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## INTEREST OF AMICUS CURIAE

Public Citizen, a nonprofit organization founded in 1971, advocates on behalf of its approximately 500,000 members and supporters, more than 50,000 of them in New York, before Congress, federal agencies, and the courts. Public Citizen believes that meaningful citizen participation depends on the public's ability to access information. To further its interest in government transparency and corporate accountability, Public Citizen has long advocated for strong whistleblower protections, including by arguing against use of non-disclosure agreements to prevent whistleblowers from speaking out.<sup>1</sup> Public Citizen also expressed concern about the use of non-disclosure agreements by the then-incoming Trump administration to hide the work of congressional staffers assisting with the transition.<sup>2</sup> In addition, Public Citizen has addressed First Amendment issues as a party or amicus curiae in numerous cases, seeking to ensure that the important principle of free speech is applied to advance the democratic goals underpinning it.

Public Citizen submits this brief to urge the Court to consider applying the doctrine of narrow construction in deciding whether publication of the book at issue violates the non-disclosure provisions of the settlement agreement, for two reasons. First, because the non-disclosure agreement ("NDA") is invoked as a waiver of First Amendment rights, the Court should apply the fundamental rule that purported waivers of constitutional rights must be read narrowly. Second, plaintiff Robert Trump has made it clear that he cannot get effective relief protecting his purported interests unless the injunction is extended to the book's publisher, which did not sign the NDA and never agreed to give up its **own** First Amendment right to publish a manuscript that it obtained by lawful means.

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<sup>1</sup> See, e.g., <https://www.citizen.org/article/support-letter-for-the-whistleblower-programs-improvement-act/>.

<sup>2</sup> See <https://www.citizen.org/news/a-first-presidential-transition-team-may-have-used-non-disclosure-agreement-to-conceal-congressional-staffers-work-on-muslim-ban/>.

Applying the principle of narrow construction will enable the Court to avoid the serious First Amendment questions that would arise from extending the prior restraint to Simon & Schuster.

Moreover, even if the NDA applies to some statements in the book, principles of equity may support the withholding of equitable relief because of the age of the agreement and the intense public interest in information about one of the parties to the agreement, the current president of the United States, who has chosen not to sue on the contract.

Without reading the book, it is impossible to know whether, as properly construed, the non-disclosure provision supports awarding any relief over the publication of the book. That issue can be determined after the book has been published, and is appropriately considered by the Court at the damages stage of the litigation. In the alternative, although it appears that the reasons given by plaintiff Robert Trump in his briefs do not support the conclusion that the contract has been violated, in camera examination of the book might be needed to assess plaintiff's motion for a preliminary injunction.

#### **STATEMENT OF FACTS AND PROCEEDINGS TO DATE**

In 2000, when settling litigation among the heirs to the estates of Fred Trump and Mary Anne Trump, members of the Trump family entered into an agreement that, among other things, prevented each side in the litigation from publishing, without the consent of the other side in the litigation (the "Proponents" and "the Objectants") anything about the other side in the litigation. Specifically, the Objectants (including Mary Trump) agreed not to publish "concerning their litigation or relationship with the 'Proponents/Defendants' or their litigation involving the Estate[s]."<sup>3</sup> Each side further agreed that each side, and each side's counsel, would "consent to the granting of a temporary or

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<sup>3</sup> The "Proponents" included Robert Trump, Donald J. Trump, and Maryanne Trump Barry.

permanent injunction against them (or any agent acting in their behalf) . . . prohibiting them from violating the terms of this Paragraph.”

Mary Trump has written a book that, by all accounts, will contain many critical statements about at least one of the parties to the Settlement Agreement, Donald J. Trump, now the president of the United States. The book will apparently accuse Donald Trump and his siblings of abusing their father and include negative statements siblings made about each other. Simon & Schuster bought the rights to Mary Trump’s manuscript and is in the process of publishing the book; as of June 30, 2020, thousands of copies of the book had already been printed, and shipped to retailers. Members of the media have apparently obtained copies of the book, and some have reported about its contents. Because it was not successfully enjoined, Simon & Schuster has continued to print and ship books.

Plaintiff Robert Trump sued both Mary Trump and Simon & Schuster, although the complaint does not state any cause of action against the publisher. Rather, the complaint purports to seek “specific performance” by **both** defendants of a contract signed by only one of them, Mary Trump; Simon & Schuster is not a party to the contract and never agreed to its terms. The complaint also seeks damages from Mary Trump for breach of contract. Apart from specific performance, plaintiff Robert Trump apparently seeks to rely on the proposition that any agent of Mary Trump, and anybody acting in concert with her, would be susceptible to contempt charges if they were found to have acted on Mary Trump’s behalf, or in concert with her, in violating that injunction.

Having obtained a temporary restraining order against Mary Trump, but not against Simon & Schuster, Robert Trump now seeks to preliminarily enjoin both defendants from proceeding with the publication of the book.

**ARGUMENT****1. At This Preliminary Injunction Stage, the Court Should Construe the Nondisclosure Agreement Narrowly to Avoid Trenching on Either Mary Trump's or Simon & Schuster's First Amendment Rights.**

Issues of constitutional law and equitable discretion aside, the propriety of the issuance of a prior restraint about the publication of Mary Trump's book turns on the meaning of the "NDA" in paragraph 2 of the 1990 Settlement Agreement. Robert Trump appears to read the paragraph as forbidding Mary Trump from publishing anything about her relationship with him personally, or about her relationship with Donald J. Trump personally, or about her relationship with Mary Anne Trump Barry personally. However, paragraph 2 is not a non-disparagement agreement, and it does not appear, on its face, to be a broad nondisclosure agreement. The NDA can easily be read as prohibiting only publication of facts about the relationship of family members on one side of the case, as a group, with the family members on the other side, also as a group.

The Court should adopt the narrowest reasonable construction of the NDA, for two independent reasons. First, a waiver of constitutional rights is valid only if it is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on th[e] valued freedom [of speech]," courts are consistently "unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967); see *Sambo's Restaurants v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981). Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights. *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997). Accordingly, purported waivers of constitutionally significant rights must be narrowly construed. *U.S. Dept. of Energy v. Ohio*, 503



U.S. 607, 626–27 (1992); *U.S. v. Chavez-Salais*, 337 F.3d 1170, 1172–73 (10th Cir. 2003); *U.S. v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996); *Natl. Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981); *Legal Aid Society v. City of New York*, 114 F. Supp. 2d 204, 226–27 (S.D.N.Y. 2000). This principle supports Mary Trump’s argument that the NDA should be construed as restricting only disclosures about the relationship between the two groups of parties to the settlement agreement and the underlying litigation.<sup>4</sup>

Second, the fact that plaintiff’s claim for injunctive relief depends on his ability to enjoin Simon & Schuster from proceeding with its publication of Mary Trump’s book creates additional reasons to construe the NDA narrowly. Plaintiff has made clear that he understands that he cannot get effective injunctive relief unless the injunction also binds Simon & Schuster. His complaint names Simon & Schuster as a defendant even though he does not allege a cause of action against that company; and his counsel’s June 26, 2020 letter to the Court advises that he depends on relief against Simon & Schuster because Mary Trump has already provided the entire manuscript to it, and “plaintiff is seeking to avoid the situation presented in the recent case of *United States v. Bolton*, 2020 WL 3401940 (D.D.C. June 20, 2020),” where the trial court decided that it could not justify a prior restraint against defendant Bolton, based on his violation of an NDA, because his publisher had already distributed physical copies of the book so widely. Because a prior restraint against Mary Trump is useless to plaintiff if that injunction does not also bind Simon & Schuster, the propriety

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<sup>4</sup> If the Court construes the NDA as barring disclosure of Mary Trump’s relationship with individual family members, that still would not justify issuing a prior restraint to bar disclosures about her relationships with Donald J. Trump or Maryanne Trump Barry. Those individuals are not plaintiffs in this case, and, if the agreement bars disclosure as to the relationships of individuals rather than the relationship between the two groups of litigants, Robert Trump lacks standing to object to disclosures about those individual relationships. And each of the passages from the book cited in plaintiff’s opening brief and verified complaint, Complaint, ¶ 28; Motion for a TRO, page 5, relates to those other individuals, not to himself.

of enjoining Mary Trump turns on whether the First Amendment permits injunctive relief against Simon & Schuster.

The effort to enjoin the book publisher, however, as persuasively argued by Simon & Schuster and by amicus Reporters Committee for Freedom of the Press, raises the most serious issues under the First Amendment considering that, by all appearances, Simon & Schuster acquired the manuscript lawfully and in an arms'-length commercial transaction. *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). By construing the NDA narrowly, the Court can avoid having to consider those serious First Amendment issues.

**2. The Evidence Presented to Date Does Not Justify the Conclusion That the Book Violates the NDA as Properly Construed.**

On the evidence so far proffered for the record, plaintiff has not made a showing that the NDA has been violated. Plaintiff has offered several aspects of the Trump book, as described in an online article, to show that it violates the NDA; he claims that the book says that:

Mary Trump played a critical role helping The New York Times print startling revelations about Trump's taxes, including how he was involved in 'fraudulent' tax schemes and had received more than \$400 million in today's dollars from his father's real estate empire and that she supplied highly confidential family financial documentation to the Times. The Beast also reported that Mary plans to include conversations with Trump's sister, retired federal judge Maryanne Trump Barry, that contain intimate and damning thoughts about her brother and that the Book would include allegations that Donald and Fred Trump Sr. contributed to" the death of her father, Fred Trump Jr. . . .

[T]his revelatory, authoritative portrait of Donald J. Trump and the toxic family that made him . . . , shines a bright light on the dark history of their family.

Brief in Support of TRO and Preliminary Injunction, at 5-6

None of these details bear on the relationships between the two groups of family members who litigated over the Trump estate at the tur4n of the century. The supposed conversations with

Maryanne Trump Barry would have been a product of Mary Trump's relationship with her aunt, but the report about the conversation is not about that relationship; it is about the relationship between Judge Barry and her brother. Narrowly construed, the NDA provides no protection against disclosing details of that relationship. Moreover, even if the Court considers the conversations to be within the prohibition of the NDA because it stemmed from Mary Trump's relationship with Judge Barry, plaintiff Robert Trump has failed to identify any injury to himself from disclosure of those conversations, and Mnryanne Trump Barry has not sued to enforce the NDA.

Because plaintiff has not offered any evidence that the book violates Robert Trump's rights in the NDA, as properly construed in the narrow fashion advocated above, this Court should deny his request for a prior restraint against publication of the book. In the alternative, the Court could review the book in camera to decide whether a prior restraint should issue.

**3. The Passage of Time and the Public Interest in Disclosure May Warrant Withholding Equitable Relief Sought in the Interest of Protecting Secrecy.**

The Appellate Division's ruling on the parties' appeal from the Court's TRO directed this Court to consider, in ruling on the motion for a preliminary injunction, whether the passage of time, combined with the public's right to have access to otherwise private facts about a candidate for President of the United States, would justify withholding equitable relief to enforce the NDA. The equitable balancing suggested by the Appellate Division also supports the narrow construction of the NDA.

As the amicus brief of the Reporters Committee for Freedom of the Press persuasively argues, broad and strict enforcement of NDAs can be harmful to the public interest. Courts have recognized the danger in issuing prior restraints to forbid dissemination of information of importance

to the public, hence declining to enforce contracts forbidding speech. The Second Circuit has allowed a party that was bound by an injunction issued by agreement thirty years before to contest the validity of that order under prior restraint principles, holding that equitable relief would not lie to enforce the agreement, and “that the parties may have agreed to it is immaterial.” *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963). And in *Caren EE. v. Alan EE.*, 2 N.Y.S.3d 657 (N.Y. App. Div. 3d Dept. 2015), the Court relied on equitable principles in deciding that an agreement that a woman would not write a book on a particular subject would be better enforced by an award placing the proceeds for the book in a trust than by a permanent injunction restraining her speech. And in *Brammer v. KB Home Lone Star*, 114 S.W.3d 101, 106 (Tex. App. 2003), the Court presumed that damages might well be awarded for a breach of the contractual provision, but held that equity would not lie to suppress the speech and hence deprive the public of valuable information. *Id.* at 108-109.

Here, where the disclosures apparently include matters occurring several decades ago, and relate to the incumbent President of the United States who is currently running for reelection, the public’s interest in the disclosures is at its apogee. Thus, even if the Court were to decide, after an in camera review of the book, that some statements in the book ran afoul of the NDA, the Court should nevertheless withhold the equitable relief of a prior restraint against publication, and leave the parties to litigate the question of whether damages are the more appropriate remedy for the violation.

### CONCLUSION

The Court should consider the motion for a preliminary injunction in light of the foregoing principles.

Respectfully submitted,

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