**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

IMRAN AWAN; ABID AWAN; JAMAL AWAN; TINA ALVI; and RAO ABBAS,

*Plaintiffs,*

v.

THE DAILY CALLER, INC.; THE DAILY CALLER NEWS FOUNDATION; SALEM MEDIA GROUP, INC., doing business as REGNERY PUBLISHING; and LUKE ROSIAK,

*Defendants.*

Case No. 2020 CA 000652 B

The Honorable Judge Fern Flanagan Saddler

**Next Event: Scheduling Conference Hearing, October 23, 2020, 9:30 a.m., Courtroom 100**

# PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS


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## INTRODUCTION

Until Luke Rosiak and The Daily Caller came along, the Awan family was living the American dream. After immigrating to the United States from Pakistan as a teenager, Imran Awan worked his way through college and landed a job providing information-technology support on Capitol Hill. He eventually trained his two younger brothers, his wife, and a close friend to work alongside him. Together, for more than a decade, they provided IT support for dozens of members of Congress. Their roles were neither public nor glamorous—they worked behind the scenes, supporting office computer systems—but they worked hard, were paid well, and earned the trust and admiration of their colleagues. Having achieved a measure of success, the Awans settled into a happy and quiet life, raising their children in the Virginia suburbs.

To Luke Rosiak, however, the existence of a family of Pakistani-born Muslims working for Democrats on Capitol Hill could only be the result of a nefarious plot, waiting to be unmasked. It was Rosiak, a self-described "investigative reporter," who thrust the Awans into the public eye. The Awans' names first appeared publicly on February 4, 2017, in an "exclusive" by Rosiak, published by The Daily Caller. An internal inquiry into IT policies that were seldom if ever observed became, in Rosiak's eyes, a sprawling international conspiracy. Over the ensuing months and years, Rosiak published article after article, and eventually a book, claiming that the Awans had "hacked" congressional computer servers and committed numerous serious crimes—including espionage, extortion, bribery, theft, blackmail, money laundering, and torture.

None of this was true. In 2018, after the FBI thoroughly investigated the allegations, interviewed approximately 40 witnesses, and forensically examined the House servers, the U.S. Department of Justice took the extraordinary step of publicly debunking Rosiak's conspiracy theories and affirmatively exonerating Imran Awan of these "public allegations." Neither he nor any of the Awans were charged with any crime related to their work. That's because, as the Justice

Department concluded, there was "no evidence" whatsoever that they had hacked or spied on Congress. At this point, the Awans understandably believed that their names had finally been cleared and that they could move on with their lives. At a hearing on August 21, 2018, U.S. District Judge Tanya Chutkan observed that these "numerous, baseless accusations" and "scurrilous" attacks—"conspiracy theories linking Mr. Awan to the most nefarious kind of conduct"—were "unfounded." They had been "investigated and found to be untrue."

But truth was no obstacle to Rosiak and his enablers. Five months after that hearing, on January 29, 2019, Rosiak and Salem Media published *Obstruction of Justice: How the Deep State Risked National Security to Protect the Democrats*—a book that doubles down on Rosiak's defamatory campaign against the Awans. Despite the DOJ's investigation and exoneration, the book falsely asserts that the Awans "hacked" the House and committed a host of other crimes. And Rosiak has continued to spread these false and malicious attacks while promoting his book on prominent television and radio broadcasts. Over time, Rosiak's claims became increasingly outlandish—including accusations that "Imran Awan is basically an attempted murderer, an extortionist, a blackmail artist, [and] a con man," and that the Awans "stole millions of dollars."

This lawsuit concerns only those falsehoods published in the year before suit was filed—*after* they were already debunked by the DOJ. The claims are provably false and defamatory per se, and the defendants hardly contend otherwise. Instead, they argue that the Awans are public figures, subject to an actual-malice standard of proof. Though the plaintiffs *can* prove actual malice here, they need not do so: The defendants' public-figure argument is foreclosed by *Wolston v. Reader's Digest*, 443 U.S. 157 (1979), in which the U.S. Supreme Court held that a former government employee, falsely named in a book as a Russian spy, was not a public figure. The facts were strikingly similar: Well before the book was published, Ilya Wolston had been the subject of a "flurry of publicity" when he and his relatives (all of Russian origin) were investigated in a grand

jury inquiry into Russian espionage and he pleaded guilty to a minor offense (failing to appear). *Id.* at 163-64. Like the Awans, he "led a thoroughly private existence prior to the grand jury inquiry." *Id.* at 165. And, like the Awans, he was not a public figure because he had not "voluntarily thrust" or "injected himself" but was instead "dragged unwillingly into the controversy." *Id.* at 166. A more recent case applying *Wolston* also bears a striking similarity: A man of Middle Eastern descent, falsely accused by the commentator Glenn Beck of being responsible for the Boston Marathon bombing, was likewise a private figure. Although he "was the subject of numerous media reports" after he was investigated by the authorities, that coverage was "involuntary and, indeed, unwanted," he hadn't "assume[d] the risk of publicity," and, by the time of the relevant defamation, he had already been "exonerated by the authorities." *Alharbi v. Beck*, 62 F. Supp. 3d 202, 209, 211, 212 (D. Mass. 2014). So too here.

Under *Wolston*, there is "no basis whatsoever for concluding" that the Awans have "relinquished, to any degree, [their] interest in the protection of [their] own name[s]." 443 U.S. at 168. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 167. Indeed, the Awans' private status is even clearer than in *Wolston* and *Alharbi* because the coverage originated with and was driven by Rosiak and The Daily Caller. "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Otherwise, a defamer could "convert a private individual into a general public figure simply by publicizing the defamation itself." *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1295 n.19 (D.C. Cir. 1980). Having dragged the Awans' names through the mud, the defendants may not deploy their own false attacks as a shield.

In addition to their defamation claim, the Awans have also properly stated claims for unjust enrichment, to recover the defendants' ill-gotten gains, and for infliction of emotional distress, to

recover for severe harms to the Awans caused by their malicious campaign: suicide attempts, hospitalizations, family separation, death threats. Under analogous circumstances, courts permit similar claims to go forward and the defendants cite no controlling authority to the contrary.

Because the defendants seek dismissal under D.C.'s Anti–SLAPP Act, this opposition attaches declarations showing the plaintiffs' likelihood of success: Four members of Congress and five senior staff attest to the Awans' character; the falsity of Rosiak's claims; the xenophobic nature of his attacks; and the resulting harm. *See* Meeks Dec. ¶¶ 5-8, 12-13; Fudge Dec. ¶¶ 7-10; Richmond Dec. ¶¶ 8-10; Wexler Dec. ¶¶ 4-7; Murphy Decl. ¶¶ 5-7; Lamel Dec. ¶ 11, Rogin Dec. ¶ 10. Willoughby Dec. ¶¶ 10-14; Johnson Dec. ¶ 4; Dominguez Dec. ¶¶ 4-7. The former head of DOJ's National Security Division stresses how "unusual" it was for federal prosecutors to address "the veracity of public allegations against a defendant in the media" to "debunk unfounded conspiracy theories." McCord Dec. ¶¶ 4, 5. A distinguished professor at Northwestern University's School of Journalism deems this case a "textbook example" of a "brazen and reckless disregard" of journalistic standards, indicating a "total disregard for accuracy." Doppelt Dec. ¶¶ 4, 10. The New York Times Magazine's former Research Editor finds this recklessness especially egregious given the Awans' private-figure status and DOJ's exoneration: "*The Daily Caller* and Salem Media decided to publish Luke Rosiak's allegations despite knowing that they were not true or without caring whether they were true or not," "to disseminate false narratives and conspiracies that appeal to xenophobic and Islamophobic stereotypes." Srivastava Dec. ¶ 8. An expert on misinformation outlines extensive connections between Daily Caller staff and white-supremacy groups, reflecting a "poisonous culture" that "helps explain how heinous accusations were made against a Muslim immigrant family in this case." Binkowski Dec. ¶ 29. And all five of the plaintiffs tell—in their own words, for the first time—how "Luke Rosiak, *The Daily Caller*, and Salem Media have turned our American dream into a nightmare." Imran Awan Dec. ¶ 5.

## FACTUAL BACKGROUND

### 1. The Awans immigrate to the United States and establish comfortable, private lives, working behind the scenes to provide information-technology support on Capitol Hill and raising their families in the Virginia suburbs.

For a time, the Awans lived the classic American immigrant dream. Born to a working-class family in Faisalabad, Pakistan, the three Awan brothers immigrated to Virginia over two decades ago, where at first they slept on a distant relative's floor as they began to make America their home. Imran, the eldest, worked at a McDonald's to support his family while he attended high school. Imran Dec. ¶ 2. He enrolled in community college and eventually transferred to Johns Hopkins University, where he earned a degree in information technology. *Id.* As a student, Imran interned at a firm that provided IT services to congressional offices. Representative Robert Wexler and his staff were so impressed that they hired Imran to work for them immediately after he graduated from Johns Hopkins in 2004. *Id.* ¶ 14; Dominguez Dec. ¶ 2.

They weren't disappointed. As former Representative Wexler's Chief of Staff recounts, "Imran was everyone's favorite staffperson in the office"—"eager to help, smart, hardworking and above all: honest." Johnson Dec. ¶ 2. On the Hill, Imran soon gained a reputation as a relentless worker, a patient and kind IT staffer, and a warm and charming presence beloved by those he helped. Fudge Dec. ¶ 5; Richmond Dec. ¶¶ 5-6; Dominguez Dec. ¶¶ 1-4. As members and their senior staff recommended Imran to other Democratic House offices, and as the work became more than one person could handle, he brought in members of his family—his brothers Abid and Jamal, his wife Hina Alvi, and his close friend Rao Abbas—whom he trained and mentored as colleagues. *Id.*[1] Working together as a team allowed them to be "always available" and ensure that an issue

[1] Although two of the plaintiffs have different surnames, the plaintiffs—Imran Awan, his wife Hina Alvi, Abid Awan, Jamal Awan, and Imran's close friend Rao Abbas, who is akin to a family member—are collectively referred to throughout this brief, for ease of reference, as "the Awans." Hina changed her name to Tina. *See* Tina Dec. ¶ 1

"would get covered." Jamal Dec. ¶ 3. Due to their hard work and experience—and the trust and respect they earned from various members of Congress—the Awans ended up managing the IT systems for dozens of congressional offices. *Id.* ¶ 16; Johnson Dec. ¶¶ 3-4; Rogin Dec. ¶ 5; Willoughby Dec. ¶¶ 2-4.

The Awans provided these offices with essential but routine IT support. Working from a tiny office on the fourth floor, they fixed printers, helped with email accounts, addressed problems with phones and computers, and ordered computer equipment. Jamal Dec. ¶¶ 3-6; Abid Dec. ¶ 4; Tina Dec. ¶ 3; Willoughby Dec. ¶¶ 5-6; Rogin Dec. ¶ 3. They had no interactions with constituents, the public, or the press; no access to classified or secret materials; and no roles in formulating House technology policies or infrastructure. Abid. Dec. ¶ 5; Jamal Dec. 8; Rogin Dec. ¶ 4; Lamel Dec. ¶ 5; Rao ¶ 4. In short, the Awans "provided the same kind of services to members and staff that any low-level IT person would do in any office in any organization, public or private." Abid. Dec. ¶ 5; Rao ¶ 4.

Having secured stable government jobs, the Awans were able to afford comfortable, middle-class lives in northern Virginia. Imran Dec. ¶ 5; Tina Dec. ¶ 5. Imran, Hina, and Rao spent most of their time outside of work raising their children and providing them a good education. Tina Dec. ¶ 5. Jamal focused on his studies at George Washington University. Jamal Dec. ¶ 7. None of the Awans had any interest in Beltway politics or public life—they were happy with the quiet lives they had created in the suburbs. Tina Dec. ¶ 5. Jamal Dec. ¶ 8; Rao Dec. ¶ 4.

### 2. In a flurry of articles in 2017, Luke Rosiak and The Daily Caller thrust the Awans into the spotlight and falsely accuse them of "hacking" the House and imperiling national security.

On February 4, 2017, the Awans' anonymity came to an end. On that day, Luke Rosiak published an "exclusive" article in The Daily Caller that publicly identified Imran, Abid, Jamal, and Hina as "rogue IT staff" who had "compromised" the House's computer networks and stolen

computer equipment.[2] Rao was first named by Rosiak in an article a few weeks later, again describing the Awans as "[r]ogue congressional staffers."[3] In a series of articles that followed, Rosiak transformed an internal investigation concerning House administrative rules into a criminal conspiracy and national-security scandal perpetrated by Pakistani-born Muslims.

Rosiak and "*The Daily Caller*, with almost two dozen articles on the family, . . led the pack in reporting the story, packaging new details that ha[d] dribbled out of the investigation into a growing web of material."[4] These articles were replete with further false attacks on the Awans, which often linked them to wide-ranging and unfounded conspiracy theories. Am. Compl. ¶¶ 20-22. For example, Rosiak alleged "a potential coverup of an espionage ring that plundered national secrets and might have been responsible for the campaign hacking of the Democratic National Committee."[5] This had no basis in truth. The Daily Caller's false claims even garnered the attention of President Trump, who amplified the attacks through his Twitter account, as well as numerous Internet conspiracy theorists, trolls, and other bad actors. Am. Compl. ¶¶ 23-25.

In the end, the House investigators found no evidence that the Awans had risked national security. What the Inspector General found, at most, were minor violations of House IT protocols that had seldom, if ever, been followed—for example, "storing personal information" like homework and family photos on a congressional server, or breaking up purchases for iPads and iPhones into multiple charges below $500 at the express direction of members of Congress. Jamal Dec. ¶ 6; Tina Dec. ¶ 4; Rogin Dec. ¶ 6. The Inspector General's inquiry also investigated

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[2] Luke Rosiak, "EXCLUSIVE: House Intelligence, Foreign Affairs Committee Members Compromised By Rogue IT Staff," *The Daily Caller* (Feb. 4, 2017), https://perma.cc/M6FV-XD52. (Sawhney Dec., Ex. C.)

[3] Luke Rosiak, "EXCLUSIVE: House Dem IT Guys In Security Probe Secretly Took $100K In Iraqi Money," *The Daily Caller* (Feb. 20, 2017), https://perma.cc/36QH-B2A2. (Sawhney Dec., Ex. D.)

[4] Nicholas Fandos, "Trump Fuels Intrigue Surrounding a Former I.T. Worker's Arrest," *The New York Times* (July 28, 2017), https://perma.cc/9SXZ-LSFW. (Sawhney Dec., Ex. E.)

[5] Shawn Boburg, "Federal probe into House technology worker," *The Washington Post* (Sept. 16, 2017), https://wapo.st/30aUPUk. (Sawhney Dec., Ex. F.)

allegations that the Awans—each of whom worked part-time for multiple offices—had sometimes worked as a team rather than individually, meaning that one of them would provide IT services to an office when the staffer who was technically employed by that office was not available. *Id.* They had indeed been doing just that, out in the open, for years—again with the express knowledge of and permission of their employers. Rogin Dec. ¶ 6; Lamel Dec. ¶ 7.

"[T]he real impetus for investigating the Awans," explains Representative Gregory Meeks, "was an inappropriate one: the fact they are Pakistani-American Muslims." Meeks Dec. ¶ 7; *see* Richmond Dec. ¶ 10 (explaining that "xenophobia, Islamophobia, and other improper factors drove the investigations of [the Awans] . . . and the attacks on them in the media"). Josh Rogin, currently Chief of Staff for House Ethics Committee Chairman Ted Deutch, and "one of the staffers in Congress who is most familiar with the congressional work of Imran Awan and the other plaintiffs," agrees: "I understood this investigation to be both politically motivated and based on bias over their nationality, ethnicity, and religion"—and "driven and sustained by" Rosiak's coverage in The Daily Caller. Rogin Dec. ¶¶ 6-7, 11. As another senior staffer put it, the purpose of the internal investigation seemed to be to "foster anti-Muslim feelings" and "score political points." Lamel Dec. ¶ 8; *see* Willoughby ¶ 10.

In early 2017, the Awans were nonetheless barred from accessing the network because of purported violations of House IT rules—even though "these rules"—which "bore no relation to any federal criminal or civil statute or any criminal behavior"—had "not previously been enforced against other House employees." Rogin Dec. ¶ 8; *see also* Richmond Dec. ¶ 8. As a result, nearly all the House offices that had employed the Awans without incident for years, and who continued to value their service, eventually concluded that they had no choice but to terminate them. *See id.* ¶ 9; Fudge Dec. ¶ 6; Meeks Dec. ¶ 9; Richmond Dec. ¶ 6. Representative Debbie Wasserman Schultz—citing "racial and ethnic profiling concerns," and her "great concern" that Imran's "due process

rights were being violated"—briefly kept Imran on in an advisory role. But she, too, ultimately concluded that she had no choice but to terminate him because he had been rendered unable to do his job. Am. Compl. ¶ 26. As Representative Meeks observes: "If they were not Muslims from Pakistan, I do not believe that they would have been investigated or wrongly barred from the House network." Meeks Dec. ¶ 13.

### 3. After a thorough investigation, the U.S. Department of Justice clears the Awans of any wrongdoing related to their work at the House.

Under political pressure from the highest levels of the Trump Administration, the FBI and the Department of Justice thoroughly and extensively investigated the allegations against the Awans, interviewing approximately 40 people and conducting a searching forensic examination of all potentially relevant computer systems and devices. The investigation definitively concluded that the Awans had not violated laws nor committed any crimes in the course of their work at the House. *See* Am. Compl. ¶ 27; *see* Sawhney Dec., Ex. A (plea agreement).

The investigators were able to identify only a single violation of law—one totally unrelated to the Awans' work in Congress. While applying for a home equity loan, Imran had made a misstatement on a loan application to a credit union, checking a box indicating that a property was his primary residence when it was actually a rental property. Although Imran quickly repaid the loan in full, and the credit union lost nothing, he was charged with bank fraud and pleaded guilty. *Id.* ¶ 28; Imran Dec. ¶ 7.

The DOJ included what U.S. District Judge Tanya Chutkan called an "extraordinary paragraph" in Imran's plea agreement, addressing the "public allegations" in the media and affirmatively exonerating Imran of any wrongdoing related to his employment in the House. Am. Compl. ¶ 29; *see* Sawhney Dec., Ex. B at 18-19. As part of the plea agreement, the "Government agree[d] that the public allegations that [Imran] stole U.S. House of Representatives ('House')

equipment and engaged in unauthorized or illegal conduct involving House computer systems do not form the basis of any conduct relevant to the determination of the sentence in this case." Sawhney Dec., Ex. A at 5. And the DOJ explicitly announced that:

> The Government has uncovered no evidence that [Imran] violated federal law with respect to the House computer systems. Particularly, the Government has found no evidence that [Imran] illegally removed House data from the House network or from House Members' offices, stole the House Democratic Caucus Server, stole or destroyed House information technology equipment, or improperly accessed or transferred government information, including classified or sensitive information.

*Id.* Federal prosecutors sought no jail time for Imran's guilty plea.

At a hearing on August 21, 2018, Judge Chutkan observed that Imran had "remained strong for his family despite the unbelievable onslaught of scurrilous media attention to which he and his family have been subjected." Sawhney Dec., Ex. B at 20. She specifically referenced the "numerous, baseless accusations, conspiracy theories linking Mr. Awan to the most nefarious kind of conduct, all of which have been accusations lobbed at him from the highest branches of government, unfounded, while this case was pending and all of which have been investigated and found to be untrue by the United States Department of Justice and the FBI." *Id.* at 22. She observed that "the negative publicity" has "affected his ability to keep a job." *Id.* at 20. After remarking that "Mr. Awan and his family have suffered sufficiently," Judge Chutkan sentenced Imran to time served and three months of supervised release. *Id.* at 22-23. Imran offered to pay a fine of $4,004 to repay the government for the cost of supervising him, but Judge Chutkan declined to order it, saying she would not charge him for something that occurred "by virtue of the fact that the government decided to investigate you." *Id.*; *see also* Am. Compl. ¶¶ 30-31.

Media outlets including The Washington Post, CNN, NBC, and Newsweek reported that federal officials had "debunked" The Daily Caller's conspiracy theories. Sawhney Dec., Exs. G, H, I, J; *see also* Am. Compl. ¶ 32. Members of Congress likewise absolved Imran and his colleagues

of any illicit or criminal activity during their time at the House, expressing indignation that Imran's "good name was dragged through the muck and mire of right-wing conspiracy theorists." Sawhney Dec., Ex. L. And in the attached declarations, they (and their senior staff) continue to do so. *See, e.g.*, Fudge Dec. ¶¶ 8-10; Meeks Dec. ¶¶ 5-8, 12-13; Richmond Dec. ¶¶ 8-10; Dominguez Dec. ¶¶ 5-7; Johnson Dec. ¶ 4; Willoughby Dec. ¶¶ 10-11.

**4. Despite the Awans' exoneration, Salem and Rosiak publish a book asserting numerous false and defamatory statements about them, and The Daily Caller and Rosiak continue to defame the Awans in the national media.**

On January 29, 2019—six months after the Department of Justice and Judge Chutkan exonerated Imran of any wrongdoing related to his work in the House—Rosiak and Salem published *Obstruction of Justice: How the Deep State Risked National Security to Protect the Democrats*. A photo of Imran appears on the book's cover. Am. Compl. ¶ 34.

The gist of the 311-page book is that the Awans committed numerous criminal acts while working at the House—despite federal prosecutors' months-long investigation concluding the opposite. Am. Compl. ¶¶ 35-37. Without regard to the evidence, the book suggests that the Awans' exoneration was part of a big cover-up. Rosiak claims, for example, that federal prosecutors "couldn't make the case go away because" there was "no doubt that crimes had occurred on . . . Capitol Hill" (p. 204). No facts could get in the way of Rosiak's conclusions that the Awans had committed crimes. When investigators told Rosiak that a House server they thought was missing had never been missing at all, he called it "a little too convenient" (p. 238).[6]

The book is riddled with provably false and defamatory attacks against the Awans. Am. Compl. ¶¶ 35-37. These include claims that the Awans conspired to hack congressional servers, spied for foreign countries, and took advantage of their status as House employees to commit

[6] Page citations to *Obstruction of Justice* refer to the manuscript attached as Exhibit 1 to Salem's motion.

extortion, theft, and bribery. *Id.* The defamatory statements (*see* Am. Compl. ¶ 36) include:

- Imran "hacked the House" and "was using his position to make 'unauthorized access' to House data" (pp. 3, 44);
- "The House had secretly caught the Awans hacking congressional servers" (p. 171);
- Imran was "caught . . . stealing the identity of an intelligence specialist, and sending electronic equipment to foreign officials" (p. xix);
- Imran "was a 'mole' in Congress" (pp. 6-7);
- Abid was "stealing cell phones" and "sending iPads and iPhones to government officials in Pakistan" (pp. 13, 104);
- The Awans were "versatile fraudsters," "stealing a couple hundred thousand in laptops" (pp. 25, 58);
- "The brothers, it seemed to me, were covering up a likely case of hacking and extortion on Capitol Hill with more hacking and extortion" (p. 213);
- The Awans committed "systematic fraud in the House of Representatives, massive violations of cybersecurity, [and] disappearing computer equipment" (p. 233);
- The Awans were "committing fraud with the way that they were employed" (p. 259);
- "The Computer Fraud and Abuse Act statute plainly stated that 'unauthorized access' to government computers was a felony, and the server logs proved that had occurred. How could they explain their failure to file these criminal charges?" (p. 261).

On his national book tour, Rosiak continued to spread lies about the Awans, including on platforms hosted by The Daily Caller and Fox News. *See, e.g.*, Am. Compl. ¶¶ 39-47, 51. In those appearances, he makes claims that are even more inflammatory and spurious than those in the book. For example, on January 28, 2019, Rosiak went on The Sean Hannity Show—the second-most popular radio show in the country, with an estimated 15 million listeners—to promote his book coming out the next day.[7] On the show, Rosiak called the Awans "sociopathic extortionists"

[7] "Obstruction of Justice," *The Sean Hannity Show* (Jan. 28, 2019), https://ihr.fm/3knr5M0.

who were "cooking the books in Congress to steal computers and send them over to Pakistan." He described Imran as a "Pakistani fella" with access to "all the files in Congress" who was taking "information" "that he should not have been accessing at the House, funneling it off the network, uh, he was also taking computer supplies, sending them over to Pakistan, huge sums of computers just disappearing." On Fox News that same evening, Hannity hosted Rosiak on his top-rated cable news show, reaching millions more viewers. Am. Compl. ¶¶ 40-41.

Just two days after *Obstruction of Justice*'s publication, Rosiak appeared on Fox Business Network's highly rated show "Lou Dobbs Tonight" to promote his book, where he made a number of false and defamatory statements about the Awans.[8] He claimed they "were never even charged with the crimes despite the massive amount of evidence laid out in my book"; that "[t]hese guys are out free, probably running around in Pakistan with the millions of dollars that they funneled from Congress over to Pakistan"; and that Imran was "this Pakistani guy on the House network who is . . . sending government devices over to Pakistan." Am. Compl. ¶ 42. Days later, The Daily Caller published a podcast and YouTube video featuring an interview of Rosiak.[9] On that show, Rosiak repeated his assertions that the Awans "hacked Congress," were "funneling data outside of the House network," and had "committed a huge cyber breach." Am. Compl. ¶ 43.

Rosiak's stream of lies did not let up after these initial efforts to publicize his book. Throughout 2019, he broadcasted his defamatory campaign against the Awans on various media programs. For example, in just one interview in July 2019,[10] Rosiak falsely claimed that: "Imran Awan is basically an attempted murderer, an extortionist, a blackmail artist, [and] a con man";

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[8] "Daily Caller's Luke Rosiak slams Democrats for 'covering up' Imran Awan scandal," *Fox Business Network* (Jan. 31, 2019), https://bit.ly/2Py9QJI.

[9] *The Daily Daily Caller Podcast* (Feb. 1, 2019), https://perma.cc/KBT6-H63F.

[10] Jan Jekielek, "What the Jeffrey Epstein, Imran Awan, and Jackson Cosko Scandals Might Have in Common: Luke Rosiak," *The Epoch Times* (July 17, 2019), https://perma.cc/7N3C-2H4J. (Sawhney Dec., Ex. K.)

"This was a story of actual hacking[,] blackmail, collusion with foreign governments, threats, evidence tampering"; "Pakistanis were hacking the House of Representatives and they let them keep doing it"; "We have this guy who we know is stealing all this data from Congress"; and "[The Awans] stole the server, they physically took the server and walked it out of Capitol Hill. That is, kind of, your first example of evidence tampering." Am. Compl. ¶ 44.

As the year progressed, Rosiak continued to tie the Awans to increasingly wild and unfounded conspiracy theories. In a December 2019 appearance on Fox News, for instance, Rosiak not only repeated his prior defamatory and false statements but also claimed that the FBI, the DOJ, and Congress conspired to cover up the Awans' wrongdoing.[11] Among these claims, Rosiak said: "I mean, this is really foreign meddling, hacking, you know, collusion, all the things we were hearing about from Fusion GPS about Russia, kind of all these things were playing out—heavily documented, when you look into it—on Capitol Hill with Imran Awan. . . . Some really powerful forces were going to great lengths to cover this thing up." Am. Compl. ¶ 45.

**5. The defendants' ongoing campaign of malicious, defamatory attacks causes the Awans to suffer severe economic, reputational, and emotional harms.**

The defendants' publication of *Obstruction of Justice* and their ongoing defamatory attacks have caused the Awans to suffer severe harm. *See id.* ¶¶ 48-50. As a result of the defendants' deliberate and malicious campaign, the Awans have "suffered a great deal financially," and now face reduced job and business opportunities. Imran Dec. ¶ 11; *see* Abid Dec. ¶¶ 8-9 (testifying that potential business partner wouldn't sign lease after reading the defendants' false claims); Jamal Dec. ¶ 11 (describing how he was "extremely anxious about losing a new job I had finally gotten and I was concerned about finding future employment"). The defendants' attacks have destroyed

[11] "Judicial Watch suing for evidence in case of congressional IT staffer Imran Awan," *Fox News* (Dec. 13, 2019), *available at* https://bit.ly/30BCHTK.

the Awans' reputations. They now experience social isolation and stigmatization—they feel like their lives have been "ruined forever." Rao Dec. ¶ 8; Abid Dec. ¶ 12 ("my good name has been driven into the ground by Rosiak's book"). The Awans have had to try to explain the baseless attacks to relatives, friends, and acquaintances, many of whom have distanced or even "left" the family. Tina Dec. ¶ 10; Jamal Dec. ¶¶ 12-13; Abid Dec. ¶ 8; Imran Dec. ¶¶ 11-12. Imran was in Pakistan visiting his father's grave when Rosiak's book was published, and the shame he felt afterward caused him to stay in Pakistan—he "didn't want to live here in the U.S. anymore because he [was] so embarrassed to face [his] daughters." Tina Dec. ¶ 9; Imran Dec. ¶ 10.

The attacks have also made the Awans "fear for [their] safety." Jamal Dec. ¶ 12. Following the book's publication, the plaintiffs faced repeated death threats. Am. Compl. ¶ 50. They feel like they are "survivor[s] of a traumatic event" "suffering a slow death," even driven to consider suicide and other forms of self-harm. Imran Dec. ¶¶ 10, 13. Some of the plaintiffs began to suffer from paranoia, panic attacks, insomnia, and problems in their relationships. Jamal Dec. ¶¶ 11-13; Tina Dec. ¶¶ 9-11; Rao Dec. ¶ 8; Abid Dec. ¶¶ 10-11; Imran Dec. ¶¶10-13. On top of all of this, they are left constantly afraid—that they and their kids aren't safe; that they are "being tailed when . . . driving," that someone will read Rosiak's book and "tak[e] things into their own hands," and that they will never be able to "get past these false conspiracies" and escape the cloud that the defendants have cast over their lives. Rao Dec. ¶ 8; Imran Dec. ¶ 10; Tina Dec. ¶ 7; Jamal Dec. ¶ 12.

## ARGUMENT

This case presents two kinds of motions to dismiss. In reviewing the defendants' motions to dismiss under D.C. Rule 12(b)(6), this Court must "accept all factual allegations in the complaint as true, and construe all facts and inferences in favor of the plaintiff." *Peterson v. Wash. Teachers Union*, 192 A.3d 572, 575 (D.C. 2018). "To survive a motion to dismiss," the plaintiffs' complaint merely must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible

on its face." *Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 99 (D.C. 2018). The plaintiffs easily shoulder that burden here with respect to all three claims.

Salem and Rosiak have also filed special motions to dismiss under the D.C. Anti-SLAPP statute, D.C. Code § 16-5501 *et seq.* That law requires that a defendant first make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). If the defendants succeed in doing so, the plaintiffs must then "demonstrate[] that the[ir] claim[s] [are] likely to succeed on the merits." *Id.* But in evaluating this showing, the court does not assume the jury's role as factfinder. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016) *as amended* (Dec. 13, 2018). The court must deny a special motion to dismiss if "a jury properly instructed on the applicable legal and constitutional standards *could reasonably find* that the claim is supported in light of evidence that has been produced or proffered in connection with the motion." *Id.* at 1232 (emphasis added).

The D.C. Court of Appeals has made clear that the "immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards." *Mann*, 150 A.3d at 1239. "[I]t is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act." *Id.* Like other anti-SLAPP statutes, D.C.'s was "not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute." *See id.* But that is exactly what the defendants try to do here. This Court should not let them. It should deny the motions to dismiss and allow the case to proceed to discovery.

## I. The Awans are likely to succeed on the merits of their defamation claim.

In the District of Columbia, a publication is defamatory where it is false, capable of defamatory meaning, made with the requisite standard of fault, and causes harm. *See Mann*, 150 A.3d at 1240. The Awans have done far more than merely plead facts to support each of these

elements. They have presented evidence that *proves* the defendants' statements are false, defamatory, and harmful—including conclusive determinations by the FBI, the DOJ, and a federal judge that the Awans did not commit any crimes relating to the House or national security. And though the plaintiffs are private individuals who need not make any further showing to succeed on the merits, they also proffer evidence in this opposition demonstrating that the defamatory statements were made with actual malice. This Court's role in evaluating an anti-SLAPP special motion to dismiss is to "test the legal sufficiency of the evidence to support the claims" to determine whether the plaintiffs are likely to succeed on the merits. *Id.* at 1240. As explained below, the plaintiffs more than satisfy that burden at this early stage.

### A. The defendants' attacks are defamatory, harmful, and false.

The Awans have established the elements necessary to show defamation under D.C. law. Indeed, the defendants do not even contest most of these elements.

**1.** Initially, the defendants' attacks on the Awans—claims that they committed serious crimes and threatened national security while employed at the House—are plainly defamatory. To accuse a person of a crime or "conduct that would render him liable to punishment" is "libel per se." *Johnson v. Johnson Publ'g Co.*, 271 A.2d 696, 697-98 (D.C. 1970) (an article alleging that a man assaulted his son was defamatory as a matter of law). So are statements that "tend[] to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990).

The overwhelming focus of Rosiak's book is that the Awans were guilty of "conduct that would render [them] liable to punishment" based on the repeated claim that they had committed crimes related to their work at the House. *Johnson*, 271 A.2d at 697. Rosiak writes that Imran was a "'mole' in Congress" "caught . . . stealing the identity of an intelligence specialist, and sending electronic equipment to foreign officials," and that his brother Abid was "stealing cell phones" and

"sending iPads and iPhones to government officials in Pakistan." He calls the Awans "versatile fraudsters," who were successfully "covering up a likely case of hacking and extortion on Capitol Hill with more hacking and extortion." *See supra* at 12. On his media tour, he repeated these claims: the Awans were "sociopathic extortionists" who were "out free" despite committing crimes like "actual hacking[,] blackmail, collusion with foreign governments, threats, [and] evidence tampering"—crimes that were, he said, "documented left and right[.]" *See supra* at 14. Because Rosiak's false statements accused the Awans of serious crimes related to their work, they are defamatory. *See Moss*, 580 A.2d at 1023; *Johnson*, 271 A.2d at 697.

Rosiak argues (at 13) that his statements were mere "rhetorical hyperbole intended to express strong disagreement with his intellectual opponents." But rhetorical hyperbole applies only to statements that "cannot reasonably be interpreted as stating actual facts about an individual." *Mann*, 150 A.3d at 1241. For example, in *Kreuzer v. George Washington University*, the GWU president commented that the damages sought in a local resident's lawsuit against the university were "too much," adding "I think he's inhaling." 896 A.2d 238, 248 (D.C. 2006). Those statements were rhetorical hyperbole because they intended to suggest that the plaintiff was seeking too much money, not that he was literally smoking marijuana. *Id.* That isn't the case here. Rosiak literally (and repeatedly) accused the Awans of being thieves, traitors, and attempted murderers.[12] An ordinary reader could, and indeed would, reasonably interpret Rosiak's statements as stating actual facts about the Awans. Thus, his "statement[s] [are] actionable" because "viewed in context [they

[12] For example, on a podcast by *The Daily Caller*, Rosiak even said that the Awans "hacked Congress" in an act "equally serious" to a hack on the DNC—a notorious criminal act that resulted in a federal grand jury indictment charging eleven defendants with, among other things, "gaining unauthorized access into the computers of U.S. persons and entities involved in the 2016 U.S. presidential election, stealing documents from those computers, and staging releases of the stolen documents to interfere with the 2016 U.S. presidential election." *See* Compl. ¶ 43; The Daily Daily Caller Podcast (Feb. 1, 2019), *available at* https://perma.cc/KBT6-H63F.

were] capable of bearing a defamatory meaning and . . . contained or implied provably false statements of fact." *Mann*, 150 A.3d at 1242.

**2.** Next, no one disputes that the Awans suffered harm from the defendants' defamation. Rosiak's book not only falsely accused the Awans of committing serious crimes; it also alleged that even the federal government's exoneration of the plaintiffs was a hoax. These baseless accusations were not only published to the book's readers, but broadcast to tens of millions of people over national television and podcasts. As a result of the defendants' defamation, the Awans have suffered severe harms to their "good name and reputation," lost job and business opportunities, and endured "mental anguish, distress and humiliation." *Moss*, 580 A.2d at 1033 n.40; *see, e.g.*, Imran Dec. ¶¶ 10-12; Abid Dec. ¶¶ 8-9; Jamal Dec. ¶¶ 11-13; Rao Dec. ¶ 8; Tina Dec. ¶¶ 9-10; Rogin Dec. ¶ 14; Lamel Dec. ¶ 12; Willoughby Dec. ¶¶ 13-14. And these harms continue to pile up: The defendants' "coordinated attack . . . has unleashed an onslaught of negative media coverage, harassment, and threats trained on the plaintiffs, that because of the nature of the Internet and social media today, will probably continue for a very long time." Doppelt Dec. ¶ 7; *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) ("[T]he truth rarely catches up with a lie.").

**3.** Among all the defendants, only Rosiak argues (somewhat circularly) that the statements aren't false because he believes them to be true. Rosiak MTD at 5-7. But that doesn't matter. *See Mann,* 150 A.3d at 1255 (noting that an "honest belief" in a defamatory statement's truth doesn't overcome proffered evidence at the anti-SLAPP stage). The plaintiffs need only demonstrate that they are likely to show, based on the evidence, that the defendants' defamatory statements were false. Here, the Awans have proffered that evidence in spades.

For starters, the plaintiffs never committed any criminal or illicit acts in connection with their employment at the House, as Rosiak said they did—and the plaintiffs can prove it. Claims are capable of being proven false when they are "objectively verifiable," and the D.C. Court of

Appeals has held that the results of an independent investigation are sufficient to proffer evidence of falsity in the anti-SLAPP context. *Mann*, 150 A.3d at 1245-46. The defendants' false claims that the Awans used their House employment to (among other things) steal equipment and data, improperly access or transfer any government information (let alone sensitive information), and commit federal crimes, *see* Am. Compl. ¶¶ 36-37, 40-45, are objectively verifiable, and they have been debunked. The FBI and DOJ thoroughly investigated the claims that Imran Awan and his coworkers "engaged in unauthorized or illegal conduct involving House computer systems." Sawhney Dec., Ex. A at 5. Specifically, the FBI and DOJ "interview[ed] approximately 40 witnesses; t[ook] custody of the House Democratic Caucus server, along with other computers, hard drives, and electronic devices; examin[ed] those devices, including inspecting their physical condition and analyzing log-in and usage data; review[ed] electronic communications between pertinent House employees; consult[ed] with the House Office of General Counsel and House information technology personnel to access and/or collect evidence; and question[ed] [Imran Awan] during numerous voluntary interviews." *Id.*

After all that, the federal government "uncovered *no evidence* that [Imran Awan] violated federal law with respect to the House computer systems"—including no evidence that Awan "illegally removed House data from the House network or from House Members' offices, stole the House Democratic Caucus Server, stole or destroyed House information technology equipment, or improperly accessed or transferred government information, including classified or sensitive information." *Id.* (emphasis added) And it took the extraordinary step of saying so publicly. As the former head of the DOJ National Security Division explains in her declaration, "it is unusual for federal prosecutors to make public statements detailing their decisions not to prosecute certain offenses, their reasons for declining to do so, the veracity of public allegations against a defendant in the media, or the extent of the Department's investigation leading to a non-prosecution decision.

This statement does all of those things." McCord Dec. ¶ 4-5. And it does so for a self-evident purpose: "to debunk unfounded conspiracy theories." *Id.*; *see* Meeks Dec. ¶ 12 ("In my experience as a former prosecutor, it is exceedingly rare and extraordinary for prosecutors to issue this type of a statement affirmatively exonerating a person in order to debunk false claims aired in the media.").

When Judge Chutkan sentenced Imran Awan for a minor misstatement on a home-loan application that the government only learned about only through its exhaustive investigation into his and his coworkers' work for Congress, she referenced the "unbelievable onslaught of scurrilous media attention to which he and his family have been subjected," including "numerous, baseless accusations, [and] conspiracy theories linking Mr. Awan to the most nefarious kind of conduct." Sawhney Dec., Ex. B at 20, 22. All of these claims, she said, had "been investigated and found to be untrue." *Id.* at 22. None of the Awans were ever charged with any crime related to their work at the House.

It is hard to imagine more clear-cut evidence of falsity. Yet months after the federal government announced its conclusion that Imran Awan and his coworkers didn't commit any crimes or participate in other illicit conduct related to their work in the House, Rosiak published a book saying exactly that. The gist of Rosiak's book and his subsequent media tour is overwhelmingly that the plaintiffs committed major crimes in the House that were covered up for political ends, and that their exoneration itself—by the Justice Department under the Trump Administration—was a hoax. By any measure, these statements are and were provably false.

**4.** Finally, Rosiak and The Daily Caller mistakenly assert that the Awans have brought defamation claims based on statements outside the statute of limitations. *See* Rosiak MTD at 4; Daily Caller MTD at 6-7. To be sure, the complaint recounts the false attacks and conspiracy theories that Rosiak spread about the Awans in articles that The Daily Caller published in 2017 and 2018. *See* Am. Compl. ¶¶ 20-23. But that is not because the Awans' defamation claims arise from

these particular statements. Rather, these statements are included for two purposes. *First*, they offer necessary context about the events that led to the publication and making of defamatory statements that are indisputably within the statute of limitations. And *second*, these statements are relevant to show that the defendants knew about (or recklessly disregarded) the falsity of their attacks, and that they have long held a defamatory and malicious motive against the Awans.[13]

### B. The Awans are private individuals, and the defendants' defamatory attacks cannot transform them into public figures.

The defendants' primary argument in their motions is that the Awans are public figures, and thus that they must meet the First Amendment's higher actual-malice standard under *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See* Salem MTD at 14-23; Rosiak MTD at 7-8.

But that argument is foreclosed by the U.S. Supreme Court's decision in *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979)—a highly analogous precedent that none of the defendants mention once in their five motions to dismiss.

**1.** In *Wolston*, the Supreme Court held that a private individual who is "dragged unwillingly into [a public] controversy" is not "automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 166-67. The plaintiff, Ilya Wolston, was a former government employee (a former interpreter for the State Department, among other things) who sued the author and publisher of a book accusing him of being a spy for the KGB, well after he and his relatives—all of Russian origin—had been investigated for espionage by the U.S. government. *See id.* at 159-60. Although Wolston was never indicted for

[13] These statements are also relevant to the infliction-of-emotional-distress claim, for which "the proper inquiry is not merely whether each individual act might be outrageous" but whether "those actions—under the totality of the circumstances—amounted to a deliberate and malicious campaign." *Rich v. Fox News Network, LLC*, 939 F.3d 112, 123 (2d Cir. 2019); *see King v. Kidd*, 640 A.2d 656, 674 (D.C. 1993) (IIED claims require "examin[ing] [the defendant's] actions as a whole and in context and cannot ignore the connections between his conduct and his awareness of" other allegations or actions).

espionage, he was the subject of a "flurry of publicity" around the investigation, and he eventually pleaded guilty to a minor offense for failing to appear at a grand-jury hearing. *Id.* at 162-63. In rejecting the argument that he was a limited-purpose public figure, the Court explained that he never sought to put himself at "the forefront of the public controversy"—instead, "[t]he Government pursued him in its investigation." *Id.* at 166. Although Wolston's "failure to appear before the grand jury and citation for contempt" was "newsworthy," the mere "fact that these events attracted media attention" did not make him a public figure. *Id.* at 167. And the fact that Wolston did not discuss the matter in the press and "limited his involvement to that necessary to defend himself" was further support for that conclusion. *Id.*

*Wolston* controls this case. Under that precedent, there is "no basis whatsoever for concluding" that the Awans have "relinquished, to any degree, [their] interest in the protection of [their] own name[s]." 443 U.S. at 168. Indeed, the case for finding the Awans to be private figures is even stronger than it was for Ilya Wolston. Unlike Wolston, who was defamed in a book years after different journalists had covered the espionage investigation, the Awans were "dragged unwillingly" into the public eye *precisely because* of the defendants' defamatory campaign. *See Hutchinson*, 443 U.S. at 135 (holding that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

For similar reasons, a Massachusetts federal court recently held that Abdulraham Alharbi, a Saudi student who was investigated—and then exonerated—by federal authorities after the Boston Marathon bombing was a private figure in his defamation case against commentator Glenn Beck, who identified him as an active participant in the bombing. *See Alharbi v. Beck*, 62 F. Supp. 3d 202, 204 (D. Mass. 2014). Alharbi "was questioned by authorities, his home was searched, and his name was cleared." *Id.* at 208. Because any "media attention Alharbi received was involuntary and, indeed, unwanted," the court held that "he d[id] not qualify for limited public figure status." *Id.* at

209. And, in any event, any public-figure status "evaporated once he was exonerated by the authorities." *Id.* at 212 (citing *Wolston*).

So too here. The Awans have never been public officials or people who "assumed an influential role in ordering society." *Gertz*, 418 U.S. at 345; *see also Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014); *Moss*, 580 A.2d at 1029 ("public official" cannot "be thought to include all public employees."). They were not oligarchs with massive amounts of money and power, *see, e.g.*, *Fridman v. Orbis Business Intelligence Ltd.*, __ A.3d __, 2020 WL 3290907 (D.C. June 18, 2020), or people with similar access and influence, *see, e.g.*, *Jankovic v. International Crisis Group*, 822 F.3d 576, 582 (D.C. Cir. 2016). The Awans were (and still are) private individuals—the kind of people who are "more vulnerable to injury" from defamation. *Gertz*, 418 U.S. at 344. "[T]he state interest in protecting them is correspondingly greater," *id.*, so the First Amendment does not require that the Awans show actual malice to establish the defendants' liability for defamation. Instead, they need only show that the defendants' "fault in publishing the statement amounted to at least negligence"—a minimal standard they have easily satisfied here. *Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009).

**2.** Nevertheless, Salem and Rosiak contend that the Awans are limited-purpose public figures because "their employment by dozens of House members placed them at the center of a public controversy—the 'House IT scandal.'" Salem MTD at 14; *see* Rosiak MTD at 8. Again, *Wolston* forecloses this argument. In holding that Wolston was a private figure, the Supreme Court reiterated that it had repudiated a "public interest" test, under which an actual-malice standard applies to "matters of public or general concern." *Wolston*, 443 U.S. at 167-68 ("We repudiated this proposition in *Gertz* and *Firestone* . . . and we reject it again today. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.").

**a.** Limited-purpose public figures are those who decide to "assume roles in the forefront of particular public controversies in order to influence the resolution of the issues involved." *Doe No.*

*1*, 91 A.3d at 1041. But "[a] controversy is not a public controversy solely because the public is interested in it." *Jankovic*, 822 F.3d at 585. Instead, courts apply a three-factor, "highly fact-intensive inquiry" to determine whether a person qualifies as a limited-purpose public figure. *Doe No. 1*, 91 A.3d at 1042. And "[t]he court must examine these factors as they existed *before* the defamation was published." *Waldbaum*, 627 F.2d at 1295 n.19 (emphasis added). "Otherwise, the press could convert a private individual into a general public figure simply by publicizing the defamation itself and creating a controversy surrounding it and, perhaps, litigation arising out of it." *Id.* Here, all factors point to the Awans being private figures.

*First*, "the controversy to which the defamation relates" was *not* "the subject of public discussion *prior* to the defamation." *Doe No. 1*, 91 A.3d at 1042. Although Salem contends (at 19) that "[t]he controversy naturally received public and media attention because it exposed flaws in Congressional network security," it cites nothing in support of that contention. That is because no one outside of the House knew the names of the IT staffers involved in the (politically and Islamophobically motivated) House investigation until Rosiak named them in Daily Caller articles. *See supra* at 6-7. It was the defendants' own defamatory attacks, in other words, that brought the so-called "controversy" into the public. And "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135; *see Neely v. Wilson*, 418 S.W.3d 52, 71 (Tex. 2013) ("The allegedly defamatory statement cannot be what brought the plaintiff into the public sphere.").

*Second*, "a reasonable person" would not "have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Doe No. 1*, 91 A.3d at 1042. Despite the defendants' wild claims, the House investigation concerned whether the Awans violated House IT administrative rules—which were normally unenforced and flouted. This mundane investigation is not typically the kind of matter that receives significant public attention; indeed, it

may well have resolved itself in the absence of Rosiak's false reporting. *See Moss*, 580 A.2d at 1031-32 (noting that firing of a university coach was not a public controversy even though "the college community, and members of the community . . . were discussing it" and "local journalists were interested"). And the House IT investigation itself likely never would have happened, let alone made it into the public consciousness, but for "the fact that the employees [under investigation] were born in Pakistan."[14] *See*, *e.g.*, Richmond Dec. ¶ 10; Lamel Dec. ¶¶ 7-8, 12; Rogin Dec. ¶ 6; Willoughby Dec. ¶ 10.

*Third*, and most important, the Awans did not have the ability to "purposely try[] to influence the outcome" nor could they "realistically have been expected, because of [their] position in the controversy, to have an impact on its resolution." *Doe No. 1*, 91 A.3d at 1042. Like Ilya Wolston and Abdulraham Alharbi before them, they were the *subjects* of the investigations—and given that they had done no wrong, the entire politicized, racialized controversy was wholly outside their control. Nor did the Awans seek "substantial publicity for [their] case." *Id.* at 1043. In fact, the only plaintiff who ever commented on the allegations publicly was Imran Awan—just once, on the day of his sentencing—to defend himself and deny the accusations. That correction "does not by itself prove access or public-figure status." *Waldbaum*, 627 F.2d at 1298 n.34. Private figures like Imran do not become public figures by "merely answer[ing] the alleged libel itself; if it did, libellers could 'create their own defense by making the claimant a public figure.'" *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990) (quoting *Hutchinson*, 443 U.S. at 135).

**b.** Against all this, Salem asserts that the Awans are nonetheless limited public figures because they "chose to work in politics, an arena perpetually under the microscope of public attention and media scrutiny." Salem MTD at 16. But the Awans *did not* choose to work *in politics*—

[14] *See* Boburg Sept. 16, 2017 article, *supra* (Sawhney Dec., Ex. F).

they were information-technology professionals, who happened to work for Congress. Tina Dec. ¶ 5; Jamal Dec. ¶ 8; Rao Dec. ¶ 4. That their employers were members of Congress does not, as Salem suggests, turn them into politicians. As the D.C. Court of Appeals has held, government employees do not become public figures merely because they work for the government. *See Moss*, 580 A.2d at 1029. And the Awans' jobs were far less connected to public affairs than that of Ilya Wolston, who had served "an interpreter for the United States Military Government and the State Department in Allied-occupied Berlin." *Wolston*, 445 U.S. at 162 n.4. Nor does the record show that the Awans ever sought public or media attention in any way. It was Rosiak and the other defendants who thrust them into the public limelight. *See Waldbaum*, 627 F.2d at 1297 ("court[s] can look to the plaintiff's past conduct" and "the extent of press coverage" to determine whether she is a public figure).

Remarkably, Salem also contends (at 18-19) that the Awans are public figures because members of Congress—their bosses—publicly defended them *after* they were wrongly investigated and falsely attacked in public. But public statements by third parties over whom the Awans had no control cannot transform the Awans into public figures. Even public statements by the Awans defending *themselves* would not make them public figures for the controversy, since people accused of crimes are permitted to defend themselves. As the Supreme Court explained in *Wolston*, "[t]here appears little reason why" individuals "should substantially forfeit that degree of protection which the law of defamation would [] afford them simply by virtue of [] being drawn into a courtroom" or having to "defend themselves against actions brought by the State or [] others." 445 U.S. at 168-69.

Salem next cites several cases that, in its view, hold that someone can become a limited public figure "based on his or her voluntary association with public officials." Salem MTD at 16. Those cases are entirely inapposite here, because they involved people who had extensive *personal*,

not employment-based, relationships with public officials, and who themselves were in a position of relative power over public discourse. *See, e.g.*, *Clyburn*, 903 F.2d at 33 (noting that plaintiff had "many social contacts with administration officials" and "hob nob[bed]" with such officials on the night of his girlfriend's death); *Hourani v. Psybersolutions LLC*, 164 F. Supp. 3d 128, 143 (D.D.C. 2016) (plaintiff had "a close relationship with Mr. Aliyev [Kazakhstani President's son-in-law] and . . . allow[ed] Mr. Aliyev's mistress to live at his apartment"); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 957, 962 (D.D.C. 1976) (the plaintiff was "the nation's 20th largest defense contractor" who chose to "entertain persons connected with the military" including a "stag party" for "a top Air Force official"). The defendants cite no case where a private individual became a public figure merely by virtue of their employment by a member of Congress or other public official. Such a rule would expand the First Amendment's protection against defamation far beyond what the Supreme Court has held permissible: It would transform an untold number of ordinary federal employees into public figures even though they have no power "to influence the resolution" of any public controversies. *Doe No. 1*, 91 A.3d at 1041.

**c.** Finally, Salem cursorily argues (at 20) that, even if the Awans are not limited-purpose public figures, they are "involuntary public figures." But the Supreme Court has never recognized this dubious category, nor has the D.C. Court of Appeals ever applied it. Although the Supreme Court speculated in passing in *Gertz* that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own," 418 U.S. at 345, the Court shut the door on that possibility just five years later, when it held in *Wolston* that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U.S. at 167. *Wolston* made clear that there are only "*two ways* in which a person may become a public figure for [the] purposes of the First Amendment"—(1) as general-purpose figures of great prominence and (2) as limited-purpose figures

who have voluntarily "thrust themselves to the forefront of particular public controversies." *Id.* at 164-66 (emphasis added). Neither category applies here. *Id.*

Salem cites only a single D.C. Circuit case for the existence of a third category, *Dameron v. Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985)—a case that numerous commentators and courts, including the D.C. Court of Appeals, have since questioned for its apparent incompatibility with Supreme Court precedent. *See, e.g.*, *Moss*, 580 A.2d at 1031 n.35 (cautioning that "*Dameron* may not be read broadly"); *Wells v. Liddy*, 186 F.3d 505, 538 (4th Cir. 1999) (same).

Regardless, even if *Gertz*'s hypothetical category survived *Wolston*, *Gertz* itself made clear that such cases would be "exceedingly rare." 418 U.S. at 345. "So rarely have courts determined that an individual was an involuntary public figure that commentators have questioned the continuing existence of th[e] category." *Wells*, 186 F.3d at 538 (citing Rodney A. Smolla, *Law of Defamation* 2.14 (1998)). Assuming the category exists, this is not one of those rare cases that falls within it. The Supreme Court has already held, under similar circumstances, that a government employee, pursued by the government for a crime (espionage) that he didn't commit and convicted of a lesser one, is not a public figure. *See Wolston*, 443 U.S. at 167.[15]

Finally, even if the Awans somehow became public figures because of the controversy over House IT violations and Imran's subsequent criminal prosecution, that status would have long expired by January 2019, when Rosiak published his book and kicked off his media tour—after the DOJ had debunked Rosiak's conspiracy. *See Wolston*, 443 U.S. at 166 n.7 (suggesting that "an individual who was once a public figure may lose that status"); *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982) (holding that courts must consider if "the plaintiff retained public figure

[15] At a minimum, to ensure consistency with Supreme Court precedent, a defendant must show that the plaintiff "assumed the risk of publicity." *Wells*, 186 F.3d at 540. But the Awans have not "taken some action, or failed to act when action was required" in a way that triggered that risk. *Id.* And, unlike the plaintiff in *Dameron*—who was by bad luck the sole Dulles Airport air traffic controller on duty on the day of an infamous plane crash—the Awans were pulled into a so-called public controversy by the defendants' own defamation. *See Hutchinson*, 443 U.S. at 135.

status at the time of the alleged defamation"). Thus, any public-figure status the Awans purportedly obtained "evaporated once [they] w[ere] exonerated by the authorities." *Alharbi*, 62 F. Supp. 3d at 212 ("Alharbi lost that status when his name was cleared.").

### C. Even assuming that the Awans are limited-purpose public figures, they have shown that the defendants acted with actual malice.

Because the Awans are private figures, they do not need to show actual malice. All they must show is negligence—a standard they easily meet here. *See Solers*, 977 A.2d at 948; *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005). The Awans' evidence shows that the defendants were far more than negligent in publishing the defamatory and false statements. At the very least, a jury "could reasonably find" in favor of their defamation claim. *Mann*, 150 A.3d at 1232; *see Kalantar v. Lufthansa German Airlines*, 402 F. Supp. 2d 130, 148 (D.D.C. 2005) (whether a defendant "acted negligently in failing to ascertain the truth" is a "question[] properly presented to the jury").

But even if this Court were to determine that the Awans are limited-purpose public figures, the Awans will be able to prove at trial that the defamatory statements were made with actual malice. A plaintiff can prove reckless disregard "inferentially," "by proof that the defendant had a high degree of awareness of the statement's probable falsity." *Mann,* 150 A.3d at 1252. And here, there is clear and convincing evidence that the statements were published with at least "reckless disregard for whether or not the statement[s] w[ere] false"—if not "subjective knowledge of the statement[s'] falsity." *Id.* at 1251-52.

At the anti-SLAPP stage, this Court need only evaluate whether the defendants had "obvious reasons to doubt the veracity" of Rosiak's claims based on "the source . . . the thoroughness of the investigations, and the conclusions reached." *Mann,* 150 A.3d at 1253. Here, as in *Mann,* an exhaustive FBI and DOJ investigation "considered[] and expressly rejected" claims that the plaintiffs engaged in criminal conduct related to their work in the House. *See id.* at 1254.

That these investigations resulted in an extraordinary statement affirmatively exonerating the plaintiffs—adopted by a federal judge in a public hearing at which Rosiak himself was present—is certainly "obvious" reason to doubt such claims. Nevertheless, Rosiak published a book accusing the Awans of committing serious crimes *after* this overwhelming, contrary public evidence had debunked those claims. The defendants' publication of the defamatory statements in the face of the Awans' public exoneration is more than enough to send the issue of actual malice to the jury. *See Nader v. De Toledano*, 408 A.2d 31, 53-54 (D.C. Cir. 1979); *Mann*, 150 A.3d at 1253; *see also Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257, 282 (D.D.C. 2017) ("[F]acts that cast doubt on the source's reliability may be probative of actual malice, assuming such facts are known to the defendant at the time of publication.").

Even standing alone, "allegations of such serious criminal wrongdoing, such as espionage or computer hacking, which are essentially libelous per se if untrue, would require the highest level of sourcing, fact-checking, and libel review by legal counsel before publication." Srivastava Dec. ¶ 6. But "[t]he highly unusual public exoneration by the U.S. Department of Justice and the FBI that occurred before [publication] . . . would have caused any responsible editor or publisher to doubt the veracity of the prior reporting, making it necessary to secure substantial corroboration before repeating these claims." *Id.* ¶ 7; *see McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1507 (D.C. Cir. 1996) (holding that "a publisher has no duty to investigate *unless* he has 'obvious reasons' to doubt the veracity of his source" (emphasis added)); *Nader*, 408 A.2d at 37, 53 (finding jury could reasonably infer actual malice as to defendant's claim that the plaintiff had "falsified and distorted evidence" in congressional testimony because a Senate report, issued after a "massive investigation," had "explicit[ly]" and "unambiguous[ly]" concluded that the plaintiff had testified in good faith). There is no evidence that Rosiak sought such corroboration here. *See* Srivastava Dec. ¶¶ 7-8; Doppelt Dec. ¶¶ 7, 9-10. As a leading scholar of journalistic ethics explains, to publish

these claims without reckless disregard for the truth, "the defendants would need to have had reliable sources to support them, the sources need to have had first-hand knowledge of the statements, and the book and stories need to have respected the privacy interests of the Awans." Doppelt Dec. ¶ 10. But here, "that did not happen." *Id.*

Salem suggests (at 22-23) that Rosiak's authoritative statements merely reflect his reporting of different perspectives. *See also* Rosiak MTD at 8-17. This argument is belied by the text of Rosiak's book, which goes far beyond putting forth diverse perspectives in context—it affirmatively and repeatedly states that the plaintiffs *in fact* committed crimes and other illicit acts. But even if Rosiak were simply presenting different perspectives, whether that would trump the evidence of actual malice that the plaintiffs proffer here is a jury question. These "objections to the [federal exoneration] can fairly be characterized as arguments that could be made to a jury as to why the reports' conclusions should not be credited or given much weight." *Mann,* 150 A.3d at 1258. And the Court's interest at the anti-SLAPP stage "is not to anticipate whether the jury will decide in favor of [the defendants] or [the plaintiffs], but to assess whether, on the evidence of record in connection with the special motion to dismiss, a jury could find for [the plaintiffs]." *Id.* at 1258; *see Nader*, 408 A.2d at 53. That Rosiak maintains (at 8) that he "sincerely believes" that his allegations are true likewise has no bearing on this Court's conclusions at the anti-SLAPP stage. *See Mann,* 150 A.3d at 1255 (noting that the defendants' "honest belief" argument "presuppose[d] what the jury will find on the facts of this case").

In sum, this case is "a textbook example of how some journalists and news organizations . . . abuse the[ir] [First Amendment] privilege by acting with brazen and reckless disregard for the awesome responsibility of informing the public." Doppelt Dec. ¶ 4. Even though they need not do so, the Awans are likely to prove actual malice.

## II. The Awans have properly stated a claim for intentional infliction of emotional distress.

"[T]o establish a prima facie case of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v. D.C.*, 9 A.3d 484, 493-94 (D.C. 2010). The Awans have done so here. Indeed, it's difficult to imagine anything more "extreme and outrageous" than the defendant's multi-year campaign of "disseminat[ing] false narratives and conspiracies that appeal to xenophobic and Islamophobic stereotypes"—a "coordinated attack that has unleashed an onslaught of negative media coverage, harassment, and threats trained on the plaintiffs." Srivastava Dec. ¶ 8; Doppelt Dec. ¶ 7. Nevertheless, the defendants argue that the Awans' claim must be dismissed because it is barred by the First Amendment, and because the Awans have not sufficiently alleged "outrageous" conduct and "severe emotional distress." These arguments are meritless.

### A. The First Amendment does not preclude an IIED claim based on the defendants' malicious and recklessly false statements.

In the defendants' view, the Awans are constitutionally barred from bringing an IIED claim here—no matter how outrageous, extreme, or offensive the defendants' conduct—because the claim targets "speech on matters of public concern." *See* Salem MTD at 23-26; Daily Caller MTD at 8-11; Rosiak MTD at 17-18. This expansive position relies entirely on a misreading of the Supreme Court's decision in *Snyder v. Phelps*, 562 U.S. 443 (2011)—a narrow and context-specific decision focused on protecting anti-gay *political opinions* expressed at a *public protest*. *Snyder* does not, as the defendants claim, immunize all public speech from state-tort liability. And it says nothing that precludes liability for a defendant who mounts a campaign to spread outrageously false factual claims, accusing someone of serious crimes, and who sells those lies for profit.

In *Snyder*, the Court held that the First Amendment protected members of the Westboro Baptist Church—who picketed a soldier's funeral by holding false, outrageous, and offensive anti-homosexual signs—from facing an IIED claim brought by the soldier's father. It so held after a fact-intensive "evaluat[ion] [of] all the circumstances of the [church's] speech," including its "content, form, and context." *Id.* at 454. In particular, the Court emphasized that the offensive signs were "of public concern" because they addressed matters involving "homosexuality in the military"; that the picketing did not involve any "pre-existing relationship or conflict between [the church] and [the soldier's father] that might suggest [the church's] speech on public matters was intended to mask an attack on Snyder over a private matter"; and that the picketers were "at a public place adjacent to a public street"—a space that "occupies a special position in terms of First Amendment protection." *Id.* at 454-58. The Court explicitly described its holding in *Snyder* as "narrow," cautioning that "[w]e are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us." *Id.* at 460; *see id.* at 461 (Breyer, J., concurring) (noting that the majority's "opinion restricts its analysis here to the matter raised in the petition for certiorari, namely, Westboro's picketing activity").

After *Snyder*, defendants accused of defamatory and malicious conduct have frequently, and unsuccessfully, tried to raise the First Amendment as a shield, as the defendants do here. Courts have consistently rejected these attempts to extend *Snyder* beyond its specific context. *See, e.g.*, *Rich v. Fox News Network, LLC*, 939 F.3d 112, 126 (2d Cir. 2019) (dismissing First Amendment argument based on *Snyder* as a "smokescreen[]"); *Greene v. Tinker*, 332 P.3d 21, 34-35 (Alaska 2014) (holding that "the First Amendment is not an all-purpose tort shield" and rejecting attempt "to read *Snyder* as creating such a sweeping rule"); *Holloway v. Am. Media, Inc.*, 947 F. Supp. 2d 1252, 1261-65 (N.D. Ala. 2013) (rejecting view that "regardless of the falsity or outrageousness of speech, it is protected by the First Amendment if it involves a matter 'of public concern'").

This Court should do the same. This case is nothing like *Snyder*. The speech challenged there consisted of broad, public-oriented statements of (extremely offensive, to be sure) religious and political *opinion*—the signs said things like "Don't Pray for the USA," "God Hates Fags," and "Maryland Taliban." 562 U.S. at 454. And the church's speech in *Snyder* took the form of public picketing along a public street—the paradigmatic public forum. *See id.* at 456. Here, by contrast, the defendants have published hundreds of pages and made numerous statements in service of a detailed and purportedly *factual* narrative that falsely and maliciously accuses the Awans of committing serious federal crimes. This false speech was not made as part of a public protest, but as part of a public-relations campaign aimed at selling Rosiak's book for profit.

While the First Amendment provides great leeway "to foster the free exchange of ideas so integral to our constitutional values, there remain limits upon the right to publish false statements that injure an individual." *Holloway*, 947 F. Supp. 2d at 1263. "Those limits appear to be drawn with respect to whether the statements published purport to convey facts (as distinct from opinions), whether the speaker had knowledge that the facts conveyed in the statements were false, and . . . whether the publication of the statements was intended to, and did, inflict severe emotional distress on a particular victim." *Id.* The defendants transgressed all of those "limits" here. That they cloak their offensive attacks on the Awans in the guise of discussing "[t]he cybersecurity of our nation's institutions" (Daily Caller MTD at 9) or "national security issues" (Salem MTD at 25) does not save them from liability. "The First Amendment may not be used as 'an all-purpose tort shield[,]'" nor can it be "used as a cloak or veil for intentionally tortious conduct that is only tangentially related to the claimed matter of public concern." *Powell v. Jones-Soderman*, 433 F. Supp. 3d 353, 370 (D. Conn. 2020) (quoting *Gleason v. Smolinski*, 319 Conn. 394, 416 (2015)); *see also State v. Carpenter*, 171 P.3d 41, 59 (Alaska 2007) ("A speaker is not privileged to speak with an intent to harass even if she has just commented on important public issues."). In sum, "the First Amendment protection described

in *Snyder* does not extend to" the defendants' offensive and outrageous statements targeting the Awans. *See Holloway*, 947 F. Supp. 2d at 1262.

Even if the defendants were correct that the First Amendment protects *all* speech relating to matters of public concern (and they aren't), that protection isn't absolute. The Supreme Court has held that a public figure suing for IIED (based on speech alone) may do so where the speech "contains a false statement of fact which was made with actual malice, *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Thus, "falsehood and actual malice are the only showings required" for the speech to be actionable as IIED, even when matters of public concern are involved. *Rich*, 939 F.3d at 126. Because the Awans have made those showings, the First Amendment is no bar to their IIED claim even under the defendants' mistaken view of the law.

### B. The Awans have suffered severe emotional distress as a result of the defendants' outrageous conduct.

**1.** Alone among the defendants, The Daily Caller argues (at 11-13) that the Awans have not alleged "extreme and outrageous" conduct. That's wrong. The complaint alleges that the defendants have targeted the Awans as part of "an unfounded, defamatory, and baseless conspiracy theory—fueled by Islamophobia and racism." Am. Compl. ¶ 47. And the evidence bears that out. As a former New York Times fact-checker explains, "the media tour and the book at issue here appear to be only masquerading as journalism in an effort to disseminate false narratives and conspiracies that appeal to xenophobic and Islamophobic stereotypes." Srivastava Dec. ¶ 8; *see also* Binkowski Dec. ¶ 29 (detailing eighteen connections between Daily Caller staff and white-supremacy groups, reflecting "a poisonous culture" that "helps explain how heinous accusations were made against a Muslim immigrant family in this case"). The Awans' former employers in Congress—including the Members themselves—concur. *See* Meeks Dec. ¶ 13 (stating that "the

attacks on [the Awans] in the media were motivated by their nationality, ethnicity, religion, as well as their political affiliation"); Richmond Dec. ¶ 10 (expressing that "xenophobia, Islamophobia, and other improper factors drove . . . the attacks on them in the media"); Lamel Dec. ¶ 11 ("All [the defendants] cared about was hurting Muslims and Democrats and fostering hate, while making some cash doing so."). As Professor Doppelt put it, the defendants levied a "coordinated attack that has unleashed an onslaught of negative media coverage, harassment, and threats trained on the plaintiffs, that because of the nature of the Internet and social media today, will probably continue for a very long time." Doppelt Dec. ¶ 7.

Based on this evidence, a jury could easily find that the defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Williams*, 9 A.3d at 94. As the Second Circuit recently held in the Seth Rich case, "although [t]he standard of outrageous conduct is strict, rigorous and difficult to satisfy . . . that is not the case when there is a deliberate and malicious campaign of harassment or intimidation." *Rich*, 939 F.3d at 122; *see King*, 640 A.2d at 674 (holding that "a series of actions may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability for infliction of emotional distress").

The Daily Caller describes its actions here as mere "news reporting," which it argues "rarely constitutes outrageous conduct sufficient to support a claim of IIED." Daily Caller MTD at 12. But, as The Daily Caller's own case explains, that applies only to "upsetting *but true* news reports." *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1222 (10th Cir. 2007) (emphasis added). When the defendants' speech is recklessly or intentionally false—as is the case here—it doesn't matter that the speech is made as part of so-called news reporting. *See, e.g.*, *Hustler Magazine, Inc.*, 485 U.S. at 56; *Mann*, 150 A.3d at 1261. In any event, "[w]here reasonable persons may differ, it is for the jury,

subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Hargraves v. D.C.*, 134 F. Supp. 3d 68, 94 (D.D.C. 2015); *see Howard Univ. v. Best*, 484 A.2d 958, 985 (D.C. 1984) ("The case should be submitted to the jury if reasonable people could differ on whether the conduct is extreme and outrageous.").

**2.** The defendants also are wrong that the Awans haven't adequately alleged "severe emotional distress." *See* Daily Caller MTD at 13-14; Salem MTD at 26-27. "In order to qualify as severe emotional distress, the complaint must describe distress of a nature so acute that harmful physical consequences might be not unlikely to result." *Johnson v. Paragon Sys., Inc.*, 195 F. Supp. 3d 96, 100 (D.D.C. 2016). But "[a]n action for intentional infliction [of emotional distress] may be made out even in the absence of physical injury or impact." *Waldon v. Covington*, 415 A.2d 1070, 1076 (D.C. 1980). At its core, "[s]evere emotional distress is defined as an emotional response so acute that no reasonable person could be expected to endure it." *Alexander v. Wash. Gas Light Co.*, 481 F. Supp. 2d 16, 38 (D.D.C. 2006).

The Awans have made such a showing. No reasonable person should be expected to endure a multi-year campaign of defamation and character assassination—driven by animus based on religion and national origin—that results in firings, reduced job prospects, and lifelong reputational harm. And, contrary to the defendants' assertions, the Awans have not cited vague or generalized harms like "mental anguish" and "stress." *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003); *see* Daily Caller MTD at 13. Rather, they alleged—and have now offered evidence showing—that the emotional distress they've suffered as a result of the defendants' malicious and outrageous conduct has led to severe consequences, including death threats, serious mental illness, and even suicide attempts. *See, e.g.*, Imran Dec. ¶¶ 10-13; Abid Dec. ¶¶ 8-12; Jamal Dec. ¶¶ 11-13; Tina Dec. ¶¶ 9-11; Rao Dec. ¶¶ 7-8. These kinds of injuries are more than enough to establish IIED. *See,*

*e.g.*, *Daniels v. D.C.*, 894 F. Supp. 2d 61, 68 (D.D.C. 2012) (plaintiff's allegation that she "was subsequently hospitalized . . . adequately stated a claim for IIED"); *Chen v. D.C.*, 256 F.R.D. 267, 273 (D.D.C. 2009) (holding that plaintiff stated IIED claim by alleging that she had "developed an abiding fear of police officers; ha[d] become scared to venture outside at night; and ha[d] experienced emotional distress so severe that she has had difficulty at work").

## III. The plaintiffs have properly stated a claim for unjust enrichment.

Finally, the plaintiffs have adequately alleged "that [the] defendants were unjustly enriched as a result of defaming" them. *Alharbi v. Beck*, 103 F. Supp. 3d 166, 168 (D. Mass. 2015). Under the common law of the District of Columbia, "[t]he doctrine of unjust enrichment applies when a person retains a benefit (usually money) which in justice and equity belongs to another." *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 556 (D.C. 2016). "[U]njust enrichment depends on whether it is fair and just for *the recipient* to retain the benefit." *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 63 (D.C. 2005) (emphasis added).

Under District of Columbia law, "every unjust enrichment case is factually unique, for whether there has been unjust enrichment must be determined by the nature of the dealings between the recipient of the benefit and the party seeking restitution, and those dealings will necessarily vary from one case to the next." *4934, Inc. v. D.C. Dep't of Emp. Servs.*, 605 A.2d 50, 56 (D.C. 1992). The necessarily fact-intensive nature of this inquiry—which the defendants' motions neither acknowledge nor address—in itself precludes dismissal here.

The Daily Caller asserts (at 16) that the plaintiffs "do not and cannot allege that they have conferred any benefit on any defendant." That is simply wrong. Here, the defendants made substantial revenues and profits over several years by publishing and repeating false, invented conspiracy theories targeting the Awans. This money was wrongfully earned and wrongfully

retained. It is not "fair and just, under all of the circumstances, for" the defendants to profit off of their defamatory attacks without "compensating" the Awans. *Jordan*, 870 A.2d at 64.

The defendants next argue that the Awans' claim still must fail because damages are an adequate remedy at law. *See* Salem MTD 27-29; Daily Caller MTD at 14-15. But "[t]he mere existence of a remedy at law is not sufficient to warrant denial of equitable relief" like unjust enrichment. *FDIC v. Bank of Am., N.A.*, 308 F. Supp. 3d 197, 202 (D.D.C. 2018). Instead, "[t]he legal remedy, both in respect to the final relief and the mode of obtaining it, must be as efficient as the remedy which equity would afford." *Id.* Here, damages are not "as efficient" as unjust enrichment—they remedy only the Awans' losses, not the defendants' ill-gotten gains. In any event, none of the cases the defendants cite apply the fact-intensive standard required under District of Columbia law. And none of the defendants' out-of-jurisdiction cases involved dismissal at the motion-to-dismiss stage. *See, e.g.*, *Ventura v. Kyle*, 825 F.3d 876, 887 (8th Cir. 2016) (appeal after jury trial); *Alharbi v. Theblaze, Inc.*, 199 F. Supp. 3d 334, 361 (D. Mass. 2016) (summary judgment).

To the contrary, courts have allowed unjust-enrichment claims to proceed to discovery when, as here, the plaintiffs' "basic theory is that [the] defendants were unjustly enriched . . . by defaming [them]." *Alharbi*, 103 F. Supp. 3d at 167; *see Diaz Rodriguez v. Torres Martir*, 394 F. Supp. 2d 389, 394 (D.P.R. 2005) (concluding at summary judgment that "triable issues of fact remain as to whether defendants were unjustly enriched by publication of plaintiff's photo and the statement that plaintiff was a client of Dr. Torres"—a statement, published by the defendant, that the plaintiff alleged was defamatory). This Court should do the same.

## CONCLUSION

The defendants' motions to dismiss should be denied. The plaintiffs respectfully request an oral hearing.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2020, I electronically filed and served the foregoing response with the Clerk of the Court and with counsel of record using the CaseFileXpress system.

*/s/Deepak Gupta*

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