Nos. 21-cv-893 & 22-cv-4

In The District of Columbia Court of Appeals

LUKE ROSIAK,
Defendant-Appellant,

and

SALEM MEDIA GROUP,
Defendant-Appellant,

v.

IMRAN AWAN; ABID AWAN; JAMAL AWAN;
TINA ALVI; and RAO ABBAS,
Plaintiffs-Appellees.

On Appeal from the Superior Court for the District of Columbia, Civil Division

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INTRODUCTION

Until Luke Rosiak, The Daily Caller, and Salem Media entered their lives, Imran Awan and his family were living the American dream. After immigrating to the United States from Pakistan as a teenager, Imran 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 with him. Together, for more than a decade, they provided IT support for dozens of congressional offices. Their roles were neither public nor glamorous—they stayed behind the scenes, supporting the offices' computer systems—but they worked hard, were paid well, and earned their colleagues' trust. Having achieved a measure of success, the Awans settled into a happy and quiet life, raising their children in peace.

But to Luke Rosiak, the existence of this unknown family of Pakistani-born Muslims, working with Democrats' computer servers on Capitol Hill, could only be the result of a nefarious plot waiting to be unmasked. In January 2019, building on a series of articles that he had written for The Daily Caller, Rosiak released *Obstruction of Justice: How the Deep State Risked National Security to Protect the Democrats*, a 311-page book published by Salem that portrays the Awans as the center of a sprawling international conspiracy. With Imran's photo on the cover, the book is riddled with assertions that the Awans conspired to hack congressional servers, spied for foreign countries, and took

advantage of their status as House employees to commit extortion, theft, bribery, blackmail, and money laundering. Rosiak continued to spread these malicious attacks while promoting his book on prominent television and radio broadcasts. Over time, Rosiak's public claims became increasingly outlandish—including accusations that Imran is "an attempted murderer, an extortionist, a blackmail artist, [and] a con man," and that the Awans "stole millions of dollars."

None of this was true. Indeed, just six months before the book's publication—after the FBI thoroughly investigated the Awans, interviewed approximately 40 witnesses, and forensically examined the House servers—the U.S. Department of Justice had taken the extraordinary step of publicly debunking Rosiak's conspiracy theories and affirmatively exonerating Imran of these "public allegations." Neither Imran nor any of the Awans was ever charged with any crime related to their jobs on Capitol Hill, and the Justice Department ultimately concluded that there was "no evidence" whatsoever that the Awans had hacked or spied on Congress. At a hearing in August 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," and had been "investigated and found to be untrue."

Before the book's publication in 2019, the Awans understandably believed that their names had finally been cleared and that they could move on with their lives. They

filed this action in 2020 to seek accountability for the defamatory campaign perpetuated by Rosiak, The Daily Caller, and Salem in the wake of the DOJ exoneration. The suit concerns only those falsehoods published in the year before suit was filed—*after* they were debunked by the DOJ and rebuked by a federal court. And the suit pinpoints only the most egregious, serious accusations of criminal wrongdoing.

After Rosiak and Salem sought to dismiss this case under the anti-SLAPP statute, the Awans supported their claims with significant and compelling evidence that would permit a reasonable jury to find in their favor—none of which the defendants rebutted:

- Five current and former members of Congress and five senior staff members attested to the Awans' character and hard work, the falsity of Rosiak's claims, the xenophobic nature of his attacks, and the resulting harm to the Awans. JA506-508, 510, 512, 514-515, 517, 520-524, 526, 528.[1]

- The former head of DOJ's National Security Division stressed 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." JA533-534.

- A distinguished professor at Northwestern University's School of Journalism deemed this case a "textbook example" of "brazen and reckless disregard" of journalistic standards, indicating a "total disregard for accuracy." JA540-542.

- The New York Times Magazine's former research editor found this recklessness especially egregious given the Awans' private-figure status and the 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." JA566-567.

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[1] Unless otherwise indicated, all "JA" citations are to Salem's joint appendix, filed on July 29, 2022

- A leading expert on misinformation outlined extensive connections between The Daily Caller's 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." JA577.

- All five of the plaintiffs recounted how "Luke Rosiak, The Daily Caller, and Salem Media have turned our American dream into a nightmare." JA486.

Based on this uncontested record evidence, the trial court determined that the Awans were likely to succeed on the merits of their claims, and thus denied the anti-SLAPP motions. That decision was correct: The attacks on the Awans are provably false and defamatory. And the accusations at issue—claims that the Awans threatened national security and committed serious crimes like attempted murder, torture, extortion, and blackmail—are plainly defamatory per se. Indeed, on appeal, Salem does not even try to contest that the Awans have established the elements of defamation under District of Columbia law.

Instead, Salem argues only that the Awans are public figures, subject to an actual-malice standard of proof. But although the plaintiffs have shown actual malice here, they need not do so: The defendants' public-figure argument is foreclosed by *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), in which the 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 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. *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, the Supreme Court reasoned, he had not "voluntarily thrust" or "injected himself" into the controversy but was instead "dragged unwillingly" into it. *Id.* at 166. A recent case applying *Wolston* also bears a striking similarity: A Muslim man, accused of being a terrorist by the commentator Glenn Beck, was the subject of numerous media reports after he was investigated by authorities. But he was still a private figure because the media 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. The trial court therefore correctly denied Salem's and Rosiak's anti-SLAPP motions. This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court correctly determine that a jury could reasonably find, based on the evidence, that the defendants' published statements about the Awans—including assertions that they committed serious crimes like extortion, bribery, torture, and attempted murder—were defamatory and false?

2. Did the district court correctly conclude that the Awans demonstrated a sufficient likelihood of success on their remaining claims of intentional infliction of emotional distress and unjust enrichment?

STATEMENT OF THE CASE

I. Factual background

A. The Awans immigrate to the United States and establish comfortable, private lives, working behind the scenes to provide information-technology support on Capitol Hill.

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. JA485. 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. JA485-486, 527.

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." JA525. 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. JA509, 512, 527-528. 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. JA486.[2] Working together as a team allowed them to be "always available" and ensure that an issue "would get covered." JA490-491. 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. JA515, 518-19, 522-23, 525-526.

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. JA490-492, 496, 500, 518, 522-523. 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. JA491, 496, 504, 518, 529. 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." JA496, 504.

[2] 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* JA499.

Having secured stable government jobs, the Awans were able to afford comfortable, middle-class lives in northern Virginia. JA486, 500. Imran, Hina, and Rao spent most of their time outside of work raising their children and providing them a good education. JA500. Jamal focused on his studies at George Washington University. JA492. 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. JA492, 500, 504.

B. 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.[3] Rao was first named by Rosiak in an article a few weeks later, again describing the Awans as "[r]ogue congressional staffers."[4] In a series of articles that followed, Rosiak transformed an internal

[3] 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 (JA623-630).

[4] 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 (JA631-637).

investigation concerning House administrative rules into a criminal conspiracy and national-security scandal perpetrated by Pakistani-born Muslims.

Although other outlets covered the investigation, 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."[5] These articles were replete with further false attacks on the Awans, which often linked them to wide-ranging and unfounded conspiracy theories. JA24. 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."[6] 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. JA25-26.

In the end, the House investigators found no evidence that the Awans had risked national security. What the House Inspector General found, at most, were minor violations of House IT protocols that had seldom, if ever, been followed—for example,

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[5] 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 (JA638-643).

[6] Shawn Boburg, "Federal probe into House technology worker," *The Washington Post* (Sept. 16, 2017), https://wapo.st/30aUPUk (JA644-657).

"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. JA491-492, 500, 519. The Inspector General's inquiry also investigated 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. JA490-492, 519. They had indeed been doing just that, out in the open, for years—again with the express knowledge and permission of their congressional employers. JA519, 530.

"[T]he real impetus for investigating the Awans," explains Representative Gregory Meeks, "was an inappropriate one: the fact they are Pakistani-American Muslims." JA507; *see* JA512-513 (explaining that "xenophobia, Islamophobia, and other improper factors drove the investigations of [the Awans] . . . and the attacks on them in the media"). Josh Rogin, who was the Chief of Staff to former 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. JA519-520. As another senior staffer put it, the purpose of the internal

investigation seemed to be to "foster anti-Muslim feelings" and "score political points." JA530; *see* JA523-524.[7]

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." JA519; *see also* JA512. 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. JA519; *see* JA507, 509-510, 512. 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. JA26. 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." JA508.

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[7] Several years later, "House officials and the Capitol Police revisited their investigation of" the Awans, and "found that the original investigation had reached certain conclusions about misbehavior that were not necessarily supported by facts." Noam Scheiber & Nicholas Fandos, *Congress Pays $850,000 to Muslim Aides Targeted in Inquiry Stoked by Trump*, N.Y. Times (Nov. 25, 2020), https://perma.cc/FSQ6-AMHA.

C. 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 any laws nor committed any crimes in the course of their work at the House. *See* JA26; *see* JA583-594 (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 nevertheless charged with bank fraud and pleaded guilty. JA487, 584.

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. JA27; *see* JA613-614. 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." JA588. 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." JA615. 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." JA617. She observed that "the negative publicity" has "affected his ability to keep a job." JA615. After remarking that "Mr. Awan and his family have suffered sufficiently," Judge Chutkan sentenced Imran to time served and

three months of supervised release. JA617-618. 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." JA617-618; *see also* JA27-28.

Media outlets including The Washington Post, CNN, NBC, and Newsweek reported that federal officials had "debunked" The Daily Caller's conspiracy theories. JA658-671; *see also* JA28. 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." JA693. And they (and their senior staff) continue to do so. *See, e.g.*, JA506-508, 510, 512-13, 523-24, 526, 528.

Eventually, the U.S. House of Representatives reached a settlement to resolve the Awans' wrongful-termination claims, arriving at "one the largest known awards by the House" in an employment case. Scheiber & Fandos, N.Y. Times, *supra*. "The settlement," according to former Rep. Ted Deutch, Chair of the House Ethics Committee, was "an acknowledgment of the wrong done to this family." *Id.*

D. 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 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*. JA70-405 (book manuscript). A photo of Imran appears on the book's cover. JA28-29.

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. JA29-30. 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." JA295. 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." JA329.

The book is riddled with provably false and defamatory attacks against the Awans. JA29-30. 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 extortion, theft, and bribery. *Id.* The defamatory statements (*see* JA29) include:

- Imran had a "penchant for extortion" (JA88);
- The Awans were "caught funneling data off the House network, stealing the identity of an intelligence specialist, and sending electronic equipment

to foreign officials" (JA88);

- Imran "hacked the House" and "was using his position to make 'unauthorized access' to House data" (JA94, 135);

- Imran "used money he earned in Congress to pay police in Pakistan to torture his enemies," and "actually gave money to a police officer and said, 'Rape the guy. How many times will you rape him? I'll pay you" (JA94);

- "The House had secretly caught the Awans hacking congressional servers" (JA262);

- Imran "was a 'mole' in Congress" (JA97-98);

- Abid was "stealing cell phones" and "sending iPads and iPhones to government officials in Pakistan" (JA104, 195);

- The Awans were "versatile fraudsters," "stealing a couple hundred thousand in laptops" (JA116, 149);

- "The brothers, it seemed to me, were covering up a likely case of hacking and extortion on Capitol Hill with more hacking and extortion" (JA304);

- The Awans committed "systematic fraud in the House of Representatives, massive violations of cybersecurity, [and] disappearing computer equipment" (JA324);

- The Awans were "committing fraud with the way that they were employed" (JA350);

- "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?" (JA352).

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.*, JA30-35. In those appearances, he made 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.[8] On the show, Rosiak called the Awans "sociopathic extortionists" 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. JA30-31.

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 more false and defamatory statements about the Awans.[9] He claimed they "were never even charged with the crimes despite the massive amount of evidence laid

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

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

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." JA31-32. Days later, The Daily Caller published a podcast and YouTube video featuring an interview of Rosiak.[10] 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." JA32.

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,[11] Rosiak falsely claimed that: "Imran Awan is basically an attempted murderer, an extortionist, a blackmail artist, [and] a con man"; "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

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

[11] 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 (JA675-688).

of, your first example of evidence tampering." JA675-688

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.[12] 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." JA33-34.

E. 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* JA35. As a result of the defendants' malicious campaign, the Awans have "suffered a great deal financially," and now face reduced job and business opportunities. JA488; *see* JA497 (Abid testifying that potential business partner wouldn't sign lease after reading the defendants' false

[12] "Judicial Watch suing for evidence in case of congressional IT staffer Imran Awan," *Fox News* (Dec. 13, 2019), *available at* https://perma.cc/3X3Q-GNW4.

claims); JA493 (Jamal 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 the Awans' reputations. They now experience social isolation and stigmatization—they feel like their lives have been "ruined forever." JA505; *see* JA498 ("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. JA488-489, 493-94, 497, 501-502. 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." JA501; *see* JA488.

The attacks have also made the Awans "fear for [their] safety." JA493. Following the book's publication, the plaintiffs faced repeated death threats. JA35. 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. JA488-489. Some of the plaintiffs began to suffer from paranoia, panic attacks, insomnia, and problems in their relationships. JA488-489, 493-494, 497-498, 501-502, 505. 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. JA488, 493-494, 501, 505.

II. Procedural history

The Awans filed this action in January 2020 to hold the defendants accountable for their malicious and defamatory campaign. Their complaint alleges three claims: (1) defamation; (2) intentional infliction of emotional distress (IIED); and (3) unjust enrichment. Rosiak and Salem responded by filing motions to dismiss under Rule 12 for failure to state a claim and under the District's anti-SLAPP law, D.C. Code § 16-5502 *et seq.* The Daily Caller filed only a partial motion to dismiss under Rule 12(b)(6), seeking a ruling that the Awans could not recover for harms caused by false statements outside of the statute of limitations.

The Awans filed a consolidated response to the defendants' motions. Primarily, the Awans argued that they were likely to succeed on the merits of their defamation claim because, under *Wolston*, they are not public figures who need to establish actual malice, and the defendants did not contest that a jury could find them negligent. Pls.' Opp. to Mot. to Dismiss at 22-30 (Aug. 7, 2020). The Awans also argued in the alternative that, even if they were public figures, overwhelming evidence—which included declarations from five members of Congress, five senior congressional staffers, the former head of the Department of Justice's National Security Division, three experts

on journalistic ethics and misinformation, and the five plaintiffs themselves—existed to allow a jury to find that Rosiak and Salem acted with actual malice. *See id.* at 4, 30-32. The Awans also argued that they had sufficiently stated claims for IIED and unjust enrichment, but they did not contest The Daily Caller's statute-of-limitations argument, explaining that those statements were included in the complaint only to prove knowledge of falsity and provide context. *Id.* at 21-22, 32-40.

The superior court agreed with the Awans in all material respects. In July 2021, it issued an order denying the defendants' motions to dismiss under Rule 12 except for The Daily Caller's partial statute-of-limitations defense. On December 20, 2021, the court issued a second order that denied Rosiak's and Salem's anti-SLAPP motions in their entirety. This order rejected the defendants' argument that the Awans were limited-purpose public figures, agreeing with the Awans that the Supreme Court's decision in *Wolston* controlled that question, and found that the Awans were likely to succeed on the merits of all three of their claims. Anti-SLAPP Order, at 13-14.

Rosiak and Salem subsequently filed notices of appeal, and the defendants filed motions to stay the proceedings against them pending appeal. The superior court denied the motions, and this Court affirmed the stay denial in a per curiam order. *See* Order at 2 (April 5, 2022). This appeal followed.

SUMMARY OF ARGUMENT

Because a reasonable, properly instructed jury could find in favor of the Awans on all of their claims, this Court should affirm the denial of the anti-SLAPP motions.

I.A. A reasonable jury could find that Rosiak and Salem published false and defamatory statements about the Awans. Rosiak's claims that the Awans committed serious felonies—including extortion, bribery, hacking, torture, and attempted murder—are defamatory per se. They are also false. A thorough federal investigation found that there was "no evidence" that the Awans committed any crimes relating to their work at the House. Yet, without any credible evidence, Rosiak accused the Awans of doing so. Rosiak cannot evade liability now by writing his serious accusations off as mere "opinions." There is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18 (1990). Nor can Rosiak outsource liability to his purported sources. *See Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298-99 (D.C. Cir. 1988). Because any ordinary reader of Rosiak's books and articles, and any ordinary viewer of his media appearances, would understand his statements to literally accuse the Awans of committing crimes that they did not commit, the statements are actionable for defamation.

I.B. The Awans are private figures. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), squarely holds 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. That precisely describes the Awans: They were behind-the-scenes IT workers who were dragged into the public eye because of the defendants' defamation and conspiracy theories. Salem and Rosiak have no answer to *Wolston*. Instead, they contend that the Awans are limited-purpose public figures just because they worked for members of the House. That is not the law. The public-figure inquiry asks whether a plaintiff has decided to assume a role "in the forefront of particular public controversies in order to influence the resolution of the issues involved." *Moss v. Stockard*, 580 A.2d 1011, 1030 (D.C. 1990). The Awans did not. Nor are they, as Salem contends, "involuntary" public figures—a dubious concept that this Court has never endorsed.

I.C. Because the Awans are private figures, they need only show negligence to succeed on their defamation claim—a standard that no one disputes they meet here. But even if they were public figures, and thus had to show actual malice, they would still succeed. At the anti-SLAPP stage, this Court need only determine 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." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1253 (D.C. 2016), *as amended* (Dec. 13, 2018). Here, Rosiak accused the Awans of serious criminal conduct after federal

investigators had fully exonerated them. As the unrebutted expert evidence makes clear, such claims would require the highest levels of sourcing, corroboration, and fact-checking. But Rosiak has no credible or reliable evidence to back up his false claims. There is more than enough evidence to send the question of actual malice to the jury.

II. & III. Finally, the superior court properly concluded that the Awans are likely to succeed on their IIED and unjust-enrichment claims. The defendants' multi-year campaign of false and Islamophobic attacks has caused the Awans to suffer severe emotional distress, including death threats, serious mental illness, and even suicide attempts. Contrary to Salem's assertions, the First Amendment does not protect such "extreme and outrageous" speech—especially when it was part of a public-relations effort aimed at selling Rosiak's book for a profit. And the defendants unjustly made substantial profits by publishing and repeating these false, invented conspiracy theories at the Awans' expense. A jury is therefore entitled to weigh the evidence and decide all three of the Awans' claims.

STANDARD OF REVIEW

This appeal arises from the superior court's denial of special motions to dismiss under the Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.* This Court 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." *See Competitive Enter.*

Inst. v. Mann, 150 A.3d 1213, 139 (D.C. 2016), *as amended* (Dec. 13, 2018). "[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.*

That statute 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 the plaintiffs' showing, the court does not assume the jury's role as factfinder. *See Mann*, 150 A.3d at 1236. As this Court recently explained, "[t]he 'likely to succeed on the merits' standard in the Anti-SLAPP context does not require a plaintiff to show that it is more likely than not that they will succeed, as the statutory language seems to say." *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 579 (D.C. 2022). Indeed, "[i]mposing that high of a bar for a suit to survive a motion to dismiss would raise serious constitutional concerns." *Id.*

To avoid those concerns, this Court has made clear that, to survive an anti-SLAPP motion, a plaintiff need only "present an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Mann*, 150 A.3d at 1262. This "more relaxed standard" is "akin to the burden on a party seeking to avoid summary judgment." *Fells*, 281 A.3d at 585; *see Mann*, 150 A.3d at 1238 n.32. Thus, a trial

court should grant dismissal "only if the court can conclude that the claimant could not prevail as a matter of law . . . after allowing for the weighing of evidence and permissible inferences by the jury." *Mann*, 150 A.3d at 1236.

This Court reviews the superior court's anti-SLAPP denial de novo. *See Nicdao v. Two Rivers Pub. Charter Sch., Inc.*, 275 A.3d 1287, 1293 (D.C. 2022).

ARGUMENT

I. The superior court correctly concluded that the Awans are likely to succeed on the merits of their defamation claim.

The law of defamation balances "the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation." *Ollman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984). Although "the free flow of ideas and opinions is integral to our democratic system of government," it has long been recognized that "an individual's interest in his or her reputation is of the highest order." *Id.* "A defamatory statement may destroy an individual's livelihood, wreck his standing in the community, and seriously impair his sense of dignity and self-esteem." *Id.* And not just that—defamation injures "both the subject of the falsehood *and* the readers of the statement." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984). Simply put, in defamation cases, "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The District of Columbia

therefore "may rightly employ its [defamation] laws to discourage the deception of its citizens." *Keeton*, 465 U.S. at 776 .

Under District of Columbia law, 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 did far more than merely plead facts to support each of these elements. They presented evidence in the trial court 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 presented substantial evidence, including unrebutted expert declarations, demonstrating that the defamatory statements were made with actual malice. Based on this evidence, the trial court correctly concluded that a reasonable jury could find in favor of the Awans on their defamation claim. Because Salem and Rosiak offer nothing to disturb that conclusion, this Court should affirm.

A. The record overwhelmingly demonstrates that the defendants' attacks are defamatory and false.

The Awans have shown the elements necessary to establish defamation under D.C. law. Indeed, Salem does not contest this—it argues *only* that the Awans are public figures who have failed to establish actual malice. Salem Br. 21-40.[13]

Rosiak alone contends (at 15-38) that the plaintiffs did not present "sufficient evidence" for a jury to likely find that his statements about the Awans were false and defamatory. This borders on the absurd. As we detail below, Rosiak's repeated claims that the Awans not only committed serious crimes but also threatened national security are defamatory per se and provably false. And Rosiak's brief does not even acknowledge some of his most baseless attacks—that the Awans "stole millions of dollars," that the Awan brothers "were covering up a likely case of hacking and extortion on Capitol Hill with more hacking and extortion," and that Imran "gave money" to police officers in Pakistan to "rape" his enemies. The trial court easily found that the record here shows that Rosiak and Salem likely made "false defamatory statements" about the Awans. JA832-34. This Court should too.[14]

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[13] As we explain in Section I.B, *infra*, Salem's public-figure and actual-malice arguments fail on multiple grounds.

[14] Rosiak and Salem do not dispute that the Awans suffered harm from the defendants' defamation. For good reason: Rosiak's defamatory attacks were not only published to the book's readers, but broadcast to tens of millions of people over national

1. As an initial matter, 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*, 580 A.2d at 1023.

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 and threatened national security. *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

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television and podcasts. As a result, the Awans have suffered severe harms to their "good name and reputation," lost job and business opportunities, and endured "mental anguish, distress and humiliation." *See Moss*, 580 A.2d at 1033 n.40; *see, e.g.*, JA488-489, 493-494, 497, 501-502, 505, 520, 524, 531. 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." JA540-541; *see Gertz*, 418 U.S. at 344 n.9 ("[T]he truth rarely catches up with a lie.").

phones" and "sending iPads and iPhones to government officials in Pakistan." JA88, 97, 104, 195. 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." JA116, 304. 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[.]" JA31-34.

Because Rosiak's false statements accused the Awans of serious crimes related to their work, the trial court correctly found that they are defamatory. JA832-34; *see Moss*, 580 A.2d at 1023; *Johnson*, 271 A.2d at 697.

2. The Awans also presented overwhelming evidence in the trial court that the statements at issue here are false.

For starters, the Awans never committed any criminal or illicit acts in connection with their employment at the House, as Rosiak said they did—and, even though they don't need to, the Awans can prove it. Claims are capable of being proven false when they are "objectively verifiable," and this Court 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* JA29-34, are objectively verifiable, and they have been debunked.

The FBI and DOJ, for example, thoroughly investigated the claims that Imran Awan and his coworkers "engaged in unauthorized or illegal conduct involving House computer systems." JA588. 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." JA533-534. And it does so for a self-evident purpose: "to debunk unfounded conspiracy theories." *Id.*; *see* JA508 ("In my [Congressman Meeks'] 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."). A federal judge likewise concluded that the conspiracy theories and accusations levied at the Awans had "been investigated and found to be untrue." JA617. And 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. In short, these statements are and were provably false. Thus, by any measure, the trial court correctly found that a reasonable jury could decide in the Awans' favor. JA832-34.

3. This Court should reject Rosiak's assorted objections to the trial court's conclusion that his statements were defamatory and false, all of which are either waived or meritless.

a. To start, Rosiak is simply wrong (at 14-15) that a different defamation standard applies to "media defendants." The U.S. Supreme Court has been clear: "The inherent worth of speech . . . does not depend upon the identity of its source." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, six justices agreed that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." 472 U.S. 749, 783-84 (1985) (Brennan, J., dissenting); *see id.* at 773 (White, J., concurring in judgment); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."). As Justice White explained, "it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to

private reputation." *Dun & Bradstreet*, 472 U.S. at 773 (White, J., concurring in judgment).

Accordingly, for decades, this Court has held that the same elements of defamation apply regardless of whether the case involves "media defendants" or "nonmedia defendants." *Vereen v. Clayborne*, 623 A.2d 1190, 1195 (D.C. 1993); *see Moss*, 580 A.2d at 1022-23 n.23. In all cases, the plaintiff "must be prepared to show that the publication was both 'false' and 'defamatory,' and at least was 'negligent.'" *Vereen*, 623 A.2d at 1195. Contrary to Rosiak's assertions (at 15), this is precisely the standard that the superior court applied here. JA832-34.

b. Next, Rosiak has waived the argument that his statements were mere "opinion." Rosiak Br. 29-37. In his anti-SLAPP motion, Rosiak *never* contended that these statements were not defamatory or false because they were statements of opinion. Instead, he argued that the Awans had "failed to adequately plead falsity" and had not presented evidence showing that "Rosiak's statements were materially false." Rosiak Anti-SLAPP Mot. (June 15, 2020) at 7-8.[15] Thus, Rosiak has waived any argument that his statements are not actionable because they are opinions. *See Easter Seal Soc. for*

[15] In the actual-malice section of his Rule 12(b)(6) motion to dismiss—the denial of which is not appealable—Rosiak characterized, without further explanation, some of his attacks on the Awans as "protected opinion." Rosiak Mot. to Dismiss (June 15, 2020) at 10-14.

Disabled Child. v. Berry, 627 A.2d 482, 489 (D.C. 1993) (noting that this Court "will not consider questions raised for the first time on appeal").

In any event, there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18 (1990). "[T]he First Amendment gives no protection to an assertion sufficiently factual to be susceptible of being proved true or false even if the assertion is expressed by implication in a statement of opinion." *Jankovic v. Int'l Crisis Grp.*, 593 F.3d 22, 27 (D.C. Cir. 2010). Statements of "opinion" are therefore "actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000). As the Supreme Court explained: "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Milkovich*, 497 U.S. at 18. If Jones did not in fact tell a lie, then the so-called "opinion" is nevertheless false and defamatory.

The statements at issue here were plainly assertions of fact. Rosiak literally (and repeatedly) accused the Awans of being thieves, traitors, and attempted murderers. An ordinary reader could—and indeed would—reasonably interpret all of Rosiak's statements as stating actual facts about the Awans. Indeed, the Supreme Court in *Milkovich* expressly held that a statement suggesting that the plaintiff "committed [a crime] is sufficiently factual to be susceptible of being proved true or false." *See* 497 U.S.

at 21. In other words, the Awans either stole "millions of dollars," JA31-32, or "they did not." *See US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 58 (D.D.C. 2021). Imran was either "a 'mole' in Congress" who was "caught . . . stealing the identity of an intelligence specialist," JA88, 97, or he was not. Imran "actually gave money to a police officer and said, 'Rape the guy,'" JA94, or he did not. These statements, like all of the defamatory statements challenged in this action "imply a provably false fact." *Guilford*, 760 A.2d at 597. And, as detailed above, the evidence that the Awans presented to the trial court proved that they are in fact false.

To be sure, Rosiak is right that "[c]ontext matters." Rosiak Br. 20; *see Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 139 (D.C. 2021). But he fails to understand that this principle actually supports the trial court's decision. That's because the context of the "publication . . . as a whole" only confirms that readers would understand Rosiak's book to present a *factual* narrative of the Awans' wrongdoing. *See Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984). This Court need not take our word for it: The book's foreword itself states that Rosiak had uncovered "possibly the biggest scandal and coverup in the history of the U.S. House of Representatives." JA79. During his book tour, Rosiak himself presented the book as an objective, factual narrative supported by a "massive amount of evidence"—it was "a story of actual hacking[,] blackmail, collusion with foreign governments, threats, evidence tampering." JA31-33.

That the statements in the book are meant to be understood as facts rather than "opinion" is obvious from their face. Indeed, Rosiak repeatedly claimed during the tour that he was "careful . . . as a reporter," and emphasized that the accusations in the book were "all well documented." JA34. Even in the briefing in this Court, the appellants contend that Rosiak engaged in "old-school investigative journalism" to produce this book. Salem Br. 38; *see* Rosiak Br. 1-2. This Court should not permit Rosiak to escape liability by characterizing his statements as purely subjective opinion now that he faces accountability for his attacks.

The same is true of Rosiak's attempt to invoke the First Amendment's protection for "rhetorical hyperbole." Rhetorical hyperbole applies only to statements that "cannot reasonably be interpreted as stating *actual facts* about an individual." *Mann*, 150 A.3d at 1241 (emphasis added). 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*. Here, as explained, Rosiak literally and repeatedly accused the Awans of threatening national security and committing a series of serious crimes. This simply "is not the sort

of loose, figurative, or hyperbolic language" that would suggest to the reader to not take the author at his word. *See Milkovich*, 497 U.S. at 21.

c. Rosiak's remaining challenges to the district court's defamation findings should also be rejected.

First, Rosiak's various attempts to defend himself on a "charge-by-charge" basis fall flat on multiple levels. Rosiak Br. 30-37. For example, Rosiak contends that he did not defame Imran by accusing him of bribery, stealing government cell phones and laptops, being a "mole," and even torture—just because he said that he claims to have heard these accusations from other people, some of whom (like Imran's estranged ex-wife) had obvious biases against the Awans. But Rosiak cannot hide behind his purported sources. "The common law of libel has long held that one who republishes a defamatory statement 'adopts' it as his own, and is liable in equal measure to the original defamer." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298-99 (D.C. Cir. 1988); *see, e.g.*, *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (discussing this "venerable principle"); Prosser and Keeton on the Law of Torts § 113, at 799 (5th ed. 1984) ("Every repetition of the defamation is a publication in itself, even though the repeater states the source, or resorts to the customary newspaper evasion 'it is alleged' . . ."). A person cannot escape liability for defamation when, as Rosiak did here, they present "pure

'rumor' or 'gossip' or 'scuttlebutt' conveyed as fact, without any disclaimer or explanation." *See Sigal Const. Corp. v. Stanbury*, 586 A.2d 1204, 1215 (D.C. 1991).

Rosiak's defense of his allegations of "hacking" fare no better. *See* Rosiak Br. 30-33. Rosiak cannot contest that all of the evidence in the record—including the results of the DOJ criminal investigation and the unrebutted affidavits from Congresspeople and their senior staff—disproves his allegations. At the very least, based on this evidence, a reasonable jury could find that his allegations were false. In response, all Rosiak points to is the House Inspector General investigation, which turned up—at most—minor IT and procurement violations that had "not previously been enforced against other House employees." JA519. Nothing about these minor administrative issues supports Rosiak's accusations of "hacking"—let alone his outlandish and conspiratorial claims that the Awans had hacked congressional servers and were "funneling data outside of the House network" in "collusion" with foreign governments. JA32. As explained, Rosiak's book "must be considered as a whole, in the sense in which it would be *understood by the readers* to whom it was addressed." *Best*, 484 A.2d at 989 (emphasis added). When Rosiak accused the Awans of "hacking" in his book and subsequent media tour, he did not intend readers to understand that he was referring to a couple minor procurement and IT infractions. Take Rosiak's own words: On a podcast by The Daily Caller, for example, Rosiak 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 twelve Russian military-intelligence officers with "committing federal crimes that were intended to interfere with the 2016 U.S. presidential election." JA32.[16] Rosiak has not offered any evidence whatsoever to support his allegations to readers and listeners that the Awans committed *this* sort of "hacking."[17]

Second, because he did not raise it in the superior court, Rosiak waived his argument (at 17-21) that reversal is warranted just because his book acknowledges the evidence that "the Awans claim exonerates them." *See* Rosiak Anti-SLAPP Mot. at 7-8. Regardless, the argument fails. "[E]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect, or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich,*

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[16] *See* Press Release, *Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election*, Dept. of Justice (July 13, 2018), https://perma.cc/7N5B-FT7F.

[17] For similar reasons, Rosiak's bizarre detour (at 24-28) about the Awans' statements in their declarations below that they "worked as a team" is irrelevant. No ordinary reader of the English language would understand Rosiak's allegations of hacking and serious criminal conspiracy to mean only that the Awans had violated a (non-criminal) rule against employees "sublet[ting]" work duties. See 2 U.S.C. § 4701. Nothing in the Awans' declarations—or in the House Members' and senior staff's declarations—suggests that Rosiak's defamatory statements were true. Quite the opposite: They establish that the relevant House rules had "not previously been enforced against other House employees," JA512, 519, and that the entire investigation was "politically motivated and based on bias over their nationality, ethnicity, and religion." JA519-520; *see* JA507, 512-13.

497 U.S. at 18-19. Here, as described, Rosiak both falsely presented facts as true and erroneously assessed the evidence. That his book simply *mentions* the DOJ investigation and Judge Chutkan's statements—only to turn around and baselessly critique them as cover-ups in service of a sprawling, international conspiracy for which he presented no evidence—does not reduce the book's overall defamatory and false nature.

Third, Rosiak contends (at 21-24) that the DOJ's unequivocal conclusion that it found "no evidence" that Imran committed any crimes related to his work at the House "doesn't constitute evidence of truth or falsity" because it was contained in a plea agreement. Again, this argument is waived. Rosiak Anti-SLAPP Mot. at 7-8. It also conflicts with the trial court's finding that the investigation "essentially cleared" the Awans of "any wrongdoing." JA833. But, most importantly, it's wrong—both as a matter of the law and the record. This Court has held that the results of an independent investigation can be evidence of falsity in the anti-SLAPP context. *See Mann*, 150 A.3d at 1245-46. And the Awans presented unrebutted expert evidence below showing that the DOJ's step here was not just "unusual" but "exceedingly rare and extraordinary." JA508, 533-34. The defendants did not even try to contest this evidence below—and Rosiak cites no case suggesting that a court considering a defamation claim should disregard the definitive findings of a federal criminal investigation just because the defendant (without evidence) questions its results.

Rosiak passingly argues (at 37) that even if the DOJ investigation proved that his accusations were false, it only did so with respect to Imran—not the other Awans. That is bold. On the very first page of the book's introduction, Rosiak describes Imran as the "manipulative mastermind" of the "operation" he was about to detail to the reader. JA88. The book's foreword highlights that "Imran Awan seems to have been at the center of what was likely the biggest scandal in Congressional history." JA81. Imran's face is on the book's cover. Rosiak's entire conspiracy theory about the Awans, in other words, hinged on Imran's purported actions and character. If Rosiak's claims about Imran are false (and they are), then his claims about the rest of the Awans fall apart.[18]

Fourth, and finally, Rosiak does not even try to defend some of his most obviously defamatory and false attacks on the Awans. His brief does not acknowledge that he accused Imran of murder and extortion. JA31-33. His brief does not mention his claim that the Awans stole "millions" of dollars. JA31-32. He does not try to provide any evidence proving the truth of very specific allegations he made about the Awans in his book—for example, that Imran "actually gave money to a police officer and said, 'Rape the guy. How many times you will rape him? I will pay you.'" JA94. Through his silence,

[18] Rosiak also fails to appreciate that the investigation of Imran necessarily would have revealed whether the rest of the Awans had committed crimes. As Judge Chutkan observed, the DOJ and FBI conducted a "thorough investigation of unfounded allegations against Mr. Awan *and his family*." JA615 (emphasis added).

Rosiak has essentially admitted that these baseless statements are defamatory and false. So, even if he could show that some of his challenged statements were true or adequately supported by his sources—which, for all the reasons discussed above, they are not—there remain numerous statements that are *indisputably* defamatory and false. That alone is enough to demonstrate that the Awans are likely to succeed on their defamation claim.

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

The defendants' primary argument below—and Salem's *only* argument about defamation on appeal—was that the Awans are public figures, and thus that they must meet the First Amendment's higher actual-malice standard under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Salem Br. 21-40; Rosiak Br. 38-44. But, as the trial court held, that argument is squarely 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 makes clear 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; *see* JA836-37.

1. In *Wolston*, the plaintiff Ilya Wolston was a former government employee 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* 443 U.S. at 159-60. Although Wolston was never indicted for 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]." *Wolston*, 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 v. Proxmire*,

443 U.S. 111, 135 (1979) (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 Abdulrahan 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 Bus. Intel. Ltd.*, 229 A.3d 494, 508 (D.C. 2020), or people with similar access and influence, *see, e.g.*, *Jankovic*, 822 F.3d at 582. 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." Salem Br. 21; *see* Rosiak Br. 38-41. Again, *Wolston* forecloses this argument. In holding that Ilya 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*."). Instead, limited-purpose public figures are those who, unlike the Awans, *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.

Even putting aside *Wolston*, the Awans are not limited-purpose public figures

under this Court's typical three-part, "highly fact-intensive inquiry." *Id.* at 1042. *First*, "the controversy to which the defamation relates" was *not* "the subject of public discussion *prior* to the defamation." *See id.* It was the defendants' own defamatory attacks on the Awans that brought the so-called "controversy" about them into the public. *See Hutchinson*, 443 U.S. at 135; *see also 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. Particularly after the Awans' exoneration, the matter may well have resolved itself quietly in the absence of Rosiak's false reporting. *See Moss*, 580 A.2d at 1031-32. *Third*, the Awans never "achieved a special prominence in the debate." *Doe No. 1*, 91 A.3d at 1042. Like Ilya Wolston and Abdulrahan Alharbi before them, they were the *subjects* of investigations over which they had no 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—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 v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1298 n.34 (D.C. Cir. 1980). 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).

Against all this, the appellees assert 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 Br. 25-26; *see* Rosiak Br. 42-43. But the Awans did not choose to work *in politics*—they were information-technology professionals, who happened to work for Congress. JA500; *see* JA492, 504. That their employers were members of Congress does not, as the appellants suggest, turn them into politicians. As this Court has made clear, government employees do not become public figures merely because they work for the government. *See Moss*, 580 A.2d at 1029. The Awans' jobs were far less connected to public affairs than that of Wolston, who had served as "an interpreter for the United States Military Government and the State Department in Allied-occupied Berlin." *Wolston*, 443 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 and Rosiak also contend that the Awans are public figures because members of Congress—their bosses—"capably" and "emphatically defended"

them *after* they were wrongly investigated and falsely attacked in public. Salem Br. 26, 29-30; Rosiak Br. 42. 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." 443 U.S. at 168-69.

The appellees also suggest that someone can become a limited public figure "based *solely* on his or her voluntary association with public officials." Salem Br. 24-25; Rosiak Br. 42. But the cases they cite are 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 "hobnob[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 at 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 being employed 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.

3. Salem alone cursorily argues (at 32-33) 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 this Court 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.

Salem cites only a single case for the existence of a third category, *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985)—a case that numerous commentators and courts, including this Court, 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.[19]

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 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.").

[19] 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.

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 that no one disputes they meet here. *See Solers*, 977 A.2d at 948; *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005). For good reason: 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—including *unrebutted* expert testimony—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, the 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." *Id.* 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 an "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—unsupported by any relevant, credible evidence—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.").

The Awans' expert testimony—none of which was rebutted by the defendants—confirms that there is sufficient evidence for a reasonable jury to find actual malice here.

As one expert testified, 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." JA566. But "the 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.*; *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 37-38, 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).

But there is no evidence that Rosiak sought such corroboration here—he simply relayed uncorroborated rumors and speculation that he received from sources, many of which had obvious biases against the Awans. *See also* JA540-42, 566-67.[20] As a leading

[20] Rosiak's reliance (at 35-56) on statements made by Imran's ex-wife Summaira Saddiqui illustrates the fatal defect in his argument. When a journalist accuses a simple IT worker of being a spy who has infiltrated the federal government, pointing to no

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." JA540-42. But here, "that did not happen." *Id.*

Salem suggests (at 38-40) that Rosiak's authoritative statements merely reflect his reporting of different perspectives—an "alternative view" of the events that transpired. 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. *See* Section I.A, *supra*. But even if Rosiak were simply presenting different perspectives, whether that would trump the evidence of actual malice that the plaintiffs presented below is a jury question. In other words, Salem's "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

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more than an ex-wife's bald assertion to defend that facially incredibly claim proves actual malice, not undermines it. *See, e.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("[Publisher] will [not] be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of [the] reports.").

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 44) that he "believed" his allegations to be 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").[21]

In sum, the record demonstrates that 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." JA540. Even though they need not do so, the Awans are likely to prove actual malice.[22]

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[21] Rosiak spends only one paragraph on the issue of actual malice, in which, aside from presenting this "honest belief" claim, he only repeats his mistaken argument that the attacks on the Awans reflect his "opinions and theories" drawn from "undisputed facts." Rosiak Br. 43-44.

[22] Alternatively, because "[t]he trial court did not resolve" the issue of actual malice here, this Court could exercise its "discretion to leave [it] for resolution by the trial court in the first instance" on remand. *Fells*, 281 A.3d at 588.

II. The Awans are likely to succeed on their 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. District of Columbia*, 9 A.3d 484, 493-94 (D.C. 2010). As the trial court found, the Awans have done so here. JA838-40. 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." JA540-41, 566-67. 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 demonstrated "severe emotional distress." Both are meritless.

1. In Salem's 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 Br. 41-44. 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 about private figures, accusing them 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 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." *Snyder*, 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. "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); *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.[23]

2. Salem and Rosiak also challenge the trial court's finding that the Awans suffered "severe emotional distress" as a result of the defendants' extreme and outrageous conduct. JA839-40; *see* Salem Br. 45-46; Rosiak Br. 46. "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).

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[23] Even if Salem was correct that the First Amendment protects all speech relating to matters of public concern (and it isn'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 Mag., 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 does not bar their IIED claim even under Salem's mistaken view of the law.

The trial court properly found that 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 offered *unrebutted* 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.*, JA488-89, 493-94, 497-98, 501-02, 505. These kinds of injuries are more than enough for a reasonable jury to find that the defendants committed IIED.[24]

[24] *See, e.g.*, *Daniels v. District of Columbia*, 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. District of Columbia*, 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 Awans are likely to succeed on their unjust-enrichment claim.

Finally, the trial court correctly determined that a reasonable jury could rule in favor of the Awans on their unjust-enrichment claim. JA840.

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). Critically, "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).

Rosiak asserts (at 46-47) that the Awans never "conferred" a benefit on any defendant. That is simply wrong. Here, Rosiak (as well as Salem and The Daily Caller) 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 at the Awans' expense. 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.

Salem does not contest that the Awans have adequately shown that the defendants unjustly retained benefits. Instead, it argues (at 47-49) that the unjust-enrichment claim still must be dismissed because damages are an adequate remedy at law. But "the 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) (emphasis added). Instead, "the 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. Accordingly, 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 v. Beck*, 103 F. Supp. 3d 166, 167 (D. Mass. 2015); *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

This Court should affirm the trial court's denial of Salem's and Rosiak's special motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2022, I electronically filed and served the foregoing brief with the Clerk of the Court and with counsel of record using the Court's electronic filing system.

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