IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROY COCKRUM, et al., *Plaintiffs*, v. DONALD J. TRUMP FOR PRESIDENT, INC., & ROGER J. STONE, *Defendants*.	Case No. 1:17-cv-1370-ESH

MEMORANDUM OF *AMICI CURIAE*
BIPARTISAN CAMPAIGN OFFICIALS
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTEREST OF AMICI CURIAE

Amici are political professionals who have worked at the senior level of campaigns for federal office, specifically:

- **Mark Salter**, who served as chief of staff to Senator John McCain and worked as a senior advisor on each of his presidential campaigns (2000 and 2008);
- **Ben LaBolt**, who served as National Press Secretary for the Obama for America 2012 re-election campaign, as Deputy Press Secretary for Obama for America 2008, and as Press Secretary for Sherrod Brown for Senate (in 2006);
- **Howard Opinsky**, who served as Press Secretary for McCain for President (from 1998 to 2000), as Deputy Communications Director for Gramm for President (the 1996 campaign of Senator Phil Gramm), and as Deputy Communications Director for the Republican Senatorial Committee (from 1993 to 1995);
- **Mindy Finn**, a 2016 candidate for Vice President and the Director of Digital Strategy for Mitt Romney for President (Governor Romney's 2008 campaign); and
- **Hari Sevugan**, who was National Press Secretary for the Democratic National Committee (from 2009 to 2011), a Senior Spokesman for Obama for America (2008), and held senior roles for numerous statewide campaigns.

They understand the critical importance of participation in electoral democracy and the central role of campaigns and political parties in fostering that participation. Without taking a position on the plausibility of the facts or claims before the Court, *amici* respectfully submit this brief to share their perspective that the price for political participation cannot become a complete forfeiture of privacy.

SUMMARY OF ARGUMENT

The wholesale hacking and indiscriminate publication of the electronic communications of campaign officials is an anathema to American democracy. If such conduct becomes a routine part of the political process, an untold number of

participants (campaign and party staff, volunteers and donors) will be harmed and future participation will be chilled. The foundational right of our political system is the right to participate in electing our leaders. That right and the system on which it is based will be compromised if the reckless disclosure of private facts about those involved in campaigns becomes commonplace.

ARGUMENT

The work of campaigning at any level, and particularly in national or prominent statewide races, is part advocacy, operations, and fundraising. Because campaign and party staff necessarily are spread throughout the country (or state, depending on the race) and working long hours, email and text messages are the primary modes of communication.

Each of the amici are (or have been) willing participants in this process because democracy is participatory and they are motivated to elect the candidates with whom they have worked so that, once in office, those candidates may positively affect public policy. None, however, entered the political world believing that each and every communication bearing their name would be blasted out to the world regardless of its content and regardless of the impact on their respective private and professional lives. Were such haphazard disclosures to become routine, the work of electing our public officials would change considerably and not for the better. So too the lives of those engaged in that work. If the allegations in the complaint are true (which must be assumed at this stage), the immunity from consequence now claimed by Defendants Donald J. Trump for President, Inc. and Roger J. Stone would have lasting repercussions.

A. Advocacy on Behalf of a Political Party or a Candidate is an Essential Part of Democracy.

As the Supreme Court has recognized time and again, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam); *see Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). Our system benefits when more people participate in those discussions and the campaigning that facilities them. *E.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (the very "purpose behind the Bill of Rights" is to facilitate advocacy, even of the lone pamphleteer). Indeed, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders," by "vot[ing], urg[ing] others to vote for a particular candidate, volunteer[ing] to work on a campaign, and contribut[ing] to a candidate's campaign." *McCutcheon v. Federal Election Comm'n*, 572 U.S. –, 134 S. Ct. 1434, 1440–41 (2014). The right to choose the cause, candidate or party for which to campaign likewise is a core constitutional right. *See id.* at 1448; *Federal Election Comm'n v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 493 (1985). For these reasons, efforts to threaten or intimidate those involved in supporting or advocating for candidates are matters of significant federal concern. 42 U.S.C. § 1983(3).

Here, the Plaintiffs have alleged that their emails (or emails referencing private details about them) were taken and, at the encouragement of a rival campaign, indiscriminately published to the world. As Justice Holmes famously recognized, our Constitution is "an experiment," reliant upon a political system defined by a "free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

If the price of admission to that trade is the forfeiture of any actionable privacy interest, the marketplace will be substantially less free.

B. The Theft and Publication of Communications of Party and Campaign Staff Will Chill Participation in Electoral Politics.

Defendants have suggested that where an individual chooses to work for a political party or a political campaign, every email he may have sent or received during that time period is transformed into a matter of public concern. This suggestion is without a limiting principle, and the logic would apply equally to modes of communication (e.g., text messages and multiple email or private social media platforms) and broadly to all types of campaigns for public office.

Neither the Supreme Court nor the D.C. Circuit has embraced such a sweeping definition of public concern. In *Bartnicki v. Vopper*, for example, the Supreme Court concluded that an illegally obtained recording of a short telephone conversation could be published without civil consequence because its *entire* content related to a contentious collective bargaining dispute with a public entity. 532 U.S. 514, 525, 535 (2001). Per the Court's instruction, the decision there "'reli[ed] on limited principles that swe[pt] no more broadly than the appropriate context of the instant case.'" *Id* at 529. (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 532–33 (1989)). Pertinently, the holding did not extend to publishing *months* of recorded telephone conversations because a few minutes of the recordings may have been newsworthy. *See id*. But that is what Defendants are alleged to have encouraged here. Nearly 20,000 emails were leaked; only a handful of them were newsworthy (even under a broad conception of that word) and the rest ranged from the trivial to the deeply personal. *See* Amended Compl. ¶ 19, 42–53. That a small part of the disclosure involved matters of public concern is no

defense to the publication of other, purely private information. *See Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 953–54 (7th Cir. 2015) (news reporting including police officers' "personal details both intruded on their privacy and threatened their safety," even where the story related "to a matter of public significance—the allegation that the Chicago Police Department manipulated a homicide investigation").

Defendants' assertion that their alleged conduct is shielded from liability by the First Amendment would have sweeping implications. In very broad strokes, parties and political campaigns are comprised of: (i) experienced political professionals; (ii) young people at the outset of their careers; (iii) volunteers; and (iv) donors. And campaigns and political parties are workplaces, where emails contain all manner of personnel records and personal details. In the grueling final months of a campaign, the work is round-the-clock. Absences are explained on email by direct reference to health issues, personal struggles or family concerns. What rational person would accept the blasting out of this information to the world just because it was referenced during the course of a campaign? *Cf. United States Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 763–64 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person . . . . According to Webster's initial definition, information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public'").

More concretely for political professionals, campaign work is cyclical and the ability to move onto the next campaign would be hindered if a record of every prior communication from a past campaign were made available on the internet for the world to see. Young people may desire to make a career in politics and will find themselves

similarly inhibited. Or they may desire to pursue a different career path and find it complicated or precluded entirely by emails from their early 20s that have been made available online — indefinitely. That is particularly true in light of the fact the crucible of campaign work (and its long hours) can give rise to close personal relationships, especially among younger staff. *See, e.g.,* Megan McDonough, "Finding Hope, and Later Love, on the Presidential Campaign Trail," *Washington Post* (Mar. 18, 2017); Tammy La Gorce, "On the Campaign Trail, Love Doesn't Always Win," *N.Y. Times* (Aug. 4, 2016). Finally, volunteers and donors — essential to our electoral democracy in their respective ways — have *other* jobs and responsibilities, which may be compromised by the indiscriminate publication of communications referencing their private information.

The public concern at issue here is not whether the disclosure of 20,000 of nonpublic emails was appropriate because several of them bore some indicia of newsworthiness. It is whether if the price of participation in American political campaigns becomes a total forfeiture of privacy, future participation will be deterred. *Cf. Bartnicki*, 532 U.S. at 537–38 (Breyer, J., concurring) (both "protecting privacy and promoting speech are 'interests of the highest order'"). The answer undoubtedly is yes.

C. Campaigning Does Not Require Relinquishment of a Private Life.

In many instances, the law protects an individual's ability to enter the public arena without forfeiting a private life. For example, in the analogous context of defamation, the D.C. Circuit recognizes the concept of the limited purpose public figure. *E.g., Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 585–89 (D.C. Cir. 2016) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974)). There, in determining the extent to which defamation is actionable, the Court considers: (i) whether the individual is

involved in "a public controversy," (ii) whether he has "played a significant role in that controversy" by "thrust[ing] himself to [its] forefront" and (iii) whether the publication was "germane to the plaintiff's participation in the controversy" or wholly unrelated to it. *Id.* (citing *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296–98 (D.C. Cir. 1980)). A similar framework should apply here. Setting aside whether all campaign or party staff meet the "significant role" threshold, they should be protected against defamation *and* the disclosure of private facts relating to purely personal matters.

In addition, federal law expressly recognizes both that the emails of federal employees generally should be made available, and exempts the disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Notably, in that context it is well established that there is no public interest in the disclosure of public employees' social security numbers. *E.g., Int'l Bhd. of Elec. Workers Local No. 5 v. HUD*, 852 F.2d 87, 89 (3d Cir. 1988).

Similar logic should control the Court's analysis here. The time is ripe to incent greater participation in our democratic process. At minimum, though, the cost of participation in our "free market" of political ideas cannot be implied consent to the worldwide and indefinite disclosure of private facts.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with Local Civil Rule 7(o)(4) and does not exceed 25 pages. I further certify, pursuant to Local Civil Rule 7(o)(5) and Fed. R. App. P. 29(a)(4)(E), that I was the exclusive author of this brief and that no party, party's counsel, or any other person or entity contributed money that was intended to fund this brief.

/s/ M. Patrick Moore Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court's CM/ECF system and via email.

/s/ M. Patrick Moore Jr.
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