SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

ROBERT S. TRUMP,	:	
	:	Index No. 2020-51585
Plaintiff,	:	Hon. Hal B. Greenwald
-v-	:	
MARY L. TRUMP and SIMON & SCHUSTER, INC.,	:	
Defendants.	:	

AMICUS CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., AND PEN AMERICAN CENTER, INC. IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

As organizations that defend First Amendment freedoms, including the rights of journalists and media organizations to gather and publish newsworthy information, the rights of publishers to publish and distribute books, and the rights of authors to produce works on public affairs, the Reporters Committee for Freedom of the Press, the Association of American Publishers, Inc., and PEN American Center, Inc. ("amici"), have a powerful interest in ensuring that this Court summarily reject the extraordinary request of Plaintiff Robert S. Trump to block further publication and dissemination of *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man* (the "Book"), authored by Defendant Mary L. Trump, Ph.D, a clinical psychologist and niece of President Donald J. Trump. Any restraint on publication of the Book is an unconstitutional prior restraint on speech. A restraint of just one day is an unacceptable affront to the First Amendment and Article 1, Section 8 of the New York Constitution—a restraint of more than a week, as this Court has already ordered, is extraordinary. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("*Nebraska Press*") (finding the burden of a prior restraint is not lightened by its "temporary nature").

Plaintiff asserts that the Book, as advertised, will "shine[] a bright light on the dark history of [the author's] family" in order to explain how her uncle, the President of the United States, became the man he is today. *See* Memorandum of Law in Support of Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order ("Pltf.'s Mem. of Law") at pp. 5–6. There can be no doubt that the Book's subject matter is of immense public interest; it is a first-hand account of the man who now holds the highest elected office in the United States government, from the perspective of a member of his own family. *See id*. Plaintiff's effort to enjoin its further publication and dissemination on the basis of an almost 20-year old confidentiality stipulation concerning the settlement of a will-contest proceeding is contrary to

law and anathema to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" embodied in the First Amendment. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Amici urge the Court to deny Plaintiff's motion for extraordinary injunctive relief for the following reasons.

First, Plaintiff's request that the Court enjoin Defendants, including the Book's publisher, Simon & Schuster, from further publishing or disseminating the Book is a prior restraint on speech prohibited by the First Amendment. The Supreme Court has, time and again, uniformly made clear the First Amendment's fundamental role in protecting the publication and dissemination of speech—especially speech critical of government officials—from prior restraint. *See Near v. Minnesota*, 283 U.S. 697, 717 (1931) ("[Freedom of the press] was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct."). Indeed, forty-nine years ago this month, in the *Pentagon Papers* case, the Supreme Court of the United States reaffirmed this "deep-seated American hostility to prior restraints[,]" *Nebraska Press*, 427 U.S. at 589 (Brennan, J., concurring), in a case in where the government sought to prevent the dissemination of speech in the name of national security. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) ("*Pentagon Papers*"). It is this "heavy presumption" against its constitutionality, *Pentagon Papers*, 403 U.S. at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)), that applies to the injunctive relief sought by Plaintiff here, and it is a standard that Plaintiff has not—and most assuredly cannot—meet. Simply put, even assuming *arguendo* that the confidentiality stipulation at issue here could be enforced, consistent with constitutional guarantees, against Defendant Mary L. Trump—which it cannot be—Plaintiff would be limited to post-publication remedies.

Second, these First Amendment-compelled limits on the relief a court can grant apply fully in disputes between private parties. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("*Philadelphia Newspapers*"); *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 257 (2d Cir. 2018) ("*Van Zant*") (refusing to extend a contractual provision between private parties to restrain publication of an expressive work).

Third, even aside from the extraordinary relief sought here—an outright book ban—it is well-settled that contractual provisions contrary to public policy, particularly confidentiality provisions with the sweep that Plaintiff attempts to give the confidentiality stipulation at issue, are void and unenforceable. *See, e.g.*, *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 222 (4th Cir. 2019) ("*Overbey*") (refusing to enforce non-disparagement clauses in police misconduct settlements as contrary to public policy); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) ("*Davies*") (refusing to enforce settlement agreement precluding defendant from running for school district office (citing *Mancuso v. Taft*, 476 F.2d 187, 189 (1st Cir. 1973) (finding right to run for office protected by First and Fourteenth Amendments))). Imbuing an almost 20-year-old, exceedingly vague contractual provision with the power to block the publication of a book would constrain public discourse to an extreme and unacceptable degree.

For the reasons set forth herein, amici urge the Court to deny Plaintiff's motion for a temporary restraining order and preliminary injunction.

ARGUMENT

I.

THE INJUNCTIVE RELIEF SOUGHT BY PLAINTIFF IS A PRIOR RESTRAINT ON SPEECH PROHIBITED BY THE FIRST AMENDMENT

A. Prior restraints are the least tolerable infringement on First Amendment rights and bear a heavy presumption against their constitutionality.

"[A]n injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint[.]" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part); *see also Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'") (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984)). Indeed, it has long been recognized that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press*, 427 U.S. at 559. And it has been said that it is "the chief purpose of the guaranty [of the First Amendment] to prevent previous restraints upon publication." *Near*, 283 U.S. at 713.[1]

This fundamental, "deep-seated American hostility to prior restraints[,]" *Nebraska Press*, 427 at 589 (Brennan, J., concurring), has given rise to a "heavy presumption against [their] constitutional validity[,]" *Pentagon Papers*, 403 U.S. at 714—one that can be overcome "only in 'exceptional cases,'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) ("*Davis*") (Blackmun, J., in chambers (quoting *Near*, 283 U.S. at 716)). Indeed, "the presumption against prior restraints is

[1] Early decisions of New York courts reflect this understanding that the First Amendment means, if nothing else, that information should be freely published without prior restraint. *See, e.g.*, *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839) (refusing to enjoin the publication of a libelous pamphlet because it could not be done "without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government").

heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *see also Nebraska Press*, 427 U.S. at 589 (Brennan, J., concurring) (citing *Carroll v. Princess Anne*, 393 U.S. 175, 180-81 (1968)) ("The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech.").

Courts have, without fail, held prior restraints on First Amendment-protected speech to the most exacting standard, including when the gravest of public interests are at stake. The Supreme Court of the United States has struck down prior restraints in cases where the justifications claimed included protecting the Sixth Amendment rights of criminal defendants, *Nebraska Press*, 427 U.S. at 570, and confidential or proprietary business information, *Davis*, 510 U.S. at 1318. And, in June 1971, the Court rejected a prior restraint preventing publication of the "Pentagon Papers" by *The New York Times* and *The Washington Post* despite the government's claims that an injunction preventing publication was necessary to protect national security. *See Pentagon Papers*, 403 U.S. at 714; *see also People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558, 510 N.Y.S.2d 844, 847 (1986) (prior restraint unconstitutional under New York law "absent a showing on the record that such expression will immediately and irreparably create public injury"). Indeed, outside the context of intellectual property disputes[2] and, in decades past, for the regulation of obscenity (speech not fully protected by the First

[2] In contrast to the prior restraint sought by Plaintiff here, injunctions are permissible in appropriate circumstances in intellectual property infringement cases because the same First Amendment concerns are not present. For example, in copyright infringement matters, First Amendment concerns are addressed through the fair use doctrine and the idea/expression dichotomy. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (explaining that "copyright's built-in free speech safeguards are generally adequate to address" First Amendment concerns).

Amendment),[3] amici are unaware of *any* appellate court to have condoned a prior restraint on the publication of a book, and in "its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech." *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986).

The lesson of *Pentagon Papers* is—as Justice Brennan wrote in his concurring opinion—that there is at most "a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden," *i.e.,* wartime censorship to shield information about, *inter alia*, "the number and location of troops," and that "only governmental allegation *and proof* that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Pentagon Papers*, 403 U.S. at 726–27 (Brennan, J., concurring) (emphasis added).

B. <u>The Book is an expressive work entitled to full First Amendment protection; Plaintiff has not and cannot justify a prior restraint on its further publication or dissemination.</u>

There can be no question that the Book is entitled to full First Amendment protection. The Constitution protects *all* forms of expressive works, whether they be entirely fictional, semi-fictional, "based on" or "inspired by" real events and people, or factual news reporting. *See, e.g.*, *Meeropol v. Nizer*, 560 F.2d 1061, 1066–67 (2d Cir. 1977) (declaring that a fictionalized account of the Julius and Ethel Rosenberg trial was not actionable under misappropriation theory since both "historical" and "fictional" works are fully protected by the First Amendment); *Rosemont Enters. v. McGraw-Hill Book Co.*, 85 Misc.2d 583, 587 (N.Y. Sup. Ct. 1975) (holding that an unauthorized, fictionalized biography of Howard Hughes could not provide the basis for a

[3] *See, e.g.*, *Kingsley Books v. Brown*, 354 U.S. 436, 441 (1957) (upholding a "closely confined" injunction on obscene booklets).

misappropriation claim and noting that an individual "cannot have a monopoly, nor can he give a monopoly to any entity, with respect to works concerning his life"). And where, as here, an expressive work is critical of government officials, it implicates core political speech about matters of intense public interest and is entitled to the First Amendment's most robust protection.

As a matter of First Amendment law, it is the near-insurmountable heavy presumption against the constitutional validity of prior restraints that applies to the injunctive relief sought by Plaintiff here. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (stating that "the First Amendment erects a virtually insurmountable barrier" against the issuance of prior restraints). Plaintiff does not—and cannot—meet that standard.

Far from the requisite showing of "exceptional" circumstances, *Near*, 283 U.S. at 716, that would justify a prior restraint, Plaintiff asserts a purported contractual right to enjoin further publication and dissemination of the Book because it may "contain material that could harm him[,]" or members of his family, including the President, "by divulging private or disparaging information about their relationship to the public." Pltf.'s Mem. of Law at pp. 8–9. But the existence of a confidentiality stipulation entered into by Defendant Dr. Trump, even assuming it is applicable and enforceable, does not remove this case from the ambit of the First Amendment, nor does it alter the legal standard applicable to the prior restraint Plaintiff seeks. "*Any* prior restraint on expression comes" to a court "with a heavy presumption against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added, internal citations and quotation marks omitted); *see also Van Zant*, 906 F.3d at 257 (explaining that even where an injunction is sought "as a result of a private contract rather than government censorship, it nonetheless restrains the viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction"); *TVC Albany,*

Inc. v. American Energy Care, Inc., 2012 WL 5830705 at *5, *8 (E.D.N.Y. Nov. 16, 2012) (rejecting plaintiff's motion to enjoin defendants from "disparaging or defaming" plaintiff on the basis of a nondisclosure agreement, and explaining that prior restraints on speech are "widely disfavored" and thus "plaintiff bears a heavy burden of showing that a prior restraint is necessary").

And that confidentiality stipulation most certainly cannot serve as a basis to independently enjoin the Book's publisher, Defendant Simon & Schuster, who was not a party to that agreement, from further publishing or disseminating the Book. *See Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (reversing district court order enjoining magazine from publishing documents designated confidential on the basis of a stipulated protective order in a civil case, explaining that the proper inquiry was not whether the magazine had "knowingly violated the protective order" it was not a party to, but whether its "planned publication of these particular documents posed such a grave threat to a critical government interest or to a constitutional right as to justify" a prior restraint on publication); *see also Van Zant*, 906 F.3d at 258 (stating that "the application of an injunction to an entity that contracts with someone arguably bound by its terms in order to prepare an expressive work . . . raises serious concerns not present in the typical" situation in which an injunction "may be applied to an entity that acts 'in active concert or participation' with anyone bound by the injunction").[4]

[4] In its per curiam opinion in *Van Zant*, the Second Circuit rejected—in amici's view, erroneously—the argument that a district court's order permanently enjoining the distribution of a film was a "classic First Amendment violation involving an unlawful prior restraint" because a "government entity" had not sought and "obtain[ed] a court order to prevent the making or release" of the film at issue. 906 F.3d at 257; *but see, e.g.*, *Philadelphia Newspapers*, 475 U.S. at 777 ("[A] suit by a private party is obviously quite different from the government's direct enforcement of its own laws. Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages."). Yet the Second Circuit nevertheless concluded

Simply put, whatever embarrassment Plaintiff speculates he or the President may experience from the publication or dissemination of a Book "divulging private or disparaging information" to the public, Pltf.'s Mem. of Law at pp. 8–9, cannot remotely approach the type of extraordinary harm that could justify a prior restraint against either Defendant. *See Pentagon Papers*, 403 U.S. at 726–27 (Brennan, J., concurring) (explaining that even if the government sought to suppress "information that would set in motion a nuclear holocaust," the government would be required to present facts showing that publication of the information at issue "would cause the happening of an event of that nature"); *see also Davis*, 510 U.S. at 1317 (stating that prior restraints are the "most extraordinary remedy," and available "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures"); *Proctor & Gamble Co.*, 78 F.3d at 225 (concluding that "private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint").

C. <u>Even if the confidentiality stipulation was applicable and enforceable with respect to the Book, Plaintiff is limited to post-publication remedies.</u>

The heavy presumption against the constitutionality of prior restraints is based on the principle that "a free society prefers to punish the few who abuse the rights of speech *after* they break the law than to throttle them and all others beforehand." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316 n.13 (1980) (per curiam). Indeed, while "a threat of criminal or civil sanctions after publication 'chills' speech" and thus burdens the exercise of First Amendment rights, a prior restraint goes even further; it "'freezes'" speech. *Nebraska Press*, 427 U.S. at 559.

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that the injunction at issue in that case—which had "allegedly been imposed as a result of private contract"—"implicate[d] free speech concerns": the injunction "nonetheless restrains the viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction." *Id*.

In light of this strong jurisprudential preference for post-publication remedies over prior restraints, even assuming *arguendo* that the confidentiality stipulation cited by Plaintiff is applicable and enforceable in connection with the Book, damages—not an injunction—would be the proper contractual remedy for Plaintiff to pursue. *See Madsen*, 512 U.S. at 794 n.1 (Scalia, J., concurring in part and dissenting in part) ("I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct.").

Indeed, the alleged reputational interests that Plaintiff seeks to protect here are precisely the kind of alleged harm that courts have concluded can "be mitigated by less intrusive measures" than a prior restraint on speech. *Davis*, 510 U.S. at 1317; *see also Org. for a Better Austin*, 402 U.S. at 419–20 ("Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature [that criticized the plaintiff and his business]."); *Metro. Opera Ass'n,* 239 F.3d at 177 ("[F]or almost a century, the Second Circuit has subscribed to the majority view that injunctions should not ordinarily be issued in defamation cases."); *Donini Int'l, S.P.A. v. Satec (U.S.A.) LLC*, 2004 WL 1574645, at *7 (S.D.N.Y. 2004) ("[T]he long-standing rule in this Circuit is that equity will not enjoin threatened libel or defamation since there are adequate legal remedies available for damages arising from harmful speech."); *Rombom v. Weberman*, 309 A.D.2d 844, 845 (N.Y. App. Div. 2003) ("Absent extraordinary circumstances, injunctive relief should not be issued in defamation cases[.]").

II.

THE CONFIDENTIALITY STIPULATION CANNOT BE ENFORCED TO BLOCK OR PUNISH PUBLICATION OF THE BOOK

A. The confidentiality stipulation as construed by Plaintiff would be unenforceable as contrary to public policy.

Aside from the unconstitutional nature of the prior restraint sought here—an outright ban on the further publication and dissemination of a book—contractual limitations on speech, particularly speech about public affairs, are "unenforceable and void" if they harm the "strong public interests rooted in the First Amendment." *Overbey*, 930 F.3d at 222. While a prior restraint, for the reasons stated above, must be rejected in this context, the confidentiality stipulation, if read as expansively as Plaintiff asserts, would be an extreme affront to the public's right to know, and therefore unenforceable as contrary to public policy.

The First Amendment imposes limitations on the relief a court may grant in disputes between private parties because a court's relief is itself state action triggering First Amendment protection. *See Philadelphia Newspapers*, 475 U.S. at 777 (finding First Amendment violation in private libel suit where burden of proving truth rested on defendant); *see also Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (barring intentional infliction of emotional distress claim by private figure based on lawful speech on matter of public concern); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) (barring intentional infliction of emotional distress claim by public figure based on non-libelous parody); *Time v. Hill*, 385 U.S. 374, 397 (1967) (limiting ability of private figure plaintiffs to bring claim under New York right to privacy law).

Thus, that this is a contract case is irrelevant to the required balancing of the interests in enforcement against the strong public policy interests against enforcement. *See, e.g.*, *Overbey*, 930 F.3d at 222 (refusing to enforce contractual provision in settlement agreement as violative of public policy); *Davies*, 930 F.2d at 1396 (same).

There can be little question that the Book, the publication of which Plaintiff seeks to permanently enjoin, concerns a matter of intense public interest. While the confidentiality stipulation arose in the context of a discrete family dispute, Defendant Dr. Trump's Book is about the President of the United States. And the Book has already generated extensive media and public attention. *See, e.g.*, Michael Kranish, *Mary Trump Once Stood Up to Her Uncle Donald. Now Her Book Describes a 'Nightmare' of Family Dysfunction*, Wash. Post (June 26, 2020), https://perma.cc/VVL6-RATF; Amazon Best Sellers, https://perma.cc/8FFJ-HSJG (last visited June 27, 2020) (showing the Book as the top seller on Amazon a month before release).

Furthermore, the subject of the Book—the President's interactions and financial transactions with his family—is also a matter of abiding public interest. *See* David Barstow et al., *Trump Engaged in Suspect Tax Schemes as he Reaped Riches from his Father*, N.Y. Times (Oct. 2, 2018), https://perma.cc/SP7S-82ZJ; *see also* Neil Vigdor and Alexandra Alter, *Trump's Niece to Publish Book With 'Harrowing' Revelations*, N.Y. Times (June 15, 2020), https://perma.cc/7T5A-V8B6 (reporting that Defendant Dr. Trump will identify herself as the source for the reporting on President Trump's financial activities in the October 2018 article).

Accordingly, enjoining the publication and distribution of the Book not only impairs the First Amendment rights of the Defendants, but also it harms the public's right to know. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Overbey*, 930 F.3d at 227 (finding standing for news organization when non-disparagement clauses prevented willing speakers from speaking to the news media).

In sum, the law in New York and around the country is that a contractual provision contrary to public policy is unenforceable and void unless the interests in enforcement outweigh

the interests in nonenforcement. *Cf. Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) ("The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." (citing Restatement (Second) of Contracts § 178 (1981)); *see also United States v. Ready*, 82 F.3d 551, 559 (2d. Cir. 1996) (finding ambiguous plea agreement did not waive right to appeal illegal sentence based on Restatement's public policy balancing approach), *superseded on other grounds*, *United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013); *Cowles v. Brownell*, 540 N.Y.S.2d 973 (N.Y. 1989) (finding release of civil rights claims in return for dismissal similar to release-dismissal agreement in *Rumery* unenforceable as contrary to public policy). Where, as here, the actual contract clause is both exceedingly vague and, as deployed by Plaintiff, would be vastly suppressive of newsworthy information central to political discourse in America, it should be held unenforceable. *Cf. Anonymous v. Anonymous*, 649 N.Y.S.2d 665, 668 (N.Y. 1996) ("It must be emphasized that an agreement such as this, which seeks to bind the parties to an extraordinary level of confidentiality by barring their discussion of certain issues with 'any person or entity' must, if it is to be capable of performance, be interpreted narrowly and limited strictly to its terms.") (Ellerin, J., concurring).

B. Broad contractual confidentiality provisions can constrain the free flow of newsworthy information to the public.

Finally, it is worth emphasizing the deleterious effect sweeping confidentiality clauses can have on the dissemination of newsworthy information about public health, public safety, and public affairs to the electorate. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of

individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

For instance, when a former executive for Brown & Williamson Tobacco Corporation attempted to inform the public about the extent to which the tobacco industry had covered up its knowledge about the health risks of smoking, Brown & Williamson sued the executive for breach of several confidentiality agreements. Bill Carter, *Tobacco Company Sues Former Executive Over CBS Interview*, N.Y. Times (Nov. 22, 1995), https://perma.cc/JA4F-DGQ4. The lawsuit to enforce the executive's confidentiality agreements and the threat of further legal action led CBS to delay airing some segments of its interview with the executive for months. Bill Carter, *CBS News Televises Disputed Interview on Tobacco Giant*, N.Y. Times (Jan 27, 1996), https://perma.cc/H5PY-BSSW. More recently, a whistleblower instrumental to the *Wall Street Journal*'s exposé of scientific fraud at Theranos, *see* John Carreyrou, *Hot Startup Theranos Has Struggled With Its Blood-Test Technology*, Wall St. J. (Oct. 15, 2015), https://perma.cc/JPM7-HB53, was accused of "violating an agreement not to disclose confidential information," and intimidated by lawyers for the company during a visit to his grandfather (who was a Theranos director). John Carreyrou, *Theranos Whistleblower Shook the Company—and his Family*, Wall St. J. (Nov. 16, 2016), https://perma.cc/LST9-NP7J.

Confidentiality clauses in settlement agreements can slow or prevent the public from learning the scope of widespread or systematic wrongdoing. *See* Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, N.Y. Times Magazine (April 23, 2019), https://perma.cc/4BA4-X2J5 (detailing history of systematic sexual discrimination and serial sexual harassment by managers at Sterling Jewelers Inc., and noting that "if there was a settlement [in arbitration], the employee often had to sign a nondisclosure agreement that

prohibited the employee from speaking about the case again."); Ronan Farrow, *Harvey Weinstein's Secret Settlements*, New Yorker (Nov. 21, 2017), https://perma.cc/J96Z-DNDX ("Weinstein used nondisclosure agreements like the one Gutierrez signed to evade accountability for claims of sexual harassment and assault for at least twenty years.").

Such clauses can also severely chill the willingness of corporate whistleblowers to provide details of public harm to the press, as when a former securities lawyer waited eight years to give her account of JP Morgan Chase's failure to disclose defects in repackaged subprime mortgages leading up to the 2008 financial crisis. Matt Taibbi, *The $9 Billion Witness: Meet JP Morgan Chase's Worst Nightmare*, Rolling Stone (Nov. 6, 2014), https://perma.cc/MC8S-L659 ("[I]n 2006 . . . Fleischmann first witnessed, then tried to stop, what she describes as massive criminal securities fraud in the bank's mortgage operations. Thanks to a confidentiality agreement, she's kept her mouth shut since then."). Even when a whistleblower does come forward—nominally violating a confidentiality provision—such clauses can hinder corroborating accounts from reaching the public. *See* Scott Higham & Kaley Belval, *Workplace Secrecy Agreements Appear to Violate Federal Whistleblower Laws*, Wash. Post (June 29, 2014), https://perma.cc/VW9X-MWVT?type=image ("[T]he U.S. Department of Energy asked contract employees . . . to sign nondisclosure agreements that prevented them from reporting wrongdoing at the nation's most contaminated nuclear facility without getting approval from an agency supervisor."); Scott Higham, *Lawsuit Brings to Light Secrecy Statements Required by KBR*, Wash. Post, (Feb. 19, 2014), https://perma.cc/8W6F-9ZZ5?type=image (reporting on allegations that Halliburton and Kellogg Brown & Root "inflated the costs of services provided to military bases" and quoting whistleblower's attorney as stating that internal confidentiality agreements

were designed "to vacuum up any potential adverse factual information, conceal it in locked file cabinets, and gag those with first-hand knowledge from going outside the company").

Accordingly, to the extent they are enforceable at all in such situations, confidentiality stipulations must be construed narrowly to preserve the free flow of newsworthy information to the public. The Plaintiff seeks to use an almost two-decade-old confidentiality clause in the private settlement of a will-contest proceeding to enjoin an author and publisher (that was not a party to the settlement) to block publication of a book about the President of the United States. The stipulation is therefore unenforceable as contrary to core First Amendment interests.

CONCLUSION

For the foregoing reasons, amici urge the Court to deny Plaintiff's motion for a temporary restraining order and preliminary injunction.

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Respectfully submitted,

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FREEDOM OF THE PRESS

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