Sub Pt 8/22/16

ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Ivana Trump, Plaintiff, -against- Donald J. Trump, Defendant.	Index No. 72319/90 **NOTICE OF MOTION TO VACATE SEALING** **ORAL ARGUMENT REQUESTED**

FILED
AND FEE PAID
AUG 11 2016
COUNTY CLERK'S OFFICE
NEW YORK

PLEASE TAKE NOTICE that, upon the annexed affirmation of David E. McCraw sworn to August 11, 2016, and upon all prior papers and proceedings had herein, non-parties The New York Times Company and Gannett Co., Inc. (collectively "Press Movants") will move this Court in Room 130, Motion Support Courtroom, at the New York County Courthouse, 60 Centre Street, New York, New York 10007, on August 22, 2016 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to CPLR § 5015 vacating (a) the sealing of the judicial records in this action imposed by operation of Domestic Relation Law (DRL) § 235(1), and (b) any protective order(s) entered in this action that prevent the parties from publicly disclosing documents or information relating to this action, including discovery materials.

SUPREME COURT
STATE OF NEW YORK
APPROVED
I.A.S. MOTION
SUPPORT OFFICE
☒ MOT ☐ X-MOT
CLERK'S
INITIALS

Dated: New York, New York
August 11, 2016

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Ivana Trump, Plaintiff, -against- Donald J. Trump, Defendant.	:	Index No. 72319/90

AFFIRMATION OF DAVID E. McCRAW IN SUPPORT OF MOTION BY NON-PARTIES THE NEW YORK TIMES COMPANY AND GANNETT CO., INC. TO VACATE SEALING

DAVID E. McCRAW affirms under penalty of perjury:

1. I am Vice President and Assistant General Counsel of The New York Times Company ("The Times"), and I am duly licensed to practice law in the State of New York. I make this affirmation in support of the joint motion by The Times and Gannett Co., Inc. (collectively, "Press Movants") to vacate and unseal pursuant to CPLR § 5015(a).

2. Through this motion, Press Movants seek to vacate (a) the sealing of the judicial records in this action imposed by operation of Domestic Relations Law (DRL) § 235(1), and (b) any protective order(s) entered in this action that prevent the parties from publicly disclosing documents or information relating to this action, including discovery materials.

3. While most court records filed in a matrimonial proceeding are presumptively sealed under New York law, the law is equally clear in empowering the courts to unseal those records in appropriate cases. See DRL § 235(1) (disclosure of court records permitted "by order of the court"); see also, Madsen v. Westchester Cnty. Clerk, 43 Misc. 3d 1217(A), 2014 N.Y. Misc. LEXIS 1899, at **2 (Sup. Ct. Westchester Cnty. Apr. 22, 2014) (party seeking access under DRL § 235 must show "special circumstances"). This is plainly such a case.

4. The defendant in this action, Donald J. Trump, is now the 2016 Republican nominee for the Office of President of the United States, and the sealed records address issues directly relevant to the presidential election. From the very first Republican presidential primary debate over a year ago, Mr. Trump's political adversaries have raised questions about his credibility, his treatment of women, his finances, and his famously litigious nature.[1] The records now under seal in this proceeding may well shed important light on how Mr. Trump exhibited these currently debated aspects of his character and capabilities during an important period in his life. Unsealing them would assist the American public in making an informed judgment in the presidential race.

5. Courts in other parts of the country have long recognized that permitting public access to the divorce records of those seeking public office, serving in government, or holding other prominent positions in society is appropriate in some circumstances. In 2004, for example, a Los Angeles Superior Court unsealed the records of the divorce of Jack Ryan when he decided to run for an open Senate seat in Illinois against Barack Obama.[2] Similarly, the New Hampshire Supreme Court in 1992 held that a candidate for the U.S. Congress could not overcome the public's right of access to his divorce records simply by advancing a blanket claim of privacy.[3] A California appellate court affirmed the unsealing of a 1,200 page record in the divorce proceeding of billionaire Ronald Burkle, a prominent Democratic donor,[4] and a Maryland judge

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[1] Patrick Healy & Jonathan Martin, Rivals Jab at Donald Trump as Republican Debate Becomes Testy, The N.Y. Times, Aug. 6, 2015, https://www.nytimes.com/2015/08/07/us/politics/rivals-jab-at-donald-trump-as-gop-debate-becomes-testy.html.

[2] Jo Napolitano, National Briefing | Midwest: Illinois: Candidate's Divorce Records Opened, The N.Y. Times, June 19, 2004, http://www.nytimes.com/2004/06/19/us/national-briefing-midwest-illinois-candidate-s-divorce-records-opened.html.

[3] Petition of Keene Sentinel, 612 A.2d 911, 913 (N.H. 1992).

[4] Burkle v. Burkle, 135 Cal. App. 4th 1045, 1063-71 (2006). Often public officials and candidates for office recognize the public importance of access to the records and do not contest unsealing. In the 2004

unsealed part of the divorce records of baseball player Cal Ripken, Jr. in response to a motion by *The Baltimore Sun.*[5]

6. The need to unseal the records of divorce proceedings where there is a legitimate public interest in disclosure reflects the special status of court records in this country. The Judiciary is the branch of government where truth is pursued through contested proceedings. The press and public depend on access to the official records of these proceedings to learn the true nature of litigated controversies, to understand the surrounding facts, to evaluate the positions taken by the parties, and to ensure that the system is acting as it should. For all these reasons, the legitimate public interest in disclosure of the official records of this case is intense.

7. Moreover, this divorce action has long since been resolved, and both the Republican candidate for President and his former wife have talked publicly about the issues that led to their divorce and its outcome—at length, over many years, and in multiple contexts. Their past disclosures have greatly diminished the types of privacy concerns that typically justify sealing the records of a divorce proceeding.

8. In this context, and with a consequential election facing the country in November, the minimal privacy concerns and the overwhelming public interest in facts contained in the sealed records unquestionably give rise to the "special circumstances" that justify unsealing them

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Illinois Senate race, for example, one Democratic primary contender consented to the release of his divorce records. David Mendell, Hull's ex-wife called him violent man in divorce file, Chicago Tribune, Feb. 28, 2014, http://www.chicagotribune.com/chi-0402280192feb28-story.html. An Alabama state court unsealed part of the divorce records of a local judge in response to a request from the press and amid much public speculation about the files' contents, and a different Alabama state court unsealed the divorce records of Alabama Governor Robert Bentley. See Kyle Whitmire, Judge Fuller Divorce Records Reveal Little, Shows Parties Struggled Over Keeping Proceedings Secret, AL.com, Oct. 20, 2014, http://www.al.com/news/index.ssf/2014/10/ judge_fuller_divorce_records_r.html; Jeremy Gray, Gov. Robert Bentley's Unsealed Divorce Records Show Property Division, Financial Terms, AL.com, Sept. 29, 2015, http://www.al.com/news/index.ssf/2015/09/gov_robert_bentleys_divorce_re.html.

[5] Pamela Wood, Baltimore County Judge Orders Part of Ripken Divorce Case Unsealed, The Baltimore Sun, May 7, 2016, http://www.baltimoresun.com/news/maryland/ investigations/bs-md-sun-investigates-ripken-records-20160504-story.html.

under the Domestic Relations Law. Moreover, the public has a qualified constitutional right of access to the records of this proceeding that cannot possibly be overcome given the immense public interest in disclosure and the absence of any compelling privacy interest to justify continued sealing. It would be deeply incongruous to American democracy to bar the public from seeing official court records pertaining directly to the credibility and character of a person they must soon decide whether to elect as their President.

BACKGROUND

9. This action for divorce was commenced by Ivana Trump in November 1990.[6]

10. This Court granted the divorce on December 11, 1990 on the grounds of "cruel and inhuman treatment" by Mr. Trump, and scheduled a trial for the following April to determine whether Ms. Trump could overturn a prenuptial agreement.[7]

11. The parties reached a post-divorce settlement on March 23, 1991.[8]

12. The Times has been informed by the Clerk of this Court that the files pertaining to this action are sealed and unavailable for public inspection.

13. Upon information and the belief, the records are sealed pursuant to an order authorized by Domestic Relations Law § 235 ("DRL § 235").

THIS MOTION IS PROPERLY BEFORE THE COURT

14. Members of the press may properly move to vacate an order sealing the records of a past action pursuant to Section 5015(a) of the CPLR. See Crain Commc'ns v. Hughes, 74 N.Y.2d 626, 628 (1989); In re Application of Phillip Marshall, 13 Misc. 3d 1203(A), 2006 N.Y. Misc. LEXIS 2325, at **7 (Sup. Ct. N.Y. Cnty. Aug. 29, 2006); Schron v. Grunstein, 41 Misc.

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[6] Ivana Trump Files for Divorce, Finally, USA TODAY, Nov. 5, 1990, at 2D.

[7] Harry Berkowitz & James A. Revson, Trumps' Rich Marriage Ends, Newsday, Dec. 12, 1990, at 3.

[8] Doug Vaughan & Harry Berkowitz, Trumps Settle: $14M, Newsday, Mar. 24, 1991, at 3.

3d 1207(A), 2013 N.Y. Misc. LEXIS 4374, at ***4-5 (Sup. Ct. N.Y. Cnty. Oct. 1, 2013); see also, Coopersmith v. Gold, 156 Misc. 2d 594, 600 (Sup. Ct. Rockland Cnty. 1992) (unsealing records from medical malpractice trial on newspaper's intervention motion that court converted to motion to vacate); George F. Carpinello, Public Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule's Future in A World of Electronic Filing, 66 Alb. L. Rev. 1089, 1117-18 (2003) ("When a sealing order has been entered and a non-party seeks to lift the order, the appropriate vehicle appears to be a motion to vacate pursuant to CPLR § 5015(a), providing notice to all parties to the action.").

15. While the provisions in CPLR § 5015 authorizing relief from an existing judgment do not specifically address vacatur of orders sealing court records, permitting post-judgment unsealing is consistent with the drafters' "inten[t] that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee." Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 68 (2003) (noting that the statute implies a "catchall category" (internal marks and citations omitted)); see also, New York v. Richard TT, 132 A.D.3d 72, 75 (3d Dep't 2015) (grounds for vacatur in CPLR § 5015(a) "are not exclusive" and a court has common law authority to grant relief "in the interest of justice" (internal marks and citations omitted)). Indeed, the Court of Appeals implicitly reaffirmed this construction of the statute in Crain when it directed that actions by the press to unseal records should be brought under Section 5015(a). 74 N.Y.2d at 628.

16. Moreover, the party seeking vacatur need not have been a party to the underlying judgment or to the order it seeks to vacate. Section 5015(a) expressly states: "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct . . . ." CPLR § 5015(a)

(emphasis added); see also, Oppenheimer v. Westcott, 47 N.Y.2d 595, 602 (1979) ("Clear from its use of the words 'any interested person' within a dozen words of the phrase 'relieve a party' is . . . that to avail himself of the remedy provided by that section[,] one need not have been a party to the original action." (citation omitted)).[9]

THIS COURT HAS AUTHORITY TO UNSEAL IN THE PUBLIC INTEREST

17. This Court plainly has authority to grant the relief sought through this motion. It is well settled that a court has "inherent powers to vacate its own decree for sufficient reason and in the interests of substantial justice." See Matter of Alayon, 86 A.D.3d 644, 645 (2d Dep't 2011) (quoting Woodson, 100 N.Y.2d at 68); see also, Visentin v. DiNatale, 4 Misc. 3d 1018(A), 2004 N.Y. Misc. LEXIS 1355, at ***8 (Sup. Ct. Putnam Cnty. Feb. 13, 2004) (vacating sealing order in part because matters were "demonstrably of public interest"). The Court's discretionary power is not subject to any time limit. See Konstantin v. 640 Third Ave. Assocs., 46 Misc. 3d 1206(A), 2014 N.Y. Misc. LEXIS 5717, at ***10 (Sup. Ct. N.Y. Cnty. Dec. 19, 2014).

18. Nor does DRL § 235 impose a blanket of secrecy upon divorce proceedings in New York, closing up everything once and for all. To the contrary, courts have repeatedly emphasized that there are instances where "the shield afforded by Domestic Relations Law § 235 must give way to the need for disclosure." Janecka v. Casey, 121 A.D.2d 28, 32 (1st Dep't

[9] Parties seeking to unseal court records have taken a variety of procedural paths, including intervention or the commencement of a special proceeding, but vacatur appears to be the proper approach. Compare Mancheski v. Gabelli Grp. Capital Partners, 39 A.D.3d 499, 501 (2d Dep't 2007) (seeking to intervene and vacate and forgiving formal procedural requirements) *with* Crain Commc'ns, 74 N.Y.2d at 628 (noting that although non-party improperly sought unsealing via Article 78 proceeding, it was not "without remedy" in the form of a motion to vacate). Should the Court disagree that a motion to vacate is procedurally proper, the merits of this motion should still be reached by converting this motion to the proper procedural vehicle. See CPLR § 2001 ("At any stage of an action . . . the court may permit mistake, omission, defect or irregularity . . . to be corrected . . . or, if a substantial right of a party is not prejudiced . . . shall be disregarded"); see also, Mancheski, 39 A.D.3d at 501 (forgiving formal procedural requirements); In re Application of Phillip Marshall, 2006 N.Y. Misc. LEXIS 2325, at **7, **25 (converting motion to intervene into motion for vacatur).

1986); see also, e.g., id. (where plaintiff "invited scrutiny into his marriage" by filing civil lawsuit, the purposes of DRL § 235 were "not thwarted"); Solomon v. Meyer, 103 A.D.3d 1025, 1026 (3rd Dep't 2013) (noting the need for courts to ask "whether defendants' right to disclosure pursuant to CPLR 3101 outweighed the privacy protections of Domestic Relations Law § 235"); Merrick v. Merrick, 154 Misc. 2d 559, 561 (Sup. Ct. N.Y. Cnty. 1992) (state law "does not provide complete privacy to matrimonial litigants"); People v. Doe, 117 Misc. 2d 35, 37 (Sup. Ct. Erie Cnty. 1982) (DRL § 235(1) "places no absolute barrier to obtaining these records").[10]

19. In writing the Domestic Relations Law, the Legislature itself did not believe that divorce actions were so private that nothing about them should be public. The statute provides that courtroom proceedings in a divorce case enjoy a statutory presumption of openness and cannot automatically be closed to the public. See DRL § 235(2); see also, Anonymous v. Anonymous, 263 A.D.2d 341, 343 (1st Dep't 2000).

20. Concededly, this same presumption does not apply to most court records in divorce cases, where the presumption of access is reversed. DRL § 235(1). But even as to divorce records, the statute provides only a presumption favoring sealing—access expressly may be allowed "by order of the court." Id. As explained in Rubino v. Albany Medical Center Hospital, 126 Misc. 2d 204, 208 (Sup. Ct. Albany Cnty. 1984), a court may order disclosure of records in a matrimonial action if "the intrusion into essentially private matters is warranted" and "special circumstances" exist. See Madsen, 2014 N.Y. Misc. LEXIS 1899, at **3-4 (noting that unsealing is permitted in special circumstances and citing cases).

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[10] To be sure, these cases concern requests seeking disclosure of divorce records by litigants in other court proceedings that have become relevant to their disputes. See, e.g., Stark v. Nussbaum, 2011 N.Y. Misc. LEXIS 5832, at *5-6 (Sup. Ct. Nassau Cnty. 2011) (finding "sufficient nexus between the matrimonial action and the instant action to warrant the unsealing of the court's file relating to the matrimonial action" (relying on Janecka, 121 A.D.2d 28)). But nothing in DRL § 235(1) limits permissible orders to these circumstances alone.

21. DRL § 235(1) does not articulate a standard for when a court may issue an order allowing access to court records, but its authorization for access should be informed by the provisions of the very next paragraph stating how determinations of public access to divorce proceedings should be calibrated. Sanders v. Winship, 57 N.Y.2d 391, 395 (1982) ("a statute is to be viewed as a whole"). Under DRL § 235(2), court proceedings may be closed only when it is demonstrated that the "public interest requires that the examination of the witnesses should not be public." DRL § 235(2) (emphasis added). The language used by the Legislature is important: The law "does not . . . authorize the closing of proceedings because of the private interests of the particular litigants. Rather, the court must be convinced that the 'public interest' requires closure." Merrick, 154 Misc. 2d at 562 (internal marks and citation omitted).

22. The public interest standard provided in DRL § 235(2) has led the First Department to conclude that privacy interests the statute otherwise seeks to protect are significantly less compelling when the parties to the action are public figures. For example, in a case where the parties were "well-known public figures of great wealth and prominence, each covered extensively by the media," the First Department reversed a lower court's decision to close the courtroom during a child custody and support trial. Anonymous, 263 A.D.2d at 342 (internal marks omitted). As the First Department put it, "[T]here is an important societal interest to be served by conducting this proceeding in an open forum." Id. at 345 (emphasis added). Such an assessment of the "important societal interest" served by public access to proceedings involving public figures—and especially public officials—should equally weigh on requests for access to the records of those proceedings.

23. The cases identify two other factors as germane to the "special circumstances" analysis of requests for access to divorce records. First, the length of the passage of time

between the divorce—when the need for confidentiality may be heightened—and the motion for unsealing bears on the calculation of special circumstances. See Parker v. Parker, 2 Misc. 3d 484, 490-93 (Sup. Ct. Nassau Cnty. 2003) (questioning whether the presumption against dissemination of matrimonial papers continues after the disposition of matrimonial litigation). Second, courts consider whether the parties, by virtue of their own public disclosures, have effectively relinquished whatever privacy interest they may have otherwise claimed under DRL § 235(1). See Janecka, 121 A.D.2d at 31.

24. All of these factors—the public interest in disclosure, the passage of time since the divorce, and the past public disclosures—are relevant to the assessment of whether "special circumstances" exist to unseal the records of a divorce proceeding. Thus, for example, in Madsen, 2014 N.Y. Misc. LEXIS 1899, a book author was denied access to a decades-old divorce file sought as part of the research for a book where his application asserted only the absence of harm to the litigants given the passage of time, but not the presence of any public interest in disclosure.

25. It is also important to note the limitations written into the presumption of sealing in DRL § 235(1). It applies by its terms just to "pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony." In other words, it does not apply to a number of categories of records, including "orders made on motions or post-trial decisions." Merrick, 154 Misc. 2d at 561. Accordingly, materials falling outside the categories listed can be released without a showing of special circumstances.

SPECIAL CIRCUMSTANCES WARRANT UNSEALING

26. The facts compellingly demonstrate that disclosure of the records of this proceeding is fully justified by the special circumstances that exist. The public interest in disclosure, the prominence of the parties, the passage of time since the divorce, and the past public disclosures all heavily favor prompt unsealing.

The Public Interest in Disclosure and the Prominence of the Parties.

27. Because of the sealing, we cannot say for sure what is contained in the record of the divorce. It may reveal the garden-variety papers and proceedings that are the usual stuff of matrimonial actions. Or it may disclose important new information about how Mr. Trump conducted himself at a critical juncture in his life. The American people who are being asked to assess his qualifications for presidency should not have to guess which one it is.

28. Mr. Trump has placed his views about women front and center in the campaign with his charge that Hillary Clinton, the Democratic presidential nominee, is playing the "woman's card" and would be a failed candidate were she a man.[11] His controversial comments about prominent women, from Carly Fiorina to Megyn Kelly to Rosie O'Donnell, have further fueled the controversy.[12] One need look no further than Mr. Trump's own campaign website

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[11] Anne Gearan & Katie Zezima, Trump's 'Woman's Card' Comment Escalates the Campaign's Gender Wars, Wash. Post, Apr. 27, 2016, https://www.washingtonpost.com/politics/trumps-womans-card-comment-escalates-gender-wars-of-2016-campaign/2016/04/27/fbe4c67a-0c2b-11e6-8ab8-9ad050f76d7d_story.html; Reena Flores, Donald Trump Slams Hillary Clinton Again with 'Woman's Card', www.cbsnews.com, Apr. 27, 2016, http://www.cbsnews.com/news/donald-trump-i-havent-recovered-from-hillary-clinton-shouting; Alan Rappeport, Donald Trump Keeps Playing 'Woman's Card' Against Hillary Clinton, The N.Y. Times, Apr. 27, 2016, http://www.nytimes.com/politics/first-draft/2016/04/27/donald-trump-keeps-playing-womans-card-against-hillary-clinton.

[12] Alyssa Bereznak, Trump's Daughters and Wife Defend His Treatment of Women, Yahoo, Apr. 12, 2016, https://www.yahoo.com/news/donald-trump-s-daughters-and-1406428601303094.html; Reena Flores, Donald Trump Fires Back Over 'Lame Hit Piece' on Women, www.cbsnews.com, May 15, 2016, http://www.cbsnews.com/news/donald-trump-fires-back-at-failing-ny-times-for-lame-hit-piece-on-women; Michael Barbaro & Megan Twohey, Crossing the Line: How Donald Trump Behaved with Women in Private, The N.Y. Times, May 14, 2016, http://nyti.ms/27lYris; Melissa Chan, RNC Chair

which reproduces in droves news articles relating to his views on women and contains a consistent stream of press releases regarding his views of women and vice-versa.[13]

29. Mr. Trump's attitude toward women is plainly a campaign issue. Just as plainly, this issue is illuminated by the actions taken in his personal life, including the events surrounding this divorce and his behavior as a matrimonial litigant.

30. Disclosure here may also help to resolve an ongoing campaign controversy over the allegation purportedly made in this divorce action that Mr. Trump sexually assaulted Ms. Trump. A biography of Mr. Trump published in 1993 (the "Biography") reported that Ms. Trump told her "closest confidantes" that Mr. Trump "raped" her in 1989 during a fit of rage.[14] The Biography includes a statement from Ms. Trump that confirms the rape allegation and explains that the allegation was made during a deposition that Ms. Trump gave in connection with her "matrimonial case."[15] In the statement she says: "As a woman, I felt violated, as the love and tenderness, which he normally exhibited toward me, was absent. I referred to this as a 'rape,' but I do not want my words to be interpreted in a literal or criminal sense."[16] After the

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Says Donald Trump Will Have to 'Answer for' Reported Treatment of Women, Time, May 15, 2016, http://time.com/4336482/donald-trump-reince-priebus-women.

[13] See, e.g., The Women Who Like Donald Trump, DonaldJTrump.com, May 10, 2016, http://www.donaldjtrump.com/media/the-women-who-like-donald-trump (article originally appeared in The N.Y. Times); Congresswoman: Trump Can Still Win Over Women Voters, DonaldJTrump.com, Apr. 2, 2016, http://www.donaldjtrump.com/media/congresswoman-trump-can-still-win-over-women-voters (article originally appeared on NBCNews.com); Donald J. Trump for President Announces Texas Women for Trump Coalition, DonaldJTrump.com, Dec. 10, 2015, https://www.donaldjtrump.com/press-releases/donald-j.-trump-for-president-announces-texas-women-for-trump-coalition-ove.

[14] Harry Hurt III, Lost Tycoon: The Many Lives of Donald J. Trump 55 (1993).

[15] Id. at Notice to the Reader.

[16] Id.

Biography was published, Mr. Trump gave an interview saying that the rape allegation was "'obviously false.'"[17]

31. The rape allegation resurfaced during Mr. Trump's presidential campaign, when the news website The Daily Beast ran a story detailing the allegations from the Biography (the "Daily Beast Story").[18] The Daily Beast Story included statements from Michael Cohen, special counsel at The Trump Organization, who confirmed that Ms. Trump's deposition testimony included the rape accusation, but denied that Mr. Trump had raped Ms. Trump. He was quoted as saying that "'by the very definition, you can't rape your spouse.'"[19] Following the Daily Beast Story, Mr. Trump again denied the rape allegation, and the Trump campaign issued a statement from Ms. Trump praising Mr. Trump and saying that "'[t]he story is totally without merit.'"[20]

32. The public record at this point leaves serious questions as to what happened in the divorce proceeding: what specifically was alleged and how Mr. Trump responded. The unsealing sought here potentially resolves once and for all exactly how the allegation arose and how it was dealt with in court, under oath, not in self-serving P.R. statements and passages from an unauthorized biography.

33. Marital fidelity is also an issue in the presidential campaign; it is a reflection of character that many voters consider relevant to a candidate's fitness for office. Mr. Trump

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[17] Wendy Lin, Trump: The Art of Tucks, Tattoos, and Tantrums, Newsday, Apr. 28, 1993, at 7.

[18] Tim Mak & Brandy Zadrozny, Ex-Wife: Donald Trump Made Me Feel 'Violated' During Sex, The Daily Beast, July 27, 2015, http://www.thedailybeast.com/articles/2015/07/27/ex-wife-donald-trump-made-feel-violated-during-sex.html.

[19] Id.

[20] Trump Campaign, Ivana Trump Push Back on 'Rape' Allegation Report, FoxNews.com, July 28, 2015, http://www.foxnews.com/politics/2015/07/28/trump-campaign-ivana-trump-push-back-on-rape-allegation-report.html.

himself has directly raised as a campaign issue the marital relationship between Ms. Clinton and her husband, and criticized Ms. Clinton as having attacked women who came forward and claimed to have had sexual relations with President Clinton.[21] And this is far from the first time Mr. Trump has opined on the relevance of the issue of marital fidelity to a candidate for President. At the time of investigations into the allegations against President Clinton, Mr. Trump mused "on the prospect of his own run for public office, saying, 'Can you imagine how controversial that'd be? You think about him with the women? How about me with the women? Can you imagine[?]'"[22]

34. In short, special circumstances exist for unsealing of the records of this case because they have become directly relevant to the issues being debated in the hotly contested presidential campaign that is now ongoing.

The Passage of Time and Past Public Disclosures.

35. Special circumstances also exist because any privacy interest that might otherwise favor sealing has been significantly diminished both by the passage of time since the divorce and the extensive public disclosures by both of the parties to it. Both Trumps have publicly discussed this divorce action, directly and through counsel or other representatives, while it was pending and in the years since.

36. In October 1990, New York magazine ran an 11-page cover story about Ms. Trump, approximately seven months after she filed for divorce (the "New York Magazine

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[21] Trump: Hillary's Married to 'the Worst Abuser of Women in the History of Politics', Fox News Insider, May 8, 2016, http://insider.foxnews.com/2016/05/08/donald-trump-hillary-clinton-married-bill-worst-abuser-women-history-politics; Maggie Haberman & Nick Corasaniti, Donald Trump Says Hillary Clinton Mistreated Husband's Female Accusers, The N.Y. Times, May 7, 2016, http://www.nytimes.com/politics/first-draft/2016/05/07/donald-trump-says-hillary-clinton-mistreated-husbands-female-accusers.

[22] Charles Blow, The Ghosts of Old Sex Scandals, The N.Y. Times, May 30, 2016, http://www.nytimes.com/2016/05/30/opinion/the-ghosts-of-old-sex-scandals.html.

Article"). Both Trumps declined to be interviewed for the piece, but Ms. Trump supplied a list of sixteen friends to the reporter and Mr. Trump asked one of his lawyers, Jay Goldberg, to speak for him.[23] The New York Magazine Article includes quotes from Mr. Goldberg that speak to details of the divorce: In regard to Ms. Trump's claims about Mr. Trump's alleged adultery, Mr. Goldberg said, "'Philandering, in the twentieth century, is not and never will be a basis to knock out an agreement,'" and "[h]e's denied [adulterous behavior before Christmas 1987], and even assuming such liaisons existed, there's still no legal basis to set the agreement aside. Donald Trump had no intention of leaving, and he didn't leave until 1990. That's a critical factor. The agreement is a steel door. She's trying to knock it down with a flyswatter.'"[24]

37. On the merits of Ms. Trump's claim that she was entitled to an equal share of Mr. Trump's assets because they were partners, Mr. Goldberg is quoted as saying that the claim is "'such a jerk job, so infirm, ludicrous.'"[25] The New York Magazine Article includes quotes from Ms. Trump's friends discussing Ms. Trump's intentions in litigating with Mr. Trump, saying that Ms. Trump "is not that money-oriented" but "'wants recognition.'"[26]

38. Mr. Trump also gave interviews about his divorce from Ms. Trump while it was taking place. He told People magazine that his prenuptial agreement was "'airtight,'" and said of the divorce: "'It's gonna be amicable, I promise you that'" and "'we never had a fight. The kids never saw anything wrong. And they're gonna be great. She's gonna be great.'"[27] In yet another interview, Mr. Trump, reportedly posing as a publicist for himself by the name John

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[23] Michael Gross, Ivana's New Life, New York Magazine, Oct. 15, 1990, at 42, https://goo.gl/wDFrht.

[24] Id. at 44.

[25] Id.

[26] Id. at 45.

[27] Mary H.J. Farrell, The Trumps Head for Divorce Court, People, Feb. 26, 1990, http://www.people.com/people/archive/article/0,,20116915,00.html.

Miller, talked to a reporter in 1991 about his divorce from Ms. Trump, saying that Ms. Trump made a mistake when she turned down a settlement offer from him and that Mr. Trump was "'smart because he got not only Ivana to sign the [prenuptial] agreement, but he got Ivana's lawyers to sign the agreement that she'd do it, that she speaks English perfectly, that everything in the agreement is known and studied and everything else.'"[28]

39. In a book that he published in 1997, when Mr. Trump was in his second marriage and presumably writing based on his experience in his first marriage to Ms. Trump, Mr. Trump advised readers to divorce wives who are "constantly nagging them about this or that" and wrote that "[f]or a man to be successful he needs support at home . . . not someone who is always griping and bitching."[29]

40. Mr. Trump has also discussed his divorce in his current presidential campaign. In one interview, he appeared to agree with an NBC reporter's characterization of his divorce from Ms. Trump as "ugly," stating that Ms. Trump now thinks he is "great," and apparently acknowledging that the subject of his marital history is likely to come up during the presidential campaign.[30] In a CNN interview about his position on gay marriage, Mr. Trump attributed his

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[28] Chris Cillizza, Donald Trump's 'John Miller' Interview Is Even Crazier than You Think, Wash. Post, May 16, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/05/16/donald-trumps-john-miller-interview-is-even-crazier-than-you-think.

[29] Andrew Kaczynski, Donald Trump's Marital Advice: Divorce 'Griping and Bitching' Wives, Buzzfeed, Mar. 17, 2016, http://www.buzzfeed.com/andrewkaczynski/donald-trumps-martial-advice-divorce-griping-and-bitching-wi#.jwgp7Wk1A.

[30] Transcript, Meet the Press, NBC News, Jan. 10, 2016, http://www.nbcnews.com/meet-the-press/meet-press-january-10-2016-n493596; Kyle Cheney, Donald Trump: My Past Is Fair Game, Politico, Jan. 10, 2016, http://www.politico.com/story/2016/01/donald-trump-my-past-is-fair-game-217546.

divorce from Ms. Trump (and a subsequent divorce from Marla Maples) to the fact that he focused too much on his business during each marriage.[31]

41. For her part, Ms. Trump is the author of the book For Love Alone,[32] which Mr. Trump described as "'nothing more than a thinly veiled account of our marriage and breakup.'"[33] It was so revelatory of the couple's marriage and dissolution that Mr. Trump publicly claimed that its disclosures violated the couple's confidentiality agreement from their divorce.[34]

42. Ms. Trump has publicly spoken about her marriage to and divorce from Mr. Trump, including during this presidential campaign. Ms. Trump gave a widely cited interview to The New York Post last April in which she commented on her divorce from Mr. Trump: "'Donald took the divorce like a businessman. And he had to negotiate and he had to win. Once the financial part was settled, we're friendly.'"[35] In that same interview, she remarked that her divorce prevented him from running for President of the United States around that time, discussed generally the custody arrangement regarding their three children ("She had custody of the children, but he saw them often. 'Once [the children] were the age of 21 and out

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[31] Josh Feldman, Jake Tapper Presses Trump on 'Traditional Marriage': You've Been Married Three Times, Mediaite, June 28, 2015, http://www.mediaite.com/tv/jake-tapper-presses-trump-on-traditional-marriage-youve-been-married-three-times.

[32] Ivana Trump, For Love Alone (1992).

[33] Donald J. Trump with Kate Bohner, Trump: The Art of the Comeback 135 (1997).

[34] Marvine Howe, Chronicle, The N.Y. Times, July 2, 1992, https://www.nytimes.com/1992/07/02/style/chronicle-947092.html; New York Court Affirms Ivana Trump Gag Order, Orlando Sentinel, July 3, 1992, http://articles.orlandosentinel.com/1992-07-03/news/9207030645_1_ivana-trump-donald-trump-alimony.

[35] Dana Schuster, Ivana Trump on How She Advises Donald—and Those Hands, N.Y. Post, Apr. 3, 2016, http://nypost.com/2016/04/03/ivana-trump-opens-up-about-how-she-advises-donald-his-hands; see also, Gabrielle Bluestone, Remember When Donald Trump's Wife and Donald Trump's Mistress Got in a Public Brawl in Aspen? Gawker, Jan. 25, 2016, http://gawker.com/remember-when-donald-trumps-wife-and-donald-trumps-mist-1754977102.

of the university, I said, 'Donald, this is the final product, now you deal with it.'"), and commenting generally that "'If you are a married woman, you usually follow what the man wants to do.'"[36]

43. Likewise, representatives for Ms. Trump have provided additional details in public reports. A Vanity Fair article published in September 1990, around six months after Ms. Trump filed for divorce, described Ms. Trump's "humiliation" when Mr. Trump announced at a press conference that he would pay her "'one dollar a year and all the dresses she can buy'" to compensate her for her position as president of the Plaza hotel.[37] It details a scene from Christmas Eve of 1987, when Mr. Trump reportedly surprised Ms. Trump with a revised prenuptial agreement amid reports that a photographer was threatening to blackmail Mr. Trump with photographs of Mr. Trump and Marla Maples, with whom he was rumored to be having an affair.[38] It includes a description of Mr. Trump's ultimatum to Ms. Trump's—"'Either you act like my wife and come back to New York and take care of your children or you run the casino in Atlantic City and we get divorced'"—and Ms. Trump's reaction, attributed to one of her assistants, asking "'What am I going to do? . . . If I don't do what he says, I am going to lose him.'"[39]

44. Significantly, in other lawsuits involving the Trumps, documents relating to the divorce and the events leading up to it (which are presumably among the sealed records) have been introduced onto the public record, either in full or in part. The publicly available records

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[36] Dana Schuster, Ivana Trump on How She Advises Donald—and Those Hands, N.Y. Post, Apr. 3, 2016, http://nypost.com/2016/04/03/ivana-trump-opens-up-about-how-she-advises-donald-his-hands.

[37] Marie Brenner, After the Gold Rush, Vanity Fair, Sept. 1990, http://www.vanityfair.com/magazine/2015/07/donald-ivana-trump-divorce-prenup-marie-brenner.

[38] Id.

[39] Id.

pertaining to Trump v. Trump, Index No. 6853/1990 (Sup. Ct. N.Y. Cnty.)—in which Ms. Trump challenged the legitimacy of her prenuptial agreement as modified in 1987—include, among other documents, Ms. Trump's deposition testimony concerning her understanding of Mr. Trump's finances at the time she signed the modified prenuptial agreement[40]; the parties' respective briefing, including their memoranda of law in regard to Mr. Trump's motion for a protective order for documents regarding his finances that Ms. Trump had subpoenaed; letters between the parties themselves, including a letter Ms. Trump wrote to Mr. Trump on March 11, 1991, seeking compliance with the prenuptial agreement; and drafts of different versions of the Trumps' prenuptial agreement with handwritten edits throughout.

45. The records pertaining to Trump v. Trump, Index No. 23416/1992 (Sup. Ct. N.Y. Cnty.)—in which Ms. Trump brought suit against Mr. Trump for allegedly failing to fulfill settlement obligations relating to financing Ms. Trump's housing—include, among other documents, a post-nuptial agreement dated December 24, 1987; a statement of net worth for Ms. Trump as of November 1, 1987; and a stipulation from this action itself, stating the parties' agreement to amendments and modifications to the December 24, 1987 prenuptial agreement.[41]

46. Such piecemeal disclosures not only undercut any argument for sealing the remainder on privacy grounds but also do a disservice to the public by presenting an inaccurate or incomplete picture of Mr. Trump as he campaigns for President of the United States.

47. Special circumstances thus also exist due to the passage of time and the parties own past disclosure of facts concerning their divorce. To the extent that the divorce records contain appropriately sealed documents involving, say, the privacy interests of third parties,

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[40] As part of that action, Ms. Trump sought disclosure of certain financial data regarding Mr. Trump's financial status as of the date of the couple's 1987 post-nuptial agreement. Mr. Trump, in turn, sought a protective order from disclosure.

[41] See generally Case File, Trump v. Trump, Index No. 23416/1992 (Sup. Ct. N.Y. Cnty.).

courts have found that "limited disclosure" is an option. See People v. Malaty, 4 Misc. 3d 525, 528 (Sup. Ct. Kings Cnty. 2004) (citing Janecka, 121 A.D.2d at 28) (ordering records from a divorce proceeding pertaining to a party's assets but not to the grounds for his divorce).

UNSEALING IS ALSO MANDATED BY THE FIRST AMENDMENT

48. While Press Movants believe that unsealing is both authorized by DRL § 235 and warranted by the special circumstances that exist, if continued sealing were deemed appropriate under the statute, on the present facts DRL § 235 would operate as an unconstitutional abridgment of the public's First Amendment right of access to the records of this case.

49. In Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), the U.S. Supreme Court held that the express guarantees of free speech, freedom of the press, and the right to petition the government enshrined in the First Amendment carry with them an implicit right of public access to certain government proceedings. The First Amendment right of access is an affirmative right that may be enforced by any member of the public or the press. See, e.g., Globe Newspapers Co. v. Super. Ct., 457 U.S. 596, 609 n.25 (1982).

50. The constitutional right of access attaches to a particular type of government proceeding if "the place and process have historically been open to the press and general public" and public access "plays a significant positive role in the function of the particular process." Press-Enterprise Co. v. Super. Ct., 478 U.S. 1, 7-8 (1986) (experience and logic confirm right of access to pre-trial hearing); see also, Globe Newspapers Co., 457 U.S. at 606-07.

51. Matrimonial actions, including ones for separation, have historically been held in public. See, e.g., Percival v. Percival, 106 A.D. 111, 114 (2nd Dept. 1905) (action for separation in 1886 was "tried in New York county in open court"); see also, Mary Mcdevitt Gofen, The Right of Access to Child Custody and Dependency Cases, 62 U. Chi. L. Rev. 857, 867 (1995)

("divorce proceedings . . . have been historically open to the public."). As noted, DRL § 235(2) establishes that court proceedings in matrimonial actions are generally required to be open to the public.

52. This historic access to divorce proceedings plays a positive role for many of the same reasons as access to other trials proceedings: "'the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.'" Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd., 274 A.D.2d 1, 7 (1st Dep't 2000) (citation omitted); see also, Gofen, supra at 868-69 (discussing same in context of divorce proceedings).

53. The history of access to divorce proceedings and the significant positive role of openness establish that the constitutional access right applies to divorce proceedings. It necessarily follows that this constitutional access right extends to those records filed with the court that are fundamental to the divorce proceeding. See, e.g., People v. Burton, 189 A.D.2d 532, 535 (1993) (documents submitted in connection with contested matters are subject to a "qualified First Amendment right of access"); Danco Labs., Ltd., 274 A.D.2d at 6 (noting First Amendment right of access to official court records of civil proceedings); Newsday LLC v. Cnty. of Nassau, 730 F.3d 156 (163-64) (2d Cir. 2013) ("the First Amendment right applies 'to civil trials and to their related proceedings and records'" (quoting N.Y. Civil Liberties Union v. NYC Transit Auth., 684 F.3d 289, 298 (2d Cir. 2012))); George W. Prescott Publ'g Co. v. Register of Prob. for Norfolk Cnty., 479 N.E.2d 664, 665 (Mass. 1985) (finding First Amendment right of access to certain divorce records).

54. The constitutional right of access to court records is a qualified right, not an absolute one, and well-settled standards exist for determining when the right may be limited. The right can be overcome, and public access limited or denied, only where the party seeking to limit access demonstrates (a) a substantial probability of prejudice to an equally compelling interest if public access is not limited, (b) the absence of any alternatives that can effectively protect that compelling interest, and (c) that any limitation of the access right is narrowly tailored. See, e.g., Richmond Newspapers, Inc., 448 U.S. at 581; Press-Enterprise v. Super. Ct., 464 U.S. 501, 510 (1984). These showings cannot be made here.

55. Applying these standards, courts in other states have held provisions like DRL § 235(1) to be unconstitutional on their face. In Burkle v. Burkle, for example, a California court of appeals struck down as overbroad a state statute that allowed certain financial records in a divorce action to be automatically sealed upon request of either party. 135 Cal. App. 4th at 1063-70; see also, Associated Press v. State of New Hampshire, 888 A.2d 1236, 1253 (N.H. 2005) (finding similar statute to violate state constitutional access right).

56. For similar reasons, the Third Department has questioned the constitutionality of another statute that could be read to require the automatic sealing of certain court records relating to rape victims, but avoided the constitutional issue by narrowly construing the sealing required. Burton, 189 A.D.2d at 534-35. So also here, the constitutional question can be avoided if DRL § 235(1) is construed to allow access to court records where, as here, there is no demonstrated risk of harm to any compelling privacy interest. Otherwise, DRL §235(1) is vastly overbroad in its limitation of the public's access right, and cannot withstand constitutional scrutiny.

ANY PROTECTIVE ORDERS SHOULD ALSO BE VACATED

57. Press Movants also request the Court to lift any protective order that limits the parties' right to disclose discovery materials that are not part of the Court's files.[42] Under CPLR § 3103(a), protective orders may be issued to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR § 3103(a) (emphasis added).[43] With the passage of time (roughly 25 years), the resolution of the divorce, and the parties' own disclosures, we respectfully request that the Court examine whether any reasonable basis remains for maintaining a protective order directed at discovery in this case.

58. Courts undoubtedly have the power to vacate protective orders, even when they have been stipulated by the parties. See, e.g., Mancheski, 39 A.D.3d at 502 (noting that despite stipulation to maintain confidentiality previously blessed by the court, "the court must make an independent determination of whether to seal court records in whole or in part for 'good cause'" (citation omitted)); Visentin, 2004 N.Y. Misc. LEXIS 1355, at ***6 ("that the parties had previously stipulated to the sealing during discovery 'does not obviate the need' for plaintiff to now establish good cause to continue the sealing pursuant to Rule 216.1" (citation omitted)); see also, In re Pineapple Antitrust Litig., No. 04-MD-01628 (S.D.N.Y Aug. 10, 2015) (granting journalist's motion to lift protective order in long-closed case in order to investigate defendant's past conduct); Constand v. Cosby, 112 F. Supp. 3d 308, 319 (E.D. Pa. 2015) (granting press motion to lift protective order and unseal deposition testimony in decade-old sexual harassment case against celebrity entertainer). And while there is generally no affirmative right of access to

[42] While Press Movants recognize that the parties may have a non-disclosure agreement between themselves, they move to lift any court-enforced protective order in this case and maintain that any such protective order can no longer be enforced by the Court for the reasons articulated herein.

[43] CPLR 3103 is the proper standard for protective orders in matrimonial actions. See Wegman v. Wegman, 37 N.Y.2d 940, 941 (1975).

unfiled discovery like there is for judicial documents filed with a court, the typical reason for disallowing access—protecting the "fair conduct" of the litigation—no longer applies to this case. See Westchester Rockland Newspapers, Inc. v. Marbach, 66 A.D.2d 335, 338 (2d Dep't 1979); see also, Seaman v. Wyckoff Heights Med. Ctr., Inc., 8 Misc. 3d 628, 632 (Sup. Ct. Nassau Cnty. 2005), aff'd in part, appeal dismissed in part by 25 A.D.3d 598 (2d Dep't 2006). By contrast, in cases involving heightened public interest, courts that have restricted access to pre-trial discovery have qualified that restriction with the caveat that the public's "right to know" will be vindicated at trial. Marbach, 66 A.D.2d at 338; see also, Scollo v. Good Samaritan Hosp., 175 A.D.2d 278, 280 (2d Dep't 1991).

59. The Court should lift any relevant protective order to accommodate the robust public interest in this case—a public interest that has not yet been vindicated since there was no trial in this divorce, and one that will only continue to amplify as the presidential election approaches. Vacating any protective orders will allow to the parties to determine whether to disclose the currently protected discovery materials, clearing the way for voluntary disclosure by either Mr. Trump or Ms. Trump.

CONCLUSION

60. As the Second Circuit has recognized, "[t]he notion that the public should have access to the proceedings and documents of courts is integral to our system of government." United States v. Erie Cnty., 763 F.3d 235, 238-39 (2d Cir. 2014). Thus, "[t]o ensure that ours is indeed a government of the people, by the people, and for the people, it is essential that the people themselves have the ability to learn of, monitor, and respond to the actions of their representatives and representative institutions." Id. It is hard to imagine a more apt scenario where this longstanding tenet applies than during a presidential election.

61. The publicly available information about Mr. Trump's divorce is a patchwork of partially disclosed, partially sealed documents and public statements that may or may not capture accurately what happened in these proceedings. That is not the record upon which voters should go to the polls in November. Accordingly, the Court should find that "special circumstances" warrant unsealing the records in this case and justify releasing the parties from any extant judicial restraints on disclosure of facts relating to this case.

WHEREFORE, Press Movants respectfully request this Court to vacate any and all protective or sealing orders previously entered in this case and direct the Clerk to make available for public inspection the entire record of this action.

Dated: New York, New York
August 11, 2016

David E. McCraw

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Ivana Trump, Plaintiff, -against- Donald J. Trump, Defendant.	Index No. 72319/90 **AFFIDAVIT OF SERVICE**

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)

BRIAN EARL, being duly sworn, deposes and says as follows:

1. I am a paralegal with the law firm of Levine Sullivan Koch & Schulz, LLP. I am not a party to this action, am over 18 years of age, and reside in Hudson County, New Jersey.

2. On August 11, 2016 I caused a true copy of the **Notice of Motion to Vacate Sealing** and **Affirmation of David E. McCraw in Support of Motion by Non-Parties The New York Times Company and Gannett Co., Inc. to Vacate Sealing** to be served by Fedex priority overnight courier upon:

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Brian Earl

Subscribed and sworn to before me
this 11th day of August, 2016

Notary Public

SCOTT BAILEY
Notary Public, State of New York
No. 01BA6201502
Qualified in New York County
Commission Expires March 2, 2017