IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROY COCKRUM, ET AL.,

Plaintiffs,

v.

DONALD J. TRUMP FOR PRESIDENT, INC. ET AL.,

Defendants.

Case No. 1:17-cv-1370-ESH

REPLY IN SUPPORT OF DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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We have explained that, in order to analyze personal jurisdiction, venue, choice of law, and the merits, one must first appreciate that this case is about the *publication* rather than the *acquisition* of the DNC emails. (Mem. 6–7.) Plaintiffs expressly accept this key premise. They say: "Plaintiffs do not seek to hold Defendants directly liable for hacking the DNC servers in D.C," because the hack "took place before [the Campaign] joined the conspiracy." (Opp. 21.) Instead, Plaintiffs seek to hold the defendants liable only "for [the] dissemination." (Opp. 27 n.10.)

For a variety of reasons, however, Plaintiffs may not hold the Campaign liable "for the dissemination" of the DNC emails. Most importantly, Plaintiffs fail to satisfy the D.C. long-arm statute and fail to overcome the Campaign's First Amendment public-concern defense. The Court should dismiss the case.

I. The Court Should Dismiss The Complaint On Procedural Grounds

Plaintiffs cannot show subject-matter jurisdiction, personal jurisdiction, or venue.

A. Plaintiffs fail to show subject-matter jurisdiction over the tort claims

Plaintiffs establish neither diversity jurisdiction nor supplemental jurisdiction over their common-law tort claims. They acknowledge that, to establish diversity jurisdiction, they must satisfy the amount-in-controversy requirement individually rather than collectively. (Opp. 14–15.) Yet their complaint never states that any individual plaintiff seeks damages exceeding $75,000. This omission decides the case, since a complaint "is fatally defective unless it contains a proper allegation of the amount in controversy." *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9 (1975).

Plaintiffs argue that, in light of the nature of the injuries pleaded in the complaint, compensatory and punitive damages could exceed $75,000. (Opp. 15.) But "the decisions of [the Supreme Court] require, that the averment of jurisdiction shall be positive, that the [complaint] shall expressly state the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively." *Brown v. Keene*, 33 U.S. 112, 115 (1834) (Marshall, C.J.); *see Bender v. Williamsport Area School District*, 475 U.S. 534, 547 (1986) ("it is not sufficient that jurisdiction may be inferred argumentatively from … the pleadings"); *CFTC v. Nahas*, 738 F.2d 487, 492 n.9 (D.C. Cir. 1984) ("a party must … affirmatively allege in his pleadings the facts showing the existence of jurisdiction"). This rule is "inflexible and without exception." *Bender*, 475 U.S. at 546. Here, the complaint fails to state affirmatively that any single plaintiff's damages exceed $75,000. And Plaintiffs have not asked for leave to amend the complaint to include such an allegation. That ends the case.

Plaintiffs try to get around the problem by appealing to the "legal certainty" test for judging the jurisdictional amount. (Opp. 14.) But the legal certainty test kicks in only *after* "the complaint affirmatively alleges that the amount in controversy exceeds the jurisdictional threshold." *Naffe v. Frey*, 789 F.3d 1030, 1040 (9th Cir. 2015). Once the plaintiff makes such an allegation, "the sum claimed by the plaintiff controls," unless it "appear[s] to a legal certainty that the claim is really for less." *Rosenboro v. Kim*, 994 F.2d 13, 16 (D.C. Cir. 1993). Here, the complaint does not affirmatively allege that any single plaintiff satisfies the amount requirement. The legal-certainty test thus does not come into play.

That leaves supplemental jurisdiction. Plaintiffs acknowledge that courts should not exercise supplemental jurisdiction where the state claims "require more judicial resources to adjudicate" than the federal claims. (Opp. 16.) Plaintiffs' state claims will consume far more judicial resources than their federal claims. To resolve the state claims, the Court must (1) conduct a choice-of-law inquiry, (2) decide novel questions of District law, such as whether the public-disclosure tort covers disclosures of sexual orientation, (3) resolve important First Amendment issues, and (4) adjudicate an anti-SLAPP motion. The federal-law claims raise no such complications. Exercising supplemental jurisdiction is thus plainly inappropriate.

B. Plaintiffs fail to establish personal jurisdiction

To establish personal jurisdiction, Plaintiffs must satisfy both the long-arm statute (D.C. Code § 13-423) and the Due Process Clause. (Mem. 10.) Plaintiffs do neither.

Long-Arm Statute. Plaintiffs claim that two subsections of the long-arm statute, (a)(1) and (a)(4), confer jurisdiction here. But neither provision applies in this case.

To start, subsection (a)(1) applies where the defendant "transact[s] any business in the District." The clause does not cover this tort case. "The words of a statute must be read … with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The long-arm statute's overall scheme includes two subsections, (a)(3) and (a)(4), that expressly address "tort[s]." This means that a tort plaintiff must rely on those tort-specific subsections. He may not circumvent the requirements of those provisions by invoking the "transacting business" clause instead.

The D.C. Circuit has specifically ruled that claims for invasion of privacy "fal[l] under" the tort subsections; they "do not fit" under the "transacting business" clause. *Crane v. Carr*, 814 F.2d 758, 763 (D.C. Cir. 1987). This Court, too, has "declin[ed] to construe 'transacting business' jurisdiction to encompass tort actions that the tort-specific provisions would otherwise disallow." *Triple Up Limited v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 21 n.1 (D.D.C. 2017); *see Alkanani v. Aegis Defense Services, LLC*, 976 F. Supp. 2d 13, 27–28 (D.D.C. 2014).

That leaves subsection (a)(4), which applies where a plaintiff suffers "tortious injury in the District." Plaintiffs assert in-District injuries for only *some* of their claims. They do not even try to show in-District injury for (1) Cockrum's claims for public disclosure and intentional infliction, (2) Schoenberg's claims for public disclosure and intentional infliction, or (3) Comer's claims regarding disclosures relating to his sexual orientation or his illness. Because personal jurisdiction is "claim-specific" (*Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir. 2006)), the Court should dismiss these claims for this reason alone.

Plaintiffs argue that their § 1985 claims involve tortious injury in the District because Plaintiffs supported the DNC, which is headquartered in the District. (Opp. 22.) The argument is wrong. Section § 1985 prohibits conspiracies to "intimidat[e]" citizens who support federal candidates. The "tortious injury" in a § 1985 case is thus the intimidation experienced by the plaintiff. That intimidation occurs where the plaintiff is located, not where the entity he supports is located. Here, none of Plaintiffs lived in the District. There is thus no tortious injury in the District.

Only Plaintiff Comer tries to shoehorn his public-disclosure claim into subsection (a)(4): He claims that the disclosure of emails in which he gossips about his colleagues caused injury here by affecting his professional relationships in the District. This argument is wrong. The long-arm statute requires "*tortious* injury." Revealing someone's gossip is not a tort, so the harm caused by the revelation is not tortious injury. *Infra* 18. Thus, this claim, too, warrants dismissal for lack of personal jurisdiction.

Due Process. Plaintiffs claim that the Court may exercise general jurisdiction under *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), even though the Campaign is permanently headquartered in New York, because it has been "*temporarily* headquartered" in the District "since January 20, 2017." (Opp. 23.) But "*Perkins* should be regarded as a decision on its exceptional facts." *Daimler AG v. Bauman*, 134 S. Ct. 746, 756 n.8 (2014). In *Perkins*, a Philippine corporation shut down its Philippine operations and moved to Ohio because of the Japanese occupation of the Philippines during World War II. "To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio." *Id.* "Given the wartime circumstances," Ohio "could be considered a [temporary] surrogate" for the principal place of business, and thus could exercise general jurisdiction. *Id.*

This case looks nothing like *Perkins*. As Plaintiffs allege, the Campaign continues to maintain its "permanent" headquarters in Trump Tower in New York. (Am. Compl. ¶ 35.) It has not temporarily shut down its offices there to move all of its operations to the District. *Perkins* thus does not authorize general jurisdiction in this case.

Plaintiffs argue, alternatively, that the Court may exercise specific jurisdiction because of "meetings" and "negotiat[ions]" that occurred in the District and because the alleged Russian hack targeted servers located in the District. (Opp. 19). But specific jurisdiction covers only claims that "arise from" the Campaign's purposeful activities in the District. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). Plaintiffs cannot show that this case "arises from" meetings or negotiations in the District, since they never allege that the Campaign ever discussed the DNC emails in those meetings. Similarly, the case does not "arise from" the alleged Russian hack; the case concerns the *publication*, rather than the *acquisition*, of the emails.

Plaintiffs fall back on the intuition that a presidential campaign faces no inconvenience in defending a case here. (Opp. 17.) But restrictions on personal jurisdiction are "territorial limitations on the power" of the court, not just an "immunity from inconvenient or distant litigation." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. "Even if the defendant would suffer … no inconvenience," a plaintiff must still show that the court has the power to decide the case. *Id.* at 1780. Plaintiffs have not done so.

Finally, Plaintiffs ask for jurisdictional discovery. (Opp. 18 n.7). But a plaintiff who wants such discovery must explain, in "detai[l]," "what discovery he wishes to conduct" and "what results [he] thinks such discovery would produce." *NBC-USA Housing, Inc. v. Donovan*, 741 F. Supp. 2d 55, 60 (D.D.C. 2010). Plaintiffs have never tried to do so. They have instead made a bare request for discovery, without telling the Court what they want to see or what they expect to learn. A plaintiff may not get discovery to start such a generalized fishing expedition into unidentified issues.

C. Plaintiffs fail to establish that venue lies in this district

Plaintiffs also fail to establish venue. Venue would be appropriate only if a "substantial part" of the events giving rise to the claim occurred in this district. 28 U.S.C. § 1392(b)(2). Plaintiffs assert that venue is proper because the hack targeted emails stored in this district. (Opp. 23.) But Plaintiffs concede that this case is about the disclosure rather than the hack. Since the hack did not itself give rise to the claims, it cannot establish venue. (Mem. 16.) Plaintiffs also assert that venue is proper because the alleged conspirators met and communicated in the District. (Opp. 23.) But as we have already explained, Plaintiffs have failed to show that any of the events in this district played a "substantial" (rather than peripheral) role in the alleged conspiracy. (Mem. 16.) Venue is thus improper in this district.

II. The Court Should Dismiss the Complaint for Failure to State a Claim

Plaintiffs also fail to state a claim for public disclosure of private facts, for intentional infliction of emotional distress, and for a violation of § 1985(3).

A. Plaintiffs' tort claims are governed by New York law, which rejects their theories of tort liability

Plaintiffs agree that, under the District of Columbia's choice-of-law rules, a court decides which state's law will apply by considering which states have an interest in having their law applied, and (if multiple states have such an interest) by asking which state has the most significant relationship to the occurrence and the parties. (Opp. 34.) Under this test, this case is governed by New York law—which rejects the tort theories alleged by Plaintiffs. The case is not governed by the law of the District, nor by Tennessee, New Jersey, or Maryland—the alternatives Plaintiffs propose.

New York has a powerful interest in applying its law to this case. Plaintiffs assert, without citation, that New York lacks an interest in "protecting its domiciliaries" from liability in other states. (Opp. 35.) But this argument contradicts *In re APA Assessment Fee Litigation*, 766 F.3d 39 (D.C. Cir. 2014)—a case we cite in our opening brief, but which Plaintiffs never attempt to distinguish. There, the D.C. Circuit held that a state *does* have an interest in "protecting defendants from litigation" and in "shield[ing]" its citizens from "liability" in other states. *Id.* at 53. As a result, a "rule of non-liability" is "owed the same consideration in the choice-of-law process" as a "rule which imposes liability." *Id.* Put simply, New York has a strong interest in ensuring that the Campaign, a New York entity, may speak freely without fear of liability for its truthful speech.

Plaintiffs claim that the Court should nonetheless apply D.C. law, because the hack targeted servers located in the District. (Opp. 34.) This claim is mistaken. Choice-of-law analysis requires "a precise inquiry" focused on the "distinct issu[e] to be adjudicated," not a panoramic view of "various state interests generally." *Barimany v. Urban Pace, LLC*, 73 A.3d 964, 967 (D.C. 2013). The issue to be adjudicated here is whether the *publication* of the emails was tortious. That issue "[does] not turn on the manner in which [the information] has been obtained." *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969). The District may well have a distinctive interest in regulating the theft of the emails (since the theft targeted servers in the District), but it has no better interest in regulating the subsequent publication of the emails than any other state (since the emails were published on the internet, not just in the District).

Even if the District had a relevant interest, New York law would still apply because New York's relationship to the occurrence and parties is more significant than the District's. Two parties (the Campaign and Mr. Stone) are headquartered in or rent a home in New York; no party lives in the District. Many participants in the alleged conspiracy (Mr. Trump, Trump Jr., Kushner) lived and worked in New York; none lived or worked in the District. The targets of the alleged conspiracy (Hillary Clinton and the Clinton campaign) are also from New York, not from the District.

Against all of this, Plaintiffs assert that they suffered some of their injuries in the District. (Opp. 35.) That claim is inaccurate; Plaintiffs all live outside the District, and thus suffered at least the bulk of their injuries outside the District. Plaintiffs also assert that the alleged conspirators met and negotiated about unspecified topics in the District. (Opp. 35). But Plaintiffs themselves say that they also met and negotiated in "New York City." (Opp. 67.) All in all, the District's ties to the case are far less significant than New York's. New York law should govern the case.

As a fallback, Plaintiffs argue that the Court should apply the laws of their own home states—Tennessee, New Jersey, and Maryland. (Opp. 35.) We agree that, just as New York has an interest in protecting the Campaign, these three states have an interest in protecting Plaintiffs. But that just takes us to the second step of the choice-of-law inquiry: asking which state has the most significant relationship to the case. The answer to that question is plainly New York, since Plaintiffs do not allege that *any* of the relevant events occurred in Tennessee, New Jersey, or Maryland. New York law thus governs this case, and Plaintiffs' tort claims fail.

B. Plaintiffs fail to state claims for public disclosure of private facts

To analyze Plaintiffs' claim for public disclosure of private facts, one must first realize that liability for this tort "[does] not turn on the manner in which [the information] has been obtained." *Pearson*, 410 F.2d at 705; *see McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 79 (8th Cir. 1976) ("manner in which information is acquired is not relevant"). A defendant is liable for public disclosure even if "the information was obtained without commission of a tort and in a manner wholly unobjectionable." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975). For example, if an email is truly "private," then a defendant commits a tort by publishing that email regardless of whether he got it by hacking into a server, by receiving a copy from a whistleblower, or by finding a printout dropped in the street.

This theory of tort liability for disclosing truthful and legally obtained material poses obvious dangers for free speech. "Punishing truthful publication in the name of privacy" is always an "extraordinary measure" (*Florida Star v. BJF*, 491 U.S. 524, 540 (1989)); doubly so when the publisher did nothing illegal in acquiring the information in the first place. These concerns make it all the more important for courts to enforce well-established restrictions on the tort's scope.

Plaintiffs' claims violate these restrictions. Most importantly, the claims improperly seek to punish speech about issues of public concern, and the kind of information that is involved in this case is not the kind of information that the tort of public disclosure is meant to protect.

1. The public-disclosure claims fail because the publication concerned newsworthy and public issues

Under the First Amendment, a defendant may not be held liable for a disclosure of stolen information if (1) the disclosure deals with "a matter of public concern" and (2) the speaker was not "involved" in the theft. *Bartnicki v. Vopper*, 532 U.S. 514, 529, 535 (2001). Similarly, under tort law, a defendant is not liable for a disclosure if the disclosure is "newsworthy." *Wolf v. Regardie*, 553 A.2d 1213, 1220 n.12 (D.C. 1989).

Plaintiffs entirely ignore the First Amendment, instead addressing only the tort-law newsworthiness element. They never so much as cite *Bartnicki*. (Opp. 45–48.) They certainly make no effort to show that the Campaign was "involved" in the initial theft of the DNC emails, in effect conceding that the Campaign satisfies the second part of the *Bartnicki* First Amendment test. The dispositive question is thus whether the disclosure in this case dealt with "newsworthy" and "public" issues. There can be no serious doubt that it did. (Mem. 21–26.) That ends the case: The disclosure satisfies the First Amendment test.

In any event, Plaintiffs' arguments are unpersuasive. *First*, Plaintiffs urge the Court to parse the emails line by line to determine which parts are protected and which are not. In their view, "every … fact disclosed" must have "substantial relevance" or a "logical nexus" to a public issue in order to be protected. (Opp. 46). This theory is wrong. Tort law analyzes newsworthiness "on an aggregate basis." *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1221 (10th Cir. 2007). Similarly, an "essential First Amendment rule" requires courts to judge speech "as a whole," not piece by piece. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002).

The Supreme Court made this point in *Bartnicki*. There, leaders of a teachers' union spoke on the phone about "blow[ing] off the front porches" of school-board members to influence salary negotiations. 532 U.S. at 518–19. The Supreme Court held that the First Amendment protected a radio host's disclosure of this illegally intercepted conversation. Even though the threat to "blow off" front porches was not itself speech about a public issue, the First Amendment protected the disclosure because the host made it while "engaged in debate about" teacher pay—"a matter of public concern." *Id.* at 535. *Bartnicki*'s "public concern" inquiry thus focuses on the broader context of the disclosure, not just on the nature of the specific fact disclosed.

The Court made the same point in *Florida Star*. There, a newspaper revealed the name of a rape victim, violating a statute that protected this private fact. 491 U.S. at 528. The Court ruled that the First Amendment barred civil liability, because "the *news article* concerned a matter of public significance." *Id.* at 536 (emphasis added). "The article generally, *as opposed to the specific identity contained within it*, involved a matter of paramount public import." *Id.* at 537 (emphasis added).

Snyder v. Phelps, 562 U.S. 443 (2011), removed any conceivable ambiguity on this score. There, protestors held up hateful signs at a soldier's funeral—some about public issues ("God Hates the USA"), some about the fallen soldier ("You're Going to Hell"). The Court held that the First Amendment protected the *entire* protest, because its "overall thrust" and dominant theme" "spoke to broader public issues." *Id.* at 454. *Snyder*—like *Bartnicki* and *Florida Star*—thus flatly contradicts Plaintiffs' salami-slicing approach to First Amendment protection.

Plaintiffs derive their "logical nexus" test from *Vassiliades v. Garfinckel's*, 492 A.2d 580 (D.C. 1985)—a case in which a doctor making a public presentation about cosmetic surgery used before-and-after photographs of one of his patients. *Vassiliades* does not support Plaintiffs' argument. One, the court simply did not address the question here: whether disclosures should be judged in the aggregate or line by line. Rather, the court noted that "the photographs" (plural) lacked a "nexus" with public issues, without suggesting it was considering the disclosed photographs separately, rather than collectively. *Id.* at 590.

Two, even assuming the D.C. Court of Appeals' 1985 opinion in *Vassiliades* could be interpreted to hold that courts must parse speech line-by-line, any such interpretation cannot survive the Supreme Court's later opinions in *Florida Star, Bartnicki* and *Snyder*. As noted, under those cases, the "public concern" test turns on the "overall thrust and dominant theme" of the speech, not on the character of individual snippets of the speech.

Three, the Campaign would prevail even under Plaintiffs' "logical nexus" test. *Vassiliades* says that a disclosure has the necessary "nexus" to a public issue if it "strengthen[s] … the credibility" of speech about that issue. *Id.* at 589. Publishing a collection of emails in its entirety, without redactions, can certainly strengthen the credibility of the overall disclosure, since redactions would likely raise suspicions that the publisher has engaged in selective, misleading disclosures. Indeed, WikiLeaks' "accuracy policy" prohibits redactions precisely to avoid accusations that WikiLeaks has "tamper[ed] with the evidentiary value of … historical archives." (Reply Ex. 1.)

Second, in an apparent effort to deny that the disclosure primarily concerns public issues, Plaintiffs assert that only "a few emails" (or "a small portion of [the] emails") addressed public issues. (Opp. 48.) The assertion is wrong. In the first place, every single email was a (1) work email (2) sent or received by "key members" of a major political party's staff (Opp. 66) (3) in the course of a presidential campaign. Every single email thus *inherently* addressed political matters.

In the second place, the "leaked cache" included "thousands of emails" between "officials and party fund-raisers" "revealing in rarely seen detail … elaborate, ingratiating and often bluntly transactional exchanges." (Mem. Ex. 5.) For example, in one set of emails, a DNC official tells "Tennessee donor Roy Cockrum": "If [you] were willing to contribute $33,400 … your generous contribution would allow you to attend a small roundtable we are having with President Obama." (Reply Ex. 2.) These "thousands" of emails *all* deal with public issues, since they *all* show the public the extent to which the DNC sold, and wealthy donors bought, access and influence to elected officials.

In the third place, a court applying the public-concern test must examine "all the circumstances of the speech"—not just "content," but also "context." *Snyder*, 562 U.S. at 454. According to Plaintiffs' own allegations, the emails were published in order to undermine Hillary Clinton's campaign (not to undermine Roy Cockrum's finances), days before the Democratic National Convention (not days before Eric Schoenberg applied for a new credit card), and on the internet (not in the Comer family's hometown newspaper). (Am. Compl. ¶ 51.) The context of the speech was public rather than private. That forecloses tort liability

Third, Plaintiffs worry that protecting disclosures will encourage "political espionage." (Opp. 48.) That claim is empirically false. It is a crime to hack a computer. *See* 18 U.S.C. § 1030. Hackers also face liability for the separate tort of intrusion (which does not have a public-concern element). And, under *Bartnicki*, a speaker involved in hacking a political opponent's emails cannot claim First Amendment protection. 532 U.S. at 529–30. These safeguards ensure that those who engage in "political espionage" can be punished.

In fact, Plaintiffs' argument is a frontal assault on *Bartnicki* itself. In *Bartnicki*, the Court ruled that "the normal method of deterring" the theft of another person's communications "is to impose an appropriate punishment on the person who engages in" the theft. *Id.* at 529. The Court considered it "quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529–330. In arguing that a state may punish disclosures in order to deter "political espionage," Plaintiffs ask this Court to reject *Bartnicki*'s holding and reasoning. The Court should summarily refuse that request.

Finally, *amici* Campaign Officials worry that protecting the disclosure here will "chill participation in electoral politics." (ECF No. 40 at 4.) Again, the Supreme Court addressed this argument in *Bartnicki*. The Court acknowledged that "the fear of public disclosure of private conversations might well have a chilling effect on private speech." 532 U.S. at 533. But it ruled that these concerns "give way when balanced against the interest in publishing matters of public importance." *Id.* at 534. *Bartnicki* thus forecloses *amici*'s arguments.

2. The public-disclosure claims also fail because this case does not involve the kind of information that this tort protects

Plaintiffs say that this case involves "four types of private facts." (Opp. 37.) Yet none of these four types of facts is protected by the public-disclosure tort.

First, Plaintiffs allege that the emails disclosed Cockrum's and Schoenberg's social security numbers, addresses, and related details. But public-disclosure liability covers only "embarrassing" facts. *Harrison v. Washington Post Co.*, 391 A.2d 781, 784 (D.C. 1978). Social security numbers and addresses are not "embarrassing."

Plaintiffs invoke *Randolph v. ING Life Insurance & Annuity Co.*, 973 A.2d 702, 710 (D.C. 2009). But *Randolph* involved a different tort—"intrusion." *Id.* Intrusion ("obtaining … information by improperly intrusive means") "should be kept clearly separate" from public disclosure (disclosing information already obtained). *Pearson*, 410 F.2d at 705. *Randolph* held only that "conduct giving rise to the unauthorized viewing of … [a] Social Security number … can constitute an intrusion," "even though there is no publication." 973 A.2d at 710.

This distinction is critical. A defendant is liable for intrusion "*whatever* the content of what he learns." *Pearson*, 410 F.2d at 705 (emphasis added). "An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact … ; for purposes of [intrusion] liability that should make no difference." *Id.* In contrast, liability for public disclosure *does* depend on the content of the disclosure. *Id.* Plaintiffs have sued for public disclosure, not intrusion. But a social security number, address, or phone number is not "embarrassing," so its disclosure does not amount to the specific tort alleged in this case.

Second, Plaintiffs conclusorily allege that the emails disclosed facts "suggesting" Comer's sexual orientation. But the complaint does not say what these "suggestive" facts are. Even though we raised this problem in the motion to dismiss, and even though Plaintiffs surely know which facts their own claim involves, Plaintiffs *still* have not specified those facts. (Opp. 39–44.) This omission defeats Plaintiffs' claim, because it deprives us of "fair notice of what the … claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Until we and the Court know precisely which facts Comer is talking about, neither we nor the Court can assess (for example) whether those facts are embarrassing, whether Comer kept them private, or whether they indeed "suggest" Comer's sexual orientation. Indeed, Plaintiffs' adamant refusal to specify the facts on which their own claim rests indicates that the allegedly "suggestive" fact is, simply, Comer's widely known job title of LGBT Finance Director. But disclosing a job title is not a tort.

In any event, *whatever* the suggestive facts may have been, Comer's claim fails because he revealed the facts to colleagues in work emails, rather than keeping the fact private. Plaintiffs insist that Comer has the right to define a "circle of intimacy"—to decide which "colleagues" and even which "acquaintances" may know his sexual orientation. (Opp. 42.) But that is not how this tort works. The *law* defines the relevant "circle" to consist "at most" of "family" and "close friends." Restatement (Second) of Torts § 652D, comment b. Comer has revealed the "suggestive" facts to people outside that sphere. He cannot now claim that facts that he shared so widely are so private, intimate, and embarrassing that their disclosure triggers tort liability.

Plaintiffs' claim, in fact, turns the public-disclosure tort upside down. A public-disclosure plaintiff normally claims that only his family knew an intimate fact, until someone disclosed it to the outside world. But here, Comer wants to claim that the only the outside world knew his sexual orientation, until someone disclosed it to his family. That theory gets this tort backwards.

Comer's claim also fails because one's sexual orientation is not "shame[ful]" (*Armstrong v. Thompson*, 80 A.3d 177, 189 (D.C. 2013)). Plaintiffs cite cases from the 1980s, 1990s, and early 2000s ruling that the public-disclosure tort covers disclosure of sexual orientation. (Opp. 40.) But attitudes about sexual orientation have (to put it mildly) changed since the 1980s. Even if the District would have considered homosexuality "shameful" then, it would not do so today.

Third, Plaintiffs allege that, in many of the disclosed emails, Comer made (unidentified) unkind remarks about his colleagues. (Opp. 38.) But the public-disclosure tort covers only "intimate" information, such as "intimate personal letters" about "family quarrels." Restatement (Second) of Torts § 652D, comment b. Plaintiffs cite no case that extends the tort to cover *workplace* correspondence about *workplace* quarrels, and we are aware of none.

Finally, Plaintiffs allege that one emails revealed that Comer suffered from "an illness." (Opp. 38.) But this illness was a run-of-the-mill condition ("stomach flu"), not an intensely embarrassing disease. (Mem. Ex. 13.) Further, Comer described the illness in a work email, not in an intimate letter to a relative or a confidential report to a doctor. He thus failed to keep the illness "private," as the tort requires.

3. The public-disclosure claim fails because Plaintiffs fail to allege specific intent to disclose private facts

Finally, Plaintiffs fail to allege that the Campaign acted with the specific intent to disclose information about them. To the contrary, the Campaign allegedly agreed to disclose information "to damage the Clinton Campaign" (Am. Compl. ¶ 23); the private facts in this case have nothing to do with that goal.

Plaintiffs argue that the public-disclosure tort requires only general intent to publish something, not specific intent to publish the private fact. Not true; a defendant is liable only if he "*intentionally* disclosed *the private fact at issue*." *Granger v. Klein*, 197 F. Supp. 2d 851, 869 (E.D. Mich. 2002) (emphasis added).

Even assuming tort law does not require specific intent, the First Amendment surely does. It is axiomatic that "a heightened intent requirement" applies to efforts to penalize speech. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 247 (4th Cir. 1997). Defamation law provides a useful analogy: *Bartnicki* relies on defamation cases and holds that "parallel reasoning" "requires" the application of the same First Amendment principles in defamation and invasion-of-privacy cases. 532 U.S. at 535. A defendant cannot be liable for defamation simply because he intentionally publishes something that contains a defamatory falsehood; rather, the defendant must have specifically had "knowledge that [the statement] was false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (cited in *Bartnicki*, 532 U.S. at 535). For the same reason, a defendant cannot be liable for public disclosure simply because he intentionally publishes something that contains a private fact; rather, the defendant must at least know that the publication contains such facts.

Moreover, a state may impose liability for the disclosure of truthful information, "if at all," "only when [the liability] is narrowly tailored" to a compelling interest. *Florida Star*, 491 U.S. at 541; *see Bartnicki*, 532 U.S. at 528. But the state does not have a cognizable (much less compelling) interest in punishing a defendant who does not have the specific intent to disclose private facts. If the defendant never intended to disclose private facts, punishing him will not directly deter such disclosures.

In fact, there is virtually no connection between the punishment Plaintiffs seek and the Campaign's alleged actions. Even under Plaintiffs' theory, the Campaign did not hack the emails, transmit the emails, or even possess the emails. Rather, Plaintiffs allege that the Campaign agreed that the Russians should disclose emails already in the Russians' possession, for the purpose of *harming candidate Hillary Clinton*. Plaintiffs thus seek to punish a defendant who neither was involved in illegally obtaining private information, nor ever specifically intended to disclose that private information. The First Amendment does not tolerate such a blunderbuss approach.

C. Plaintiffs fail to state a claim for intentional infliction

Plaintiffs' claims for intentional infliction fail for a number of reasons. *First*, tort law and the First Amendment both foreclose liability because the disclosures here deal with newsworthy matters and matters of public concern. (Mem. 31.)

Second, tort law forecloses liability because the defendants' alleged conduct was not "directed at" Plaintiffs. (Mem. 32.) A plaintiff normally may not recover for intentional infliction of emotional distress for "conduct … directed at a third person." *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 331 (D.C. Cir. 2003) (quoting Restatement

(Second) of Torts § 46). For example, if Smith murders Jones in the street, a bystander who has just watched Jones die may experience intense emotional distress. Yet he does not have an intentional-infliction claim, since Smith's actions were "directed at" Jones, not at the bystander. Restatement (Second) of Torts § 46, comment *l*. In this case, the disclosure was "directed at" the Clinton campaign; nobody alleges that it was directed at these three Plaintiffs. That means Plaintiffs' claims fail.

Third, Plaintiffs fail to show that the disclosure was outrageous. (Mem. 32.) Plaintiffs instead shift focus, arguing that the alleged *collusion* was outrageous: "Defendants conspired with Russian agents and others to undermine an election and the very foundation of our democracy—conduct that … would rightfully arouse shock and outrage." (Opp. 51–52.) But that misses the point. Plaintiffs may sue only about the disclosure of their own information; they lack standing to raise generalized grievances about the legitimacy of the election. The only question is thus whether the disclosure itself was outrageous and Plaintiffs make no argument that it was.

Finally, Plaintiffs fail to show the necessary level of emotional distress. The law of the District of Columbia "sets a high standard"; a plaintiff must show that the distress is "so acute" that it is likely to cause "harmful physical consequences." *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 164 (D.C. 2013). Plaintiffs never even try to show that Cockrum and Schoenberg experienced harmful physical consequences. Nor do they try to show that the consequences Comer experienced were proximately caused by the disclosure—rather than by other events in his life, such as his loss of "a long-term romantic relationship" (Opp. 55). The intentional-infliction claims fail.

D. Plaintiffs fail to state a viable theory of vicarious liability

Since Plaintiffs do not allege that *the Campaign* published the emails, they must show why the Campaign is vicariously liable for that disclosure. They fail to do so.

Conspiracy with Russia. Plaintiffs first assert civil conspiracy. The "elements" of this theory are: "(1) an agreement … (2) to participate in an unlawful act" and "(3) an injury caused by … (4) [an] overt act … done pursuant to and in furtherance of the common scheme." *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983).

Plaintiffs assert a civil conspiracy between the Campaign and "Russian actors." But Plaintiffs have never alleged that the Campaign entered into an agreement to reveal their social security numbers or sexual orientation. In fact, they have never alleged that the Campaign even *knew* that the DNC emails contained these details.

Plaintiffs therefore claim that the Campaign entered into a "more general agreement" to cooperate to defeat Hillary Clinton, and that this "more general agreement" makes it liable for the disclosure. (Opp. 27. n.10). This aggressive theory of vicarious liability—under which the Campaign can be liable for a disclosure it neither committed nor agreed to, simply because it agreed to *something else*—is incorrect.

First, a plaintiff asserting civil-conspiracy liability must show that the defendant agreed "to participate in an *unlawful* act." *Halberstam*, 705 F.2d at 481 (emphasis added). Plaintiffs cannot satisfy this element. "Cooperating" with someone to defeat a particular candidate is not a tortious or unlawful act. Quite the contrary, it is association protected by the First Amendment. Therefore, an agreement to engage in such cooperation does not constitute a civil conspiracy.

Second, the plaintiff must also show that the tort for which he is suing "was done pursuant to and in furtherance of the common scheme." *Id.* The alleged "common scheme" here was a scheme "to damage the Clinton campaign." (Am. Compl. ¶ 23.) But exposing Comer's sexual orientation does not further the scheme of damaging the Clinton campaign. Neither does revealing social security numbers.

Third, Plaintiffs have in any event failed to plausibly plead a "more general agreement." Plaintiffs contend that, even before the Campaign entered the picture, Russian actors had already independently decided to "defeat Hillary Clinton and help elect Mr. Trump," and had already independently "broke into [the DNC's] computer networks." (Am. Compl. ¶ 23.) But if Russia already wanted to defeat Hillary Clinton, and it already had the emails that would help it accomplish that objective, why would it have needed to enter into an agreement with the Campaign to disclose them? Why not just disclose the emails on its own? Plaintiffs have no good answers.

Conspiracy with WikiLeaks. Plaintiffs next assert a conspiracy with WikiLeaks. To overcome WikiLeaks' Communications Decency Act immunity, they cite *Dennis v. Sparks*, 449 U.S. 24 (1980), which holds that federal judicial immunity does not protect a judge's co-conspirator form a § 1983 claim. But *Dennis* involved a federal immunity from a *federal* law (§ 1983), while this case involves a federal immunity from *state* law (D.C. tort and conspiracy law). In *Dennis*, the Court had to reconcile the competing federal rules, but in this case, the Supremacy Clause means that the federal rule simply prevails. *PLIVA v. Mensing*, 564 U.S. 604, 621–23 (2011) (plurality). The federal immunity trumps D.C. conspiracy liability, foreclosing Plaintiffs' claims.

Aiding and Abetting. Plaintiffs last claim that the D.C. Circuit's decision in *Halberstam* allows them to hold the Campaign liable on the ground that it aided and abetted Russian actors. (Opp. 32.) But since *Halberstam*, the D.C. Court of Appeals has stated that it "ha[s] not recognized the tort of aiding and abetting." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015). The D.C. Court of Appeals' later interpretation of D.C. law thus supersedes, the D.C. Circuit's earlier decision.

E. Plaintiffs fail to show that their theories of liability comply with the First Amendment and vagueness doctrine

Responding to the argument that their tort theories violate the First Amendment, Plaintiffs claim that the torts are content-neutral and thus immune from strict scrutiny. That is wrong. A law is content-based if it turns on "the communicative content" of the speech regulated. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Each of Plaintiffs' tort theories does just that; each turns on what the speaker says, rather than where or when or how he says it. If the disclosure consists of intimate facts, the speaker is liable; if it consists of vanilla facts, he is not. That triggers strict scrutiny.

Responding to the argument that their tort theories are void for vagueness, Plaintiffs claim that the law frequently uses "imprecise standards." (Opp. 59.) But that is true only when the government regulates conduct; the government must regulate "with narrow specificity" when it deals with speech. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Terms such as "offensive" and "outrageous" violate this heightened vagueness standard; "'outrageousness' in [this] area … has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 58 (1988).

F. Plaintiffs fail to state a claim under 42 U.S.C. § 1985

Section 1985(3) prohibits conspiracies (a) to deprive anyone "of the equal protection of the laws, or of equal privileges and immunities," (b) to prevent state governments from providing "equal protection," (c) to use "force, intimidation, or threat" to prevent a citizen from "giving his support or advocacy" in a federal election, and (d) to "injure" a citizen "on account of such support or advocacy." Plaintiffs' claims, brought under the "support or advocacy" provisions, fail for a variety of reasons.

1. The § 1985(3) claim fails because Plaintiffs fail to allege state action

Our opening brief explains, in four steps, why Plaintiffs must allege state action to state a claim under § 1985(3). First, § 1985(3) provides a remedy for conspiracies to violate predicate rights defined by other laws; it does not create any freestanding rights of its own. Second, § 1985(3) covers a purely private conspiracy if—but only if—federal law protects the predicate right against private action. Third, the predicate right here—the First Amendment right to support a candidate in a federal election—is protected only against state action, not against private action. Fourth, Plaintiffs must therefore allege state action. (Mem. 42.) Plaintiffs have failed to do so.

Plaintiffs contest only the first step. They agree that § 1985(3)'s "equal protection" and "equal privileges" provisions merely provide a remedy for violations of predicate rights defined by other laws, but they insist that the "support or advocacy" provisions work differently. They say that these provisions create a substantive right to support federal candidates, that is "independent" of the Constitution, and thus covers both private and state action. (Opp. 61.) Their reading is wrong.

First, Plaintiffs' reading contradicts the Supreme Court's, the D.C. Circuit's, and this Court's precedents. The Supreme Court has ruled: "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great American v. Novotny*, 442 U.S. 366, 372 (1979). Again: "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere." *Carpenters v. Scott*, 463 U.S. 825, 833 (1983). Once more: "§ 1985(3) [is a] remedial statute." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). Similarly, the D.C. Circuit has ruled: "[T]he rights protected by section 1985(3) exist independently of the section and only to the extent that the Constitution creates them." *Hobson v. Wilson*, 737 F.2d 1, 15 (D.C. Cir. 1984). And this Court has held: "There can be no recovery under section 1985(3) absent a violation of a substantive federal right." *Wiggins v. Philip Morris, Inc.*, 853 F. Supp. 470, 480 (D.D.C. 1994).

Plaintiffs would limit all of these rulings to the "equal privileges" provisions of § 1985(3), deeming them inapplicable to the "support or advocacy" provisions. But these rulings are categorical statements. They refer to "§ 1985(3)," not to "some parts of § 1985(3)" or "some provisions of § 1985(3)." Moreover, in adopting this interpretation, the Supreme Court did not rely specifically on the wording of the "equal privileges" clause. Rather, it relied on the "language, structure, and legislative history of § 1985(3)" as a whole. *Scott*, 463 U.S. at 834; *see Novotny*, 442 U.S. at 381 (Powell, J., concurring) ("purpose, history, and common understanding of this Civil War Era statute"). There is no basis for ruling that the Supreme Court's interpretation covers some parts of § 1985(3) but not others.

Second, and more specifically, Plaintiffs' reading contradicts the Supreme Court's decision in *Scott*. There, the Court refused to interpret § 1985(3) to cover "every concerted effort by one political group to nullify the influence or do other injury to a competing group by … unlawful means." 463 U.S. at 836. The Court cautioned that accepting that view "would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics." *Id.* For example, a broad reading "would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings." *Id. Scott* warned federal courts that they "should not be quick to assume" the role of refereeing such disputes. *Id.*

Plaintiffs point out that *Scott* involved the "equal privileges" clause rather than the "support or advocacy" clause of § 1985(3). (Opp. 64.) That's true. Even so, *Scott*'s reasoning is quite important here. Plaintiffs' reading would produce *precisely* the results that *Scott* went out of its way to avoid. On their view, federal courts *would* become "monitors of campaign tactics." Political parties *would* face claims that they had conspired to "intimidate" their adversaries by heckling their speakers or disrupting their rallies. Indeed, a federal case could arise any time two people agree to fire an employee because of his political views, to start a bar fight with a customer wearing political apparel, or to cyberbully a political opponent on Twitter. Yet *Scott* tells us to avoid reading § 1985(3) so broadly that it encompasses such disputes. Plaintiffs may not get around that instruction by invoking different words ("support or advocacy") in the same sentence of the same subsection of same statute.

Third, Plaintiffs in all events misread the statute. Section 1985(3) rests on Congress' power to enforce "the Thirteenth, Fourteenth, and Fifteenth Amendments." *Scott*, 463 U.S. at 837; *see Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) ("powers under § 2 of the Thirteenth Amendment"). Indeed, the statute is titled "An Act to enforce the Provisions of the Fourteenth Amendment …" 17 Stat. 1871. Thus, the support-and-advocacy clause is designed to *enforce* preexisting constitutional rights against state action, not to *create* new rights against private action.

Plaintiffs' contrary reading would make § 1985(3) unconstitutional. The enforcement clauses empower Congress to enact "remedial" laws enforcing preexisting rights; they clearly do not empower it to enact "substantive" laws *expanding* those rights. *City of Boerne v. Flores*, 521 U.S. 507, 524, 527 (1997). Most obviously, where a guarantee "prohibits only state action," the power to enforce the guarantee does not reach "purely private conduct." *United States v. Morrison*, 529 U.S. 598, 622 (2000). In fact, the Supreme Court struck down the criminal counterpart to § 1985(3) *precisely* because the Government applied it to the "action of private individuals." *United States v. Harris*, 106 U.S. 629, 639 (1883); *see Morrison*, 529 U.S. at 621 (reaffirming *Harris*).

The First Amendment (as incorporated by the Fourteenth) "restrains only official conduct." *Scott*, 463 U.S. at 833. The power to enforce it thus does not include the power to create new rights against purely private conduct. Reading the "support or advocacy" clause to create independent rights against private parties would render the statute unconstitutional—or, at the least, raise grave constitutional doubts. The Court should avoid those doubts by rejecting Plaintiffs' reading.

Plaintiffs lack a persuasive response. They argue that the support-and-advocacy provisions do not explicitly state that they "rely on rights defined elsewhere." (Opp. 62.) But this argument fails to account for context. Congress enacted the support-and-advocacy clause (1) during Reconstruction, (2) in "An Act to enforce the Provisions of the Fourteenth Amendment … ," (3) in a sentence that echoes the Fourteenth Amendment by referring to "privileges and immunities" and "equal protection." This context shows that the clause merely enforces rights already secured by the First and Fourteenth Amendments; it does not create new rights against purely private conduct.

Plaintiffs also invoke *Kush v. Rutledge*, 460 U.S. 719 (1983). That case is irrelevant. *Kush* interpreted subsection (2) of § 1985. But this case involves subsection (3), not subsection (2). Moreover, *Kush* considered whether a plaintiff must show racial or class-based animus to prove a violation of § 1985(2). But the issue in this case is whether a plaintiff must show state action, not whether a plaintiff must show class-based animus. *Kush* therefore has no bearing on this case.

Amicus Campaign Legal Center argues that the legislative history supports an expansive reading of the statute. (ECF No. 38 at 16–19.) Yet in *Scott*, the Supreme Court adopted a narrow interpretation of § 1985(3) even though it "realize[d] that there is some legislative history to support the view that § 1985(3) has a broader reach." 463 U.S. at 836. This Court should do the same.

Amicus also cites *Paynes v. Lee*, 377 F.2d 61 (5th Cir. 1967). But *Paynes* says that § 1985(3) covers private conspiracies against the "right to vote." *Id.* at 64. Under the White Primary Cases (*e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953)), the Fifteenth

Amendment protects the right to vote even against some private conduct. Not so for the right to speak. Thus, even if § 1985(3) reaches private conspiracies to prevent voting, it does not reach private conspiracies to prevent speaking.

2. The § 1985(3) claims fail for additional reasons

Plaintiffs' claims fail because Plaintiffs never plead that the purpose of the alleged conspiracy was "to prevent" any voter "from giving his support or advocacy." Plaintiffs argue that, because the leaked emails included "communications of key members of the DNC finance team," a court can infer that the purpose of the conspiracy must have been to intimidate the DNC's donors. (Opp. 66.) But even if the leaks did target the finance team, that would only show a purpose to expose the DNC's reliance on wealthy donors, not a purpose to intimidate or threaten the donors themselves.

Plaintiffs' claims also fail because § 1985(3) does not allow *respondeat superior* liability. Plaintiffs assert that, notwithstanding the prohibition on *respondeat superior* liability, the conspiracy is "attributable to the Campaign" because it was formed by "senior" officials "acting as agents of the Campaign." (Opp. 69.) Plaintiffs' distinction does not make sense. *Respondeat superior* is nothing more than the theory that an employer is responsible for an act because one of its employees (*i.e.*, one of its agents) committed that act. That is precisely the theory that Plaintiffs advance here. It does not matter whether they call it *respondeat superior*, vicarious liability, agency, attribution, or something else; regardless of the label, § 1985(3) does not allow it.

CONCLUSION

The Court should grant the Campaign's motion to dismiss.

Dated: December 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 2017, 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: December 29, 2017

/s/ Michael A. Carvin

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