**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

**DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S**
**OPENING BRIEF IN SUPPORT OF**
**MOTION FOR STAY OF DISCOVERY**

## INTRODUCTION

Defendant Donald J. Trump for President, Inc. (Campaign) has moved to dismiss Plaintiffs' claims. But Plaintiffs have rejected the Campaign's request to defer discovery until after resolution of the motion to dismiss. They have also served the Campaign with a set of discovery requests, which (if the requests' overbroad definitions are taken seriously) purport to demand documents from the sitting President and Vice President of the United States. The Campaign, accordingly, moves for a stay of all discovery pending resolution of the motion to dismiss.

Discovery would interfere with the responsibilities of the Executive Branch, infringe the Campaign's First Amendment rights, conflict with Special Counsel Robert Mueller's parallel criminal investigation, and draw this Court and the appellate courts into a never-ending stream of discovery disputes. These burdens are certain. In contrast, because the Campaign has filed a motion to dismiss all of Plaintiffs' claims, Plaintiffs' claimed need for discovery is entirely hypothetical. The mere *possibility* that Plaintiffs may end up needing discovery *if* they prevail on the Campaign's motion to dismiss does not justify the imposition of these burdens.

In *Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158, 189 (D.D.C. 2018), Plaintiffs' previous lawsuit against the Campaign, Judge Huvelle denied Plaintiffs the opportunity to take jurisdictional discovery before resolution of the Campaign's motion to dismiss, reasoning that doing so would "set coequal branches … onto a collision course." Similarly, in *In re Donald J. Trump*, No. 18-2486, Dkt. 9 (4th Cir. Dec. 20, 2018), an Emoluments Clause lawsuit in which the plaintiffs sought discovery from the President, the Fourth Circuit stayed discovery and all other proceedings pending appellate review of the district court's denial of a motion to dismiss. If it was proper to deny discovery outright in *Cockrum*, and to stay discovery despite *denial* of a motion to dismiss in *Trump*, it is surely appropriate to stay discovery pending *resolution* of the motion to dismiss in this case.

**FACTS**

In 2017, Plaintiffs sued the Campaign in federal district court in the District of Columbia, alleging that the Campaign conspired with Russia and WikiLeaks to publish emails stolen from the Democratic National Committee. *See Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158 (D.D.C. 2018). Upon filing the lawsuit, Plaintiffs' lawyers issued a press release that trumpeted supportive statements from a variety of "legal experts." https://tinyurl.com/y94nhqf3. This press release candidly described this litigation as "a vehicle for discovery of documents and evidence," and confidently predicted that "the matter will easily survive a motion to dismiss and therefore allow discovery regarding these critically important matters." *Id.*

After the Campaign moved to dismiss Plaintiffs' claims in the District of Columbia, Plaintiffs moved for "jurisdictional discovery" to rebut the Campaign's personal jurisdiction defense. *Cockrum*, 319 F. Supp. 3d 187. In Judge Huvelle's words, Plaintiffs "ask[ed] for everything under the sky." *Id.* at 189. Plaintiffs' requests amounted to an "ill-defined," "overly broad," "not narrowly tailored," "wide-ranging," "thinly-veiled," "speculative," "overreaching" "fishing expedition." *Id.* at 187–89. And discovery would set the court on "a collision course" with a "co-equal branc[h] of government," overlap with "Special Prosecutor Robert Muller's ongoing investigations," and "draw [the] Court into endless discovery disputes." *Id.* at 189. Judge Huvelle denied discovery, and dismissed the case for lack of personal jurisdiction and improper venue. *Id.*

Plaintiffs then refiled their lawsuit in this district, and the Campaign again moved to dismiss. (Dkt. 22.) This Court scheduled a hearing on the motion to dismiss for January 24, 2019, and, in the meantime, ordered the parties to meet and confer in accordance with Federal Rule of Civil Procedure 26(f). (Dkt. 68.) At the Rule 26(f) conference held starting on January 2, and again in the Rule 26(f) report filed on January 11, Plaintiffs rejected the Campaign's proposal to defer discovery until after resolution of the Campaign's motion to dismiss. (Dkt. 72.)

On January 8, Plaintiffs served the Campaign with their first set of discovery requests. (Ex. 1) Plaintiffs' requests demanded documents from the Campaign, which Plaintiffs have defined to include "any past and present parents, subsidiaries, affiliates, predecessors, successors, employees, independent contractors, officers, agents, advisors, vendors, accountants, and all other persons or entities acting on its behalf or under its direct or indirect control, whether paid or unpaid." (*Id.* at 2.) If taken seriously, that vastly overbroad definition includes the President of the United States. It includes a number of high-ranking federal officials, including Vice President Mike Pence, Secretary of Housing and Urban Development Ben Carson, Senior Advisors to the President Jared Kushner and Stephen Miller, Counselor to the President Kellyanne Conway, and White House Cabinet Secretary William McGinley. By its terms, it even includes thousands of volunteers who knocked doors or called voters or delivered yard signs on behalf of the Campaign.

If that were not bad enough, many of Plaintiffs' individual requests are *broader* than the requests previously criticized by Judge Huvelle. For example:

| **Requests criticized by Judge Huvelle (319 F. Supp. 3d at 188–89)** | **Plaintiffs' current requests (Ex. 1) (all emphases added)** |
|---|---|
| "Communications" with "any Russian" relating to the "publication of the DNC emails" | "*All* documents relating to the publication or any other use … of [DNC] e-mails" |
| Documents relating to "meetings" with Russians "in which any form of assistance by Russians … was discussed" | "*All* documents relating to *any* meeting [with] any Russian national in 2016" |
| "Communication[s]" with "any Russian" "in the District of Columbia" "in which any form of assistance by Russia … was discussed" | "*All* documents discussing or relating to *any* communications [with] any Russian national regarding the DNC" |
| "Communication[s]" with "WikiLeaks" "in which any form of assistance by Russia … was discussed" | "*All* documents discussing or relating to *any* communications [with] WikiLeaks" |

The Campaign now moves for a stay.

## ARGUMENT

### I. The Court Should Stay Discovery Until After Resolution Of The Campaign's Pending Motion To Dismiss

A federal district court has the "inherent" power to "stay proceedings" in order to promote "economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). In resolving a motion for a stay, a court "should consider three factors": (1) "hardship … to the moving party if the action is not stayed," (2) "interests of judicial economy," and (3) "potential prejudice to the non-moving party." *Gibbs v. Plain Green, LLC*, 331 F. Supp. 3d 518, 525 (E.D. Va. 2018).

Even in routine cases, federal courts regularly "defe[r] discovery" until after "a motion to dismiss … is decided." 8A Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice & Procedure* § 2046.1 (3d ed. 2018). Indeed, "a stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting time and effort of all concerned, and to make the most efficient use of judicial resources." *Sai v. Dep't of Homeland Security*, 99 F. Supp. 3d 50, 58 (D.D.C. 2015); *see, e.g.*, *Doe v. Old Dominion University*, 289 F. Supp. 3d 744, 748 (E.D. Va. 2018) (discovery stayed until resolution of motion to dismiss); *Williams v. Guilford Tech. Community Coll. Bd. of Trs.*, 117 F. Supp. 3d 708, 714 (M.D.N.C. 2015) (same).

In this case, the justifications for deferring are far more compelling than in routine litigation. This case involves discovery from the President and high-ranking federal officials (raising separation-of-powers problems) and from a political campaign (raising First Amendment problems), on subjects that overlap with Special Counsel Robert Mueller's investigation (raising concerns about coordinating parallel civil and criminal proceedings). Put simply, the reasons for staying discovery in this case until after resolution of the motion to dismiss are overwhelming.

**A. A stay of discovery would avert serious hardship**

Proceeding to discovery would cause serious "hardship." *Gibbs*, 331 F. Supp. 3d at 525. Indeed, it would transgress the separation of powers, violate the Campaign's rights under the First Amendment, and interfere with an ongoing criminal investigation.

***Separation of powers.*** The Supreme Court has emphasized the "paramount necessity" of protecting "the Office of the President" from "civil discovery" on "insubstantial legal claims"—lest civil litigants use "meritless" lawsuits to compromise "the Executive's interests in maintaining its autonomy and safeguarding its communications' confidentiality." *Cheney v. U.S. District Court*, 542 U.S. 367, 370, 385–87 (2004). Critically, federal courts must account for these "paramount" interests at the front end by imposing appropriate limits on "the timing and scope of discovery." *Id.* at 385. Seeking to control discovery after the process has begun is unacceptable because it would force the President "to bear the onus of critiquing the unacceptable discovery requests line by line," and also because the "checks in the civil discovery process" are "insufficient" to protect the President. *Id.* at 386, 388.

In this case, Plaintiffs have already purported to demand documents relating to the President's official acts. For example, Plaintiffs' request for "any communications between The Trump Campaign and any Russian national regarding … the 2016 DNC Hack" would cover diplomatic negotiations between the President of the United States and the President of Russia—"Trump Campaign" is defined to include President Trump, "any Russian national" includes President Putin, and the request does not include a limitation to any particular time window. (Ex. 1 at 6.) Similarly, Plaintiffs' request for "all documents relating to any meeting between The Trump Campaign and any Russian national in 2016" would cover diplomatic meetings between President-Elect Trump and foreign ambassadors during the presidential transition. (*Id.* at 9.) And that is just the start. The Amended Complaint contemplates further discovery into the President's of-

ficial 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.)

Even where a plaintiff seeks discovery regarding a sitting President's private rather than official acts, "the high respect that is owed to the office of the Chief Executive … should inform … the timing and scope of discovery." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982). Plaintiffs, again, have already asked for discovery from the Campaign, defined to include the President, regarding a wide range of meetings, documents, and communications from the President's time as a political candidate. (Ex. 1 at 5–9.) The Amended Complaint promises more of the same, making allegations about 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.) And in the Rule 26(f) report, Plaintiffs reserved the option of compelling the President to sit for a deposition. (Dkt. 72 at 12.)

Courts must also protect other high-ranking government officials from "disruptive discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). "If a Government official is to devote time to his or her duties, … it is counterproductive to require the substantial diversion that is attendant to participating in litigation." *Id.* Plaintiffs have already purported to demand documents from just about everyone who has ever been affiliated with the Campaign. (Ex. 1 at 2.) That category, understandably, includes many current government-officials, such as the Vice President, the Secretary of Housing and Urban Development, and multiple White House advisors. *Supra* 4. And there is no reason to expect Plaintiffs to stop there, since their Amended Complaint includes alle-

gations about Vice President Pence and various White House advisors. (Am. Compl. ¶¶ 28, 124, 222.) Judge Huvelle was right: proceeding to discovery will "set coequal branches of the government onto a collision course." *Cockrum*, 319 F. Supp. 3d at 189.

***First Amendment.*** Proceeding to discovery raises serious First Amendment problems because Plaintiffs' claims concern political speech. 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.). Otherwise, many speakers, "rather than undertake the considerable burden … of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). 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 expression chills constitutionally protected speech.

Proceeding to discovery also raises serious First Amendment problems because the defendant here is a political campaign. The First Amendment prohibits the courts from compelling a political group to divulge "membership lists." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958). Plaintiffs, however, have demanded disclosure of a full list of the Campaign's "employees," "advisors," and "consultants," "whether paid or unpaid." (Ex. 1 at 5.) The First Amendment likewise prohibits the use of "civil discovery" to compel the disclosure of "internal campaign communications." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th Cir. 2010). Yet Plaintiffs have demanded disclosure of "documents relating to the … use … of e-mails … in the

2016 DNC Hack"—a category would encompass internal communications and strategy memoranda about how a presidential campaign should respond to a major news story. (Ex. 1 at 6.) They have also demanded discovery about the Campaign's alleged "attempt[s] to influence [the Republican] party platform." (Ex. 1 at 9.) The violation of First Amendment rights is palpable.

***Parallel investigations.*** Discovery would also 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 (5th Cir. 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.) Launching parallel civil discovery into the same subjects would threaten to interfere with that investigation; for instance, responding to discovery requests may compromise the confidentiality of the investigation by revealing to these private litigants what preservation protocols the Campaign has already adopted, what collections it has already made, and what documents it has already disclosed during the course of the Mueller investigation. Launching parallel discovery also jeopardizes the rights of potential criminal defendants, since Plaintiffs' discovery request purports to demand documents from some people currently under indictment. (Ex. 1 at 2;

Am. Compl. ¶ 81.) And, as Judge Huvelle recognized, Plaintiffs obviously "will be faced with witnesses who will invoke their Fifth Amendment rights." 319 F. Supp. 3d at 189.

On top of all of that, congressional committees are also vigorously investigating the same issues. (Am. Compl. ¶ 80.) Needless to say, launching civil discovery in parallel with these investigations will greatly complicate the discovery and potentially conflict with, and undermine, these investigations in myriad ways not currently foreseeable.

***Burden of discovery.*** Even apart from all the special concerns just discussed, there is every reason to expect that proceeding with discovery would impose undue burdens on the Campaign. Plaintiffs themselves appear to view this litigation as a "vehicle for discovery." *Supra* 3. And Judge Huvelle described Plaintiffs' requests for discovery in their earlier lawsuit as an "ill-defined," "overly broad," "not narrowly tailored," "wide-ranging," "thinly-veiled," "speculative," "overreaching" "fishing expedition." *Cockrum*, 319 F. Supp. 3d at at 187–89.

Plaintiffs' first set of discovery requests proves the Campaign's point. As already noted, Plaintiffs have demanded documents from the "Campaign," but have defined "Campaign" to include "any past and present parents, subsidiaries, affiliates, predecessors, successors, employees, independent contractors, officers, agents, advisors, vendors, accountants, and all other persons or entities acting on its behalf or under its direct or indirect control, whether paid or unpaid." (Ex. 1 at 2.) Plaintiffs' definition purports to cover documents controlled by the President, numerous high-ranking government officials, and a multitude of campaign vendors, workers, and unpaid volunteers. The burden is self-evident.

Plaintiffs' particular requests only make matters worse. For example, one request demands "all documents relating to the 2016 DNC Hack" (with "relating to" defined as "refers to, contains, embodies, mentions, supports, corroborates, bolsters, demonstrates, proves, evidences,

shows, refutes, negatives, diminishes, disputes, rebuts, controverts, contradicts, describes, reflects, analyzes, interprets, or summarizes"). (Ex. 1 at 2, 6.) Another demands "all documents relating to the … the release, amplification, promotion, or distribution … of e-mails or other documents … taken from the DNC in the 2016 DNC Hack." (Ex. 1 at 6.) Of course, the 2016 DNC hack and WikiLeaks' publication of the DNC's emails were major news stories during the 2016 election campaign. One would expect that people in the political world to have discussed these stories. Yet Plaintiffs want everything that even *mentions* the DNC or any of its emails. It would be bad enough to impose such wildly unreasonable burdens after a court decides that a case should advance beyond the pleading stage, but, in this case, Plaintiffs seek to impose them *even before they have survived a motion to dismiss.* There is no justification for allowing Plaintiffs to do so.

**B. A stay of discovery would promote judicial economy**

Proceeding to discovery would also undermine "interests of judicial economy." *Gibbs*, 331 F. Supp. 3d at 525.

***Discovery disputes.*** As Judge Huvelle recognized, this is "not a routine" case, and proceeding to discovery here would "draw this Court into endless discovery disputes." 319 F. Supp. 3d at 189. Even Plaintiffs are forced to concede that any discovery here "will almost certainly create complex discovery issues and, by any realistic assessment, disputes." (Dkt. 72 at 26.) That understates the point. Here are a few examples of the serious, complex, and in some cases constitutional questions that the Court would have to decide if it proceeds to discovery:

- May the Court force the President to sit for a deposition? The Vice President? A Cabinet Secretary? 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?

- Do Article II and the Presidential Transition Act of 1963 allow discovery about a President-Elect's official transition activities?

- Does the First Amendment allow discovery of a list of the Campaign's advisors and consultants? Its internal communications? Its strategy memos? Its communications with surrogates? Its communications with the Republican Party?

- Does the requirement to submit a privilege log apply to the First Amendment right against compelled disclosure of protected associational activities? Does such an application of the requirement itself violate the First Amendment? Does it violate the principle that a constitutional right can be waived only through the right-holder's affirmative, knowing, and voluntary consent?

- May Plaintiffs compel disclosure of the President's tax returns?

It makes no sense to start working through these disputes now, before the Court has decided the motion to dismiss. For one, the principle of constitutional avoidance directs courts to decide constitutional questions only when necessary. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (Brandeis, J., concurring). Until the Court rules on the Campaign's motion to dismiss, there is no need to address these complex constitutional questions about the scope of discovery; after all, if the Court grants the motion to dismiss, any discussion of these constitutional issues will turn out to be unnecessary. For another, many of these legal questions require the Court to balance, among other factors, *the legal strength of the plaintiff's claim*. *See, e.g.*, *Cheney*, 542 U.S. at 386 (separation-of-powers concerns preclude discovery against the President on "meritless claims"); *Perry*, 591 F.3d at 1165 (First Amendment precludes compelled disclosure of campaign materials where the plaintiff lacks a "sufficient" "interest in obtaining the disclosures"). A court thus cannot meaningfully evaluate these legal questions until it decides whether the claims can survive a motion to dismiss.

***Third-party discovery.*** It gets worse. Denying a stay would likely embroil the Court in complex, multinational, third-party discovery. For example:

- *Discovery from Russia and Russian nationals.* The Amended Complaint 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.) And Plaintiffs have already sought discovery from the Campaign regarding a wide range of documents relating to "any Russian national." (Ex. 1 at 5–9.)

- *Discovery from WikiLeaks.* One of the central actors in Plaintiffs' alleged conspiracy is WikiLeaks, an organization that Plaintiffs describe as a "non-state hostile intelligence service." (Am. Compl. ¶ 175.) WikiLeaks founder Julian Assange, another central actor in the alleged conspiracy, currently lives in the Ecuadorian embassy in London. (*See id.* ¶ 182.) And Plaintiffs have already sought discovery regarding documents relating to WikiLeaks. (Ex. 1 at 5–9.)

- *Discovery from the Democratic National Committee.* The Amended Complaint alleges that Russia hacked the DNC's computers. Addressing that allegation surely requires discovery into the Democratic National Committee's computer operations.

These discovery efforts would generate further disputes for the Court to resolve. For example, the Court would have to address claims of sovereign immunity. It would have to decide whether it may order foreign nationals to participate in depositions. It would have to determine whether information about the DNC's computers constitute trade secrets. *See* First Am. Compl., *Democratic National Committee v. Russian Federation*, No. 1:18-cv-3501, Dkt. 182 (S.D.N.Y. 2018) (DNC claiming, in parallel lawsuit brought by DNC about alleged collusion with Russia and WikiLeaks, that materials on DNC computers constitute trade secrets). And on and on.

***Appellate proceedings.*** In addition to consuming judicial resources, discovery would also likely take up the resources of the appellate courts, and potentially delay progress in litigation until those appellate courts have resolved the disputes. The courts of appeals "should … entertai[n] an action in mandamus" where the President, Vice President, and other senior federal officials "are the subjects of … discovery orders." *Cheney*, 542 U.S. at 382. They should also "exercise [their] mandamus jurisdiction" to review discovery orders that undermine "First Amendment

privilege." *Perry*, 591 F.3d at 1158. Further, the Supreme Court has stepped in to enforce these limits on civil discovery, for example by staying a recent order directing Secretary of Commerce Wilbur Ross to sit for a deposition. *See In re Department of Commerce*, 139 S. Ct. 16 (2018).

In sum, a stay of discovery would promote judicial economy. It would defy common sense to force this Court, the Fourth Circuit, and the Supreme Court to decide an endless stream of discovery disputes and third-party-discovery disputes, before this Court has resolved whether *any* discovery is even needed in the first place.

**C. A stay of discovery would cause no undue prejudice**

A stay of discovery pending resolution of the motion to dismiss also would not cause any unfair "prejudice to the non-moving party." *Gibbs*, 331 F. Supp. 3d at 525. As an initial matter, if a "complaint is deficient," a plaintiff "is not entitled to discovery, cabined or otherwise." *Iqbal*, 556 U.S. at 686. Rather, a plaintiff must "surviv[e] a motion to dismiss" to "unloc[k] the doors of discovery." *Id.* at 679–80. In other words: "A plaintiff with a largely groundless claim [should not] be allowed to take up the time of a number of other people … [The motion-to-dismiss] threshold … must be crossed before [a] case should be permitted to go to … costly and protracted discovery." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). This principle is so elementary that even Plaintiffs' own press release predicted that "this matter will easily survive a motion to dismiss *and therefore allow discovery*." *Supra* 3 (emphasis added).

In addition, there is no urgent need to proceed to discovery. Deferring discovery will not cause the evaporation of the Campaign's documents. Nor will it lead to the loss of pertinent witness testimony. Nor, for that matter, do Plaintiffs have an interest in the immediate resolution of their claims. Quite the contrary, Plaintiffs have themselves caused extensive delay. First, they filed their previous lawsuit nearly a year after the alleged disclosure, 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). They chose to file the lawsuit in a district (the District of Columbia) that lacked personal jurisdiction and in which venue was improper. *See Cockrum*, 319 F. Supp. 3d at 165. They also chose to assert diversity jurisdiction, yet failed to plead the citizenship of the parties in their complaint—thereby delaying the case by forcing Plaintiffs to file an Amended Complaint, and by restarting the motion-to-dismiss briefing schedule. *See* Motion to Dismiss, *Cockrum v. Donald J. Trump for President, Inc.*, No. 1:17-cv-1370, Dkt. 51 at 8. They then caused further delay by filing an "untimely" "motion for jurisdictional discovery." 319 F. Supp. 3d at 187. Together, Plaintiffs' litigation choices delayed this case by about twelve months. Plaintiffs are thus in no position to demand expedition now.

Plaintiffs have argued that they will be prejudiced because the "clock is running on discovery under the standard timetable in this Court's Scheduling Order, and because deferring discovery may unduly truncate the time for discovery. (Dkt. 72 at 1.) But those discovery timelines can obviously be adjusted if and when the motion to dismiss is denied. In contrast, the harm to the Executive Branch, to the Campaign, to the Mueller investigation, and to judicial economy cannot be undone.

**D. Precedent supports granting a stay of discovery**

Judge Huvelle's decision in Plaintiffs' previous lawsuit against the Campaign confirms that the Court should grant a stay here. In that case, Judge Huvelle categorically rejected Plaintiffs' efforts to conduct jurisdictional discovery before the resolution of the Campaign's motion to dismiss—refusing to "set coequal branches of the government onto a collision course" and to get "draw[n] … into endless discovery disputes." *Cockrum*, 319 F. Supp. 3d at 189. Judge Huvelle's conclusions apply *a fortiori* here. If mere *jurisdictional discovery* in this case would lead to interbranch conflict and mire the judiciary in endless discovery disputes, full-blown *merits*

*discovery* would do so all the more. And if it was appropriate for Judge Huvelle to deny discovery outright, it is surely appropriate for this Court to take the lesser step of deferring discovery until after resolution of the Campaign's motion to dismiss.

The Fourth Circuit's ruling in recent Emoluments Clause litigation leads to the same conclusion. In that litigation, the district court denied a motion to dismiss Emoluments Clause claims against the President in his individual capacity, and refused to stay discovery. *District of Columbia v. Trump*, 2018 WL 5728678 (D. Md. Nov. 2, 2018). The Fourth Circuit, however, overrode the district court's decision and stayed all proceedings pending resolution of the appeal. *In re Donald J. Trump*, No. 18-2486, Dkt. 9 (4th Cir. Dec. 20, 2018). The Fourth Circuit's ruling is highly pertinent here. The plaintiffs in the Emoluments Clause litigation proposed to conduct discovery regarding the President's finances, and Plaintiffs here likewise have highlighted the President's "tax returns," "business relationships," and "financial ties." (Am. Compl. ¶¶ 136, 238.) If a stay was appropriate in that case even *after* the denial of the motion to dismiss, it is all the more appropriate in this case *pending* the motion to dismiss.

The same result follows from *Nwanguma v. Trump*, 2017 WL 3430514 (W.D. Ky. Aug. 9, 2017), a lawsuit against the President and the Campaign regarding a disturbance at a campaign rally. In that case, the district court denied a motion to dismiss, but stayed discovery against the President *and* the Campaign "pending resolution of the interlocutory appeal." *Id.* at *5. If a stay was proper in *Nwanguma* pending resolution of the appeal, it is surely proper pending resolution of the motion to dismiss itself.

## II. Plaintiffs' Objections To A Stay Are Meritless

In the parties' Rule 26(f) report, Plaintiffs make a series of objections to the Campaign's request for a stay. These objections all lack merit.

*First*, Plaintiffs assert that separation-of-powers concerns are beside the point because "the Campaign … is a private, not a governmental, entity." (Dkt. 72 at 11.) Judge Huvelle, of course, disagreed. She understood that the Campaign is a private entity, yet she explained that proceeding to discovery in this lawsuit would "set coequal branches … onto a collision course." *Cockrum*, 319 F. Supp. 3d at 189. Judge Huvelle was right. The Campaign is a private entity, but discovery in this case would affect more than just the Campaign. As already explained, Plaintiffs' first set of discovery requests already defines the "Campaign" to sweep in the President, the Vice President, a Cabinet Secretary, and many more high-ranking officials. And Plaintiffs' Amended Complaint is replete with allegations about the President's meetings, finances, tweets, and official acts. To pretend that discovery will affect only private entities is to defy common sense. Moreover, "it is no answer to these concerns to say that discovery [from the President and other high-ranking officials] can be deferred while pretrial proceedings continue for [the Campaign]. It is quite likely that, when discovery as to the [Campaign] proceeds, it would prove necessary for [the President and other officials] to participate in the process. … Even if [the President and other officials] are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery." *Iqbal*, 556 U.S. 662 at 685–86.

*Second*, Plaintiffs assert that discovery will not "necessarily violate the First Amendment," because a political campaign's First Amendment privilege turns on "a multipart interest-balancing test." (Dkt. 72 at 12.) Plaintiffs' argument, however, just proves the Campaign's point: this Court cannot meaningfully evaluate the First Amendment issues in this case until after it resolves the motion to dismiss. The balancing test turns, in part, on whether the plaintiff has "demonstrate[d] a sufficient need for the discovery to counterbalance [the] infringement" on First Amendment rights. *Perry*, 591 F.3d at 1164. In the Campaign's view, Plaintiffs have *zero*

"need for … discovery" because their claims are all meritless and can be dismissed on the papers without any discovery at all. How can the Court meaningfully evaluate this argument before the motion to dismiss is resolved?

*Third*, Plaintiffs assert that the pendency of parallel criminal proceedings does not matter, because "the Special Counsel is capable of alerting the Court … at the appropriate time" if discovery interferes with his investigation. (Dkt. 72 at 13.) Plaintiffs' proposal would require the Special Counsel, who surely has more important things to do, to monitor discovery in this case to ensure that there is no interference. It would also require the parties to conduct discovery in fits and starts—to commence discovery now, but to stop it later once the Special Counsel objects. Needless to say, it is far more logical to stay discovery at the outset, before any interference with such a critically important investigation occurs. In any event, Plaintiffs' argument addresses only one side of the issue. Criminal defendants and witnesses have their own interests in avoiding parallel civil and criminal proceedings, and Plaintiffs' proposal undermines those interests.

*Fourth*, Plaintiffs urge the Court to confront problems if and when they arise, using "case management tools." (Dkt. 72 at 8.) Where a plaintiff has not already survived a motion to dismiss, however, "it is no answer to say" that a court can limit abuse of "the discovery process" using "careful case management." *Twombly*, 550 U.S. at 559. This "rejection of the careful-case-management approach" is especially important in lawsuits involving discovery against "Government officials." *Iqbal*, 556 U.S. at 685. "There are no … checks in the civil discovery process" that are adequate to safeguard such officials from improper discovery. *Cheney*, 542 U.S. at 386.

* * *

Even in ordinary litigation, courts routinely stay discovery pending resolution of a motion to dismiss. There is all the more reason to do so in this extraordinary case. It is, after all, certain

that discovery will impose severe burdens—on the President, on public officials, on the Campaign, and on the Court itself. Yet it is entirely hypothetical whether such discovery is even needed in the first place, because the Court could still dispose of all of Plaintiffs' claims on the papers without any discovery. It makes no sense for this Court to "set coequal branches of the government onto a collision course," and to consume its own judicial resources deciding complex constitutional questions regarding discovery, merely because of the hypothetical possibility that Plaintiffs could survive the motion to dismiss. *Cockrum*, 319 F. Supp. 3d at 189.

**CONCLUSION**

The Court should grant the Campaign's motion to stay discovery pending resolution of the Campaign's motion to dismiss.

Dated: January 11, 2019

Respectfully submitted,

/s/ Nikki L. McArthur

Michael A. Carvin*
Nikki L. McArthur (Virginia Bar No. 84174)
Vivek Suri*
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com
nmcarthur@jonesday.com
vsuri@jonesday.com

Jeffrey Baltruzak*
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
jbaltruzak@jonesday.com

* *Pro hac vice*

*Counsel for Donald J. Trump for President, Inc.*

**CERTIFICATE OF SERVICE**

I certify that on January 11, 2019, 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: January 11, 2019

/s/ Nikki L. McArthur
Nikki L. McArthur
*Counsel for Donald J. Trump for President, Inc.*