

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION  
CASE NO. 16-61511-CIV-WJZ

CAROL WILDING, ET AL., .  
 .  
 Plaintiffs, . Fort Lauderdale, Florida  
 . April 25, 2017  
 v. . 1:24 p.m.  
 .  
 DNC SERVICES CORP, d/b/a, .  
 DEMOCRATIC NATIONAL .  
 COMMITTEE, ET AL., .  
 .  
 Defendants. .  
 . . . . .

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Transcript of Motion Hearing had  
before the Honorable William J. Zloch,  
United States District Judge.  
- - - - -

Proceedings recorded by mechanical stenography, transcript  
produced by computer.

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1                                    TUESDAY, APRIL 25, 2017, 1:24 P.M.

2                                    *(The Judge entered the courtroom)*

3                    **THE COURT:** Good afternoon. Please be seated.

4                    Calling Case Number 16-61511-Civil.

5                    Counsel, would you note your appearances?

6                    **MR. BECK:** Good morning, your Honor. Jared Beck on  
7 behalf of the plaintiffs.

8                    **MR. O'BRIEN:** Your Honor, Cullin O'Brien on behalf of  
9 the plaintiffs.

10                   **MR. HERNANDEZ:** Your Honor, Antonio Hernandez on  
11 behalf of the plaintiffs.

12                   **MS. VIRUES:** Beverly Virues on behalf of the  
13 plaintiffs.

14                   **THE COURT:** Good afternoon.

15                   **MR. SPIVA:** Good afternoon, your Honor. Bruce Spiva  
16 on behalf of the defendants.

17                   **MR. CARAMANICA:** And, your Honor, Mark Caramanica on  
18 behalf of the defendants.

19                   **THE COURT:** Good afternoon.

20                   We're here this afternoon for -- or upon the motion to  
21 dismiss filed by the defense.

22                   I have, obviously, questions for both sides. And what  
23 I'd like to do is, as we cover various technical issues, such  
24 as standing, the pleadings, class action allegations, and so  
25 forth, rather than hear from just one side, as we go through

1 with individual questions, I'll hear from the defense, I'll  
2 hear from the plaintiff on that particular issue. All right.  
3 And, again, these are technical issues that we will be dealing  
4 with.

5 But let me just give a brief description of the case  
6 at this point. The plaintiffs brought this suit as a putative  
7 class action against Defendants DNC Services Corp. and Deborah  
8 Wassermann Schultz. According to their first-amended  
9 complaint, that is, Docket Entry Number 8, the plaintiffs are,  
10 quote, "residents of 45 states and the District of Columbia."  
11 They seek to represent three distinct classes:

12 One, all people or entities who contributed to the DNC  
13 from January 1, 2015, through July 13, 2016, referred to as the  
14 "DNC Donor Class."

15 Two, all people or entities who contributed to the  
16 Bernie Sanders campaign from January 1, 2015, through July 13,  
17 2016, known as the "Sanders Donor Class."

18 And, three, all registered members of the Democratic  
19 Party, known as the "Democratic Party Class."

20 This case arises generally from the DNC's alleged bias  
21 in favor of Hillary Clinton during the 2015-2016 Democratic  
22 Presidential Primary, as well as the DNC's handling of donor  
23 information, which was attacked by an online hacker.

24 Plaintiffs bring six causes of action, each germane to  
25 particular proposed classes.

1           Count 1, fraud by the DNC Donor Class and the Sanders  
2 Donor Class.

3           Count 2, negligent misrepresentation by the DNC Donor  
4 Class and the Sanders Donor Class.

5           Three, violation of Section 28-3904 of the District of  
6 Columbia code by the DNC Donor Class and the Sanders Donor  
7 Class.

8           Count 4, unjust enrichment by the DNC Donor Class.

9           Count 5, breach of fiduciary duty by the Democratic  
10 Party Class.

11           And Count 6, negligence by the DNC Donor Class.

12           The defendants have moved to dismiss the first-amended  
13 complaint, Docket Entry Number 8. The defendants' arguments  
14 fall generally under three umbrellas.

15           First, the defendants argue that plaintiffs lack  
16 standing to bring their claims. Next, the defendants argue  
17 that the first-amended complaint fails to state a claim. And,  
18 third, the defendants argue that the class action allegations  
19 should be stricken.

20           Now, with that general description of the pleadings at  
21 this stage -- well, let me do it this way. Are there any  
22 opening remarks that the defense would like to give? And then  
23 I'll hear from the plaintiff as well. And then I'll go into my  
24 questions.

25           **MR. SPIVA:** Your Honor, I was prepared to give some

1 opening remarks, but if you would prefer to just ask questions,  
2 I'm also happy to do it that way.

3 **THE COURT:** Well, go ahead. You can give your -- take  
4 your time. We have the whole afternoon.

5 **MR. SPIVA:** Okay.

6 And mindful of what your Honor said about wanting to  
7 take, you know, the issues kind of one at a time, maybe I'll  
8 cover the -- I'll start with the issue of standing and whether  
9 the Court has subject-matter jurisdiction first. Because, of  
10 course, if we are correct that there is no subject -- no  
11 standing and no subject-matter jurisdiction, then the entire  
12 complaint -- all of the claims should be dismissed, your Honor.

13 **THE COURT:** So you were gonna go into your arguments.

14 **MR. SPIVA:** Yes. Well, why don't I do this. Why  
15 don't I -- I'll give you just some very brief overview opening  
16 statement, and then I'll sit down, and the other side can do  
17 the same. And then we can --

18 **THE COURT:** Then I'll begin with my questions.

19 **MR. SPIVA:** Okay.

20 **THE COURT:** Because we'll cover all of these technical  
21 points.

22 **MR. SPIVA:** Sure. That makes sense, your Honor.

23 **THE COURT:** All right.

24 **MR. SPIVA:** Your Honor, just briefly, this is really  
25 an action that was brought as a political weapon against the

1 DNC and its former chairperson, Congresswoman Debbie Wassermann  
2 Schultz. And it really threatens some serious First Amendment  
3 injury to the defendants, because the crux of the plaintiffs'  
4 claims here are that the DNC and Congresswoman Schultz  
5 purportedly breached an internal rule of the party in saying on  
6 the one hand that the party would remain neutral between the  
7 two candidates and on the other hand not doing that behind the  
8 scenes. That's the allegation.

9 And I think really what runs through all of these  
10 questions, your Honor, the questions that the Court would have  
11 to address to resolve that claim that really demonstrate why  
12 there is no subject-matter jurisdiction, why this can't be  
13 resolved as a class action, and why there's a failure to state  
14 a claim, and that is, your Honor, the Court would have to  
15 resolve such issues as what was the meaning of the Democratic  
16 Party's internal rule and how should it be enforced.

17 **THE COURT:** You're talking about the DNC's charter  
18 now.

19 **MR. SPIVA:** Yes, their bylaws, which is where this  
20 purported obligation arises to remain neutral as between the  
21 candidates.

22 **THE COURT:** Article V, Section 4.

23 **MR. SPIVA:** Correct, your Honor.

24 **THE COURT:** Go ahead.

25 **MR. SPIVA:** And the Court would have to basically tell

1 the party that it couldn't change that rule, even though it's a  
2 discretionary rule that it didn't need to adopt to begin with.

3 The Court would have to find that these individuals  
4 were induced to give money to Representative Sanders --  
5 sorry -- Senator Sanders on the basis that there would be this  
6 neutrality that there purportedly was not, and that they  
7 wouldn't have -- they relied on that, and that they wouldn't  
8 have given that money otherwise.

9 And same with DNC members. The Court would have to  
10 define who is a member of the Democratic Party nationwide.  
11 There is no national registration for either of the major  
12 parties. And so, this Court would have to determine what it  
13 means to be a Democrat and then determine whether the class  
14 that the Court defined was injured in some way by the  
15 allegations.

16 I think through each of these questions, your Honor --  
17 and there are more -- they are not justiciable, because they  
18 are political questions that courts have repeatedly said  
19 they -- that they are not the province of the civil courts.  
20 It's not redressable, because if the Court were to seek to  
21 answer those questions and impose burdens upon the party, it  
22 would violate the First Amendment rights of the party for free  
23 association. And so it's not redressable.

24 And, really, I think there's an impossible showing of  
25 causation. I mean the Court would have to find that people who

1 fervently supported Bernie Sanders and who purportedly didn't  
2 know that this favoritism was going on would have not given to  
3 Mr. Sanders, to Senator Sanders, if they had known that there  
4 was this purported favoritism.

5 And, of course, there are lots of other underlying  
6 factual determinations that this Court would have to make in  
7 terms of whether there was such favoritism, and how it affected  
8 the race, that also raise similar types of questions that  
9 really are without -- it's outside the province of the Court.

10 I think this really runs through all of these issues,  
11 your Honor. I think it also shows why this can't be determined  
12 on a class basis, because every single person who was  
13 determined to be a member of one of these three subclasses  
14 would need to be deposed and would need to testify at trial  
15 about issues such as reliance.

16 And so, I think those questions really, your Honor,  
17 are at the heart of why this case should be dismissed for lack  
18 of subject-matter jurisdiction, why there's a failure to state  
19 a claim, and why the class action allegations should be  
20 stricken.

21 Thank you.

22 **THE COURT:** Thank you, Counsel.

23 **MR. BECK:** Thank you, your Honor.

24 **THE COURT:** Good afternoon.

25 **MR. BECK:** Good afternoon.

1           And thank you, Counsel.

2           Your Honor, we've been accused just now of wielding a  
3 political weapon. We've been accused of posing a threat to the  
4 First Amendment. But, in fact, the First Amendment is not  
5 absolute, and the Supreme Court recognizes that again and  
6 again. And, in fact, the First Amendment yields on many  
7 occasions to more ancient common-law rights that precede even  
8 the founding of this republic.

9           Freedom of speech and freedom of association are very,  
10 very important, but we also have a right not to be defrauded.  
11 We also have a right not to be taken advantage of by a  
12 fiduciary. We have a right not to be deceived. There's no  
13 exception to those rights just because the fraudulent speech or  
14 the fraudulent conduct involved takes place in a political  
15 context. But that's what the defendants want you to conclude  
16 in this case. But if you concluded that, your Honor, you would  
17 be in direct contravention of what the Supreme Court has said  
18 time and again.

19           *Virginia State Board of Pharmacy*, quote:

20           "Untruthful speech, commercial or otherwise, has  
21 never been protected for its own sake."

22           The famous *Gertz* opinion, one of the seminal First  
23 Amendment cases, quote:

24           "There is no constitutional value in false  
25 statements of fact. Neither the intentional lie nor

1 the careless error materially advances society's  
2 interest in uninhibited, robust, and wide-open debate  
3 on public issues."

4 And more recently in *Madigan vs. Illinois*, a 2006  
5 opinion from the Supreme Court, the Court held:

6 "Consistent with our precedent and the First  
7 Amendment, states may maintain fraud actions when  
8 fundraisers make false or misleading representations  
9 designed to deceive donors about how their donations  
10 are used."

11 I think it's very clear that there is no real First  
12 Amendment issue involved here, simply because we are talking  
13 about speech which occurred in the political context. The  
14 First Amendment or the common-law admits no exception to the  
15 rights not to be defrauded, not to be deceived, just because  
16 speech was involved. That's very central to our system of  
17 justice.

18 And as to standing, which is the means by which a  
19 litigant enters court, standing here is a very, very basic  
20 question -- or a very basic issue. And I think it's readily  
21 decided in this case, because we are talking primarily about  
22 the loss of money. And federal courts have recognized again  
23 and again that loss of money is a valid injury to confer  
24 Article III standing.

25 Just because that money was paid as part of a

1 political process, again, we get back to the First Amendment,  
2 we get back to all those cases that the Supreme Court has  
3 decided. There's no protection of fraudulent speech that comes  
4 under the rubric of freedom of speech or freedom of  
5 association.

6 This is not a case about enforcing political promises.  
7 They want you to think that, I believe, because they want to  
8 paint this case in a line of cases that have been filed  
9 throughout the years where candidates may make political  
10 promises, and then disappointed voters bring lawsuits to  
11 enforce those promises or seek damages in one form or another.  
12 But that's not what this case is about. We're not talking  
13 about campaign rhetoric. We're not talking about a campaign  
14 platform of any kind.

15 What we're talking about here is the very core of what  
16 our democracy runs on, the very basis for our democracy, which  
17 is the conduct of free and fair elections. That's the basis,  
18 that's the bedrock on which the claims of this case take off,  
19 because the election -- the elections -- as American history  
20 has developed, the conduct of those elections, for better or  
21 worse, has come under the domain of the two major political  
22 parties in this country.

23 And in our case, in getting into the allegations of  
24 our case, what we are alleging and what we are very, I think,  
25 clearly alleging and specifically alleging in this complaint is

1 that people paid money in reliance on the understanding that  
2 the primary elections for the Democratic nominee -- nominating  
3 process in 2016 were fair and impartial. And that's not just a  
4 bedrock assumption that we would assume just by virtue of the  
5 fact that we live in a democracy, and we assume that our  
6 elections are run in a fair and impartial manner. But that's  
7 what the Democratic National Committee's own charter says. It  
8 says it in black and white. And they can't deny that.

9 **THE COURT:** Let me just interrupt you.

10 **MR. BECK:** Oh, sure.

11 **THE COURT:** And I apologize. This is not your  
12 problem.

13 **MR. BECK:** Okay.

14 **THE COURT:** But for those of you who are here as  
15 spectators -- and there's at least one individual and maybe  
16 two -- you are distracting the Court with your show of  
17 exuberance in support of counsel's arguments. You might as  
18 well be doing somersaults or backflips in support of counsel's  
19 argument. So, you are distracting me. So, if you want to help  
20 the side that you're here to support, let me listen to the  
21 lawyer, and please stop distracting me.

22 Counsel, go right ahead.

23 **MR. BECK:** Thank you, your Honor.

24 I was talking about the charter, because I was making  
25 the point that we're not just talking about a bedrock

1 assumption of what it means to live in a democracy and what  
2 formed the bedrock understanding of the plaintiffs in this  
3 lawsuit, but it's also in the charter itself, which --

4 **THE COURT:** Article IV -- or -- excuse me --  
5 Article V, Section 4.

6 **MR. BECK:** Correct.

7 Which requires the DNC and its chairperson to act in  
8 an even and impartial manner with respect to the presidential  
9 nominating process.

10 **THE COURT:** Which is in paragraph 159 of your  
11 first-amended complaint.

12 **MR. BECK:** Correct.

13 And not only is it in the charter, but it was stated  
14 over and over again in the media by the Democratic National  
15 Committee's employees, including Congresswoman Wassermann  
16 Schultz, that they were, in fact, acting in compliance with the  
17 charter. And they said it again and again, and we've cited  
18 several instances of that in the case.

19 So, getting back to the question of standing, when you  
20 have money -- in this case, it's in the form of political  
21 donations, but, again, I don't think the political context  
22 makes any difference -- but when you have money that's paid in  
23 reliance on a false understanding and a false -- or a false  
24 belief that is created by the defendant, then you have all of  
25 the elements of Article III satisfied.

1           You have an injury in fact. You have a causal  
2 connection, because the money, which is the injury in fact --  
3 and there's no denying the case law on that -- the money was  
4 paid in reliance on the false understanding. And then in terms  
5 of judicial redress, the principal relief we're asking for in  
6 this case is damages.

7           So, I think -- personally I think standing is -- in  
8 spite of the defendants' efforts to muddy the waters and try to  
9 turn this into -- and try to paint us with a political brush,  
10 like we're, you know, fighting some political battle, which is  
11 just totally not true, you know, I think standing's an easy  
12 question.

13           We may represent people that gave to Bernie Sanders,  
14 but that doesn't mean that this has -- and -- this lawsuit has  
15 any connection whatsoever to the political campaign that Bernie  
16 Sanders fought in 2016, which is now over. And in terms of the  
17 relief we're seeking, the principal relief we're seeking is  
18 damages.

19           Now, in terms of the complaint and in terms of the  
20 allegations of the complaint, and specifically what the DNC did  
21 wrong, I just think the context of when this complaint was  
22 drafted is important. We drafted this complaint and filed it  
23 in June of 2016, which was before the DNC primary -- or the DNC  
24 convention occurred in July. And, at the time, the evidence  
25 that we had access to consisted of this set of documents that

1 your Honor referenced in your prefatory remarks that were  
2 released by a figure named Guccifer 2.0.

3 And the core document that was released by that  
4 individual on that website purports to be an internal DNC  
5 memorandum, which outlines a strategy for advancing Hillary  
6 Clinton to the nomination of the Democratic Party before the  
7 primaries had even really gotten off the ground. And this was  
8 at a time -- you know, Bernie Sanders I believe had announced  
9 for about a month before this particular memo came out. But we  
10 think that's clear evidence of what the DNC's intent was  
11 throughout the primary process. It was to leverage their  
12 connections with the media in order to advance Hillary  
13 Clinton's candidacy at the expense of everybody else.

14 Subsequent to this memorandum being released into the  
15 public by Guccifer 2.0, many more documents have come into the  
16 public domain. We have a wealth of information that was  
17 released by WikiLeaks that comes from e-mails from officials of  
18 the DNC, as well as the Hillary Clinton campaign, which really,  
19 I think, flesh out and fill in the detail of this really  
20 seminal internal document that Guccifer released and which is  
21 pled in our complaint.

22 These additional leaks have shown that DNC officials  
23 participated in creating and disseminating media narratives to  
24 undermine Bernie Sanders and advance Hillary Clinton.

25 It shows former DNC Chair Donna Brazile giving debate

1 questions in advance to Hillary Clinton during the primaries.

2 It shows the DNC at one point changing its donor  
3 policies specifically to favor Hillary Clinton.

4 It shows the scheduling of debates to favor Hillary  
5 Clinton over Bernie Sanders.

6 It shows, in general, the DNC pouring its considerable  
7 resources and relationships into propelling Hillary Clinton to  
8 the nomination.

9 It shows the creation of an aura of inevitability of  
10 Hillary Clinton's candidacy that the DNC pushed into the media  
11 and, essentially, in our view, crushed the Bernie Sanders  
12 campaign.

13 It shows the DNC coordinating and taking direction  
14 from Hillary Clinton's campaign operatives, making hiring  
15 decisions based on what Hillary Clinton's campaign was telling  
16 them, picking sides in the disputes between the candidates.

17 I mean, there's one famous example of an alleged  
18 chair-throwing incident in Nevada, where instead of acting in  
19 an even and impartial manner, Debbie Wassermann Schultz  
20 immediately sided with the Hillary Clinton campaign.

21 And all of this, you know, comes out of documents that  
22 have been released into the public domain subsequent to the  
23 drafting of this complaint, based on the Guccifer 2.0 leaks.  
24 But we're not even getting into at this point -- we're not even  
25 getting into the question of widespread reports of

1 irregularities at polling locations in various states relating  
2 to the actual voting in the primary. There's widespread  
3 reports of voting machine irregularities, voter suppression,  
4 strange purging of the rolls.

5 I mean, your Honor, I think when all of this is seen  
6 together, it's really hard to deny that the DNC was not acting  
7 in accordance with its own charter and not acting in accordance  
8 with its role and, quite frankly, its duty as a custodian of  
9 this country's democracy. But, again, this is not a case about  
10 abstract political principles.

11 This is a case -- and I have to make this point again  
12 and again, because I think this really gets back to the  
13 technical issues that your Honor identified at the outset,  
14 which is that we have standing here because there was payment  
15 of money in reliance on a false understanding that was created  
16 by these defendants.

17 And I do want to say that I think we have a second  
18 basis for standing that goes beyond money. And I don't want to  
19 forget this, but there's a whole line of cases which talks  
20 about the invasion of established common-law rights as a valid  
21 basis for standing. And I don't want to lose sight of that,  
22 because I don't think money is the only basis for standing. I  
23 think this especially -- is of special relevance for the  
24 Democratic Party Class, and specifically the breach of  
25 fiduciary duty count, which doesn't necessarily rely on the

1 payment of money.

2 Now, they've said in their opening remarks,  
3 essentially, that there's no such thing as the Democratic  
4 Party, or we can't ascertain who's in the Democratic Party. I  
5 mean, to me, you know, that's -- that -- I think that would be  
6 a surprising proposition to most people in this country. I  
7 think we can figure out who's a democrat and who's not. But I  
8 think those are factual issues anyway.

9 Perhaps those -- you know, perhaps they have arguments  
10 that can be made at a summary judgment stage or something, but  
11 here we're talking about the pleadings, we're talking about  
12 what we've alleged, and I think we've pled enough to state a  
13 valid breach of fiduciary duty claim. The D.C. law that we've  
14 cited I think is, uhm -- recognizes a sufficiently flexible  
15 definition of what a fiduciary duty means in order to encompass  
16 the relationship between a party or the head of a party and its  
17 members.

18 In fact, there's a whole line of cases -- and I know  
19 it's not the D.C. cases, it's New York cases -- but under  
20 New York fiduciary law, a whole line of cases which recognize  
21 such a duty. So, I don't really think it's a stretch at all to  
22 say that, number one, there is a Democratic Party; and,  
23 number two, that the party owes a fiduciary duty to its  
24 members. And if the party's not -- and if the party doesn't  
25 owe such a duty to its members, then who does it owe a duty to?

1 Well, you know, I think in some ways that's what this case may  
2 be about.

3 I just want to finish up with a few points, and then I  
4 know your Honor has a number of questions, so I want to make  
5 sure to leave sufficient time for that.

6 I think the argument under Rule 12(g)(2) that the  
7 defendants have waived their right to bring a 12(b)(6) motion  
8 is a strong argument. I recognize that there's some tension in  
9 the case law on that. By no means does it seem to be a settled  
10 question. But the rule does specifically have an exemption for  
11 challenges to subject-matter jurisdiction, which I think makes  
12 sense, given what subject-matter jurisdiction entails. But  
13 it -- I think it's (*sic*) very specifically says that if you  
14 bring a motion under 12(b), and then you bring a subsequent  
15 motion, unless you bring the arguments in the first motion,  
16 you've waived them.

17 And they filed a motion to dismiss based on service of  
18 process. They could have stated those arguments at that time.  
19 They chose not to. I think under the plain reading of  
20 Rule 12(g)(2), they've waived everything except their challenge  
21 to subject-matter jurisdiction.

22 I think they have -- they take the position that we  
23 haven't pled enough in our complaint to -- we haven't pled our  
24 claims for fraud and negligent misrepresentation with  
25 sufficient specificity. I think we've gone into very

1 considerable detail about the public statements of the DNC, the  
2 content of its charter. And I think we very specifically pled  
3 that what the folks who are serving as plaintiffs in this case  
4 did in reliance on those representations, which is that they  
5 paid donations to a political campaign in some cases, or to the  
6 DNC in others, it's certainly been sufficient to put the DNC on  
7 notice of what the claims against them are. I don't think they  
8 have any mystery about what our theory of the case is. So, I  
9 think we've satisfied the pleading requirements.

10 We have specific allegations there related to  
11 Congresswoman Wassermann Schultz, specifically what she said in  
12 the media, what her role is in the organization, and, uhm, I  
13 think -- and her title is referenced in the charter. So I  
14 don't think it's any mystery as to what the allegations are  
15 against her personally.

16 A couple final points. The CPPA, which is the D.C.  
17 consumer statute that we've pled as one of the claims, I do  
18 think that the statute is worded in a broad enough fashion to  
19 cover the claims in this case. Its whole purpose is to protect  
20 consumers of goods and services. And many of, if not the vast  
21 majority of the Bernie donor class (*sic*), are people that used  
22 an online or service or application called ActBlue, which  
23 charges a 3.95 percent processing fee in connection with every  
24 donation. So, that's a service.

25 Now, we haven't sued ActBlue. But I don't think we

1 need privity under the D.C. cases that I've looked at and which  
2 we've cited to the Court. I think that the -- well, a couple  
3 of those cases specifically say that anyone involved in the  
4 chain of supply is appropriate as a defendant in an action  
5 under that statute. And the DNC and its chairwoman were the  
6 entity and the person responsible that this election was going  
7 to be fair and evenhanded -- or the primary process was going  
8 to be fair and evenhanded, as they promise in their charters.

9 So, I think that under the statute, and bearing in  
10 mind that it's a broad consumer statute, I think we have a  
11 viable claim, and we've pled a claim there.

12 And, finally, I just want to close with a couple words  
13 on the negligence claim. Because the negligence claim  
14 specifically related to the data breach and the loss of the  
15 donors' data. Again, there is a difference of opinion in the  
16 case law specifically on this issue. We recognize that the  
17 Ninth Circuit and the Seventh Circuit have taken the position  
18 that the data doesn't actually have to be misused in order to  
19 have a valid claim based on a defendant's loss of private data.  
20 The Third Circuit has taken the other view.

21 I personally think that the Ninth Circuit and the  
22 Seventh Circuit have the issue right. And I think that the  
23 DNC's own donors were harmed the moment their sensitive  
24 personal data was released into the public domain, because the  
25 DNC failed to take sufficient steps to protect it.

1           So, I think that covers all the issues that I wanted  
2 to address in my opening statement. And I'll be happy to  
3 answer any questions the Court has.

4           **THE COURT:** All right. Thank you, Counsel.

5           Well, let me start with the defense. And I've got  
6 some questions regarding the operation of the DNC.

7           What does the DNC do as the head of the Democratic  
8 Party?

9           **MR. SPIVA:** I mean, the DNC coordinates with state and  
10 local parties. It supports the activities of candidates,  
11 democratic candidates. It has a role in the presidential  
12 primary process in terms of coordinating those elections. It  
13 is -- essentially provides leadership for -- in support of  
14 electing democratic candidates up and down the ballot  
15 nationwide.

16           **THE COURT:** What type of involvement does the DNC have  
17 in primaries at the state level?

18           **MR. SPIVA:** The -- it -- the DNC -- those are  
19 primarily dealt with by state parties, state and local party  
20 committees, your Honor. There's some coordination between the  
21 DNC and those parties. The DNC also obviously runs the  
22 convention, the nominating convention, and there are certain  
23 rules about how delegates get seated and the like. But as a  
24 general matter, does not run the state-level primaries, if that  
25 gets to your Honor's question.

1           **THE COURT:** Does the DNC help to fund the state  
2 primaries?

3           **MR. SPIVA:** Uhm, you mean literally, the mechanics of  
4 the primaries, your Honor, the actual holding of the election,  
5 the primary election?

6           **THE COURT:** Does the DNC, with the money that it  
7 raises, use some of that money to help fund the states put on  
8 their individual state primaries?

9           **MR. SPIVA:** I don't believe so, your Honor. No.

10          **THE COURT:** But you don't know.

11          **MR. SPIVA:** I'm 90 percent on that, your Honor, but I  
12 don't believe that's the case. I believe that's generally  
13 state funded. In my experience -- and I have had experience  
14 with a number of these -- the funds for actually having the  
15 election is -- they're state funds.

16          **THE COURT:** Well, you've said several times that the  
17 DNC helps coordinate. What do you mean by that?

18          **MR. SPIVA:** Well, the DNC sometimes works to sponsor  
19 debates and then get out a general democratic message, offers  
20 certain data services to candidates for the presidency, for  
21 instance, and for other offices as well. It collects data  
22 about voting behavior and other kinds of data. It obviously  
23 raises money. So, those are some of the activities that I was  
24 alluding to.

25          **THE COURT:** And what type of involvement does the DNC

1 have with the state democratic parties?

2 **MR. SPIVA:** It coordinates with state democratic  
3 parties to try to help elect democratic candidates really up  
4 and down the ballot.

5 **THE COURT:** And does the DNC give its preference to  
6 the state democratic parties as to any particular candidate?

7 **MR. SPIVA:** No, not in -- certainly not in the  
8 presidential elections, they don't set forth a preference, no.

9 **THE COURT:** What about the primaries, the democratic  
10 primaries?

11 **MR. SPIVA:** I'm sorry, I thought that was what you  
12 were referring to, your Honor.

13 No, the DNC does not take sides in the state  
14 primaries, presidential primaries.

15 **THE COURT:** What type of strategic support does the  
16 DNC provide to the state democratic parties?

17 **MR. SPIVA:** Well, I mean I actually -- I don't know --  
18 I can't answer that in detail, your Honor, but, you know,  
19 certainly support in terms of issues, you know, addressing  
20 issues, I think funding support, and the like.

21 **THE COURT:** But I mean in light of the plaintiffs'  
22 allegations, you see the thrust of my questions.

23 **MR. SPIVA:** I -- I'm actually -- I see the thrust,  
24 your Honor, but I'm actually not sure where your Honor is going  
25 with this line, to be honest. I'm sorry, I may just be

1 being --

2           **THE COURT:** Well, the plaintiff is alleging that the  
3 DNC, on its own -- and I'm gonna paraphrase -- but basically  
4 favored Hillary Clinton over Bernie Sanders. And so, I'm  
5 asking you, that preference that the plaintiff alleges about  
6 the DNC, did that work its way down to the democratic state  
7 primaries?

8           **MR. SPIVA:** Well, I mean our position, your Honor, is  
9 there was no such preference, and certainly there was no -- the  
10 Democratic National Committee did not, you know, tell the state  
11 parties that it supported one candidate over the other.

12           So, if that answers your question. I mean, of course,  
13 stepping back and kind of going to our subject-matter  
14 jurisdiction issue, I mean, the litany of things that counsel  
15 referred to, to suggest that there was this favoritism, I think  
16 clearly illustrates the types of issues that the courts really  
17 don't wade into as an Article III matter. I mean these are  
18 what -- I believe it was the *Wymbs*, the Republican State  
19 Executive Committee case in the Eleventh Circuit referred to as  
20 political squabbles that courts are -- you know, really can't  
21 take a position on.

22           And so here you have a charter that says you have to  
23 be -- where the party has adopted a principle of  
24 evenhandedness, and just to get the language exactly right,  
25 that they would be evenhanded and impartial, I believe, is the

1 exact language. And, you know, that's not self-defining, your  
2 Honor. I mean that's kind of like, you know, saying, Who's a  
3 Baptist? You know, I mean, for your Honor to wade into that,  
4 you would really have to -- whether the party was evenhanded or  
5 not, whether they gave each side equal debate time, and whether  
6 their hiring decisions reflected in some measure a bias towards  
7 Secretary Clinton, these are all issues that courts -- really  
8 would drag this Court right into the political squabbles, and  
9 really there'd be no way constitutionally to offer redress  
10 for -- even for what they are claiming.

11 **THE COURT:** So, are you suggesting that this is just  
12 part of the business, so to speak, that it's not unusual for,  
13 let's say, the DNC, the RNC to take sides with respect to any  
14 particular candidate and to support that candidate over  
15 another?

16 **MR. SPIVA:** Well, I'm not suggesting that that is par  
17 for the course, your Honor. But what I am suggesting is to  
18 have those kinds of allegations is the rough and tumble of  
19 politics. I mean, you know, certainly in the *Wyms* case, if  
20 anything, that was a case which involved something that was  
21 maybe more concrete, where the issue was how the party decided  
22 who was gonna go to the convention as a delegate and who could  
23 speak for the party in the state, in Florida, in terms of how  
24 they selected delegates to the state party.

25 And, you know, there, there was a numeric component to

1 it, because it was -- the challenge was based on one person/one  
2 vote, and the district court in that case actually said, Well,  
3 you know, we should do this kind of like a *Reynolds v. Sims*,  
4 and it should be based on one republican/one vote. So,  
5 plausibly there, there's some kind of standard that maybe a  
6 Court could look to. And even there, the Eleventh Circuit  
7 said, No, that's internal party politics.

8           The party has the freedom of association to decide how  
9 it's gonna select its representatives to the convention and to  
10 the state party. And, as a matter of fact -- and that case was  
11 decided in the early '80s, the Republican Party in Florida was  
12 a minority party. So they said, Well, it might not make sense  
13 to the party to have one republican/one vote as a matter of  
14 committee representation, because we have to attract the votes  
15 of democrats.

16           And so -- but that's for the party to decide. The  
17 Court's not gonna get into that. Here, you have something far  
18 more inchoate, your Honor, which is this purported -- this  
19 claim that the party acted without evenhandedness and  
20 impartiality. That -- even to define what constitutes  
21 evenhandedness and impartiality really would already drag the  
22 Court well into a political question and a question of how the  
23 party runs its own affairs.

24           The party could have favored a candidate. I'll put it  
25 that way. Maybe that's a better way of answering your Honor's

1 original question. Even if it were true, that's the business  
2 of the party, and it's not justiciable.

3 **THE COURT:** All right. Thank you, Counsel.

4 **MR. SPIVA:** Thank you. And I'm happy to answer --

5 **THE COURT:** Oh, no, I've got more questions.

6 **MR. SPIVA:** But on that issue --

7 **THE COURT:** I'm gonna give the plaintiff an  
8 opportunity.

9 **MR. SPIVA:** Okay. Great. Thanks, your Honor.

10 Yeah, people sometimes say that the lawyers will be  
11 more prepared than the judges they appear before. I think your  
12 Honor has disproved that today. But I do want to address  
13 whatever questions the Court has with respect to any of these  
14 issues.

15 **THE COURT:** Well, we're gonna go through standing, and  
16 the pleadings, and class actions allegations. Don't worry,  
17 we're going to cover the full breadth of it.

18 **MR. SPIVA:** Thank you, your Honor.

19 **THE COURT:** What does the plaintiff say on the  
20 operational aspect of the DNC?

21 **MR. BECK:** Well, your Honor, I'm shocked to hear that  
22 we can't define what it means to be evenhanded and impartial.  
23 If that were the case, we couldn't have courts. I mean, that's  
24 what courts do every day, is decide disputes in an evenhanded  
25 and impartial manner.

1           So, to me, it's not a difficult question at all what  
2           it means to be evenhanded and impartial. It doesn't mean  
3           having to wade in to a political dispute about how the party  
4           conducts its affairs, because that's what the party represented  
5           in its charter, that's what the party represented over and over  
6           again in the media, that's, frankly, what I think is at the  
7           bedrock of what it means to live in a democratic society. I  
8           think that's why the Democratic National Committee has it in  
9           its charter, because if you don't have the organization that is  
10          responsible for organizing in this very large sense the  
11          nominating process for president, which entails multiple  
12          elections in every state of the union, if you're not evenhanded  
13          and impartial, then you don't have a democratic process. I  
14          think it's that simple.

15                 And I think what it means is the Democratic National  
16          Committee should not be putting any resources into one  
17          candidate at the expense of another.

18                 I think it means that it should not be assisting the  
19          media in crafting narratives that hurt one candidate at the  
20          expense of another.

21                 I think it means that when there's a dispute that  
22          comes up in one of the primaries, say, in Nevada, where there  
23          are allegations of misbehavior during a primary or an event, I  
24          think it means that the DNC should not be picking sides and  
25          should be adjudicating those disputes in a fair and evenhanded

1 manner.

2 I think this is not a difficult thing at all to  
3 decide. I think the language speaks for itself in many ways.  
4 And so, again -- and I'll just say it again -- they keep citing  
5 cases where plaintiffs have brought grievances that are  
6 political in nature. And now they're starting to use this  
7 defense of justiciability, which, interestingly, I don't think  
8 that particular defense, as phrased, appeared anywhere in their  
9 papers. I may be missing something, but I don't see how this  
10 is a political question.

11 We're not asking this Court to infringe on the  
12 province of another branch of this government or to get  
13 involved in the conduct of Congress or the conduct of the  
14 Office of President. We're asking this Court to determine  
15 whether representations and omissions were false and  
16 misleading, and whether money was paid on the basis of those  
17 representations, whether folks were injured in a financial  
18 sense as a result of those representations, and whether duties  
19 to the class members were breached, including fiduciary duties.

20 I think those -- courts do those types of things all  
21 the time. There's nothing inherently political about those  
22 determinations. And I -- again, I think this gets back to this  
23 theme that they keep putting in front of the Court that there's  
24 some type of immunity that comes out of the First Amendment,  
25 because we're talking about politics and sort of anything goes

1 as far as political speech is concerned. I think that's kind  
2 of what their theory boils down to.

3 And I would just emphasize that, again, we are talking  
4 about the payment of money. And once money is involved, once  
5 people are paying money based on false understandings, clearly,  
6 there is standing, and I don't see the political question or a  
7 justiciability issue.

8 **THE COURT:** All right. Thank you, Counsel.

9 **MR. BECK:** Okay. Thank you.

10 **THE COURT:** All right. Let me ask the defense --  
11 we're going to go into the issue of standing now at this point.

12 Let me ask counsel. If a person is fraudulently  
13 induced to donate to a charitable organization, does he have  
14 standing to sue the person who induced the donation?

15 **MR. SPIVA:** I think, your Honor, if the circumstance  
16 were such that the organization promised that it was going to  
17 abide by some general principle, and the donee -- or donor,  
18 rather, ultimately sued, because they said, Well, we don't  
19 think you're living up to that general principle, we don't  
20 think you're, you know, serving kids adequately, we think your  
21 program is -- the way you're running your program is not  
22 adequate, you know, you're not doing it well enough, that  
23 that -- that they would not have standing in that circumstance.

24 I think if somebody -- a charitable organization were  
25 to solicit funds and say, Hey, we're gonna spend this money on

1 after-school programs for kids, and the executive director  
2 actually put the money in their pocket and went down the street  
3 and bought a Mercedes-Benz, I think in that circumstance, they  
4 would have standing.

5 I think this circumstance is even one step further  
6 towards the no standing side of that, because here we're  
7 talking about a political party and political principles and  
8 debate. And that's an area where there's a wealth of doctrine  
9 and case law about how that -- just simply giving money does  
10 not give one standing to direct how the party conducts its  
11 affairs, or to complain about the outcomes, or whether or not  
12 the party is abiding by its own internal rules.

13 And I should say, your Honor, I just want to be clear,  
14 because I know it may sometimes sound like I am somehow  
15 suggesting that I think the party did not -- you know, the  
16 party's position is that it has not violated in the least this  
17 provision of its charter.

18 **THE COURT:** I understand.

19 **MR. SPIVA:** So I just want to get that out there. But  
20 to even determine -- to make that determination would require  
21 the Court to wade into this political thicket. And -- you  
22 know, which would invade its First Amendment interests, and  
23 also, I think, would raise issues -- standing issues along all  
24 three prongs of the standing test.

25 Causation. Did -- the thrust of plaintiffs'

1 allegations appears to be that some -- that one of the  
2 subclasses gave money to the Sanders campaign, because they  
3 thought the party was living up to this idea. They don't  
4 actually allege that any particular plaintiff, by the way, knew  
5 about this charter commitment or that they relied upon it in  
6 giving money to Sanders. But even if they had, showing the  
7 causation there, I think, is not something that can be done.  
8 And it's something that would require, again, the Court to wade  
9 into the political thicket.

10 Similarly, they purport to speak on behalf of this DNC  
11 Donor Class. Most, most of the class that they purport to  
12 speak on behalf of, you know, disagrees with them. And so, the  
13 Court would have to wade into that to establish causation. And  
14 it really can't -- it can't be done.

15 The other part of their injury here appears to be that  
16 Mr. Sanders -- Senator Sanders would have done better had the  
17 party supposedly been more evenhanded than it was.

18 Well, that -- there's all kinds of alternative factors  
19 for why Secretary Clinton actually got more votes in the end  
20 and won. And as everybody knows, Senator Sanders endorsed her  
21 and campaigned for her. And so, there's a causation problem.  
22 And there are other issues that we discuss in our brief -- I  
23 won't repeat them -- with causation.

24 There is certainly a redressability problem, which I  
25 think I've already covered in my previous remarks. I won't go

1 over that, again unless your Honor has other questions.

2 And then in terms of concrete injury, which was really  
3 the first prong, that, again, is problematic, because -- and  
4 this goes back to your Honor's question -- there is no right  
5 to -- just by virtue of making a donation, to enforce the  
6 parties' internal rules. And there's no right to not have your  
7 candidate disadvantaged or have another candidate advantaged.  
8 There's no contractual obligation here.

9 Nor is there a fiduciary obligation, although I know  
10 we're gonna get to that later. But there's -- it's not a  
11 situation where a promise has been made that is an enforceable  
12 promise. And I think that goes both to the concrete injury  
13 prong and the redressability prong.

14 **THE COURT:** And then one other question on the issue  
15 of standing for the defense. Is there a difference between a  
16 campaign promise made by a political candidate and a promise  
17 that pertains to the integrity of the primary process itself?

18 In other words, President George H.W. Bush's --

19 **MR. SPIVA:** "Read my lips."

20 **THE COURT:** -- promise -- "read my lips, no new  
21 taxes," and then he raised taxes. Well, he could not be sued  
22 for raising taxes. But with respect to the DNC charter,  
23 Article V, Section 4, is there a difference between the two?

24 **MR. SPIVA:** Not one -- there's obviously a difference  
25 in degree. I think your Honor -- I'm not gonna -- I don't want

1 to overreach and say that there's no difference. But I don't  
2 think there's a difference that's material in terms of how the  
3 Court should decide the question before it in terms of  
4 standing, in that this, again, goes to how the party runs  
5 itself, how it decides who it's going to associate with, how it  
6 decides how it's going to choose its standard bearer  
7 ultimately. In case after case, from *O'Brien*, to *Wymbs*, to  
8 *Wisconsin v. LaFollette*, *Cousins v. Wigoda*, the Supreme Court  
9 and other courts have affirmed the party's right to make that  
10 determination. Those are internal issues that the party gets  
11 to decide basically without interference from the courts.

12 And the fact that money has -- I know that my  
13 distinguished colleague on the other side has several times  
14 said that, Well, money makes this different, and it really  
15 doesn't in this context. You know, again, if you had a charity  
16 where somebody said, Hey, I'm gonna take this money and use it  
17 for a specific purpose, X, and they pocketed it and stole the  
18 money, of course that's different. But here, where you have a  
19 party that's saying, We're gonna, you know, choose our standard  
20 bearer, and we're gonna follow these general rules of the road,  
21 which we are voluntarily deciding, we could have -- and we  
22 could have voluntarily decided that, Look, we're gonna go into  
23 back rooms like they used to and smoke cigars and pick the  
24 candidate that way. That's not the way it was done. But they  
25 could have. And that would have also been their right, and it

1 would drag the Court well into party politics, internal party  
2 politics to answer those questions.

3 **THE COURT:** All right. Thank you, Counsel.

4 **MR. SPIVA:** Thank you, your Honor.

5 **THE COURT:** Let me have the plaintiff respond to those  
6 two questions of the defense. And then I have questions for  
7 the plaintiff regarding standing, and I'll let the defense  
8 respond to those --

9 **MR. BECK:** Okay.

10 **THE COURT:** -- to those answers.

11 **MR. BECK:** Uhm --

12 **THE COURT:** First, your response to their answers.

13 **MR. BECK:** Yes. And I'll take the last part first,  
14 which was the question your Honor had posed, is there -- and  
15 I'm paraphrasing it, but is there a material difference between  
16 a campaign promise, such as "read my lips, no new taxes," and  
17 representations that are made in the DNC's own charter?

18 And, quite frankly, if what defendant -- or what the  
19 DNC has just said is true -- and I really hope it's not true,  
20 but if what he said is true, then I think it's a really sad day  
21 for democracy in this country. Because what essentially the

22 DNC has now stated in a court of law is that it believes that  
23 there is no enforceable obligation to run the primary elections  
24 of this country's democracy in a fair and impartial manner.

25 And if that's the case -- and I think counsel just

1 said it himself -- then really, you know, the sky's the limit  
2 in terms of what the DNC and any party, for that matter, can  
3 do.

4 **THE COURT:** Can go around doing.

5 **MR. BECK:** And I'm -- I hope that's not the case, but  
6 I don't think it is the case under the law. Because I think  
7 these are enforceable obligations. Because, again, money is  
8 involved, number one, payment of money based on false  
9 understandings that have been created by the defendants. That  
10 is textbook Article III standing, and the Supreme Court has  
11 settled that question. And it's settled that question in a  
12 context that's, I think, very close to the situation we have in  
13 the case pending before the Court.

14 And, specifically, I'm referring to  
15 *Madigan vs. Illinois* -- or *Illinois vs. Madigan*, which was a  
16 case about charitable fundraising and the state's right to  
17 enforce laws against fraud and misrepresentation in the context  
18 of solicitations of charitable contributions.

19 And I think this gets back to the Court's first  
20 question that was posed to counsel, which is, is there standing  
21 in this situation where false representations are made, and  
22 those representations or omissions cause people to donate money  
23 to a cause? In this case, not a political cause but a  
24 charitable cause.

25 And -- now, the Supreme Court says -- and I'm reading

1 from *Illinois vs. Madigan* at page -- starting at page 623:

2 "Our decisions have repeatedly recognized the  
3 legitimacy of government efforts to enable donors to  
4 make informed choices about their charitable  
5 contributions."

6 And then it goes on further down:

7 "Just as government may seek to inform the public  
8 and prevent fraud through such disclosure  
9 requirements, so it may, quote, vigorously enforce  
10 antifraud laws to prohibit professional fundraisers  
11 from obtaining money on false pretenses or by making  
12 false statements."

13 Well, this is a case that involves political  
14 contributions as opposed to charitable contributions. But,  
15 again -- and I think I've discussed the reasons I think this is  
16 so, but I don't think that the political context of the speech  
17 involved here or the money that was paid makes any difference  
18 to the Court's analysis, whether that analysis is cast in terms  
19 of First Amendment grounds, because the First Amendment has  
20 always recognized a right not to be defrauded or to be  
21 deceived, because those are common-law rights that precede the  
22 First Amendment, and the First Amendment is a very important  
23 right, but it by no means protects the rights of any  
24 organization to make false representations.

25 And in this case, I think that besides the First

1 Amendment question, there's also implicit in *Madigan* and other  
2 cases that we've cited in the briefs, that, of course, there is  
3 standing when money is paid. That's the essence -- one of the  
4 essences of Article III is that financial industry -- injury  
5 gives rise to standing.

6 I submit that there's a second line of cases which  
7 also talks about invasion of common-law rights. I think that  
8 we have standing on behalf of all three of the classes based on  
9 both of those principles.

10 And I know your Honor said --

11 **THE COURT:** I have questions.

12 **MR. BECK:** -- you had questions.

13 **THE COURT:** All right. Thank you.

14 **MR. BECK:** So I'll be happy to take those.

15 **THE COURT:** With respect to the issue of standing  
16 on -- you stated earlier that the plaintiff is seeking damages.  
17 Damages in the sense of return of the contributions or over and  
18 above that?

19 **MR. BECK:** Yes. The basis for the economic damages  
20 are the contributions themselves that were paid.

21 **THE COURT:** Okay. And what imminent future injury do  
22 the plaintiffs allege?

23 **MR. BECK:** Well, I think that the imminent future  
24 injury -- and this has -- sort of, I think, become apparent  
25 perhaps in the course of today's hearing, but the imminent

1 future injury is that elections occur on a cyclical basis. And  
2 so, unless the Court -- if we prove our claims, and unless the  
3 Court issues a remedy to prevent the --

4 **THE COURT:** DNC.

5 **MR. BECK:** -- the DNC from engaging in this type of  
6 conduct in future elections, then there's nothing that's going  
7 to be stopping them.

8 **THE COURT:** Is it the donor plaintiffs' position that  
9 they would not have donated to the DNC or the Bernie Sanders  
10 campaign if they believed the statements described in paragraph  
11 number 160 -- 1-6-0 -- of the first-amended complaint to be  
12 false?

13 **MR. BECK:** Oh, thank you.

14 **THE COURT:** And if so, which allegations support that  
15 position?

16 **MR. BECK:** Yes. That is our position. And the  
17 allegations that support that position can be found in  
18 paragraph 188, paragraph 195... yes, those are the two  
19 paragraphs where we allege reliance.

20 **THE COURT:** All right. What injury have the DNC donor  
21 plaintiffs suffered as a result of the DNC's alleged negligence  
22 as set forth in Count 6?

23 **MR. BECK:** Yes. Our position as to Count 6, which is  
24 the data breach count, is that the release of the donor's  
25 sensitive data into the public domain itself constitutes the

1 injury.

2 Now, we recognize that there's a circuit split on that  
3 issue. We think that the Ninth Circuit and Seventh Circuit  
4 cases that we cited in our brief, which agree that that's a  
5 sufficient allegation, we think that has the better reasoning.  
6 But there's also an opinion out of the Third Circuit, which  
7 takes the view that the -- you actually have to allege that the  
8 data's been misused, which we haven't alleged.

9 So -- and to my knowledge, the Eleventh Circuit has  
10 not come down on one side or the other on that issue.

11 **THE COURT:** All right. Then my last question for the  
12 plaintiff on the issue of standing is, how -- excuse me -- how  
13 have all registered members of the Democratic Party suffered a  
14 concrete and particularized injury as a result of the  
15 allegations in the first-amended complaint?

16 **MR. BECK:** Yes. So, this is, uhm, an issue that comes  
17 up specifically with respect to the breach of fiduciary duty  
18 count. And our -- what we rely on with respect to that count  
19 specifically is that the breach of a fiduciary duty to folks  
20 that join the Democratic Party, were registered members of the  
21 Democratic Party, but saw the party that they chose to  
22 affiliate with, they saw that party violate the terms of its  
23 own internal charter, that breach is itself a breach of a  
24 common-law right, a recognized common-law right that itself is  
25 sufficiently concrete and particularized to satisfy

1 Article III.

2 **THE COURT:** All right. Thank you, Counsel.

3 **MR. BECK:** Thank you.

4 **THE COURT:** Any other comments before I hear from the  
5 defense?

6 **MR. BECK:** Not at this time, your Honor. Thank you.

7 **THE COURT:** All right. Thank you.

8 All right. What does the defense say in response to  
9 those answers?

10 **MR. SPIVA:** Thank you, your Honor.

11 First, I just want to say -- because in response to my  
12 hypothetical that the party could choose its nominees in a  
13 smoke-filled room, I want to just reiterate that the party ran  
14 the process fair and impartially, and does not do that and  
15 doesn't plan to do that. But these, again, are political  
16 choices that either party is free to make and are not  
17 enforceable in a court of law.

18 In terms of -- I want to start from where the  
19 gentleman on the other side left off, the --

20 **THE COURT:** That was regarding the question of a  
21 concrete or particularized injury.

22 **MR. SPIVA:** Yes, your Honor. And I think the last  
23 question was, how have all members of the Democratic Party  
24 suffered a concrete injury?

25 And there really isn't an allegation in the complaint

1 that explains that. You know, in terms of the donor class, you  
2 know, clearly many of the people who they purport to represent  
3 agree with the DNC and support -- and continue to support it.  
4 With respect to the individuals who they are putative class  
5 representatives, they haven't actually alleged specific injury.  
6 They've just said that they donated money.

7 And although we are not relying on this for our  
8 standing argument, this kind of goes to plausibility. There  
9 are statements in the public by some of these class  
10 representatives that show that there was no reliance and no  
11 injury. Some of them even gave money in order to participate  
12 in this lawsuit.

13 And so, again, even if your Honor disregards that as  
14 being outside the pleadings, and your Honor can go outside the  
15 pleadings on a 12(b)(1) motion, but even if you disregard it, I  
16 think it just illustrates the implausibility that every single  
17 member of the Democratic Party has suffered a concrete injury.

18 In terms of the data breach, there is no allegation in  
19 the complaint, your Honor, that any of the named plaintiffs  
20 have actually even had their data breached, let alone that  
21 they've suffered an injury. And that is certainly required  
22 along with a plausible allegation of injury. And I would refer  
23 to the -- I believe it was the *Case v. Miami* -- your Honor's  
24 indulgence.

25 **THE COURT:** That's all right. Take your time. We

1 have all afternoon.

2 **MR. SPIVA:** Okay.

3 *Case v. Miami Beach Healthcare Group*, a decision from  
4 this district, which we cite in our briefs, that you need to  
5 have not only an allegation that your data was actually  
6 breached, but that, you know, something was actually done with  
7 it.

8 And counsel referred to -- in response to your Honor's  
9 questions about whether the donors' position was that they  
10 would not have donated to the Sanders campaign or the DNC  
11 campaign if they knew or believed that the charter statements  
12 and the other public statements regarding neutrality were  
13 false, and counsel referred to paragraphs 188 and 195 of the  
14 first-amended complaint. These are broad, general claims of  
15 reliance. There are no specific allegations with respect to  
16 the named plaintiffs of even knowledge of these statements, let  
17 alone reliance. And like I said, there are statements out in  
18 the public domain that show that that is not plausible. In  
19 fact, it's false. And, again, of course, I think illustrates  
20 that this can't be -- A, this case shouldn't proceed in any  
21 procedural form, but it certainly couldn't proceed as a class  
22 action.

23 Reliance is really the third rail of class actions,  
24 because you can't prove predominance. And even in terms of  
25 ascertainability, who's in the class, who's in these

1 subclasses, I think would pose an impossible task for the Court  
2 to do, and one that would require, really, in-depth inquiry  
3 into the parties', you know, files and membership and lists of  
4 voters, all these things that *NAACP vs. Button* and other cases  
5 have said the courts can't do that under the First Amendment.  
6 And it would require an invasion of Senator Sanders' campaign,  
7 frankly, to find out about how his supporters feel about this.

8 Counsel said that the plaintiffs are seeking an  
9 injunction to prevent the DNC from engaging in future conduct  
10 in future elections of this type. Again, very vague  
11 allegations of what the conduct at issue is. You know, no real  
12 answer to how a federal court can tell a party how it should  
13 conduct its affairs going forward.

14 And, by the way, your Honor asked whether the damages  
15 that were being sought were the return of the contributions.  
16 That is the case, but they also seek punitive damages,  
17 exemplary damages. And so it's -- and the complaint actually  
18 says in order to make an example of them. And I would suggest,  
19 your Honor, that that is all the proof you need of the chilling  
20 of the First Amendment activities that this complaint seeks.

21 Just back to the -- whether money makes it different.  
22 Does the fact that money was given create standing for the  
23 failure to live up to a promise by the party, an alleged  
24 failure in the primary? Someone said, We're gonna build a  
25 wall, and Mexico is gonna pay for it during the primaries. If

1 their theory holds that money creates standing, the donation of  
2 money, that means that anybody could sue President Trump or the  
3 Trump campaign for statements that were made that -- where the  
4 promise was not kept in the context of the primary.

5 I think I have covered everything that counsel covered  
6 in the last discussion. And so if your Honor has questions  
7 about any of the other claims or anything else, I'm happy to  
8 answer.

9 **THE COURT:** I have more questions, but not on that  
10 point.

11 **MR. SPIVA:** Okay.

12 **THE COURT:** We're gonna go into the pleadings and then  
13 into the class action allegations.

14 But I think what we'll do is, to give the court  
15 reporter a break, we'll take a short recess. And then we'll  
16 come back and conclude with my questions into those areas, and  
17 then any additional comments that either side wishes to bring  
18 to the Court's attention.

19 **MR. SPIVA:** Great. Thank you, your Honor.

20 **THE COURT:** All right. Let's have everyone back in  
21 here at, let's say, five after by the courtroom clock.

22 Court's in recess.

23 **COURTROOM SECURITY OFFICER:** All rise.

24 *(The Judge exited the courtroom)*

25 *(Recess taken at 2:50 p.m. until 3:06 p.m.)*

1           *(The Judge entered the courtroom)*

2           **THE COURT:** Please be seated.

3           We have two remaining areas to cover -- the pleadings  
4 and then the class action allegations. And some of the  
5 comments that you've already made will have already touched  
6 upon some of the questions that I'm going to ask, but I want to  
7 ask them in any event so that we have a complete record.

8           And for the defense.

9           **MR. SPIVA:** Okay.

10          **THE COURT:** Having filed a previous Rule 12(b) motion,  
11 does Rule 12(g) bar the defense from filing a successive  
12 Rule 12(b) motion?

13          **MR. SPIVA:** No, your Honor, for a couple of reasons.

14          **THE COURT:** And take your time. There's no rush,  
15 there's no rush.

16          **MR. SPIVA:** Okay. Thank you.

17                 First of all, 12(g)(2), your Honor, Rule 12(g)(2),  
18 which is the rule that plaintiffs cite for waiver here, doesn't  
19 apply to a 12(b)(1) motion. I think they concede that, the  
20 subject-matter jurisdiction.

21                 With respect to the 12(b)(6) motion, it actually  
22 doesn't apply to that either. It -- you know, it refers to  
23 12(b)(2) through (5).

24                 And here, we asked for more time to raise 12(b)(6)  
25 issues in the motion to quash that we filed, and the plaintiffs

1 raised no objection at that time that we would have waived the  
2 12(b)(6) motion based on a failure to state a claim. And  
3 there's really, I think, no question that we could raise the  
4 same arguments in a 12(c) motion for judgment after the answer.  
5 And so, I think this would -- even if the rule did apply here,  
6 this would be one of those cases -- and I think one of the  
7 cases we cited was *Carelogistics* and some other cases in our  
8 brief -- where it really wouldn't make any sense. I mean it  
9 kind of cuts against the purpose of the rule, which is where  
10 you're trying to prevent piecemeal litigation of defenses.  
11 After the defendant loses one, they bring another.

12           That's not what has happened here, your Honor. You  
13 know, we weren't properly served. We offered to accept service  
14 of process. The plaintiffs refused to do that. And so we were  
15 forced to file the motion. We actually won the motion. They  
16 refiled. And here, you know, really, this is the first kind  
17 of, I think, first time at bat, if you will, your Honor, in  
18 terms of the 12(b)(6) merits-type issues.

19           And given that we could raise those in a 12(c) motion,  
20 it really doesn't seem like it would serve any kind of judicial  
21 efficiency interests to not consider those arguments if the  
22 Court gets to them. I mean, of course, our position is that  
23 because there's no subject-matter jurisdiction, the Court won't  
24 need to reach those issues.

25           **THE COURT:** If the Court concludes that Rule 12(g)

1 prevents the defense from making their failure to state a claim  
2 arguments in the motion to dismiss, does the defense anticipate  
3 that they will file a Rule 12(c) motion?

4 **MR. SPIVA:** Yes, your Honor. I mean assuming that the  
5 Court didn't dismiss everything based on the 12(1) -- 12(b)(1)  
6 portion of the motion.

7 **THE COURT:** All right. Thank you.

8 Any comments from the plaintiff? Take your time.

9 **MR. BECK:** Thank you, your Honor.

10 I think in response to the Court's questions on the  
11 effect of Rule 12(g)(2), I think for us it's really a simple  
12 question of what the rule states. And when you look at  
13 12(g)(2), it -- the Court -- it clearly permits them to raise  
14 subject-matter jurisdiction in a successive motion under  
15 Rule 12, but it states that you may not raise other issues,  
16 including Rule 12(b)(6) issues, if you fail to raise those in  
17 your original motion.

18 I'm not sure why the defendant making a request for  
19 additional time to raise such issues in connection with its  
20 original motion would do anything to alter the plain language  
21 and the plain effect of the rule. I think the rule makes a lot  
22 of sense, and it gives the defendant an option, which it's  
23 already said it's planning to take -- avail itself of, should  
24 the Court -- were the Court find the rule to preclude them from  
25 raising these issues now, but it gives them an option to file a

1 motion for judgment on the pleadings, which is I think -- I  
2 think makes perfect sense.

3           These are very significant issues that have been  
4 placed in front of the Court. The law surrounding these issues  
5 is not uncomplex. And so, I think when you put so many big  
6 picture arguments in one motion at one time, and you're trying  
7 to argue subject-matter jurisdiction, and at the same time  
8 you're arguing failure to state a cause of action, at the same  
9 time you're arguing motion to strike class certification, you  
10 know, it makes -- it perhaps doesn't crystallize the issues as  
11 well as they could be.

12           So, if the defendants had wanted to bring these issues  
13 with the Rule 12 motion, they had every opportunity when they  
14 filed their motion to dismiss based on service of process.  
15 They failed to do so. The rule is very clear what happens in  
16 that circumstance. It allows them to raise subject-matter  
17 jurisdiction issues, but it doesn't allow them to raise  
18 12(b)(6) issues. And it gives them an option to do so in the  
19 context of a motion for judgment on the pleadings. And based  
20 on what the rule says, we think that's what ought to happen.

21           Thank you.

22           **THE COURT:** All right. Let me ask the plaintiff, with  
23 respect to questions regarding the pleadings, as you've just  
24 stated, the plaintiffs contend that the defendants' failure to  
25 state a claim arguments are barred by Rule 12(g)'s

1 consolidation requirements.

2 If the defendants may simply raise these arguments  
3 again in a Rule 12(c) motion, what is the expedience of  
4 avoiding those issues now?

5 **MR. BECK:** Well, I don't think it's just a matter -- I  
6 don't know that expedience is the only consideration behind  
7 that rule. Certainly that's always a value and a consideration  
8 that ought to be taken into account in judicial labor. And we  
9 understand that.

10 But a motion for judgment on the pleadings is  
11 predicated on them answering to the allegations in the  
12 complaint. And so, should they go ahead and file a motion for  
13 judgment on the pleadings, as the rule specifically directs  
14 that they do, the Court will have a fundamentally different  
15 record in front of it. It will have not just the first-amended  
16 complaint, but it will also have, presumably, an answer and  
17 affirmative defenses.

18 And without knowing how the DNC and the congresswoman  
19 are going to answer the allegations in the complaint, I think  
20 it may be a little difficult to foresee how the issues might  
21 come up, differently in a judgment on the pleadings, but they  
22 certainly could. And because that's what the rule specifically  
23 refers to, I have to think that there's some intent behind how  
24 that rule's written to promote a value that's not just  
25 expediency, but having a fuller record in front of the Court,

1 when, in fact, the defendants could have raised those arguments  
2 on their first motion, and they chose not to.

3 **THE COURT:** If the Court proceeds to consider the  
4 defense's failure to state a claim arguments, how would the  
5 plaintiff be prejudiced at this time?

6 **MR. BECK:** Well, I don't think that we would be  
7 specifically prejudiced at this time. I think the only issue  
8 would be that the rule states what it states. But as to -- I  
9 think we've -- I feel comfortable that we've briefed the issues  
10 in a way that doesn't prejudice us and that we've had certainly  
11 a hearing today on the issues. So, I don't think we would take  
12 the position that we're prejudiced.

13 **THE COURT:** All right.

14 With respect to paragraph numbers 188 and 195 of your  
15 first-amended complaint -- and, again, take your time --

16 **MR. BECK:** Yeah. Yes, I've got them in front of me.

17 **THE COURT:** -- what factual allegations support the  
18 legal conclusions set forth in those paragraphs --

19 **MR. BECK:** Right.

20 **THE COURT:** -- that the plaintiffs relied on various  
21 statements made by the defendants?

22 **MR. BECK:** All right. So, in terms of the factual  
23 allegations that are incorporated into each of those counts --

24 **THE COURT:** And, again -- and I apologize for  
25 interrupting you -- but without reading them into the record.

1 We are all mindful of the Rule 9(b) pleading requirements.

2 **MR. BECK:** Understood.

3 **THE COURT:** Go ahead, Counsel.

4 **MR. BECK:** Understood, your Honor.

5 I think that the allegations that support reliance in  
6 this case are the only allegations in the complaint, which  
7 pertain to the plaintiffs, really the only activities in the  
8 complaint that they're alleged to have done, which is to have  
9 contributed money to a presidential campaign.

10 So, my first -- the first part of my response would be  
11 to direct the Court to paragraphs 2 through 109, which in each  
12 of those paragraphs, the plaintiff is named, their residence is  
13 given, and then the only activity that any of these plaintiffs  
14 is alleged to have done is stated, which is the contribution of  
15 a specified amount of money either to the Bernie Sanders  
16 campaign or to the DNC.

17 So, that can only be the activity that the plaintiffs  
18 undertook as part of the reliance element in those two counts,  
19 because it's their only activity in the complaint. And I think  
20 the only fair reading of the complaint is that those -- that is  
21 the activity.

22 In terms of what the plaintiffs relied on in paying  
23 those sums of money, I would direct the Court to the paragraphs  
24 starting with paragraph 159, which describes the DNC's charter  
25 and quotes it, and then goes on to describe the various

1 specific statements in the media that were made by various  
2 officials of the DNC, including the congresswoman, which repeat  
3 what the charter says in terms of the DNC's commitment by its  
4 own charter to running the process in a fair and evenhanded  
5 manner.

6 And, again, there are no other -- there is no other  
7 category of misrepresentations that's alleged in the complaint.  
8 And we've also alleged that the deception occurred by way of  
9 omission.

10 So, we don't believe that we have to prove that any  
11 particular plaintiff relied on the specific statements cited,  
12 but because this was conduct occurring behind the scenes, not  
13 publicly disclosed by the DNC until their computers were  
14 accessed or information leaked out into the public domain, and  
15 it became known how the DNC was actually running the nominating  
16 process contrary to its charter, contrary to its public  
17 statements, that is a -- what we believe is an adequate -- to  
18 be an adequately alleged omission that the plaintiffs relied  
19 on.

20 In other words, the failure to state that the  
21 democratic process was not, in fact, democratic, but biased and  
22 predetermined from the beginning for Hillary Clinton over  
23 Bernie Sanders.

24 **THE COURT:** Where does the complaint allege that the  
25 defendants intended to gain as a result of their alleged fraud?

1           **MR. BECK:** I think the first paragraph which alleges  
2 that is paragraph 187, which is that the defendants intended  
3 that the false statements and omissions would induce the DNC  
4 Donor Class plaintiffs and Sanders Donor Class plaintiffs to  
5 rely on them. And that allegation is substantially repeated in  
6 paragraph 194 under the negligent misrepresentation count.

7           I think we've also alleged that in connection with  
8 other counts what we've alleged in paragraph 204, that the  
9 conduct was intentional, willful, wanton, and malicious.

10           We've done the same in paragraph 210 of the complaint  
11 under the unjust enrichment count.

12           We've also alleged substantially the same in  
13 paragraph 216 for the breach of fiduciary duty count.

14           **THE COURT:** You're saying that those paragraphs that  
15 you have just referenced to the Court support the legal  
16 conclusions in paragraphs 187 and 194.

17           **MR. BECK:** I think they do support those.

18           I would also direct the Court back into the factual  
19 corpus of the complaint.

20           **THE COURT:** Because that was gonna be my next  
21 question. Well, let me just ask --

22           **MR. BECK:** Yes.

23           **THE COURT:** -- the question.

24           What factual allegations support the legal conclusions  
25 in paragraph numbers 187 and 194 of the first-amended complaint

1 that the defendants intentionally induced plaintiffs to donate  
2 to the Sanders campaign and to the DNC?

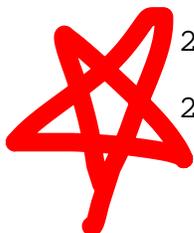
3 **MR. BECK:** Right. I think that those allegations are  
4 supported starting at paragraph 161 and going on through  
5 paragraph 171. And these are getting to the issues and the  
6 allegations of what exactly the DNC did in violation of the  
7 charter and the commitment to neutrality.

8 And, essentially, these paragraphs set forth that the  
9 DNC was biased in favor of one candidate, that the DNC was  
10 devoted to supporting Clinton's candidacy over everybody else's  
11 candidacy, including Senator Sanders, and that the DNC actively  
12 concealed its bias from its own donors, as well as the donors  
13 to the Sanders campaign.

14 And I think the concealment comes from the public  
15 statements that were made by the congresswoman and other  
16 officials of the DNC, which created a media narrative that the  
17 DNC was following the terms of its charter, when, in fact, this  
18 was not the case.

19 And so, in terms of the allegations of, you know,  
20 whether -- the intentionality here, I think the intentionality  
21 is an inference from the fact of the support for  
22 Senator Clinton.

23 In other words, that the DNC was going to do... I'm  
24 sorry. The DNC was going to do whatever it could to advance  
25 and predetermine the nomination for Hillary Clinton, while at



1 the same time maintaining the fiction that it was operating in  
2 a fair and evenhanded manner.

3 If I could just take one moment and confer with  
4 counsel?

5 **THE COURT:** Go right ahead.

6 **MR. BECK:** Okay. Thank you.

7 **THE COURT:** Take your time. Feel free to do so.

8 **MR. BECK:** Thank you.

9 *(Discussion had off the record between counsel)*

10 **THE COURT:** Take your time.

11 **MR. BECK:** So, I think those allegations going to what  
12 exactly the DNC was doing for the Hillary Clinton campaign  
13 behind the scenes, how it was working with the Hillary Clinton  
14 campaign, this was all part of a preset strategy that was set  
15 down in various internal documents that have come to light  
16 through Guccifer, which, obviously, that's the basis for our  
17 complaint. There have been leaks that have come out since the  
18 complaint was put on file. But I think they all show the same  
19 thing, which is an intentional, predetermined strategy to  
20 advance Hillary Clinton's candidacy to the nomination.

21 And in terms of satisfying the element of intent for  
22 these claims, I think those allegations support that.

23 **THE COURT:** All right. Thank you.

24 My next question is: How is donating to a political  
25 campaign considered a consumer transaction under the District

1 of Columbia law?

2 **MR. BECK:** Your Honor, the District of Columbia law in  
3 question is a broad consumer statute, which defines its terms  
4 in a very broad manner to protect individuals in the purchase  
5 of goods and services.

6 To quote one recent case from the D.C. Superior Court:

7 "The purpose of the D.C. Consumer Protection  
8 Procedures Act is to protect consumers from a broad  
9 spectrum of unscrupulous practices by merchant.  
10 Therefore, the statute should be read broadly to  
11 assure that the purposes are carried out."

12 Now, in terms of who may file suit under the CPPA,  
13 that is specified in the D.C. code at Section 28-3905, Sub (k),  
14 which defines "consumer" to include any person who, quote,  
15 "would purchase or receive consumer goods or services." And  
16 "goods or services" is defined to mean, quote, "any and all  
17 parts of the economic output of society at any stage or related  
18 or necessary point in the economic process." And it includes  
19 consumer credit, franchises, business opportunities, real  
20 estate transactions, and consumer services of all types. All  
21 types.

22 And that's found in Sections 28-3901, Sub (a)(2), and  
23 Section 28-3091, Sub (a), Sub (7) of the D.C. code.

24 So, the plaintiffs who made their donation payments  
25 through this company called ActBlue, which we've specifically

1 described in the complaint, those plaintiffs are -- do qualify  
2 as consumers, we believe, and we believe they're entitled to  
3 bring suit under the CPPA. Because, as we've alleged, ActBlue  
4 charges a 3.95 percent fee for processing services on each  
5 donation. So, in essence, when somebody donates through  
6 ActBlue, maybe they do it on their iPhone or their computer or  
7 what have you, they are paying this percentage fee for  
8 processing. And under the terms of the statute, that makes  
9 them consumers.

10 So, then the next question becomes, if the plaintiffs  
11 are consumers, who do they have a cause of action against? And  
12 I think that in their papers, the defendants take the position  
13 that you need to have privity -- some sort of privity of  
14 contract between the plaintiff and the defendant in order to  
15 support a cause of action under the statute. And I don't think  
16 the statute, in fact, has that requirement.

17 Obviously, we're not suing ActBlue. We're suing the  
18 DNC and Congressman Wassermann Schultz (*sic*), because those are  
19 the -- that's the entity and the person that were responsible  
20 for running these primary elections, leading the process from  
21 the top.

22 And when you look into the D.C. law on this issue --  
23 and I'm specifically referring to the case we've cited in our  
24 brief -- *Calvetti vs. Antcliff* out of the District of Columbia  
25 Circuit, 2004, which states that:

1           "The CPPA liability extends to, quote, any person  
2           connected with the supply side of a consumer  
3           transaction."

4           That's really quite broad language -- "any person  
5           connected." I would say that if the transaction is deemed to  
6           be the moment when the plaintiff donates a specified sum  
7           through ActBlue, either to the Sanders campaign or the DNC, and  
8           gets charged that 3.95 percent fee, making them a consumer, the  
9           entity that's running the election, which encompasses the  
10          candidate to which they're donating to, is a person connected  
11          with the supply side of the consumer transaction. Because  
12          they're essentially responsible for the ultimate -- it's not a  
13          product, it's not a commercial transaction, but it is the end  
14          result of the money that people are paying.

15          The supply is the political campaign. And the  
16          political campaign is ultimately under the auspices of this  
17          organization that purports to be fair and impartial.

18          So, I know that's sort of a long answer to a short  
19          question, but I think a fair reading of the statute allows us  
20          to plead a claim for those reasons.

21                 **THE COURT:** And you may have just answered my next  
22                 question, but what services have the DNC donors purchased from  
23                 the DNC?

24                 **MR. BECK:** Right. I wouldn't -- I would not say that  
25                 they've purchased don -- services from the DNC. I would say

1 that the service that's being purchased is the processing fee  
2 that is being offered by ActBlue to consummate this political  
3 contribution transaction. So, there is -- I would not go so  
4 far as to say that there's a purchasing of services in the way  
5 that the statute means. But the fact that they haven't  
6 purchased services doesn't mean that the DNC and Debbie  
7 Wassermann Schultz are not persons connected with the supply  
8 side of the transaction. And for that reason, we think there's  
9 a valid cause of action under the statute.

10 **THE COURT:** My next question for the plaintiff is:  
11 What is the DNC's "special relationship" with registered  
12 members of the Democratic Party?

13 **MR. BECK:** Well, I think the "special relationship"  
14 comes down to the fact that this organization is the face of  
15 the leadership of the political party that these particular  
16 proposed plaintiffs, the Democratic Party Class have joined.  
17 That's the special relationship.

18 I think that the New York cases that we cited show  
19 that courts have no hesitation, at least in those cases, of  
20 finding that there's a responsibility owed from a party to its  
21 members, and it finds that this duty is sufficient to form a  
22 fiduciary duty. Admittedly, those are New York cases. They're  
23 decided under New York law.

24 I think it's premature to engage in choice of law  
25 analysis at this stage. I'm not sure that the record is fully

1 complete. But I do think that on the face of it, this is a  
2 D.C. corporation that's based in D.C. It would seem to me that  
3 D.C. law would apply to the question of whether a -- of what,  
4 if any, fiduciary duty is owed by the DNC to its members -- the  
5 leadership of the party to the party's members.

6 And the D.C. law on this question is, as just to quote  
7 *Kemp vs. Eiland*, which is a 2015 case from the District of  
8 Columbia circuit:

9 "District of Columbia law has deliberately left  
10 the definition of fiduciary relationship flexible so  
11 that the relationship may change to fit new  
12 circumstances in which a special relationship of  
13 trust may be properly implied."

14 In a situation like this, the trust, I think, is that  
15 folks have joined the Democratic Party believing that the  
16 Democratic Party is a custodian of a fair and impartial  
17 election process, as it states in the DNC's own charter and as  
18 the DNC has repeatedly -- or did repeatedly state in public,  
19 according to our complaint.

20 And I think pursuant to this particular definition of  
21 D.C. law, which I think applies here, because we're talking  
22 about a D.C. organization. This is the organization that's  
23 entrusted with the process. This is the organization that  
24 folks have registered based on the assumption that this is a  
25 democratic process that's being carried out. So, I mean, at

1 least at the pleading stage, it seems to me to be a clear  
2 case -- that we've alleged enough, just based on who the DNC  
3 is, who the members of the class are, to support the existence  
4 of a fiduciary relationship given the case law that we've  
5 cited.

6 **THE COURT:** And maybe you've already answered my next  
7 question, at least to a certain extent. But how is it that an  
8 entity can owe the same fiduciary duty to millions of people at  
9 the same time?

10 **MR. BECK:** Well, I think that actually -- it's perhaps  
11 not as unusual as it first sounds, when you think that in the  
12 context -- when you consider that in the context of private  
13 corporations in the commercial world, companies have duties to  
14 their shareholders, and that's a rather uncontroversial  
15 proposition. And there's a concept that when you become a  
16 shareholder of a company, you become part of an enterprise, and  
17 the folks at the top have a duty to you when they -- in terms  
18 of running the company.

19 And I mean in this case, I don't think it's that much  
20 of a stretch of an analogy. I mean this may be a different  
21 market we're talking about. We're not talking about economics,  
22 we're talking about politics. But, again, I think as the  
23 discussion has developed today, we strenuously take the  
24 position that just because we're talking about politics doesn't  
25 mean that the rights that exist at common law and under the

1 D.C. statute are vitiated.

2 And so I would say that, in answer to your question,  
3 in this case, we are talking about the political realm. But if  
4 the members of the Democratic Party are considered to be  
5 shareholders in that entity, in that political enterprise, then  
6 it seems perfectly reasonable that there would be a fiduciary  
7 duty to run the party according to what the charter itself  
8 says. That would not be unlike a situation one finds all the  
9 time with public corporations in the economic domain.

10 **THE COURT:** If registered democrats are actually  
11 members of state Democratic parties, not the DNC itself, how is  
12 it that the DNC owes those registered democrats a fiduciary  
13 duty?

14 **MR. BECK:** Again, I think this gets into some --  
15 perhaps some factual issues that aren't quite encompassed by  
16 the complaint at this stage. But -- in terms of how the DNC  
17 exercises its command over the party, and that command trickles  
18 down through all the state parties.

19 It seems to me that exactly how that happens, I think  
20 we -- there was some discussion of it earlier between counsel  
21 for the DNC and your Honor relating to funding. But I think  
22 the DNC does much more than that. I think it -- at the end of  
23 the day, I don't think anyone is really under any illusion that  
24 the DNC runs the show in terms of the overall policy that the  
25 Democratic Party pursues at a national level. I mean in this

1 case, we're talking about a national election.

2 In terms of -- perhaps the best analogy is that a  
3 board of directors of a corporation owes a duty to the  
4 shareholders. The shareholders are members of a company.  
5 They're not members of the board of directors. But it's the  
6 board of directors that's running the show, so the duty does  
7 run down, because that's who's calling the shots. And I think  
8 we've pled enough in this complaint to -- for one to reasonably  
9 infer that the DNC is, in fact, calling the shots when it comes  
10 to the Democratic Party, if that is defined to mean all of the  
11 constituent state Democratic parties.

12 **THE COURT:** And then my last question for the  
13 plaintiff is: What is Deborah Wassermann Schultz's connection  
14 with the data breach described in the first-amended complaint?

15 **MR. BECK:** With respect to that specific allegation  
16 and the claim associated with that allegation, our position is  
17 that the congresswoman is the -- at the time of the events  
18 alleged, was the leader of the DNC. It was up to her  
19 ultimately to implement policies that reasonably protected the  
20 information of the DNC's own donors. And by virtue of the data  
21 breaches occurring, she clearly failed in that responsibility.

22 **THE COURT:** All right, Counsel. Thank you very much.

23 **MR. BECK:** Thank you.

24 **THE COURT:** And I'll hear from the defense with  
25 respect to those questions and answers.

1           **MR. SPIVA:** All rightee.

2           **THE COURT:** Take your time.

3           **MR. SPIVA:** Thank you, your Honor. I'm just trying to  
4 find my place.

5           So, I'll start back at the beginning of your Honor's  
6 last line of questions. And I think the first one, your Honor  
7 asked what the factual support was for paragraphs 188 and 195  
8 of the first-amended complaint, which set forth fraud and  
9 negligent misrepresentation allegations. And I think, quite  
10 rightly, your Honor noted that Rule 9(b) applies here, which  
11 is -- you know, requires a detailed pleading, particular  
12 pleading specificity. As one of the cases says, the who, the  
13 how, the what, the where, the when of the alleged fraud. And  
14 there's no allegation, really, with respect to any of these  
15 individual plaintiffs, your Honor, about, you know, who made a  
16 statement to them, how it defrauded them.

17           If you look through the paragraphs that counsel  
18 directed your Honor to, paragraphs 2 through 109, all it says  
19 is that these individual plaintiffs gave money and where they  
20 live. And it doesn't say that they received these statements,  
21 knew about these statements, relied upon these statements. And  
22 we know that with respect to many of them, it couldn't,  
23 consistent with Rule 11.

24           And that's a big deal, your Honor. It's not just a  
25 simple minor pleading defect. This is a fraud allegation.

1 And, as your Honor noted, there's a reason why Rule 9(b)  
2 requires specificity -- excuse me -- specificity.

3 And opposing counsel said that he didn't believe that  
4 they had to prove that a particular plaintiff relied on a  
5 specific statement. But that, in fact, is exactly what they  
6 would have to prove and I think, again, shows why this  
7 certainly couldn't work as a class action.

8 Your Honor asked where in the complaint did they  
9 allege -- did the plaintiffs allege that the defendants  
10 intended to gain as a result of the alleged fraud? And my  
11 response would be really nowhere, your Honor. The vague and  
12 generalized allegations in paragraphs 187 and 194 don't say  
13 that, that the defendants intended to gain by doing this.

14 And in terms of plausibility, your Honor, under the  
15 *Iqbal* and *Twombly* standards, some of this, frankly, just  
16 doesn't really make logical sense, I mean that the party tried  
17 to induce -- was -- favored Secretary Clinton and so induced  
18 many members of the party to give to Senator Sanders. It just  
19 doesn't -- that just doesn't make logical sense, your Honor.  
20 And there really isn't any allegation that defendants intended  
21 to gain as a result of the alleged fraud.

22 I think your Honor's next question was: How is  
23 donating to a political campaign a consumer transaction under  
24 the D.C. Consumer Procedure Protection Act (*sic*), an act which  
25 I have some familiarity with.

1           First of all, you know, as -- we quoted the language  
2 in our brief that the D.C. CPPA defines a consumer as "a person  
3 who, other than for purposes of resale, does or would purchase,  
4 lease, or receive consumer goods or services, including as a  
5 co-obligor or surety, or does or would otherwise provide the  
6 economic demand for a trade practice," clearly doesn't apply to  
7 donating money to a political campaign.

8           The act goes on to define a consumer good or service  
9 as something that "is used primarily for personal or household  
10 use." Clearly, donating, again, to a political campaign is  
11 not -- first of all, there is no service or good that is being  
12 purchased; and, second of all, certainly, even if one could  
13 somehow characterize it as a service being purchased, it's  
14 certainly not for household -- primarily for household or  
15 personal use.

16           In addition, plaintiffs tried to link this to  
17 ActBlue's commission on donations. That also doesn't really  
18 make any sense, your Honor. You know, ActBlue is not a  
19 defendant here. Certainly the DNC and certainly  
20 Congresswoman Wassermann Schultz is not a merchant under the  
21 definitions of the act. And the fact that ActBlue charges a  
22 commission doesn't convert either of them to a merchant, and  
23 certainly you can't sue the defendants that are present in this  
24 case for something that ActBlue -- it's unclear what -- but  
25 ActBlue allegedly has done wrong.

1           And keeping in mind, of course, that the plaintiffs  
2 are seeking the return of all of the donations. They're not  
3 just asking for the commission that ActBlue charges. They're  
4 asking for a complete return of all of the donations.

5           So, this act just does not apply to the donations at  
6 issue here.

7           The other issue, your Honor -- and this kind of goes  
8 back to class certification -- is they're trying to apply this  
9 D.C. statute nationwide to anybody in the country, no matter  
10 what state they reside in. And that also is not proper to do.

11           It wouldn't take a complicated choice of law analysis  
12 to say you can't apply a local state law, even if there were a  
13 consumer transaction here or a merchant involved under the act,  
14 to consumers all over the country. We don't have consumers  
15 here, but if we did, that -- there's no basis to do that.

16           Your Honor asked: What services have the DNC donors  
17 purchased from the DNC? I think I just addressed that.

18           And then moving on to the fiduciary duty, your Honor  
19 asked: What is DNC's special relationship with the members of  
20 the party? And I would just note that the plaintiffs' position  
21 on what law applies here has kind of shifted. I mean at first,  
22 we -- the complaint doesn't really apprise the defendants of  
23 what law is being asserted here. I think we thought it was  
24 Florida law, and we addressed that in their briefing, and then  
25 in their response, I think they said it was D.C. law. And now

1 counsel said it's too early to do that kind of a choice of law  
2 analysis.

3 But, regardless, the -- it would not be appropriate to  
4 find a fiduciary duty here. You know, it's kind of a misnomer  
5 even to speak in terms of members of the DNC. There is no  
6 national registration. Some states don't even have party  
7 registration. Many states, in fact. I mean Virginia, when you  
8 register to vote, you don't register as a democrat or a  
9 republican or whatever. So, as far as the party's concerned,  
10 they are trying to encourage people to vote for democratic  
11 candidates and to support democratic policies and values. But  
12 that's not a class of people that can be defined by the Court.  
13 And that changes with every election and possibly, and  
14 probably, more frequently than that.

15 That's not a situation that's akin to a shareholder of  
16 a corporation. It certainly can't, I think under, really, any  
17 state's law, be the basis of some kind of a special  
18 relationship of the type that would create a fiduciary  
19 obligation.

20 Counsel cited a D.C. Circuit case. I'll just briefly  
21 note that the D.C. Circuit actually is not the authoritative  
22 source for D.C. state law. D.C. is not a state, obviously, but  
23 there are local D.C. courts that actually are the authoritative  
24 source for what a fiduciary relationship would be under D.C.  
25 law, and the same would apply to the D.C. Consumer Procedure

1 Protection Act.

2 Your Honor asked: How can one entity owe fiduciary  
3 duty to millions at the same time? And I think -- you know, my  
4 earlier comments, I think, went to that. I really don't think  
5 it is possible, your Honor, with such a nebulous, changing  
6 relationship, to say that there's a fiduciary duty created  
7 between the party and people who believe in democratic -- you  
8 know, the values of the Democratic Party or who vote for  
9 democratic candidates.

10 And I would note, because counsel for the plaintiffs  
11 said many times, Well, it should be reasonable, I think this or  
12 that about the DNC, and I just want to note that it is the  
13 plaintiffs' burden here to establish that there is a fiduciary  
14 duty, and what the basis of that fiduciary duty would apply,  
15 and what law would the Court look to, to determine that. And  
16 if they can't do that, then they can't state a claim. And they  
17 haven't.

18 In all, I think what I just said would apply even more  
19 strongly to Congresswoman Deborah Wassermann Schultz. I keep  
20 forgetting to say each time that I'm speaking for both, your  
21 Honor, but I certainly am. And what reminded me of that is  
22 your Honor's next question is: What is Congresswoman  
23 Wassermann Schultz's connection to the data breach described in  
24 the complaint? And really there's no allegation of her  
25 connection to that data breach. She is mentioned in three

1 paragraphs of the complaint, none of which address a data  
2 breach, frankly, none of which could support any of the claims  
3 that have been brought against her.

4 Counsel said that as the leader of the DNC, she's  
5 essentially responsible for what happened on her watch. But  
6 that would be a strict liability standard, your Honor, and  
7 that's certainly not the case with respect to a data breach or  
8 these types of tort claims, or contract claims, for that  
9 matter, that you could say that the head of an organization, or  
10 the CEO of a corporation, for that matter, is -- can be held  
11 liable for everything that happens within that organization or  
12 allegedly due to the actions of the organization, without  
13 specific allegations of what that person actually did to cause  
14 the alleged harm.

15 Thank you, your Honor.

16 **THE COURT:** All right. Thank you.

17 I have some questions for the defense.

18 **MR. SPIVA:** Okay.

19 **THE COURT:** We'll go into the class action allegations  
20 at this point.

21 With respect to the class action allegations, we'll  
22 keep in mind, obviously without reading them into the record,  
23 the threshold requirement that is required for the plaintiff to  
24 meet, and then assuming that the threshold is met, then  
25 Rule 23(a) and 23(b) come into play.

1           But with those requirements in mind, assuming that the  
2 Court rejects the defendants' standing arguments, why should  
3 the Court address the class issues now rather than waiting for  
4 a motion for class certification?

5           **MR. SPIVA:** Well, I think this is the appropriate time  
6 in this case, your Honor, for a few reasons. First, even to  
7 define really any of the three classes, but particular --  
8 subclasses, but particularly with respect to the Democratic  
9 Party Class, your Honor, the Court would have to invade the  
10 party's associational rights and define what it means to  
11 actually be a member of the Democratic Party.

12           And that would also entail discovery that would invade  
13 the party's rights and the rights of the Sanders and the  
14 Clinton campaigns. Of course, the campaigns aren't themselves  
15 corporations, they're third parties. They're not parties to  
16 this litigation, but there would be discovery of both of those  
17 campaigns.

18           And all of this would invade the First Amendment. And  
19 I think it really highlights that the class really is not  
20 ascertainable, your Honor. And so, the Court should strike the  
21 allegations at this stage to save a huge amount of resources on  
22 behalf of both the parties and the Court in terms of fighting  
23 those motions and the discovery that would come with that.

24           In addition, there are problems with standing with  
25 respect to individual members of the putative class. And so,

1 even if your Honor rejects our overarching standing argument,  
2 we would still have the right, your Honor, to challenge each  
3 class member's standing. Did they rely on statements of the  
4 DNC? Did they even know about them? Would they have not given  
5 if they had known? Same with the Sanders subclass. Same with  
6 the third subclass.

7 And so, millions of people have no injury. And it  
8 would require both invasive, expensive, you know, thousands, if  
9 not millions, of essentially depositions and, of course, a  
10 minitrial on each individual standing alone. The same issues,  
11 I think, come up with respect to predominance and typicality  
12 and probably several other of the requirements under 23(b).

13 And so, we submit, your Honor, that now is the  
14 appropriate time to avoid that thicket, which would, I think,  
15 enmesh the Court in a lot of political issues, would invade the  
16 First Amendment interests of certainly the defendants here.

17 And at the end of the day, your Honor, this is a class  
18 that is not certifiable. It -- you know, the reliance -- and  
19 that's not the only problem, but reliance, again, is the third  
20 rail of class certification. And they can't prove that on a  
21 class-wide basis without individualized proof from every single  
22 class member, which destroys any usefulness of the class device  
23 here.

24 **THE COURT:** All right. And, again, understanding that  
25 if -- or assuming arguendo that the Court were to reject the

1 defendants' standing arguments, if the Court strikes the class  
2 allegations, will the Court have jurisdiction over the claims  
3 in the first-amended complaint?

4 **MR. SPIVA:** So I'm assuming the Court has rejected our  
5 standing arguments, but struck the class allegations.

6 **THE COURT:** Allegations.

7 **MR. SPIVA:** I mean, there's --

8 **THE COURT:** Let's do it this way.

9 **MR. SPIVA:** Okay.

10 **THE COURT:** If I did what I suggested --

11 **MR. SPIVA:** Right.

12 **THE COURT:** -- the jurisdiction for the remaining  
13 claims would be based on what?

14 **MR. SPIVA:** Well, I would submit, your Honor, that  
15 there would be no jurisdiction for all the reasons that there  
16 is no standing. The reason I'm having difficulty is, if I  
17 assume you're rejecting the standing arguments with respect  
18 to --

19 **THE COURT:** Well, would it be based on diversity?

20 **MR. SPIVA:** Oh, that is what plaintiffs have alleged,  
21 that there's diversity jurisdiction here.

22 **THE COURT:** So the question is: If I struck the class  
23 allegations, would I still have jurisdiction over the claims in  
24 the first-amended complaint?

25 **MR. SPIVA:** And, again, I'm putting standing to one

1 side.

2 **THE COURT:** Sure.

3 **MR. SPIVA:** My first answer would be no because of  
4 standing. But -- but I -- I'm not sure, your Honor, and this  
5 is the reason. I believe that what gets them into diversity  
6 with the class allegations is CAFA. And I'm not positive,  
7 standing here at this moment -- I can check -- whether every  
8 single one of those putative class representatives lives  
9 outside of Florida -- I'm sorry -- lives outside of D.C.  
10 Because, of course, if one of the plaintiffs --

11 **THE COURT:** Well, the DNC is registered in the  
12 district.

13 **MR. SPIVA:** Right. Right. The District of Columbia.

14 **THE COURT:** And has its principal place of business in  
15 the district.

16 **MR. SPIVA:** Right. To be clear, whether every single  
17 one of the named plaintiffs -- putative named plaintiffs lives  
18 outside of the District of Columbia. Because I believe that if  
19 there is one -- and I believe there is at least one -- that  
20 lives in the District of Columbia, that would destroy complete  
21 diversity, and the Court would not have jurisdiction.

22 **THE COURT:** All right. Go ahead. That's all right.

23 **MR. SPIVA:** Okay.

24 **THE COURT:** I've got a chart here somewhere.

25 **MR. SPIVA:** And I can take a quick look when I next --

1           **THE COURT:** No, that's all right. That's all right.  
2           Your argument is that if one lives in the district,  
3           the Court would not have diversity jurisdiction. That's all  
4           right.

5           **MR. SPIVA:** That's right.

6           **THE COURT:** Okay.

7           **MR. SPIVA:** That's right, your Honor.

8           The other thing that I -- I'm not sure they could meet  
9           the amount in controversy, but I -- but I'm -- yeah, I'm not  
10          sure that they could meet it even collectively. I mean there  
11          are a lot of -- maybe they could, because there are about a  
12          hundred-some people on the list. But I'm -- but if one lives  
13          in the District of Columbia, that would destroy complete  
14          diversity.

15          **THE COURT:** All right. Thank you.

16          **MR. SPIVA:** Thank you, your Honor.

17          **THE COURT:** I'll hear from the plaintiff.

18          **MR. BECK:** Your Honor, on the issue of their motion as  
19          it pertains to the class action allegations, this is  
20          alternative relief that they sought by way of their -- what  
21          they styled their motion to dismiss. And the last sentence of  
22          the defendants' -- the first paragraph in their motion states,  
23          quote:

24                 "In the alternative, to the extent any portion of  
25                 the complaint survives, the Court should strike the

1           allegations which are facially unsustainable."

2           They don't cite a specific provision of Rule 12 in  
3 making that request to the Court. But the one provision of  
4 Rule 12 that deals with anything relating to a motion to strike  
5 or a request to strike allegations is 12(f).

6           And because of that, I think my first point on this  
7 line of questions from the Court is that I do believe we get  
8 back to 12(g)(2) and the argument that they've waived these  
9 arguments, for the same reason that we discussed in connection  
10 with their 12(b)(6) motion or the aspect of their motion  
11 relating to whether we state a cause of action. But I would  
12 add a proviso, and getting back to the Court's previous  
13 question when we were addressing 12(b)(6), the Court asked how  
14 would it prejudice us to decide those issues now, and our  
15 answer was, with respect to 12(b)(6), we don't suggest there is  
16 any prejudice.

17           I think the situation is somewhat different with  
18 respect to the class act allegations. I think that the  
19 12(g)(2) still applies, but with the addition that there is  
20 prejudice to entertaining a motion to strike class action  
21 allegations at this stage, and that this prejudice has been  
22 articulated in the case law.

23           And we cited some cases, including cases from this  
24 district, *Martorella vs. Deutsch Bank*, which is a Southern  
25 District case from 2013, which states that the question of

1 class certification is generally not addressed on a motion to  
2 dismiss.

3           There's also *Gill Samuel* (*phonetic*) from 2014 --  
4 again, appearing on page 2 -- page 18 of our brief -- which  
5 holds that "an order on a motion to strike class action  
6 allegations would, by its very nature, carry more finality and  
7 less prospective flexibility than the typical order on a  
8 class -- on motion for class certification."

9           And for that reason, the Court deemed that these types  
10 of motions are contrary to the spirit of Rule 23, which allows  
11 for some flexibility, and also contemplates that there would  
12 have been an opportunity to conduct some discovery in  
13 connection with the class certification determination.

14           So, we would submit that based on -- again, based on  
15 12(g)(2), based on the cases from this district, which disfavor  
16 ruling on a class certification motion -- or defer ruling on a  
17 motion to strike class certification allegations outside of a  
18 formal motion for class certification, we submit, then, in view  
19 of those two sources of authority, that it's premature to even  
20 consider the defendants' arguments at this time.

21           That said, just to quickly address some of the points  
22 they've made. They suggest that it's impossible for us to  
23 maintain a class action in this case, because we've pled  
24 reliance, and we've pled reliance on false statements. There's  
25 a whole line of cases that certify class actions in the context

1 of uniform omissions. And I think that ultimately this is a  
2 case that's more about omissions than specific statements of  
3 fact. Because as I think we've addressed more than a couple  
4 times throughout this hearing, the essence of the claims in  
5 this case is that folks made contributions to a political  
6 candidate and a political party's governing body, based on the  
7 assumption that the primary process was fair and evenhanded,  
8 and the true facts were concealed from them, because behind the  
9 scenes, the DNC was being anything but fair and evenhanded in  
10 connection with the primary.

11 So, in that sense, I think we have more than enough  
12 material for a uniform omissions theory of class certification.  
13 But, again, I submit that it's premature to even be discussing  
14 those issues at these stages.

15 And the Court asked the question about jurisdiction.  
16 I recently dealt with that issue, but it was in the Ninth  
17 Circuit. And if my recollection serves me well, the question  
18 of jurisdiction is determined at the time that the complaint is  
19 filed and makes the allegations that invoke CAFA jurisdiction,  
20 which is what we've done in this case. So -- and this was in  
21 the context of a Court then subsequently denying class  
22 certification in a written order, and at the same time  
23 recognizing that the case still had jurisdiction under CAFA in  
24 that court, notwithstanding the class certification motion  
25 having been denied.

1           So, if that principle also holds in the Eleventh  
2 Circuit, and I haven't looked at that issue, then I would  
3 submit that the Court still would have jurisdiction, regardless  
4 of where the particular plaintiffs live, because CAFA  
5 jurisdiction was properly invoked in the original complaint.

6           And, finally, there's a thread that runs throughout  
7 the defendants' arguments, which suggests that by conducting  
8 this as a class action, there will be rampant violations of  
9 people's rights to association, because they -- by virtue of  
10 how the classes are defined, they will be swept into a lawsuit  
11 that alleges claims which either they disagree with or for  
12 whatever reason, they may not want to have any part of it.

13           Rule 23, as this Court knows well, is a very -- it  
14 has -- is a very flexible rule that contains mechanisms for  
15 addressing just those types of issues that someone doesn't have  
16 to be dragged into a lawsuit that they want no part of. There  
17 are opt-out mechanisms. There are notification mechanisms.  
18 There are issues relating to how the class could be defined.  
19 There are issues relating to the formation of subclasses. In  
20 connection with some of the choice of law issues that we've  
21 discussed, those can be handled through those Rule 23  
22 mechanisms. So I just don't think those are valid concerns  
23 that the defendant has raised.

24           But, again, I would stress that I really think that  
25 the Court would -- and the parties would benefit most by having

1 a chance to conduct discovery and fully brief a formal motion  
2 for class certification before any of the issues that have been  
3 raised by defendant in connection with this aspect of their  
4 motion are decided by the Court.

5 **THE COURT:** All right. Thank you, Counsel.

6 Now, I have some questions for the plaintiffs  
7 regarding the class action allegations. And you've answered  
8 one of them already, regarding what were to happen if the Court  
9 were to strike the class allegations.

10 My next question -- well, actually, my first question  
11 for the plaintiff is: Are each of the plaintiffs diverse in  
12 citizenship from each of the defendants?

13 **MR. BECK:** Your Honor, I'm just going to grab a copy  
14 of the complaint.

15 **THE COURT:** No, no, take your time. Take your time.  
16 And consult if you need to.

17 **MR. BECK:** If I may.

18 **THE COURT:** We're not going anywhere.

19 *(Discussion had off the record between counsel)*

20 **MR. SPIVA:** I definitely don't mean to interrupt, your  
21 Honor, but I actually have the answer to this now, if --

22 **THE COURT:** Well, you can step over and talk with  
23 counsel. I mean that's....

24 **MR. BECK:** Sure.

25 *(Discussion had off the record between counsel)*

1           **MR. BECK:** Yes. Counsel has informed me -- and it is,  
2 indeed, the case -- that paragraphs 55 and 87 are -- they're  
3 related to plaintiffs who live in the district. So, those  
4 plaintiffs would not be diverse, because I -- because the DNC  
5 is a member -- or a resident of the district.

6           **THE COURT:** And where might the Court find the  
7 allegation of citizenship for Deborah Wassermann Schultz?

8           *(Discussion had off the record between counsel)*

9           **MR. BECK:** Paragraph 154 is the paragraph which speaks  
10 to the congresswoman and specifies that she maintains offices  
11 in Pembroke Pines and the District of Columbia. However, I'm  
12 looking at this now, and it doesn't appear to contain an  
13 allegation relating to her.

14           **THE COURT:** Citizenship.

15           **MR. BECK:** Correct. I would agree with that.

16           **THE COURT:** That's fine. That's all right.

17           My next question for the plaintiff is: Are there  
18 Bernie Sanders donors who would not have standing to  
19 participate in this lawsuit?

20           **MR. BECK:** I can't think, as I sit here now, why any  
21 Bernie Sanders donor would not have standing to participate.

22           **THE COURT:** All right. Would a Bernie Sanders  
23 supporter who donated to Senator Sanders' campaign because of  
24 the DNC's alleged bias have standing?

25           **MR. BECK:** A Bernie Sanders donor who donated to the

1 Bernie Sanders campaign.

2 **THE COURT:** Campaign.

3 **MR. BECK:** Yes, they would have standing -- to the  
4 Bernie Sanders campaign, yes, they would have standing -- oh,  
5 the question is, because of the DNC's alleged bias.

6 I think this gets into some issues in terms of how the  
7 defendant has framed our allegations, and, of course, they have  
8 this footnote in -- first of all, I don't see how a donor to  
9 the Bernie Sanders campaign could -- would be in a position to  
10 have the knowledge that the DNC was predetermining the outcome  
11 for Hillary Clinton in the way that the complaint alleges.

12 I think that certainly there was campaign rhetoric  
13 throughout the campaign. And I would not deny this, that there  
14 was a sense and a feeling, through the process, that it was  
15 unfair and that it was slanted.

16 That said, I think there were orders of magnitude at  
17 issue in this case, which take this out of the realm of -- you  
18 know, I just don't see how a Bernie Sanders campaign -- a  
19 Bernie Sanders donor would have the knowledge to know that the  
20 DNC had predetermined the result for Hillary Clinton,  
21 number one.

22 **And, number two, it just doesn't make sense to me why**  
23 **somebody would participate in a political process by paying**  
24 **money into the process, when they knew that that process was**  
25 **rigged from the start, which is what we're alleging.** I mean

1 that's what we're alleging in this complaint.

2 **THE COURT:** Sure.

3 **MR. BECK:** It just doesn't seem like a plausible  
4 position to be in at the same time we're having this exchange  
5 in the context of not having conducted discovery and just on  
6 the basis of the four corners of a complaint, as I think is  
7 called for given the motion that the defendants have filed.

8 So, it -- I just don't know that -- I guess it's hard  
9 to imagine that situation given the state of the record at this  
10 point.

11 *(Discussion had off the record between counsel)*

12 **THE COURT:** Are there DNC donors who would not have  
13 standing to participate in this lawsuit?

14 **MR. BECK:** Again, I think that -- I think,  
15 fundamentally, people give money to candidates and can -- and  
16 political parties, because they believe that we have a fair  
17 democratic process. And I think that that's a baseline  
18 assumption whenever a donation is made.

19 I think if it's proven that the process is not what  
20 people believe it to be, then I think we've alleged standing on  
21 the basis of a false understanding that's been created by the  
22 defendants.

23 And so, again, I would think that all DNC donors have  
24 standing, because I believe that people -- when people  
25 participate in the process in this way, and they actually write

1 a check to a party or to a candidate, they believe that the  
2 process is fundamentally fair and democratic.

3 **THE COURT:** Would a person who donated to the DNC  
4 without reading the DNC's charter or hearing the statements  
5 described in paragraph 160 of the first-amended complaint have  
6 standing?

7 **MR. BECK:** Yes. I think that a person in that  
8 situation would have standing. I think -- again, I think that  
9 this is a case that ultimately and probably for many and many  
10 people in the classes, as we've defined them in this complaint,  
11 this is a case of omission and concealment of what was actually  
12 going on behind the scenes at the DNC. And so, I don't think a  
13 person necessarily has to read a news article where the DNC is  
14 specifically proclaiming its neutrality, or I don't think a  
15 person has to read the charter itself.

16 I think that there's a fundamental understanding in  
17 this country that's taught from a very early age, certainly I  
18 remember it, that we live in a democracy. And I think a  
19 fundamental part of what a democracy means is that elections  
20 are not conducted in this biased and predetermined way. And I  
21 think that everybody who seeks to participate in the political  
22 process, especially when they're going to the trouble of  
23 cutting a check to a candidate that they support or a party  
24 that they support, they believe that those candidates and  
25 entities are taking place in a process that is fair and

1 impartial, because they believe in a process that's democratic.

2 So, I don't think someone necessarily needs to read  
3 the articles we've cited or the charter to be in the class of  
4 people that have been defrauded or deceived or unjustly treated  
5 in terms of the unjust enrichment claim by the DNC's conduct.

6 **THE COURT:** Are there registered members of the  
7 Democratic Party who would not have standing to participate in  
8 this lawsuit? And maybe your last answer would be the same.

9 **MR. BECK:** Yeah, I think that's a similar answer to  
10 the previous question. I think, again, if there is, indeed, a  
11 fiduciary duty owed from the leadership of a party to the  
12 party's members, as we maintain in this case, then the DNC  
13 doesn't just abuse that relationship when it favors -- it  
14 doesn't just abuse its relationship with its members who are  
15 Bernie Sanders supporters, it abuses the relationship with all  
16 of its members, because it's ultimately not acting according to  
17 what its charter requires it to do and, I would submit,  
18 according to what its position in this society as a trustee of  
19 our democratic institutions requires it to do.

20 And so, I think in the long run, it hurts everybody in  
21 the party. And, you know, that may involve some factual issues  
22 that are not appropriately at issue before the Court right now.  
23 But I do think it's something that can be demonstrated.

24 **THE COURT:** If there are persons who meet the  
25 plaintiffs' proposed class definitions who would not have

1 standing, how could this Court certify the class?

2 **MR. BECK:** Well, I think -- again, I think that the  
3 definitions as we've set them forth in our complaint describe  
4 people who do have standing for the reasons discussed.

5 That said -- and, again, this is why I think in some  
6 ways these issues merit a full class certification process and  
7 discovery and briefing and so forth, as opposed to an  
8 alternative relief sought in a Rule 12 motion.

9 But that aside, I think that the rule, Rule 23  
10 specifically, is flexible enough for courts to change class  
11 definitions, certify subclasses, and so forth. So, I think  
12 it's -- I don't think it would be the first time that a  
13 class -- you know, if that were to happen, if that  
14 determination were made, I don't think it would be the first  
15 time that a Court had determined that perhaps a class was  
16 overbroad or whatnot and needed to be refined. But, again, I  
17 think those determinations are best made in the course of a  
18 Rule 23 motion for class certification.

19 **THE COURT:** Is it possible to narrow the class  
20 definitions in such a way that class members are readily  
21 ascertainable by objective criteria while persons who do not  
22 have standing are excluded?

23 **MR. BECK:** Well, again, I don't think I'm -- I would  
24 concede the point that, as defined in the context of our  
25 allegations and claims, that anybody -- that any of these

1 plaintiffs don't have standing, or any of the people who would  
2 be compassed within the class definitions don't have standing.  
3 That said, if it's just a matter that -- of people -- I mean  
4 there are mechanisms by which people can opt out of class  
5 actions. And class definitions can also be revised throughout  
6 the course of a litigation and frequently are.

7 So, it seems to me that that could be a possibility as  
8 well. But, again, I don't think that there's anything about  
9 this particular class action that makes it any less susceptible  
10 to being managed by the flexible tools that are available under  
11 Rule 23 and at the Court's disposal. And, again, just because  
12 it happens to deal with politics as opposed to a securities  
13 class action or something that's more commonly seen in  
14 lawsuits.

15 **THE COURT:** Given the nature of plaintiffs' claims,  
16 will individualized issues predominate over common issues?

17 **MR. BECK:** I don't think that's the case -- I don't  
18 think that would be the case, your Honor. Again, and I think  
19 this gets back to the point that the predominant rung here is  
20 the defendants' acting behind the scenes to rig a primary  
21 process and not disclosing that to the public. And, in fact,  
22 making -- taking actions to conceal that from the public.

23 So because it's more an issue of what was concealed as  
24 opposed to what was specifically stated, to me, that has the  
25 badge of a uniform omissions case. And my understanding of the

1 law in this district and the Eleventh Circuit is that cases,  
2 even fraud cases, can be certified when a pattern of uniform  
3 omissions is established. And that analysis I would think  
4 would apply to the fraud and negligent misrepresentation claims  
5 that we've asserted.

6 **THE COURT:** What law will the Court be applying with  
7 respect to Counts 1, 2, 4, 5, and 6?

8 **MR. BECK:** Let me confer with counsel.

9 **THE COURT:** Go right ahead. Take your time. Take  
10 your time.

11 *(Discussion had off the record between counsel)*

12 **THE COURT:** Take your time.

13 *(Discussion had off the record between counsel)*

14 **MR. BECK:** My cocounsel wanted me to correct something  
15 that I stated to the Court earlier --

16 **THE COURT:** That's all right. Go right ahead.

17 **MR. BECK:** -- in regards to the residence of Debbie  
18 Wassermann Schultz.

19 **THE COURT:** Citizenship.

20 **MR. BECK:** Yes, the citizenship. My impression is  
21 that we had -- that was the only paragraph that we had  
22 referenced her. But my counsel's alerted me to the fact that  
23 in paragraph 1, we specifically state that Deborah Wassermann  
24 Schultz resides in and is as congresswoman representing  
25 portions of this district, meaning the Southern District of

1 Florida. So, I think that is probably sufficient to establish  
2 her as a citizen of Florida.

3 But to get to the question posed by the Court just  
4 now, which is what law should the Court apply to those  
5 specified counts? You know, our brief assumed Florida law or  
6 D.C. law. Again, I just -- I don't know that the record is  
7 well-developed enough to make a choice of law now. So  
8 certainly I don't think it was fully briefed in the papers.

9 And my understanding is that in the course of a class  
10 action, oftentimes subclasses are created which correspond to  
11 the various laws invoked specifically to the various plaintiffs  
12 based on their citizenship, if, in fact, that's a factor that  
13 determines the choice of law analysis. And I'm not sure,  
14 again, that that issue is really before the Court now.

15 We cited, I think, one case in our brief which  
16 suggested that courts ought to await a more fully developed  
17 factual record before engaging in those determinations. So, I  
18 guess at this stage, we would rest on the position in our  
19 briefs to assume that Florida or D.C. law applies to those  
20 counts, but without waiving any argument that other laws may  
21 not apply to those class members as well.

22 **THE COURT:** If my count is accurate, taking it -- that  
23 count coming from the first-amended complaint, assuming  
24 arguendo that the Court must apply 46 different jurisdictions'  
25 laws to this case, would a class action be manageable?

1           **MR. BECK:** I think there are cases that address that  
2 issue in the class certification analysis. And oftentimes it  
3 depends on the -- whether or not there are material differences  
4 in the various laws being applied such that manageability  
5 becomes a problem.

6           I guess without delving into the -- what may be the  
7 material differences for those counts -- and I don't know that  
8 there are any -- but, again, that's a -- you know, I think  
9 that's an issue that comes up on Rule 23 -- in the context of a  
10 Rule 23 motion. And I think, you know, in making that  
11 determination, the Court is probably best -- would benefit most  
12 from having full briefing and discovery on those specific  
13 issues as they relate to class certification.

14           **THE COURT:** And, again, assuming arguendo that the  
15 Court must apply 46 different jurisdictions' laws to this case,  
16 are there questions of law common to all members of each class?

17           **MR. BECK:** Yes, I do think that regardless of  
18 whether -- how many states' laws would ultimately apply, the  
19 issues of law -- I mean, it would surprise me that there is --  
20 that if the law of fraud, the law of negligent  
21 misrepresentation, the law of unjust enrichment, the law of  
22 negligence as it applies to the data breach claim -- I mean it  
23 would surprise me if the elements of those laws varied so  
24 considerably from state to state that they presented issues  
25 that threatened commonality in a Rule 23 analysis.

1           But, again, I would state that I think we can -- I  
2 think that question would probably benefit most from a class  
3 certification brief that directly addressed those issues and  
4 analyzed whatever differences there are between the state laws  
5 at issue, because I don't know that there are material enough  
6 differences to create a manageability issue in this case.

7           **THE COURT:** And then, finally, what evidence do the  
8 plaintiffs anticipate discovery would yield regarding  
9 certification of each of the proposed classes?

10           **MR. BECK:** Well, I think that discovery in terms of  
11 the class certification issues would proceed -- I mean I think  
12 it would address each of the class 23 elements that we'd need  
13 to prove to prevail on a motion for class certification. So, I  
14 think we would be addressing issues of commonality, typicality,  
15 predominance, superiority, manageability, all of the standards  
16 issues. I think that we would be creating a -- obviously, I  
17 mean I wouldn't be surprised if the defendants would be  
18 conducting discovery of our class representatives -- usually  
19 they do something like that from their end. So I think that  
20 would be part of the process.

21           But from our end, we would be taking document  
22 discovery that we at this point anticipate would fill in the  
23 details of what we've already alleged in the complaint, which  
24 is that there was a systematic, unified, and overarching effort  
25 to work behind the scenes to advance Hillary Clinton's

1 candidacy to the nomination. And so, from the perspective of  
2 commonality, from the perspective of whether any of those  
3 common issues predominate in the analysis, which ultimately we  
4 would have to show on a Rule 23, those would be the issues that  
5 would be addressed in the discovery process.

6 **THE COURT:** All right, Counsel. Thank you very much.  
7 I appreciate your answers.

8 **MR. BECK:** Thank you, your Honor.

9 **THE COURT:** All right. Let me hear from the defense.

10 **MR. SPIVA:** All rightee.

11 Thank you, your Honor.

12 I'll just kind of quickly go through the questions.

13 **THE COURT:** Take your time.

14 **MR. SPIVA:** All right.

15 **THE COURT:** We're not going anywhere.

16 **MR. SPIVA:** So, I think you already got an answer to  
17 the question about whether all the plaintiffs are diverse from  
18 each defendant; they are not.

19 And then, are there Bernie Sanders donors who would  
20 not have standing, was I think the first question after that  
21 your Honor asked. And clearly there are. I mean -- and  
22 clearly the only way to find out would be to do an  
23 individualized inquiry of each of them. Because here, where  
24 we're talking about reliance, we're talking about knowledge,  
25 we're talking about motive, not only the defendants' alleged

1 motive, but the motive of these individuals. I mean, Bernie  
2 Sanders himself endorsed, voted for, campaigned for Hillary  
3 Clinton. And so, presumably, he donated to his own campaign,  
4 and I assume he wouldn't -- would not consider himself to be a  
5 member of this class. And there are other donors. There are  
6 millions of Bernie Sanders donors and voters who voted for  
7 Hillary Clinton. And so, those people would not have standing  
8 to bring this suit. They would have no injury.

9           There are many Bernie Sanders donors who gave because  
10 they thought the system was rigged, to use Donald Trump's  
11 phrase, or that it was an unfair system and they wouldn't have  
12 standing.

13           So, I think clearly there would. And the greater  
14 problem, your Honor, is that the only way to find out would be  
15 to invade -- you know, to query each one of them and invade  
16 their privacy and First Amendment rights and, on the other  
17 hand, invade the privacy -- rather, the First Amendment rights  
18 of the party. And we heard again and again --

19           **THE COURT:** Just slow down a little bit for the --

20           **MR. SPIVA:** Sure.

21           We heard again and again that certain questions could  
22 be potentially resolved through discovery, and one can only  
23 imagine how burdensome this discovery would be. Counsel didn't  
24 actually specify what types of information that counsel thought  
25 he would discover. But, clearly, there's a contemplation of

1 going through the files of the DNC and trying to explore what  
2 the strategy and internal workings of the party was. Clearly,  
3 protected by the First Amendment.

4 And, of course, we would need to seek discovery of the  
5 Sanders campaign and the individuals who gave to  
6 Senator Sanders and individuals who gave to the DNC, and they  
7 have a First Amendment right not to be questioned in that way.

8 So, to answer your Honor's second question, a Bernie  
9 Sanders supporter who donated to the campaign because of a  
10 perceived bias also would not have standing.

11 There was also a phrase that kind of pervaded  
12 counsel's last presentation about -- it's kind of shifted from  
13 the allegations in the complaint, which is that the DNC and  
14 Congresswoman Wassermann Schultz deviated from the bylaws in  
15 showing impartiality and evenhandedness to a focus on the  
16 results being predetermined.

17 There's really no allegation in the complaint that the  
18 results were predetermined, nor could there be. I mean  
19 millions more people voted for Secretary Clinton than voted for  
20 Senator Sanders. And those individuals certainly wouldn't have  
21 standing, even though they would fall within one of the  
22 subclasses that have been articulated.

23 And one of the answers to that question that your  
24 Honor was given, was that it's not plausible that someone would  
25 give to the Sanders campaign if they viewed the system as

1 rigged. But I think actually the opposite conclusion is more  
2 logical and certainly apparent, that you would to try to beat  
3 the system, if you viewed it as rigged.

4 Your Honor asked whether there are DNC donors who  
5 would not have standing. And, clearly, there would be. I  
6 mean, clearly, there are millions of people who voted for  
7 Secretary Clinton and gave to the DNC in both the primary and  
8 the general, and they would not have standing, because they  
9 haven't been injured. And they don't agree with the point of  
10 view of the plaintiffs in the lawsuit.

11 You asked whether a person who gave to the DNC without  
12 having read the DNC's charter were -- any of the allegations  
13 where the DNC was alleged to have made statements about  
14 neutrality, would that person have standing? Well, there  
15 couldn't be reliance if they didn't have any knowledge of the  
16 statement. So that person would also not have standing.

17 And then your Honor asked that if there are members of  
18 the plaintiffs' proposed classes that would not have standing,  
19 how can the Court certify the class? And, again, the answer  
20 was discovery, your Honor. But I think the answer is actually  
21 that really wouldn't be proper to certify a class where certain  
22 members of the proposed class don't have standing, and where  
23 the only way to determine whether they do is to actually, you  
24 know, take discovery from each individual.

25 And that's not gonna change. That's the thing. If

1 they're allowed to amend again, that is always going to be the  
2 case, that there are gonna be some people in these classes as  
3 proposed who do not have standing, and the only way to  
4 determine that is to ask them individually.

5           And that goes to the next question your Honor asked,  
6 which is potentially changing the class definitions. And I  
7 think counsel had said that it's not infrequent that class  
8 definitions get narrowed or defined, and that is not -- it's  
9 not that it doesn't ever happen, for sure, but at the same  
10 time, it's still the plaintiffs' burden to identify an  
11 ascertainable class, one that's manageable, that -- where  
12 common issues predominate. And none of that's the case here,  
13 your Honor.

14           And answering your Honor's next question, it really  
15 isn't possible to narrow these class definitions so that the  
16 class is ascertainable by objective criteria. All of the  
17 allegations in the complaint, and certainly all the statements  
18 made today, are shot through with subjective determinations,  
19 which can only be resolved through individualized discovery and  
20 trial.

21           There was an analogy to securities class actions,  
22 which I'd submit, your Honor, is wildly different from the  
23 political realm here with the First Amendment issues that  
24 we've -- that I talked about, where it's potentially the only  
25 place where you have a notion of fraud on the market, you know,

1 such that reliance can, in certain circumstances, be presumed  
2 totally different and inapplicable and an inapt analogy to this  
3 situation.

4 Your Honor asked whether individual issues would  
5 predominate over common issues. I think the answer is clearly  
6 yes. I've kind of covered that, so I won't go over that again.

7 Your Honor asked about choice of law, and what law the  
8 Court would apply to Counts 1, 2, 4, and 6.

9 **THE COURT:** Five.

10 **MR. SPIVA:** And five, thank you.

11 And -- that's the breach of fiduciary duty count, yes.  
12 I think that's not clear at this point.

13 And I think the answer that I heard, your Honor, was  
14 basically that the plaintiffs sued the defendants, but they're  
15 not gonna tell the defendants until later what law they're  
16 alleged to have violated. Because, of course, if you're not  
17 saying what state's fiduciary duty law they've alleged to have  
18 violated, or what state's unjust enrichment law, et cetera,  
19 then you're not even meeting the basic requirements under  
20 Rule 8. And, certainly, class certification is not the stage  
21 at which to decide what law applies to the claims that they're  
22 asserting. It destroys commonality; it destroys predominance.

23 And I don't think there's a case that I've ever  
24 seen -- and none has been cited -- where a Court has said that  
25 through the discovery process, a class with 46 states

1 represented could -- you know, through the discovery process,  
2 we could discover what law applies. That would be totally  
3 unmanageable, your Honor. And I submit it would have to be a  
4 violation of due process for the defendant to have to respond  
5 to that and the types of massive discovery that that would  
6 entail.

7 And it's really their burden to figure this out in  
8 advance and put it in their complaint. It's not something to  
9 be resolved either through class certification or through  
10 discovery.

11 Your Honor asked, assuming that the Court must apply  
12 the laws of 46 states, would the class action be manageable?  
13 And I submit, your Honor, the question almost answers itself.  
14 I mean, you know, no. It would be, I think, an impossible  
15 management problem. It would -- there'd be no commonality, no  
16 predominance.

17 And one of the answers was, it would surprise me if  
18 elements of these various causes of action varied so  
19 considerably as among states. But, again, this is the  
20 plaintiffs' burden to figure out at the outset. I mean that's  
21 very rare where a federal court is going to say, Well, we're  
22 gonna apply a nationwide standard of contract, breach of  
23 contract, for instance -- I'm just using that as an example --  
24 because a breach is a breach wherever you are. That's very  
25 rare. But, certainly, at the very least, the plaintiffs have

1 to identify those causes of action for which the law doesn't  
2 vary significantly, and why they could meet the class  
3 certification standards, and why it would be manageable. It's  
4 not for the Court to assume or for the plaintiffs to assume and  
5 we get to it later. That's just not proper.

6 Your Honor asked what evidence did the plaintiffs  
7 anticipate discovery would yield regarding certification of  
8 each of the proposed classes. And I didn't really hear a  
9 definite answer other than anything going to the various  
10 Rule 23 elements, document discovery, which would fill in the  
11 details. And, again, that -- the only kind of document  
12 discovery that could even conceivably be relevant to the types  
13 of claims being made here would totally invade the province of  
14 the party's strategizing, their internal workings, and,  
15 similarly, Congresswoman Wassermann Schultz's First Amendment  
16 rights as well.

17 And so -- and I think, frankly, your Honor, even if  
18 that weren't an issue, there really isn't discovery that can  
19 fix these problems other than individualized discovery of every  
20 single plaintiff. And so, I don't think that that's an  
21 adequate answer to your Honor's question. I don't think  
22 there's discovery that can fix the problems with the complaint.

23 **THE COURT:** All right. Thank you.

24 Hold on for one second.

25 **MR. SPIVA:** Thank you.

1           *(Discussion had off the record between the Court and*  
2 *court reporter)*

3           **THE COURT:** I'm gonna give the defense five minutes  
4 for any additional comments, any clarification of any previous  
5 answer or response, and then I'll give five minutes to the  
6 plaintiff for the same.

7           **MR. SPIVA:** Thank you, your Honor.

8           I will endeavor and I will not repeat what I've said.  
9 But I think, starting with standing, this is a case where  
10 plaintiffs have not met their burden to show causation of harm  
11 here, that -- a particularized injury that is redressable by  
12 the Court, and that that really should end the lawsuit right  
13 there.

14           I think their state law claims, I guess I'll group  
15 them -- the ones that focus on issues such as fiduciary duty  
16 and the like, first, all suffer from the same problem, but also  
17 are defective on the pleadings and would be totally  
18 unmanageable in terms of a class certification.

19           And then I think what I would do, so as not to repeat,  
20 because I have made these arguments, but I just want to  
21 emphasize that there really is a body of case law here, I  
22 think, that supports the notion that this is really not the  
23 province of the courts. This is the rough -- what we've heard  
24 is the kind of thing -- you certainly heard on the Republican  
25 side, you know, President Trump alleged that the Republican

1 primary was rigged. He ended up getting more votes than the  
2 other primary members and ultimately at least got more  
3 electoral college votes and that's how our system works.

4 And so this is very common to have these kind of  
5 inter/intraparty squabbles about doctrine, about policy, about  
6 rules, about selection of delegates. And the courts have said  
7 from the *O'Brien* case to the *LaFollette* case, the *Berg v. Obama*  
8 case, which I think is very -- has some very close similarities  
9 to this one in terms of people saying they were duped by  
10 certain statements about what the party stood for, the *Wymbs*  
11 case in this circuit vs. *the Republican State Executive*  
12 *Committee*, all of these cases I think come down to the same  
13 thing, that really these are matters for the parties. They are  
14 private associations. Yes, they play a big role in the  
15 election of the president of the United States. But they are  
16 still private associations. They still have a right to order  
17 their own affairs.

18 If someone's not happy with the party that they've  
19 been aligned with, their choice is to start another party, or  
20 to give to the other party, or to give to a candidate that they  
21 think will shake things up within the party.

22 But giving a donation gives no one the right to  
23 succeed, to have their candidate win an election. It doesn't  
24 give them the right to tell the party how to conduct its  
25 affairs or to, you know, rifle through the strategizing of the

1 party.

2 And I want to be clear, I know I've said this, but I,  
3 you know -- because this has become somewhat of a public case,  
4 that the defendants absolutely deny that there was any  
5 unfairness here or impartiality. But the allegations that have  
6 been made are very common in terms of political process. And  
7 the courts have been clear that that is a matter for the  
8 parties and for private associations, not for the courts.

9 And I think really that runs through -- that premise,  
10 that precedent really runs through all of our arguments, and  
11 that's the reason why there's no standing here, why there's a  
12 failure to state a claim, and so why this case should be  
13 dismissed with prejudice.

14 Thank you, your Honor.

15 **THE COURT:** Thank you, Counsel.

16 **MR. BECK:** Thank you, your Honor. And I want to thank  
17 the Court for hearing us today.

18 Counsel mentioned a concept that's familiar in the  
19 context of securities actions known as fraud on the market.  
20 And his suggestion was that this -- to paraphrase him -- that  
21 this case is -- invokes principles that are wildly different to  
22 fraud on the market cases that make that analogy inappropriate.

23 Well, I think that it's an extraordinarily appropriate  
24 analogy. We're talking about the political market here. This  
25 is fraud on the political market. The DNC, by virtue of how

1 the democracy of this country has developed over history, is  
2 one of two parties in a two-party democratic system that  
3 essentially has custody over the market for how candidates are  
4 chosen and elected and nominated and ultimately run in general  
5 elections.

6 And the shareholders in this case are not people that  
7 have purchased stock or purchased shares in a company, but  
8 they've bought into this political process, because at bottom,  
9 they believe in American democracy and that we live in a  
10 democratic system. And they bought into the process how? By  
11 donating their money to candidates. In this case, they've  
12 donated to Bernie Sanders' campaign. But this is how people  
13 participate in the political process these days aside from  
14 voting. And they've also registered as democrats, because that  
15 was the party that they chose to align themselves.

16 And in making those decisions and undertaking those  
17 actions, I submit that they're no different than people that  
18 purchase shares of stock believing that the company is a good  
19 investment. I see no reason that somebody would take their  
20 hard-earned money and throw it at a candidate in a democratic  
21 primary knowing full well that the outcome was predetermined.

22 And I know my friend on the other side takes issue  
23 with my use of the word "predetermined" to describe this  
24 election, but I think it's entirely inappropriate (*sic*),  
25 because it captures the state of where we are as a country

1 today, which is to say that when you have one of the two major  
2 political parties working hand in glove with all of the arrayed  
3 media outlets that are in the position of disseminating  
4 information to the American public, and they are engaged in a  
5 concerted effort to advance one candidate at the expense of the  
6 other candidates in the field, I submit that that outcome is  
7 nothing other than predetermined. And to say anything less is  
8 to undersell the power of politics and media in this country.

9 It may be that we've reached a dire state of affairs  
10 in this country politically. When I heard counsel state that  
11 it would be more likely for somebody to donate to a candidate  
12 if they thought the process was rigged, that made me really  
13 sad, actually. I mean I'm somebody that's donated to political  
14 campaigns. I know a lot of people who have donated to  
15 political campaigns. And when I made those donations, I never  
16 suspected or believed that the process was rigged in the way  
17 that we allege that this process was rigged in the complaint.

18 If it's the case that an entity, the DNC, its  
19 chairperson can rig an election, and there's no remedy at law  
20 for people who've made financial contributions on the basis of  
21 what they've omitted to tell the public, well, I submit that  
22 that's a really dire road for this country to be on. But what  
23 gives me hope is that we have an ancient tradition of common  
24 law in this country that goes back even well before the  
25 founding of this republic and protects against fraud and

1 protects against deceit. And it makes no exception for people  
2 who are in the political realm. And it doesn't offer blanket  
3 immunity for people to make misrepresentations simply because  
4 those representations are made in the context of a political  
5 campaign.

6 **THE COURT:** One minute.

7 **MR. BECK:** And they've said that -- and, again, I  
8 think all of their arguments as to why -- against us having the  
9 right to conduct discovery fall back on this First Amendment  
10 argument, which I submit to the Court is a fiction.

11 And I just want to close with this. We're not seeking  
12 to undo the results of an election. We're not seeking -- we're  
13 not sitting here saying that Bernie Sanders should be the  
14 nominee, and there should be a do-over. We're not asking for  
15 relief like that. Our relief is confined to remedying the  
16 injuries that we've identified in this complaint, which are  
17 very concrete and tied to the payment of money and membership  
18 in a political party, and are not tied to any of these voter  
19 standing-type theories, which you see in all the cases, or many  
20 of the cases that they've cited, where a person tries to  
21 enforce a political promise or -- for instance, I think an  
22 example was given of a promise made by President Trump. None  
23 of that is remotely at issue here.

24 We're talking specifically about people who bought in  
25 to the political process by donating money, by registering as

1 democrats. If there is no possibility of judicial or legal  
2 relief for those individuals, then I submit that the prospects  
3 for democracy in this country are dark indeed.

4 Thank you, your Honor.

5 **THE COURT:** All right. Thank you very much.

6 Well, I want to thank counsel for your responses to  
7 the Court's questions. They've been very helpful. This is a  
8 very interesting case, to say the least. And counsel for the  
9 plaintiffs spoke about whether or not our society -- these are  
10 the Court's words, not his words, he did not use the word  
11 "society" -- but whether society is in a dire situation. And  
12 so I leave the lawyers with this. Democracy demands the truth  
13 so people can make intelligent decisions.

14 Everyone have a safe trip back and I'll be putting  
15 together an order based on the arguments presented here today.

16 I'll be candid with you, that's gonna take some time.  
17 The legal issues are complex for the Court to consider and to  
18 rule upon.

19 So everyone have a safe trip back and everyone have a  
20 great week.

21 There being no further business, this session of the  
22 court is adjourned.

23 **MR. SPIVA:** Thank you, your Honor.

24 **THE COURT:** Take care.

25 **MR. BECK:** Thank you, your Honor.

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**MR. O'BRIEN:** Thank you, Judge.

**THE COURT:** Go ahead. Court's in recess.

*(The Judge exited the courtroom)*

*(Proceedings concluded at 5:20 p.m.)*

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

          /S/Francine C. Salopek            
Francine C. Salopek, RMR-CRR  
Official Court Reporter

                                          4-28-17                                            
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