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
REPLY BRIEF IN SUPPORT OF
MOTION FOR STAY OF DISCOVERY

ARGUMENT

The Campaign's motion asks the Court to take the modest step of staying discovery until after the Court has resolved the Campaign's motion to dismiss. It does not (as Plaintiffs seem to believe) ask the Court to declare that the Campaign is permanently and categorically "immune from civil discovery." (Opp. 2.) Plaintiffs' objections to this modest step are unpersuasive.

First, Plaintiffs fail to engage with the Campaign's central argument that courts should and do stay discovery pending resolution of a motion to dismiss even in routine cases that raise no separation-of-powers and First Amendment concerns. The Supreme Court explained in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)—a case that involved a private corporation and that had nothing to do with the First Amendment—that discovery "can be expensive," especially where the case involves a "massive factual controversy." As a result, before a court allows a case "to go to its inevitably costly and protracted discovery phase," it should at the very least assure itself that "the plaintiffs can construct a claim from the events related in the complaint." *Id.* Otherwise, "a plaintiff with a largely groundless claim" would "be allowed to take up the time of a number of other people." *Id.* These concerns, by themselves, justify a stay of discovery pending resolution of the motion to dismiss. To be sure, the separation of powers, the First Amendment, and the Mueller investigation make this normal justification especially compelling, but they are not a departure from the norm. Plaintiffs have no response to this key point.

Second, Plaintiffs acknowledge that discovery in this case would raise complex constitutional questions, but urge the Court to decide these issues as they arise. (Opp. 1.) Under that logic, no court would ever grant a stay of discovery pending resolution of a motion to dismiss, since a court could always decide discovery disputes as they arise. Yet courts "have often stayed discovery while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Sai v. Dep't of Homeland Security*, 99 F. Supp. 3d 50, 58 (D.D.C. 2015). They do so

because Plaintiffs' proposed alternative—plowing ahead with discovery even though the case may be decided on the motion to dismiss without any discovery—misuses "judicial resources" and "wast[es] time and effort of all concerned." *Id.*

Moreover, in this case, Plaintiffs' proposal is not only wasteful, it is quite unworkable. As the Campaign has already shown, the Court and the parties *cannot* properly analyze the legal issues that will come up in discovery until the Court decides the motion to dismiss. For example, deciding whether the First Amendment protects the Campaign's communications, the Court may have to balance the Campaign's constitutional interests against the Plaintiffs' "need for the discovery." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010). In the Campaign's view, Plaintiffs have *no need whatsoever* for discovery, because their claims lack legal merit and can be dismissed without any discovery at all. There is simply no way to evaluate that argument until the motion to dismiss has been decided.

Indeed, Plaintiffs' brief shows that discovery would raise another threshold question—who and what is part of the "Campaign"—in addition to the thorny constitutional issues the Campaign has already identified. Plaintiffs sought discovery "from the Campaign" (Opp. 2), and, in their first set of requests, announced a definition of "Campaign" that is so broad that it would, by its terms, sweep in the President, the Vice President, a Cabinet Secretary, and multiple senior White House officials, not to mention thousands of employees and unpaid volunteers (Mem. 4). Plaintiffs now retreat from that broad definition, asserting that they "currently" do not ask for documents "from the President or any other high ranking official" or relating to "the President's official acts." (Opp. 2.) That statement conspicuously leaves open the possibility that Plaintiffs *will* make such a request in the future. And, in any event, it suggests that Plaintiffs' definition purports to encompass every "unpaid volunteer" who worked for the Campaign in 2016. (Opp. 2.)

Finally, Plaintiffs deny the relevance of Judge Huvelle's previous refusal to allow discovery in this litigation. *See Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158 (D.D.C. 2018). In Plaintiffs' telling, "Judge Huvelle's concern was that plaintiffs were seeking merits discovery and not discovery tailored to jurisdictional matters." (Opp. 4.) That was certainly *one* of Judge Huvelle's concerns, but it was far from her *only* concern. Judge Huvelle raised a multitude of additional concerns as well, all of which apply in this lawsuit, too:

- Judge Huvelle explained that proceeding to discovery would "set coequal branches of the government onto a collision course." *Cockrum,* 319 F. Supp. 3d at 189. That concern is equally applicable here.

- Judge Huvelle explained that discovery would "dovetail with Special Prosecutor Robert Mueller's ongoing investigations" and that Plaintiffs "will be faced with witnesses who will invoke their First Amendment rights." *Id.* That concern is equally applicable here.

- Judge Huvelle explained that proceeding to discovery "would also draw this Court into endless discovery disputes." *Id.* That concern is equally applicable here.

- Judge Huvelle explained that proceeding to discovery would force the Campaign to bear "burden and expense." *Id.* That concern is equally applicable here.

- Judge Huvelle explained that Plaintiffs' requests constituted an "ill-defined," "overly broad," "not narrowly tailored," "wide-ranging," "thinly-veiled," "speculative," "overreaching" "fishing expedition." *Id.* at 187–89. That concern is equally applicable here—in fact, more applicable, since Plaintiffs' requests are broader than the requests Judge Huvelle criticized. (Mem. 4.)

* * *

Plaintiffs' own allies, in a press release issued by Plaintiffs' own counsel, have described this lawsuit as "a vehicle for discovery of documents and evidence" from the Campaign. (Mem. 3; *see also* https://protectdemocracy.org/cockrum-v-trump/legal-experts/.) Plaintiffs' dramatically overbroad discovery requests in Judge Huvelle's court, and their even broader discovery requests in this Court, confirm this assessment of the lawsuit's goals. It cannot be the case that a plaintiff can fail to show that his lawsuit is consistent with the First Amendment, fail to plead claims un-

der the law of the correct state, fail to plead the legal elements of those claims, and fail to plead a plausible factual theory—yet still gets exactly what he wants out of the lawsuit. The Court should grant the motion for a stay.

CONCLUSION

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

Dated: January 17, 2019

Respectfully submitted,

/s/ Nikki L. McArthur

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CERTIFICATE OF SERVICE

I certify that on January 17, 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 17, 2019

/s/ Nikki L. McArthur
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