precedent expressly holding that "outrageous conduct directed at *A* does not necessarily give *B* a cause of action." *Homer v. Long*, 599 A.2d 1193, 1198 (Md. Ct. App. 1992); (Mem. 27). Plaintiffs make no effort to address this authority. Plaintiffs also assert that "the conspirators meant specifically to intimidate Mr. Comer." (Opp. 16.) But, as discussed above, the Complaint establishes that the alleged conspiracy targeted the Clinton Campaign and DNC; nothing in the Complaint suggests that Russia, WikiLeaks, and the Campaign were even aware of Mr. Comer's existence, much less that they entered into an international conspiracy "specifically to intimidate" him. *Supra* 5.

The Campaign has also explained that, as a matter of law, the disclosure of stolen emails cannot be outrageous, because newspapers routinely print stolen documents and because there is a First Amendment right to do so. (Mem. 27–28.) Plaintiffs simply assert that releasing stolen

emails "arouses shock and outrage" (Opp. 16), but cite no legal authority for that assertion. The Court should, therefore, dismiss the intentional-infliction claim.

E. Plaintiffs fail to state a claim for civil conspiracy

In their Complaint, Plaintiffs asserted a separate claim for "civil conspiracy" to violate federal campaign-finance law. (Am. Compl. Count VI). The Campaign spent three pages refuting this claim, but Plaintiffs devote just a footnote to it in their response. (Opp. 8 n.5.) Plaintiffs have thereby forfeited this claim: "An issue raised only in a footnote … is waived." *Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App'x 646, 650 (4th Cir. 2014). In any event, Plaintiffs' claim warrants dismissal on the merits for reasons that the Campaign has already identified and that Plaintiffs have failed to address: Plaintiffs lack standing to enforce the federal campaign-finance laws; they lack a private right of action to enforce those laws; federal law preempts any effort to use state law to enforce federal campaign-finance laws; and Plaintiffs in all events fail to allege a conspiracy to violate federal campaign-finance laws. (Mem. 28–30.)

F. Plaintiffs do not plausibly allege unlawful conspiracy or collusion

Yet another reason to dismiss Plaintiffs' claims is that Plaintiffs fall short of the "plausibility" pleading standard established by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)—most importantly, because they fail to plausibly allege that the Campaign acted with the specific intent to injure them. (Mem. 10–11.) Plaintiffs respond that, under tort law, "specific intent is not an element of civil conspiracy liability." (Opp. 19.) But it is blackletter law that "there must be specific intent to injure a particular plaintiff" to maintain "a civil conspiracy claim." *Whitfield v. John Bourne Co.*, 16 F. App'x 116, 125 (4th Cir. 2001); *see, e.g.*, *Galaxy Comp. Servs., Inc. v. Baker*, 325 B.R. 544, 555 (E.D. Va. 2005) ("civil conspiracy requires … specific intent"); *Nippert v. Jackson*, 860 F. Supp. 2d 554, 568 (M.D. Tenn. 2012) ("civil conspiracy requires specific intent"). Plaintiffs also claim that "the conspirators specifically targeted Plaintiffs." (Opp. 19.) But the Campaign

has already refuted this suggestion; the Amended Complaint shows that object of the purported conspiracy was to undermine the DNC and Hillary Clinton, not to harm Mr. Comer, Mr. Cockrum, and Mr. Schoenberg by revealing gossip and social security numbers. *Supra* 5.

G. Plaintiffs' lawsuit violates the Communications Decency Act

Last of all, the Campaign has shown that that Plaintiffs' claim that the Campaign conspired with WikiLeaks is not a conspiracy to commit an "unlawful act" because, under section 230 of the Communications Decency Act, WikiLeaks disclosure was not illegal. (Mem. 16–17.) In response, Plaintiffs cite *Dennis v. Sparks*, 449 U.S. 24 (1980)—in which the Supreme Court held that a private actor who bribes a judge may be liable under § 1983, notwithstanding judicial immunity—and claim that "immunity for one co-conspirator" (WikiLeaks) "does not immunize the others" (such as the Campaign). But *Dennis* is inapposite. First, *Dennis* involved a legal rule that merely protects a particular actor from suit, not a legal rule that makes the underlying conduct lawful. Judicial immunity immunizes a bribed judge from suit under § 1983, but it does not make the judge's acceptance of the bribe lawful. In contrast, the Communications Decency Act makes the underlying disclosure lawful. That makes a difference, because an agreement to commit a lawful act is not a conspiracy. Second, *Dennis* held simply that a private actor who bribes a judge acts "under color of state law within the meaning of § 1983" (*id.* at 29); it did not opine on the substantive requirements of conspiracy law. Third, *Dennis* involved a federal immunity from a *federal* claim, while this case involves a federal defense to a *state* tort claim. In dealing with a federal immunity from a *federal* claim, a court must try to reconcile and give effect to the competing policies that underlie both federal laws. In dealing with a federal defense to a *state* claim, by contrast, a court has no such obligation; under the Supremacy Clause, the federal rule simply prevails. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621–23 (2011) (plurality). Here, the federal defense established by § 230 trumps state tort liability, foreclosing Plaintiffs' claims.

III. Plaintiffs Fail To Plead A Valid Claim Under § 1985(3)

A. Plaintiffs fail to show that § 1985(3) covers conspiracies that do not involve physical violence or its threat

Plaintiffs lack a persuasive response to the Campaign's argument that the support-or-advocacy clause of § 1985(3) covers only conspiracies to cause or threaten physical violence—not agreements to disclose information in the course of a political campaign. (Mem. 17–20.) Plaintiffs first invoke the "plain language" of the statute: a defendant is liable if it conspires to use "force, intimidation, or threat" to prevent a voter from giving support or advocacy, or to "injure any citizen in person or property" on account of support or advocacy. (Opp. 23.) Plaintiffs assert that "publicizing the complete mailboxes of finance-team members" amounted to "intimidation or threat." Opp. 23). But the Campaign has already cited precedent establishing that the term "intimidation" means conduct that leads a reasonable person in the victim's position to fear "bodily harm" (*United States v. McNeal*, 818 F.3d 141, 154 (4th Cir. 2016)), and that the term "threat" in this context means an "expression of an intention to do bodily harm" (*Anderson v. Clarke*, 2014 WL 6712639, at *5 (E.D. Va. Nov. 26, 2014)). (Mem. 18.) Again, Plaintiffs do not address these decisions. Plaintiffs also assert that, by allegedly "work[ing] to expose private information," the Campaign "conspired to injure citizens on account of their support or advocacy." (Opp. 23.) The statute, however, does not punish conspiracies "to injure citizens"; it punishes conspiracies "to injure any citizen *in person or property*." Plaintiffs fail to show how the release of one's private information amounts to injury *in person or property*.

Next, Plaintiffs claim that the legislative history of § 1985 supports their interpretation. (Opp. 24.) But the Supreme Court has rejected the use of "legislative history" to "broad[en]" § 1985(3) beyond "its central concern—combating the violent and other efforts of the Klan … to resist [the Reconstruction Amendments]." *Carpenters v. Scott*, 463 U.S. 825, 836–37 (1983).

Finally, Plaintiffs invoke the Supreme Court's decision in *Haddle v. Garrison*, 525 U.S. 121 (1998)—a case interpreting a companion provision, § 1985(2). (Opp. 23–24.) In *Haddle*, however, the Supreme Court addressed an issue that has nothing to do with this case: whether injury to "property" under § 1985 is coextensive with deprivation of "property" under the Due Process Clause. 525 U.S. at 125–26. The Court explicitly refused to address the issue that *does* matter in this case: "We express *no opinion* regarding [the] argument that intimidation claims under § 1985(2) are limited to conduct involving force or threat of force." 525 U.S. at 125 n.3 (emphasis added). That is why another court has already *rejected* the "argu[ment] that § 1985(2) does not require evidence of physical threats or violence … [under] *Haddle*." *Patterson v. McCarron*, 2001 WL 1488122, at *6 (S.D.N.Y. Nov. 21 2001). Even after *Haddle*, "the lack of judicial precedent expanding the statute's scope to wholly non-violent cases"—plus the "history" showing that § 1985 "was originally enacted to combat violence against blacks in the Reconstruction Era"—means that a plaintiff's claim fails "absent a showing of any violent or threatening conduct." *Id.* No such showing has been made here.

B. Plaintiffs fail to show that § 1985(3) applies to purely private conspiracies to interfere with the right to speak

Plaintiffs also lack a meritorious response to the Campaign's argument that § 1985(3) protects predicate rights defined by other laws; that the statute covers a purely private conspiracy only if federal law protects the predicate right too; and that the predicate right in this case (the First Amendment right to support a candidate) is protected only against state action, not private action. (Mem. 20–22.) Plaintiffs first claim that "the equal-protection clauses of § 1985(3) … are indeed vehicles for asserting rights established elsewhere," but that the support-or-advocacy clause creates independent rights of its own. (Opp. 27.) This claim defies precedent. The Supreme Court has ruled: "Section 1985(3) provides no substantive rights itself; it merely provides

a remedy for violation of the rights it designates." *Great American v. Novotny*, 442 U.S. 366, 372 (1979). Again: "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere." *Carpenters*, 463 U.S. at 833. Again: "§ 1985(3) [is a] remedial statute." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). Each of these categorical statements discusses § 1985(3) as a whole; none is limited to just "the equal-protection clauses" (Opp. 27).

Plaintiffs also invoke three cases applying § 1985(3) or its criminal counterpart to private conspiracies to interfere with voting. *See Ex Parte Yarbrough*, 110 U.S. 651, 657 (1884) (conspiracy to intimidate black citizen "in the exercise of his right to vote"); *Paynes v. Lee*, 377 F.2d 61, 64 (conspiracy to interfere with the "right to vote"); *LULAC v. Pub. Interest Leg. Found.*, 2018 WL 3848404, at *1 (E.D. Va. Aug. 13, 2018) (conspiracy to prevent citizens from "registering" and "voting"). But "the right of citizens to vote," unlike the right to speak, is protected "from individual as well as from State interference." *United States v. Williams*, 341 U.S. 70, 77 (1951) (plurality). It thus makes sense that § 1985(3) covers private conspiracies to interfere with the right to vote. As the Fourth Circuit has held, however, § 1985(3) "cannot be interpreted to [cover] persons who conspire without involvement of government to deny another person the right of free association," "because the right of association derives from the first amendment—itself framed as a prohibition against the federal government and not against private persons." *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 506–07 (4th Cir. 1974).

C. Plaintiffs fail to show that the alleged conspiracy targets them

Plaintiffs likewise have no meritorious response to the Campaign's argument that the support-or-advocacy clause prohibits conspiracies to intimidate individual "citizens," and that, unlike the equal-protection component of § 1985(3), it does not prohibit conspiracies targeting a "class of persons." (Mem. 23.) Plaintiffs assert that this reading leads to the "absurd result" that the clause "would not cover a conspiracy to leave a bomb at the DNC's get-out-the-vote head-

quarters." (Opp. 26.) That is incorrect. Section 1985(3) *does* prohibit a conspiracy to bomb a political party's headquarters, because such a conspiracy targets specific individuals (namely, the individuals present at the headquarters). In contrast, § 1985(3) *does not* prohibit a conspiracy to "intimdat[e] and dete[r] existing or potential donors." (Am. Compl. ¶ 19.) "Existing or potential donors" constitute an open-ended class, rather than a discrete group of specific individuals, and the support-or-advocacy clause does not protect classes.

Plaintiffs also asserts that the conspiracy "aimed to injure the specific people whose email boxes were released to the world." (Opp. 25.) The Campaign has already shown above that the Amended Complaint nowhere plausibly alleges that the Campaign entered into a global conspiracy with the aim of injuring Mr. Comer, Mr. Cockrum, and Mr. Schoenberg. *Supra* 5.

D. Plaintiffs improperly seek *respondeat superior* liability

Under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), a defendant cannot be held liable under federal civil-rights laws for the acts of its agents. (Mem. 23.) Plaintiffs answer that *Monell* applies only to § 1983, not § 1985. (Opp. 28.) No; courts have rejected "respondeat superior" liability specifically under "section 1985." *Moore v. New Hanover County Gov't*, 2004 WL 3266045, at *9 (E.D.N.C. Aug. 13, 2004). Plaintiffs also say that *Monell* deals with "a municipality," not "a private corporation." (Opp. 29). No again; the Fourth Circuit has held that "[*Monell*'s] holding [is] equally applicable to the liability of private corporations." *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (1982). Plaintiffs, finally, say that they "need not rely on *respondeat superior*." (Opp. 29.) No yet again; the Amended Complaint makes it clear that Plaintiffs seek to hold the Campaign liable for the acts of "agents of the Trump Campaign." (Am. Compl. ¶ 87.) That, by definition, is *respondeat superior* liability.

CONCLUSION

The Court should dismiss Plaintiffs' claims with prejudice.

Dated: November 28, 2018

Respectfully submitted,

/s/ Nikki L. McArthur

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CERTIFICATE OF SERVICE

I certify that on November 28, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: November 28, 2018

/s/ Nikki L. McArthur
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