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

ROY COCKRUM; SCOTT COMER; and ERIC SCHOENBERG, Plaintiffs, v. DONALD J. TRUMP FOR PRESIDENT, INC., Defendant.	Civil Action No. 3:18-cv-484-HEH

JOINT STATEMENT REGARDING DISPUTED PROPOSED DISCOVERY AND SCHEDULING PLANS

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, Local Civil Rule 26, and this Court's Scheduling Order issued on December 27, 2018 (ECF No. 68) and accompanying Pretrial Schedule A (ECF No. 68-1), counsel for Plaintiffs Roy Cockrum, Scott Comer, and Eric Shoenberg ("Plaintiffs") and counsel for Defendant Donald J. Trump for President, Inc. ("Defendant" or the "Campaign") respectfully submit their respective positions for this Court's consideration at the Pretrial Conference scheduled for January 24, 2019, at 2 p.m.

I. Meet and Confer Conferences

Counsel for the parties conferred via telephone pursuant to this Court's December 27, 2018 Scheduling Order on January 2 and 4, 2019 (ECF No. 68) (the "Scheduling Order"). During those conferences, counsel for both parties explained their respective positions. In light of the parties'

positions, they found themselves at an impasse with respect to agreeing to a discovery plan to present to the Court.

II. Plaintiffs' Position

Plaintiffs propose the discovery and case schedule plan set forth below.

Defendant has responded to Plaintiffs' attempts to meet and confer with respect to discovery and case scheduling matters, as required by this Court's Scheduling Order and Schedule A, as well as the Local Civil and Federal Rules, by taking the position that meeting and conferring with respect to certain discovery and case schedule matters, as well as actual discovery, should all be postponed pending resolution of the Motion to Dismiss (ECF No. 21). This Court's Scheduling Order was issued on December 27, 2018, and no stay is in effect. The clock is running on discovery, and Defendant's position here defies the plain requirements of applicable rules and orders.

Defendant has justified this refusal to comply with this Court's Rules by arguing below that opening discovery pursuant to this Court's Scheduling Order and Schedule A is "unlawful and unworkable." Defendant's assertions are greatly overstated, and Defendant has not established any need to stop this case from proceeding according to this Court's Rules. The matters that Defendant's stay request would immediately affect include the usual preliminary steps of initial disclosures; meeting and conferring with respect to discovery plans, including document preservation and ESI issues, and with respect to an appropriate case schedule; and responding to initial document discovery. Plaintiffs provide their full response to Defendant's proposal for a stay in Section II.B below. Plaintiffs are taking necessary steps to proceed diligently and respectfully request that this Court permit the case to move forward under appropriate Court management.

A. Plaintiffs' Proposed Discovery Plan and Case Schedule

1. Rule 26(a)(1) Disclosures. Pursuant to Rule 26(a)(1), the parties' disclosures are due fourteen days from the Rule 26(f) conference, which began on January 2, 2019, consistent with the Scheduling Order and Pretrial Schedule A (ECF No. 68-1) ("Schedule A"). The deadline for initial disclosures is therefore January 16, 2019. Plaintiffs will comply with this deadline; Defendant does not intend to do so. Plaintiffs respectfully request this Court order Defendant to comply with the Federal Rules.

2. Discovery

Deadline. As discussed further with respect to Plaintiffs' Proposed Case Schedule below, Plaintiffs propose a schedule that separates the deadlines for fact and expert discovery. Plaintiffs' proposed schedule includes a fact discovery deadline of 55 days in advance of trial, consistent with Schedule A. Plaintiffs propose an expert discovery deadline of approximately 45 days in advance of trial. *See* subsection 3 below.

Preservation. Plaintiffs informed Defendant that that they are taking all reasonable steps necessary to preserve discoverable information. Defendant did not provide Plaintiffs with information regarding Defendant's preservation measures during the meet and confer conferences and explained its position that discussion of preservation, along with any other discussion of retention and retrieval and ESI-related matters, should be postponed until after the pending Motion to Dismiss is resolved. Plaintiffs request the Court order Defendant to comply forthwith with the meet and confer requirements established by Federal Rule of Civil Procedure 26, Local Civil Rule 26, and this Court's Orders.

Production. Plaintiffs anticipate that discovery in this case will involve Electronically Stored Information (ESI). Plaintiffs proposed that the parties promptly negotiate an agreement

with respect to ESI that governs discovery, including addressing production format, search terms, custodians and retrieval systems. Defendant's position was that discussion of ESI protocols was premature in light of Defendant's request for a stay. Plaintiffs request that the Court order Defendant to comply forthwith with the meet and confer requirements established by Federal Rule of Civil Procedure 26, Local Civil Rule 26, and this Court's Schedule A.

Service. The parties have agreed to serve all discovery electronically.

Depositions. In light of the complexity of this conspiracy case, as reflected in the Complaint's allegations (ECF No. 8), Plaintiffs propose a limit of twenty non-party, non-expert depositions. The nature of the conspiracy allegations contribute to a higher than typical number of non-party witnesses in this case (ECF No. 8). While Plaintiffs have not yet taken discovery on the extent of the Defendant's officers, directors, and employees, the passage of time since the operative events in 2016 has almost certainly resulted in at least some witnesses with relevant information becoming non-party, rather than party, witnesses. The limit of five non-party depositions imposed by Schedule A will prejudice Plaintiffs' ability to pursue discovery well within the scope of the Federal Rules, and Plaintiffs therefore propose this increase.

Plaintiffs have also proposed that the parties agree that the Local Civil Rules 30 and 45, regarding location and cost of depositions, may be altered by agreement of the parties. Defendant's position was that discussion of depositions was premature in light of Defendant's request for a stay.

Interrogatories. In light of the complexity of this conspiracy case, as reflected in the Complaint's allegations (ECF No. 8), Plaintiffs propose a limit of thirty-five Interrogatories. The use of Interrogatories by the parties will allow this complex case to proceed more efficiently. The limit of twenty-five imposed by Federal Rule of Procedure 33(a)(1) will prejudice Plaintiffs'

ability to pursue discovery well within the scope of the Federal Rules, and Plaintiffs therefore propose this increase. Defendant's position was that discussion of interrogatories was premature in light of Defendant's request for a stay.

Expert Discovery. Plaintiffs anticipate that this case may involve expert opinion testimony, but that expert testimony will not be the focus of either side's evidentiary proof. Plaintiffs have proposed below a case schedule that permits the simultaneous exchange of expert disclosures, simultaneous rebuttal disclosures, and an expert discovery deadline that permits reasonable time for parties' depositions of opening and rebuttal experts. Defendant's position was that discussion of expert discovery was premature in light of Defendant's request for a stay.

Weekly Meet-and-Confer Conferences. Given the complexity of the case, Plaintiffs have proposed that the parties agree to weekly meet-and-confer telephone conferences in order to move discovery forward expeditiously, and to quickly surface and resolve any disputes (or present them for the Court's resolution when necessary). Defendant's position was that discussion of weekly conferences was premature in light of Defendant's request for a stay.

Privilege and Inadvertent Productions. The parties agreed generally to negotiate an appropriate stipulation with respect to inadvertent disclosures of privileged documents. Plaintiffs proposed doing so promptly; Defendant's position was that negotiation was premature pending the Court's resolution of the pending motion to dismiss. Again, Plaintiffs request the Court order Defendant to comply forthwith with meet and confer requirements imposed by this Court's Local Civil Rules and Orders.

Protective Order Regarding Confidentiality. Plaintiffs proposed negotiating an appropriate protective order. Defendant's position was that negotiation was premature in light of Defendant's request for a stay.

3. Case Schedule and Trial Date

This case, which involves an alleged civil conspiracy between a political campaign and a foreign government, as well as cyber-espionage resulting in the theft of electronic documents from an opposing political party and publication of those documents in furtherance of that conspiracy, presents the type of "complex litigation or … other unusual circumstances" that warrants an exception to this Court's typical trial date of 90 to 150 days from the date of the Pretrial Conference. ECF No. 68-1. The nature of the statutory violations, torts, and defenses at issue here are by themselves complex, and the international conspiracy allegations render the case even more so.

The complexity of the allegations, claims and theories of liability, and defenses will almost certainly result in complex discovery issues and, by any realistic assessment, disputes—which, taken together, warrant a longer than typical case schedule. While the parties will work diligently to resolve any disputes, it is realistic to anticipate—particularly in light of the positions taken by Defendant—that this case will likely raise issues on which the parties will disagree and therefore require court resolution—including anticipated issues of privilege. For example, the Defendant's Answer (ECF No. 71) invokes a "First Amendment privilege" to responding to myriad factual assertions. Defendant, in setting forth its argument below, appears to assert that *any* discovery of the Campaign—indeed, any discovery of any political campaign – violates the First Amendment — a contention without legal support or justification, *see infra*, but that nonetheless would require resolution by this Court at the appropriate time. Defendant has also raised concerns regarding the potential impact of discovery in this case on federal officials (see, e.g., ECF No. 23 at 1)—but those too are concerns that, while premature, the Court is well-equipped to handle at the appropriate time, if necessary. (It is worth noting that almost all of the individuals currently or

previously associated with the Campaign, and named as part of the alleged conspiracy, are *not* federal officials (ECF No. 8)). By any realistic assessment, the Campaign's asserted concerns may result in issues and disputes that could delay the normal course of discovery.

An exception to the Court's typical trial date of 90 to 150 days from the Pretrial Conference is further warranted because of complexity surrounding some (but not all) of the relevant witnesses. For example, at least some of the witnesses, co-conspirators, and/or agents of Defendant named in the Complaint now reside in prison, which adds complexity—and often time—to discovery efforts. (Of course, that some witnesses may invoke the Fifth Amendment is not an issue with which this Court is unfamiliar and is certainly not a reason to delay *all* discovery, as Defendant requests.) Further, the allegations in the Complaint involve cyber-espionage at the international level, which may raise complex issues of discovery and proof apart from the alleged conspiracy between a political party and foreign government. Moreover, individuals with relevant information are not located in a single location, a single state, or even a single country. Coordination with all of the relevant counsel and protection of any implicated institutional interests is simply likely to take more time than would discovery in the typical case, even with counsels' combined best efforts to move the case forward swiftly. All of these issues, which are apparent from the factual allegations in Plaintiffs' Complaint and from Defendant's Answer, and Defendant's position below, are manageable with this Court's case management tools, but they do justify a discovery period and case schedule that is somewhat longer than the typical case.

Balancing these concerns with this Court's interest in moving cases swiftly to trial, Plaintiffs have proposed a case schedule below predicated on a trial date 270 days (or roughly nine months) following the January 24, 2019 Pretrial Conference. To be sure, this case schedule would

still be far more compressed than the schedules that often occur in cases this complex, but Plaintiffs are prepared to proceed without delay to move this case forward through discovery and to trial.

Trial Date: 270 days from January 24, 2019 (October 21, 2019).

Fact Discovery Deadline: 55 days prior to trial (August 27, 2019).

Expert Disclosures, Discovery, and Challenges:

a. Disclosures: 90 days prior to trial (July 23, 2019).

b. Rebuttal Disclosures: 60 days prior to trial (August 22, 2019).

c. Expert Discovery Deadline: 14 days later (Sept. 5, 2019).

d. Daubert Motion Deadline: 30 days prior to trial (Sept. 20, 2019).

i. Oppositions to Daubert Motions: 7 days later (Sept. 27, 2019)

ii. No replies to Daubert Motions.

Summary Judgment:

a. Motions for Summary Judgment: 50 days prior to trial (Aug. 30, 2019)

b. Oppositions: 14 days later (Sept. 13, 2019)

c. Replies: 7 days later (Sept. 20, 2019)

Pretrial Deadlines: Plaintiffs propose the following schedule which includes a Final Pretrial Conference in light of the complexity of this case.

a. Deadline to meet & confer re: stipulations of uncontroverted facts: 40 days before trial (Sept. 11, 2019)

b. Simultaneous exchange of witness and exhibit lists: 30 days before trial (Sept. 20, 2019)

c. Designation of supporting discovery by party bearing burden of proof on relevant issue: 30 days before trial (Sept. 20, 2019)

i. Designation of opposition discovery: five days later (Sept. 25, 2019)

d. Deadline for motions in limine: 25 days before trial (Sept. 26, 2019)

i. Responses due 7 days later (Oct. 3, 2019)

ii. No replies

e. Proposed jury instructions and voir dire: 21 days before trial (Sept. 30, 2019)

i. Responses and objections: 7 days later (Oct. 7, 2019)

ii. No replies

f. Submission of Joint Proposed Pretrial Order: 14 days before trial (Oct. 7, 2019)

g. Pretrial conference: 10 days prior to trial (Oct. 11, 2019)

Settlement: Plaintiffs do not propose any change to the Court's mandatory Settlement Conference with a magistrate pursuant to Schedule A, pursuant to which a settlement conference would occur by February 25, 2019.

B. Response to Defendant's Proposal for a Stay Pending Resolution of the Motion to Dismiss

Defendant's request that this matter be stayed pending resolution of the Motion to Dismiss (ECF 23) should be denied. Plaintiffs are prepared to move this case forward, and, given the speed with which litigation moves forward in this Court under the Local Rules and Scheduling Order, any delay in discovery—even during the period while this Court considers, hears argument, and then rules on the pending motion—will prejudice Plaintiffs by reducing the overall discovery period by a substantial amount of time unless an equal and corresponding extension of the discovery period is provided.

Moreover, Plaintiffs' Opposition to the Motion to Dismiss (ECF 30) set forth all the reasons the motion to dismiss should be denied. If the Court concurs with Plaintiffs following the hearing on January 24, 2019, any delay in proceeding to discovery will have delayed the adjudication of this case.

As the party requesting the stay, Defendant bears the burden of demonstrating the need for such extraordinary action, and Defendant's contentions below that discovery here would be "unlawful and unworkable" greatly overstate the circumstances the parties and this Court currently face. While the Court has discretion to stay discovery pending the resolution of a dispositive motion, such a stay requires a clear and convincing demonstration of hardship and good cause, the burden of which is on the Campaign to show. *E.g.*, *Gibbs v. Plain Green LLC*, 331 F. Supp. 3d 518, 525 (E.D. Va. 2017); *Bennett v. Fastenal Co.*, No. 7:15-cv-543, 2016 WL 10721816, at *1 (W.D. Va. Mar. 8, 2016) (stay "generally disfavored because delaying discovery may cause case management problems as the case progresses.") (internal quotation marks and citation omitted). As a general matter, the issues that Defendant raises can be addressed through objections or protective motions as they arise—they are not a basis for staying all discovery.

First, Defendant's position exaggerates the extent to which discovery from the Campaign—which is a private, not a governmental, entity and is certainly not the same entity as the President of the United States—implicates Defendant's stated concerns. Discovery "at this stage" does *not,* as Defendant contends, "force the Court to confront" questions including whether Plaintiffs may seek discovery from the President or other high-ranking administration officials, as Plaintiffs have not sought discovery from anyone other than the Campaign. Nor is the Court currently faced with the issue of discovery into "the President's official acts." In any event, acts taken during the Campaign were not official acts, and the vast majority of the allegations in the complaint focus on events that occurred before Mr. Trump was elected President. Focusing on the tasks immediately at hand, a stay pending resolution of the Motion to Dismiss will serve to delay three things—initial disclosures; Defendant's obligations under Schedule A and this Court's Rules to meet and confer and attempt to reach agreement on discovery and case schedule; and the initial

document discovery Plaintiffs have served on the Campaign.[1] A political campaign's compliance with initial disclosure obligations or basic document discovery simply does not violate separation of powers or interfere with the working of the federal government.[2]

Nor does discovery of a political campaign necessarily violate the First Amendment, as Defendant suggests. Defendant's position—that discovery of the internal communications of a political campaign is per se unconstitutional—is a remarkable one that is not supported by *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), as Defendant contends. In *Perry*, the Ninth Circuit engaged in a multipart interest-balancing test that the Campaign doesn't even try to describe, let alone satisfy. *See id.* at 1159-65. It cannot reasonably be argued that *all* of the subject matter of the document requests Plaintiffs have actually made here—–for example, for any communications between the Campaign and Russians regarding the hack into the Democratic National Committee's computer systems or the e-mails stolen therefrom, or any communications about those e-mails with WikiLeaks—are similarly protected by the First Amendment. *Compare Perry*, 591 F.3d at 1165 (basing privilege ruling on the conclusions that the specific documents

[1] As discussed above, pursuant to applicable Federal and Local Civil Rules and the Scheduling Order opening discovery, Plaintiffs served a targeted set of document requests to the Campaign on January 8, 2019. These requests seek documents related to the structure of the Campaign; the Campaign's documents about Plaintiffs; and communications and documents in the Campaign's possession regarding the emails stolen from the Democratic National Committee ("DNC") and their publication on WikiLeaks, and any coordination with co-conspirators regarding those topics—document requests that begin at the core, not the periphery, of Plaintiffs' claims. Defendant's speculation regarding hypothetical requests arising from every statement in the Complaint, or reference to jurisdictional discovery before the D.D.C., while ignoring the discovery *actually served*, is a red herring.

[2] Defendant's contention that Plaintiffs' counsel described this case as "a vehicle for discovery" in a press release is highly misleading. The quote is from an article by a law professor with no connection to this case, *see* Andy Wright, DNC Hack Victims Sue Trump Campaign and Roger Stone, Just Security, July 12, 2017, https://www.justsecurity.org/43077/dnc-hack-lawsuit/, which was later excerpted in a compilation of reactions to the case from several legal experts.

sought were "attenuated from the issue" of the *Perry* plaintiffs' claim). Nor is the Campaign entirely immunized from discovery because some of the documents in its possession may be arguably subject to a privilege. Like any other litigant, it can raise any and all privilege objections pursuant to this Court's discovery rules and procedures at the appropriate time. It is certainly not the case that *all* of the Campaign's responsive documents are privileged—the position the Campaign asserts here.

Defendant's position effectively challenges this Court's Rules and Orders by suggesting that any discovery at all prior to resolution of a motion to dismiss—standard practice under this Court's Local Civil Rules and Scheduling Orders—is "unlawful" or somehow contrary to the Federal Rules of Civil Procedure. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), cited by Defendant, did not hold that discovery is improper prior to resolution of a motion to dismiss. Indeed, no case holds that. This Court has long concluded that swiftly moving litigation through the initial proceedings serves the interests of justice. This case is no exception, and proceeding according to this Court's Rules and Orders violates no law.

All of Defendant's remaining justifications also miss the mark. The Campaign expresses concern for exactly three federal officials (President Trump, his advisor Jared Kushner, and his counselor Kellyanne Conway). No discovery to any of these individuals or any other federal official is pending; and were Plaintiffs to seek discovery of any of them, this Court has significant experience managing discovery aimed at federal officials.[3]

[3] Defendant misrepresents the meet and confer conference with Plaintiffs' counsel on January 4, 2019 (as well as Plaintiffs' position in this statement). During the meet and confer, Plaintiffs' counsel *never* stated that they "would seek to depose the President" (as Defendant contends below). Counsel for Defendant took the position that any meeting and conferring with respect to depositions was premature, but then directly asked whether Plaintiffs sought to depose the President in this case. Plaintiffs' counsel responded that Plaintiffs understand the legal hurdles

And finally, Defendant vicariously invokes concern for interference with Special Counsel Robert Mueller's investigation. As this Court is aware, civil and criminal proceeding often proceed in parallel. *See, e.g.*, *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379 (4th Cir. 2013) ("Because of the frequency with which civil and regulatory laws overlap with criminal laws, American jurisprudence contemplates the possibility of simultaneous or virtually simultaneous parallel proceedings and the Constitution does not mandate the stay of civil proceedings in the face of criminal proceedings.") (internal quotation marks omitted). But more importantly, the Special Counsel is capable of alerting the Court to and defending any interests implicated by the subject matter of this case and specific discovery requests at the appropriate time, and does not need—and has not asked—this Court to cease all discovery from the outset to prophylactically insulate that investigation from hypothetical concerns. Again, these issues are all well within this Court's ability to manage in the normal course of litigation, even in litigation as complex as this.

In sum, Defendant cannot establish here any real prejudice in complying with the requirements of the Federal and Local Rules and Scheduling Order regarding meeting and conferring with Plaintiffs to develop appropriate discovery agreements, providing initial disclosures, or responding to basic document discovery. All of the concerns Defendant raises here, while overstated, as discussed above provide good reason to provide a reasonable case schedule, but are not to delay the case further from the outset.

For all these reasons, Plaintiffs oppose Defendant's request, and respectfully request this Court order Defendants to proceed as required under the Local Rules and this Court's Scheduling Orders.

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to such a request and that any litigant who sought such a subpoena would need to comply with this Court's specific Local Rules (*e.g.*, L.R. 45(D)), among other significant legal requirements.

III. THE CAMPAIGN'S VIEWS AND PROPOSALS

In the Campaign's view, starting discovery before the resolution of the Campaign's pending motion to dismiss would be unlawful and unworkable. The Campaign therefore proposes that this Court should defer any discovery in this lawsuit until the resolution of the Campaign's pending motion to dismiss. If the motion is denied, the Campaign will promptly confer with the Plaintiffs and advise the Court on how to proceed on any discovery-related issues.

A. Starting discovery before the resolution of the motion to dismiss would be unlawful and unworkable

Under the Federal Rules of Civil Procedure, a plaintiff must ordinarily "surviv[e] a motion to dismiss" in order to "unlock the doors of discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). As a result, "the pendency of such a motion" is a ground for "deferring discovery until the motion is decided." 8A Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice & Procedure* § 2046.1 (3d ed. 2018). In routine cases, courts sometimes exercise their discretion to allow discovery to proceed even before a motion to dismiss is resolved. This case, however, is anything but routine. The unique features of this case establish that proceeding to discovery in this case before resolution of the Campaign's pending motion to dismiss would unlawful and unworkable.

First, proceeding to discovery would violate the constitutional separation of powers. The Supreme Court has ruled that "the high respect that is owed to the office of the Chief Executive … should inform … the timing and scope of discovery" against a sitting President of the United States. *Clinton v. Jones*, 520 U.S. 681, 707 (1997). It has also ruled that courts should deny "civil discovery" against a sitting President on "insubstantial legal claims," in order to avoid "disrupt[ing] the functioning of the Executive Branch" *Cheney v. U.S. District Court*, 542 U.S. 367, 382, 386 (2004). In this case, Plaintiffs' own statements at the Rule 26(f) conference and in

this report show that Plaintiffs would seek to depose and take other discovery from the President. Further, their complaint suggests that they plan to seek wide-ranging discovery into the President's "meetings," "speech[es]," "tax returns," "business relationships," and "financial ties," going back all the way to "1987." (Am. Compl. ¶¶ 16, 98, 128, 238.) Even worse, the complaint foreshadows discovery into the President's *official acts*: the formulation of foreign policy regarding "Russia," deliberations about whether to sign "a bill sanctioning Russia," statements at an international "summit," and the "decision to fire Director Comey," (Am. Compl. ¶¶ 169, 171, 252.) Indeed, according to Plaintiffs' counsel's own press release, this case is "a vehicle for discovery of documents and evidence." https://tinyurl.com/y94nhqf3. To allow such discovery even though Plaintiffs have not even survived a motion to dismiss would violate the separation of powers.

The Supreme Court has also ruled that courts should protect other public officials from "disruptive discovery," so that they can "devote [their] time to [their] duties," rather than to "participating in litigation." *Iqbal*, 556 U.S. at 685; *see, e.g., In re Department of Commerce*, 139 S. Ct. 16 (2018) (staying deposition of Secretary of Commerce). In this case, the Amended Complaint shows that Plaintiffs may seek discovery from a wide range of public officials, including Vice President Mike Pence, Senior Advisor to the President Jared Kushner, and Counselor to the President Kellyanne Conway. (Am. Compl. ¶¶ 28, 124, 222.) But Plaintiffs are "not entitled to [such] discovery" until they survive a motion to dismiss. *Iqbal*, 556 U.S. at 686.

Second, discovery would violate the freedom of speech guaranteed by the First Amendment. The Supreme Court has held that Courts should "minim[ize] … discovery" in cases involving "political speech," to avoid "chilling speech through the threat of burdensome litigation." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.). As the Campaign's motion to dismiss explains, the core of this case is an alleged act of

political speech: the disclosure of information about an opposing political campaign on the internet. *See* Dkt. 23 at 4–9. Forcing the Campaign to undergo burdensome discovery simply because Plaintiffs allege that it has engaged in this constitutionally protected expression violates the First Amendment.

In addition, the compelled disclosure of "internal campaign communications in civil discovery" violates the First Amendment. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th Cir. 2010). The Amended Complaint, however, shows that Plaintiffs plan to seek discovery into communications among Campaign officials and surrogates, deliberations regarding "the Republican Party platform," and even the Campaign's evaluation of "possible running mate[s] for Mr. Trump." (Am. Compl. ¶¶ 28, 143, 207.) Allowing Plaintiffs to pry into the Campaign's internal operations, before Plaintiffs have even established that they have a meritorious legal claim, violates the Campaign's First Amendment rights.

Third, discovery would conflict with Special Counsel Robert Mueller's ongoing criminal investigation. Courts routinely "defe[r] civil [discovery] pending the completion of parallel criminal prosecutions." *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970). Stays protect the prosecution by preventing civil litigants from interfering with "the integrity of [ongoing] criminal investigations." *In re Grand Jury Subpoena*, 866 F.3d 231, 235 (2017). They protect the defense by preventing "exposure of the criminal defense strategy" in "civil discovery." *Creative Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). And they protect witnesses in the civil case by preserving their "Fifth Amendment protection against self-incrimination." *United States v. Shane Co.*, 147 F.R.D. 99, 101 (M.D.N.C. 1992). Here, Special Counsel Robert Mueller has been investigating allegations of Russian interference in the 2016 presidential election, and has already

"obtained 35 indictments." (Am. Compl. ¶¶ 81.) Parallel civil discovery into the same subjects would threaten to interfere with those proceedings.

Fourth, proceeding to discovery at this stage would force the Court to confront a multitude of complex constitutional and legal questions. For example: May Plaintiffs force the President to sit for a deposition? The Vice President? Senior White House advisors? Does Article II of the Constitution allow discovery about the President's exercise of his foreign-affairs powers? His interactions with foreign leaders and foreign ambassadors? His removal of executive officers? Does the First Amendment allow discovery of the Campaign's internal communications? Its communications with surrogates? Its communications with the Republican Party? Do federal laws governing the confidentiality of tax records allow discovery of the President's tax returns?

The Court should wait until after resolution of the motion to dismiss to address these serious, complicated and novel issues. To start, the principle of constitutional avoidance counsels against addressing constitutional questions unnecessarily—and, if the Court grants the Campaign's motion to dismiss, the resolution of all of these constitutional questions will turn out to be unnecessary. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (Brandeis, J., concurring). In addition, the Court cannot meaningfully analyze these legal questions before resolving the motion to dismiss, because the issues turn, in part, *on the legal strength of the Plaintiffs' claims*. *See, e.g.*, *Cheney*, 542 U.S. at 386 (separation-of-powers concerns preclude discovery against the President on "meritless claims"). What is more, disputes over these questions would likely lead to interlocutory review before the Fourth Circuit and even the Supreme Court—but it makes little sense to embroil this Court, the Fourth Circuit, and the Supreme Court in an endless stream of discovery disputes before Plaintiffs have even established that they can survive a motion to dismiss. *See, e.g.*, *Cheney*, 542 U.S. at 381 (mandamus review appropriate where

plaintiff seeks discovery from the President or Vice President); *Perry*, 591 F.3d at 1158 (mandamus review appropriate where plaintiff seeks discovery from a political campaign); *Commerce*, 139 S. Ct. at 16 (order staying deposition of high-ranking government official); *In re Donald J. Trump*, No. 18-2486, Dkt. 9 (4th Cir. Dec. 20, 2018) (order staying discovery into the President's finances).

Fifth, the Amended Complaint also contemplates complex, multinational, third-party discovery. Most obviously, it contemplates discovery from the DNC regarding its computer security operation. It also includes allegations about "Russian General Staff Main Intelligence Directorate (GRU)," Russia's "Deputy Foreign Minister" and "Foreign Minister," the Russian ambassador to the United States, a Russian "billionaire" and various Russian "oligarchs," a "deputy governor of Russia's central bank," and the "chairman" of a Russian state-owned bank. (Am. Compl. ¶ 86-87, 93, 98, 101, 114, 116, 119, 144, 228, 252.) Further, one of the central actors in Plaintiffs' alleged conspiracy is WikiLeaks, an organization that Plaintiffs describe as a "non-state hostile intelligence service." (*Id.* ¶ 175.) WikiLeaks founder Julian Assange, another central actor in the alleged conspiracy (*id.* ¶ 182) currently lives in the Ecuadorian embassy in London. And that just covers the potential third-party witnesses whom the Amended Complaint identifies by name. The Amended Complaint also refers to a multitude of other witnesses who are unidentified ("Putin confidants") or identified by Twitter handles ("Guccifer 2.0"). *Id.* ¶¶ 111, 120. Judicial economy counsels against embarking on such complicated discovery involving, among other things, foreign nationals and potential sovereign-immunity claims, before Plaintiffs have even survived a motion to dismiss.

Sixth, Judge Huvelle's decision in *Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158 (D.D.C. 2018)—Plaintiffs' previous lawsuit against the Campaign—confirms all of

these points. In that case, Judge Huvelle rejected Plaintiffs' request to conduct "jurisdictional discovery" before the Court resolved Plaintiffs' motion to dismiss. *Id.* at 187. The court explained that granting discovery would "set coequal branches of the government onto a collision course," since "plaintiffs' request for depositions would include Trump Campaign officials who are now high-level officials in the Executive Branch." *Id.* In addition, since discovery would "dovetail with Special Prosecutor Robert Mueller's ongoing investigations," Plaintiffs would be "faced with witnesses who invoke their Fifth Amendment rights." *Id.* Further, granting discovery would "draw [the] Court into endless discovery disputes"—especially since Plaintiffs had already "overreach[ed]," making "ill-defined" and "overly broad" jurisdictional-discovery requests that "ask[ed] for everything under the sky." *Id.* at 187–89. This Court should follow the same approach as Judge Huvelle, and should therefore reject any effort to take discovery before the resolution of the Campaign's pending motion to dismiss.

Finally, on the other side of the ledger, deferring discovery until the resolution of the motion to dismiss will not meaningfully prejudice or burden Plaintiffs. Deferring discovery will not lead to the evaporation of relevant documents or witness testimony. And any timetable for discovery can be appropriately adjusted if and when the motion to dismiss is denied. Nor is there any urgency in resolving Plaintiffs' damages claims. Indeed, Plaintiffs themselves caused a twelve-month delay in the resolution of this dispute by choosing to file first in a district (the District of Columbia) that lacked personal jurisdiction. And even that suit was not filed until nearly a year after the alleged wrongdoing, just a few days before the applicable statute of limitations expired. *See Greenpeace, Inc. v. Dow Chemical Co.*, 97 A.3d 1053, 1061 (D.C. 2014) (one-year statute of limitations for invasion-of-privacy claims in the District of Columbia). In sum, deferring discovery

is essential to the coherent resolution of the important issues involved in lawsuits involving the President and his Campaign, but, on the other hand, will not cognizably burden Plaintiffs.

B. The Campaign proposes deferring discovery until at least the resolution of the motion to dismiss

In addition, the Campaign makes the following proposals regarding the specific subjects identified in Rule 26(f):

1. Initial Disclosures. In accordance with Rule 26(a)(1)(C), the Campaign objects that initial disclosures are not appropriate. If the Court denies the motion to dismiss—and decides that it is otherwise appropriate to proceed to discovery—the parties should arrange for initial disclosures at that stage.

2. Timing and scope of discovery. The Court should defer any discovery until (at a minimum) the resolution of the Campaign's motion to dismiss. If the Court denies the motion to dismiss—and decides that it is otherwise appropriate to proceed to discovery—the parties should, at that point, hold a further conference, develop a new discovery plan, and state their views and proposals on the timing and scope of discovery in that plan.

3. Electronically stored information. The Campaign has taken reasonable steps necessary to preserve discoverable information. Plaintiffs' description of the Campaign's position—that the Campaign believes that "discussion of preservation … should be postponed" (*supra* 3)—is inaccurate. If the Court denies the motion to dismiss—and decides that it is otherwise appropriate to proceed to discovery—the parties should state their views and proposals on the disclosure and discovery of electronically stored information in a new discovery plan.

4. Privilege. If the Court denies the motion to dismiss—and decides that it is otherwise appropriate to proceed to discovery—the parties should state their views and proposals on privilege and protection for trial-preparation materials in a new discovery plan.

5. Discovery limitations. If the Court denies the motion to dismiss—and decides that it is otherwise appropriate to proceed to discovery—the parties should state their views and proposals on discovery limitations in a new discovery plan.

6. Other orders. If the Court denies the motion to dismiss—and decides that it is otherwise appropriate to proceed to discovery—the parties should state their views and proposals on any other orders that the Court should issue in a new discovery plan.

C. Plaintiffs' objections to the Campaign's position are baseless

Plaintiffs assert that the Campaign's position "defies the plain requirements of applicable rules and orders." That is simply not so. In accordance with Rule 26 and this Court's order, the Campaign *has* met and conferred with Plaintiffs, and it has set out its views and proposals: Resolution of the extraordinarily complicated and constitutionally sensitive discovery issues in this case should be deferred until after the Court resolves the motion to dismiss. These fact-specific, constitutional issues can be avoided if the motion to dismiss is granted, and cannot possibly be intelligently resolved until the Court rules on the scope and legal strength of Plaintiffs' various causes of action.

Plaintiffs seemingly fault the Campaign for failing to propose specific timelines regarding discovery. The Campaign has explained, however, why any effort to develop such a proposal would be incoherent. Legal tests governing the scope of discovery from high-ranking executive branch officials and political campaigns require balancing the strength of the Plaintiffs' claims—something that the parties cannot intelligently evaluate until the Court opines on the motion to dismiss. In addition, Plaintiffs themselves have refused to state whether they plan to seek depositions or other discovery from the President, the Vice President, and other high-ranking officials. Instead, Plaintiffs assert that "concerns regarding … federal officials" are "premature."

Supra Part II-A-3. The Campaign cannot reasonably make specific proposals while the scope of Plaintiffs' own proposed discovery remains uncertain.

Finally, Plaintiffs accuse the Campaign of arguing that this Court's usual practice of scheduling discovery before trial is *categorically* unlawful and unworkable. *Supra* Part II-B. That attacks a strawman. To repeat what the Campaign has already said: "In routine cases, courts sometimes exercise their discretion to allow discovery to proceed even before a motion to dismiss is resolved. *This case, however, is anything but routine.* The *unique features* of *this case* establish that proceeding to discovery *in this case* before resolution of the Campaign's pending motion to dismiss would unlawful and unworkable." *Supra* Part III (Emphasis added.)

Respectfully submitted,

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