DCCA Case Nos. 21-CV-00893, 22-cv-4

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In the District of Columbia Court of Appeals

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LUKE ROSIAK,
APPELLANT,

V.

IMRAN AMAN et al.,
APPELLEES

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ON APPEAL FROM THE SUPERIOR COURT FOR
THE DISTRICT OF COLUMBIA CIVIL DIVISION

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# APPELLANT LUKE ROSIAK'S REPLY BRIEF

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## INTRODUCTION

The Awans' Consolidated Response Brief ("RB") asks this Court to look the other way in the face of undisputed facts to preserve a false narrative that the Awans are victims of ethnic animus at the hands of Appellant. Appellant's Opening Brief ("OB") provided this Court with the thorough sourcing for *Obstruction of Justice*'s ("Book") claims. OB 29–38. The Awans have *no evidence* that any of these underlying facts were false.

In response to the litany of facts backing up the Book's hacking claims, OB 29–33, the Awans suggest, not that any of Mr. Rosiak's facts were false, but that the Awans' unauthorized access onto House members' servers wasn't really *that* bad. RB 41. In response to the evidence that a Democratic IT staffer accused Imran Awan of trying to bribe him, OB 33, that Imran Awan's wife accused him of being a criminal and of claiming to be a Congressional "mole," OB 34, and that many other parties accused Imran Awan of threatening them with violence and abuse (including wife and fellow Plaintiff Tina Alvi and many other Pakistani nationals, JA 694–5), OB 35, the Awans don't suggest these episodes never happened or that the named sources were misquoted. Without *any* evidence or discussion, they claim that maybe these individuals were biased. RB 40.

The Awans ignore and provide no response to the undisputed evidence showing that Imran Awan stole an intelligence specialist's identity. OB 33. And

they admit that the Book presented the exact "conclusive determinations by the FBI, the DOJ, and a federal judge" that the Awans claim proves their innocence, but—saying the quiet part out loud—their feathers are ruffled because they believe Mr. Rosiak "erroneously assessed the evidence" and "baselessly critique[d] [the government's statements] as cover-ups." RB 43.

But not content with just ignoring the record, the Awans repeatedly misattribute statements and allegations to Mr. Rosiak that are neither included in the Book, nor were stated in Mr. Rosiak's public interviews.

Mr. Rosiak engaged in core protected journalistic First Amendment activity: reporting undisputed facts and suggesting to his readers what he believed those undisputed facts tend to prove. Adopting the Awans' theories of defamation would destroy the profession of journalism. This Court should reverse the Superior Court's decision and remand the case with instructions to dismiss the Awans' Amended Complaint and award Mr. Rosiak fees and costs under D.C.'s Anti-SLAPP Act.

## ARGUMENT

### I. A JOURNALIST MUST BE ABLE PRINT AND DISCUSS A NAMED SOURCE'S OR A DISCLOSED DOCUMENT'S CLAIMS WITHOUT FEAR OF PERSONAL DEFAMATION LIABILITY

In October 2020, Adam Payne of the Business Insider reported that Donald Trump called Joe Biden "a criminal."[1] Under the Awans' contortion of defamation law, Adam Payne would be liable for defamation for publishing those words.

As discussed in Mr. Rosiak's Opening Brief, OB 29, "[t]he District of Columbia has long recognized and accorded the media the privilege of fair comment on matters of public interest." *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980). "To state accurately what a man has done, and then to say that in your opinion such conduct was disgraceful or dishonorable, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well founded or not." *Id.* (quoting *De Savitsch v. Patterson*, 159 F.2d 15 (D.C. 1946)). The privilege extends if "opinions expressed are based on true facts." *Boley v. Atl. Monthly Grp.* 950 F.Supp.2d 249, 259 (D.D.C. 2013) (cleaned up).

[1] *See, e.g.*, Adam Payne, "Trump calls a reporter asking him a question 'a criminal' for not reporting on the Hunter Biden allegations," *Business Insider* (October 20, 2020), https://www.businessinsider.com/trump-calls-reporter-criminal-hunter-biden-allegations-joe-biden-2020-10.

The Awans' provide this Court with a list of statements they claim are defamatory. RB 16–18. But each of these statements—along with every other statement they claim defamed them—had a named source that was not Mr. Rosiak. Mr. Awan's purported "wife" by polygamous marriage, Sumaira Siddique, accused Imran Awan of being a notorious criminal, JA 92, paying money to torture and rape his enemies in Pakistan, JA 94,[2] and of claiming to be a "mole" in Congress, JA 98. Fellow Democrat Congressional aides suggested the Awans were "stealing cell phones," JA 104, engaged in procurement fraud, JA 159, attempted bribery, JA 159, were funneling House data onto external servers, JA 163, and had boasted about hiring the Faisalabad police to beat their enemies naked with a shoe, JA 160. Relative Syed Ahmed accused Abid Awan of "sending iPads and iPhones to government officials in Pakistan." JA 195. The House Inspector General detailed the Awans' missing equipment and procurement irregularities suggesting fraud, as well as unauthorized access to House computer networks. JA 48–51, 159. As shown in Mr. Rosiak's thoroughly sourced Book, every claim of which the Awans complain originated from another named source and often multiple sources.

Yet none of these sources is a defendant here. Even if these named sources were biased, as the Awans argue to try to get out from under this uncomfortable

[2] "'[Imran Awan] actually gave money to a police officer and said, "Rape the guy. How many times will you rape him? I will pay you."' Sumaira told me." JA 94.

truth, Mr. Rosiak is still allowed to report what these sources said and let readers determine for themselves what part bias may have played in the sources' statements. Just like Adam Payne of the Business Insider did not adopt Donald Trump's claims when he reported Donald Trump said Joe Biden is a criminal, Mr. Rosiak did not adopt his sources' statements when he reported what they said about the Awans. Moreover, the Awans presented *no evidence* suggesting that any of the facts alleged by these sources were false.

Mr. Rosiak also fully disclosed the documents on which he relied in coming to his opinions. These include presentations from the House Inspector General, JA 43,[3] a CAO memorandum which detailed the Awans had:

> "1) $219,000 in outstanding invoices for purchases…all of which [were] unknown to the congressman's office; 2) Eighty-three pieces of missing equipment with a purchase price of $118,683.80 that had been 'written off' from the House inventory by the CAO staff at the direction of the [Awans]; 3) Missing equipment includ[ing] laptops, iPads, TVs, video conferencing equipment, and computers; 4) Fourteen examples of equipment delivered to the home[s] of the [Awans], instead of the House of Representatives, thus bypassing internal controls during the receiving process; and 5) Examples of unopened equipment being stored at unknown locations for long periods."

JA 43, 52–57, and an FBI memo which accused the Awans of "funneling data outside the House network," JA 44, 65. The Awans, far from having

[3] During these presentations, the House Inspector General made statements suggesting Awans stole "a couple hundred thousand in laptops." JA 43.

"overwhelming evidence" that the above documents were false, have never even mentioned these documents, let alone presented *evidence*—rather than opinions of people who conveniently and self-servingly pretended like these documents don't exist—suggesting either these documents, or the claims made within these documents, are false.

Within the context of these disclosed and undisputed facts, the First Amendment affords Mr. Rosiak "breathing space" to "criticize and interpret" what was stated by these sources. *Guilford Trans. Indus., Inc. v. Wilner*, 760 A.2d 580, 589 (D.C. 2000) (quoting *Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994)). Similarly, the First Amendment also provides breathing space for Mr. Rosiak to review government comments discussing the Awans and suggest they do not tell the whole story—or maybe even are themselves evidence of greater wrongdoing. OB 18. The key is whether underlying facts are provided so that the reader may judge for him or herself whether the criticism and interpretation of the reporter is correct. The Book does so. OB 15–37.

At its core, the Awans' lawsuit seeks to hold a journalist personally liable for reviewing undisputed facts and coming to a different conclusion than the official government line. The Awans fully admit this when they argue that Mr. Rosiak "erroneously assessed the evidence" and "baselessly critique[d] [the government's

statements] as cover-ups." RB 43. This is a radical rejection of core First Amendment principles and an attack on journalism itself.

## II. THE AWANS' RESPONSIVE BRIEF ASKS THIS COURT TO HOLD MR. ROSIAK ACCOUNTABLE FOR STATEMENTS NOT MADE BY HIM AND NOT ALLEGED IN THE COMPLAINT

Grasping at straws, the Awans claim that Mr. "Rosiak does not even try to defend some of his most obviously false and defamatory attacks on the Awans." RB 44. That would be because many of these "obviously false and defamatory attacks" are not in the record and were not made by Mr. Rosiak.[4] The Awans cite JA 31–33, stating that Mr. Rosiak accused Imran Awan of murder. RB 44. The complaint does not include this allegation and Mr. Rosiak has never accused Imran Awan of murder. The Awans cite JA 31–32, claiming that Mr. Rosiak accused the Awans of "st[ealing] 'millions' of dollars." RB 44. Again, this allegation is noticeably absent from the Awans' citation and Mr. Rosiak made no such claim. Without any citation, the Awans claim Mr. Rosiak accused the Awans of being "spies." RB 1, 2, 57. Despite making the claim three times in their brief, not once do the Awans include a record citation backing up this claim. They falsely claim that Mr. "Rosiak alleged, 'a potential coverup of an espionage ring that plundered

[4] The two other "obviously defamatory" claims the Awans suggest were not addressed by Mr. Rosiak did not come from Mr. Rosiak, but named sources, and are specifically discussed in Section I.

national secrets and might have been responsible for the campaign hacking of the Democratic National Committee.'" RB 10. Yet those claims came from the New York Times and were not attributed to Mr. Rosiak.[5] Time and again, the Awans obfuscate the real record to try to save their lawsuit. This Court should not reward their bait and switch.

## III. THE SUPERIOR COURT ERRED BY APPLYING THE COMMON LAW DEFAMATION STANDARD RATHER THAN THE APPLICABLE CONSTITUTIONAL DEFAMATION STANDARD FOR MATTERS OF PUBLIC CONCERN

Mr. Rosiak does not claim—as the Awans suggest—that defamation claims against media defendants require application of *elements* different from the common law standards. OB 14–15. However, what is clear from *Philadelphia Newspapers, Inc. v. Hepps*—and the Awans concede by their failure to address Mr. Rosiak's real arguments—is that, for those speaking on matters of public concern, the constitution shifts the *burden of proof* on the element of falsity from the defendant to the plaintiff. 475 U.S. 767, 776 (1986).

The parties and the Superior Court all agreed this case involves matters of public concern. JA 832. Despite this, the Superior Court saddled Mr. Rosiak with the burden of proof when, constitutionally speaking, it was the Awans load to

[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.

carry. The Superior Court determined that Mr. Rosiak's claims lacked a "reasonable basis," JA 834, but, under *Hepps*, Mr. Rosiak does not have to show his claims had a reasonable basis. JA 834. Instead, within the context of anti-SLAPP, *Hepps* required the Awans to provide enough evidence that a jury would be "likely" to find Mr. Rosiak's claims were "materially false." *Id.*

A statement cannot be deemed materially false based on differences in degree. *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991). Minor inaccuracies and alterations do not make a statement materially false. *Id.* So where Mr. Rosiak describes, for instance, undisputed facts showing violations of House rules as "hacking" and "procurement fraud," the Awans describe the same underlying activity—which they do not dispute occurred—as "minor IT and procurement violations." RB 41. The tension lies not in whether the underlying activity occurred—the facts of the matter—it lies in the perceived severity of those underlying violations. Mr. Rosiak's different interpretation of the undisputed facts cannot be proven "materially false" as required for liability under *Hepps*.

Further, as discussed in Section I, the purported defamatory claims made in the Book came from other named sources. Unless the Awans had presented evidence that, for example, IT aid Pat Sowers did not tell Mr. Rosiak that the Awans were "funneling all the data off members' official servers," JA 163, or that African American Marine and Democrat Andre Taggart did not tell Mr. Rosiak

that in the garage of the home he rented from the Awans he found, "a cache of hard drives and phones that [Taggart] recognized as government equipment," JA 167, or that tenant Laurel Everly never told Mr. Rosiak that Imran Awan was "abusive and threatening" towards her, JA 170, they did not provide the Court with *any* information that the Book's claims were material false. Even if the Awans had proved they did not do any of these things—and they did not by *any* stretch of the imagination—they certainly made no effort to prove that these statements were materially false by showing that these named sources did not utter what they are alleged to have said.

The Superior Court did not shift the burden of proof to the Awans as required under *Hepps*. Under the appropriate constitutional standard, the Awans needed to present the Superior Court with information by which a jury was "likely" to determine Mr. Rosiak's statements were "materially false" in response to Mr. Rosiak's anti-SLAPP motion. They did not, and this Court should correct this clear error.

## IV. THE AWANS ARE LIMITED-PURPOSE PUBLIC FIGURES

The Awans cannot boast about influencing the public controversy through their agent in one breath and then claim to be private figures in the next. The Awans admit that a person becomes a limited-purpose public figure when they "assume roles in the forefront of particular public controversies in order to

influence the resolution of the issues involved." RB 48; *Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014). They then spend five pages without an acknowledgement or explanation of the most salient fact proving they meet this definition: they had their lawyers acting to influence the press on their behalf. Affidavit of Imran Awan, JA 487 ("Before the publication of the book…I did not comment on these claims or the investigation publicly *because I had a lawyer who was doing that for me*.") (emphasis added). The Awans admitted they were trying to influence the resolution of the issues involved in this controversy through their agents, meaning they voluntarily assumed their public figure status.

The Awans try to pivot to suggest that any public figure status they may have attained lapsed. They state that *Wolston v. Reader's Dig. Ass'n, Inc.* "suggest[s] that 'an individual who was once a public figure may lose this status.'" RB 54; 443 U.S. 157, 166 n.7 (1979). However, the Court in *Wolston* expressly declined to decide that issue. *Id.* ("[W]e *need not and do not decide* whether or when an individual who was once a public figure may lose that status by the passage of time.") (emphasis added).

The other two cases the Awans cite for the proposition that a limited public figure can lose their status in a controversy by the passage of time do not help their argument. The Fourth Circuit determined that the plaintiff in *Fitzgerald v. Penthouse Intern., Ltd. was* a limited purpose public figure because "the

controversy into which the plaintiff thrust himself was continuing." 691 F.2d 666, 669 (4th Cir. 1981). Other than their self-serving suggestion the controversy had ended, the Awans provide no analysis of why that claim is to be believed. In fact, the controversy regarding the Awans was ongoing at the time of the Book's release in February 2019 and continued after.[6]

*Alharbi v. Beck*, far from finding that a limited public figure could lose their status by the passage of time, opined that an "involuntary public figure"—unlike one who sought to influence the controversy like the Awans—might have public figure status for limited duration. 62 F.Supp.3d 202, 212 (D. Mass. 2014).

Yet even if these cases *did* stand for the proposition the Awans posit, neither would be binding on this Court. Mr. Rosiak did not find any case in this jurisdiction where a limited public figure lost their public figure status by the passage of time.

In the forty-three years since *Wolston* was decided, the Supreme Court has never found that a limited public figure could lose their status by the passage of time. The Awans blatantly attempted to mislead this Court as to the true state of

[6] *See, e.g.,* David Shortell, "Former House IT Staffer at center of debunked conspiracy theories avoids jail time." *CNN.com*, (August 21, 2018) https://www.cnn.com/2018/08/21/politics/imran-awan-sentencing/index.html; Noam Scheiber and Nicholas Fados, "Congress pays $850,000 to Muslim aides Targeted in Inquiry, *NY Times*, (November 25, 2020) https://www.nytimes.com/2020/11/25/business/congress-settlement.html.

the law. The Awans are limited purpose public figures who purposefully sought to influence the outcome of a public controversy meaning they must prove malice.

## V. THE AWANS CANNOT PROVE MALICE

"The burden of proving actual malice requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized his statement was false or that he subjectively entertained serious doubt as to the truth of that statement." *Bose Corp. v. Consumers Union of U.S., Inc.,*466 U.S. 485, 520 at n. 20 (1984). The Awans have not even come close to showing a "likelihood" that they could meet this standard as they must to beat Mr. Rosiak's anti-SLAPP.

Ignoring the binding precedent of *Bose Corp.*, the Awans seek to change the standard by which this Court decides malice by suggesting that malice could be found if Mr. Rosiak did not seek corroboration of his claims before he published his Book, RB 57, once again, without acknowledging the avalanche of evidence on which Mr. Rosiak relied and provided to his readers. Even if this new "must seek corroboration" rule *were* the appropriate malice standard—and it is not—Mr. Rosiak would still win. None of the Awans' "experts," which they repeatedly tout, discussed or explained away the House Inspector General's reports, the CAO's memorandum, or the FBI memo. None of them discussed the claims of fraud, bribery, and violence made by the Awans' fellow Democratic IT aides, other House staffers, the Awan's business partners, tenants, and the Awans' own family

members. The Awans' experts demonstrate their ignorance of the Book's contents by claiming that the Book needed to rely on sources with "first-hand knowledge of the statements" to be able to make these types of claims, JA 540–42, *which is exactly what the Book did*. *See* Section I. The Awans' experts said that for these types of claims journalists should "rely on confidential sources only as a last resort," JA 540–42, *which is exactly what the Book did*. But for one IT aide who used a pseudonym, the Book included named sources throughout. The purported expert of journalism said he could not find anything that supported Mr. Rosiak's claims, when the very pages on which those claims were found named and quoted their sources. *See* Section I.

The Awans' experts repeatedly parrot the DOJ statement as if it is gospel truth and the DOJ can never make a mistake. Yet the Book quoted the DOJ statement *in full*. JA 98, 350–360. None of the experts provided evidence showing the purported falsity of Mr. Rosiak's claims that Mr. Rosiak did not himself first reveal to his readers.

Under the real malice standard recited in *Bose Corp.*, the Awans have provided no evidence—nor could they—that Mr. Rosiak subjectively entertained serious doubt as to the truth of the Book's statements. He continues to stand by the truth of his reporting to this day. Yet even under the specious standard the Awans try to feed this Court, Mr. Rosiak's claims were thoroughly corroborated. And

under *their own experts' standards of journalistic ethics*, the Book passes with flying colors.[7]

## VI. THE AWANS DID NOT HAVE A CONTRACT WITH MR. ROSIAK

The Awans never even acknowledge, let alone address, the elephant in the room with regard to their unjust enrichment claim. RB 66. A contract or quasi-contract must exist in order to bring an unjust enrichment claim under D.C. law. *News World Communications v. Thompson*, 878 A.2d 1218, 1222 (D.C. 2005) (stating unjust enrichment is a "theory of quasi-contract.") The Awans not only fail to address this binding precedent, but also fail to point to any type of bargained for exchange that would allow this claim to proceed. Nor have they pointed to any authority which would suggest this total about face—turning a contractual remedy into a tort remedy unmoored from any preceding agreement—is appropriate or necessary.

## VII. MR. ROSIAK DID NOT WAIVE ANY OF HIS ARGUMENTS

The Awans' repeated cries that Mr. Rosiak waived arguments are meritless. The Awans claim that Mr. "Rosiak *never* contended that his statements were mere

[7] Because, as discussed in Mr. Rosiak's Opening Brief, OB 44–46, a public figure "may not recover for the tort of intentional infliction of emotional distress…without showing… actual malice," *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1260–61 (D.C. 2016), this same analysis dooms the Awans' Intentional Infliction of Emotional Distress claim.

'opinion'" RB 36 (emphasis in original), when Mr. Rosiak's Superior Court brief said his statements "expressed his opinions on the conduct of Plaintiffs." Defendant Luke Rosiak's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act ("Rosiak Anti-SLAPP") 4. Mr. Rosiak's Superior Court brief argued the Awans "fail[ed] to even acknowledge the evidence Rosiak produced in support of his alleged defamatory statements, let alone prove falsity." Rosiak Anti-SLAPP 4, 7. Thus, it was no surprise when, on appeal, Mr. Rosiak discussed the various pieces of evidence the Awans did not acknowledge and that they did not prove false, including evidence related to the plea agreement, DOJ statements, and FBI statements. RB 42–43. The questions of law raised by Mr. Rosiak are the same questions of law raised at the trial court, which is all that is required for an appellant to make an argument on appeal. *Wagshal v. District of Columbia,* 430 A.2d 524, 527 (D.C.1981). Not every shade of argument must be argued in the same way as chosen at the trial court. *Id.* Mr. Rosiak did not waive any of his arguments.

## CONCLUSION

Mr. Rosiak requests that the Court reverse the Superior Court's ruling on his anti-SLAPP motion in its entirety, remand the case with instructions for the Superior Court to dismiss the Awans' complaint with prejudice, and award Mr. Rosiak his fees and costs.

Dated: December 2, 2022

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## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was served on all counsel of record via the Appellate E-filing System on December 2, 2022.

/s/ David A. Warrington
David A. Warrington

# District of Columbia
# Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

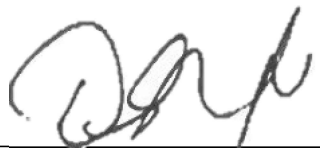
2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

21-CV-00893, 22-cv-4

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