ELECTRONICALLY FILED
8/22/2019 11:24 AM
03-CV-2018-900017.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

LEIGH CORFMAN, Plaintiff, vs. **ROY S. MOORE, *et al.***, Defendants.	CIVIL ACTION NO. CV-2018-900017.00

PLAINTIFF LEIGH CORFMAN'S COMBINED OPPOSITION TO DEFENDANT JUDGE ROY MOORE FOR US SENATE'S MOTION FOR SUMMARY JUDGMENT, AND TO DEFENDANT ROY MOORE'S MOTION FOR SUMMARY JUDGMENT

Mere months after a second failed attempt at dismissal of Ms. Corfman's defamation claims, Defendants Roy S. Moore and Judge Roy Moore for US Senate ("Moore Campaign Committee") ask this Court to enter summary judgment on Ms. Corfman's Complaint. But Mr. Moore's (Doc. 794) and the Moore Campaign Committee's (Doc. 797) summary judgment motions, and their supporting briefs (respectively, "Moore Br." and "Campaign Committee Br."), largely restate legal grounds for dismissing defamation claims under the First Amendment and other asserted privileges that Ms. Corfman has thoroughly (and repeatedly) refuted, and this Court has properly rejected. The record developed in discovery is irrelevant to such legal challenges, and they should therefore be rejected once again.

To the extent that Defendants have raised new, record-based challenges with respect to the Moore Campaign Committee's responsibility for the defamatory statements of its representatives, and the state of mind of those representatives in defaming Ms. Corfman, Defendants' arguments fare no better. Each issue is generally inappropriate for resolution on summary judgment and are instead reserved for the jury's ultimate assessment of witness credibility and the inferences to be

drawn from established facts. Even if considered prematurely at this stage, Defendants' arguments cannot square with the standard for review on summary judgment—under which facts are viewed, and all justifiable inferences from those facts are drawn, in Ms. Corfman's favor, the record developed through discovery, and well-established principles of agency law and First Amendment protection.

At bottom, nothing of material importance has changed since the Court denied Defendants' Renewed Motion to Dismiss on March 10, 2019. The dispute regarding the truth of Defendants' defamatory statements about Ms. Corfman's accounts of her sexual abuse by Mr. Moore as a 14-year old high school freshman remains. And the legal standards governing defamation claims, both as a matter of Alabama state defamation law and under the First Amendment, likewise remain unchanged. These standards have long "recognized '[t]he legitimate state interest underlying the law of libel,'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991), to protect "the individual's interest in his reputation," *Herbert v. Lando*, 441 U.S. 153, 169 (1979). As Ms. Corfman has continuously shown, the Complaint states a valid claim for defamation in defense of her reputation. The record at this stage of discovery further confirms the sufficiency of Ms. Corfman's defense of her reputation.

Having taken multiple (unsuccessful) bites at the Complaint as a matter of law, it is time for Defendants' *seriatim* legal attacks to end. Defendants' motions have shown only the genuineness of the parties' dispute and that this case must proceed to the jury, as the ultimate arbiter of fact.

COUNTERSTATEMENT OF FACTS

A. Public Allegations Regarding Mr. Moore's Past Conduct Toward Women

On September 26, 2017, Mr. Moore became the Republican Party nominee in the special election for the United States Senate seat vacated by former Attorney General Jeff Sessions. *See*

Ex. A (Moore Dep. Tr.), 87:21–88:12. The special election was held December 12, 2017, and Mr. Moore lost to the Democratic candidate. *See id*., 103:21–104:2.

Before the special election, on November 9, 2017, *The Washington Post* published an article entitled, *Woman says Roy Moore initiated sexual encounter when she was 14, he was 32*. Ex. B (Moore Dep. Ex. 33); Ex. A, 88:22–90:3; Compl. ¶ 11.[1] The article recounts interviews of Ms. Corfman regarding her encounters with Mr. Moore in 1979, when she was 14 years old and he was an assistant district attorney in his 30s.[2] *See* Ex. AJ (Affidavit of Leigh Corfman).

According to Ms. Corfman (and her mother), Mr. Moore approached them outside a courtroom in early 1979 and offered to sit with Ms. Corfman while her mother attended a child custody hearing. *See* Ex. B at 2; Ex. AJ ¶¶ 1–2. "The *Post* confirmed that [Ms. Corfman's] mother attended a hearing at the courthouse in February 1979 through divorce records" and that Mr. "Moore's office was down the hall from the courtroom." Ex. B at 3.

The article then describes Ms. Corfman's account of what happened after her mother went into the courtroom. According to *The Post*, "Corfman says [that] Moore asked her where she went to school . . . and whether he could call her sometime." *Id*. at 4; Ex. AJ ¶ 2. Ms. Corfman gave Mr. Moore her telephone number and "not long after" she "talked to Moore on her phone in her bedroom, and they made plans for him to pick her up at Alcott Road and Riley Street, around the corner from her house." Ex. B at 4; *see also* Ex. AJ ¶¶ 2–3. Mr. Moore "drove her to his house,"

[1] Although Defendants dispute the truth of the encounters—set forth below—in the news articles describing Mr. Moore's behavior toward young girls in the late 1970s and early 1980s, they do not dispute the authenticity of the articles themselves or the dates of publication.

[2] The *Post* approached Ms. Corfman in Fall 2017, near the end of Mr. Moore's special election campaign, and "Ms. Corfman responded truthfully to the reporter's questions." Compl., ¶ 10; *see also* Ex. AJ ¶¶ 9–10. Ms. Corfman neither "received any compensation, from *The Washington Post* or from any other source, for disclosing Mr. Moore's sexual abuse of her when she was 14 years old," Compl., ¶ 30, nor did she make "this disclosure at the behest of any political organization or campaign," *id*., ¶ 31. *See also* Ex. AJ ¶¶ 11–12.

where "[s]he remembers an unpaved driveway" and going inside where "they sat and talked." Ex. B at 4; *see also* Ex. AJ ¶ 4. Mr. Moore "told her she was pretty, put his arm around her and kissed her, and . . . she began to feel nervous and asked him to take her home . . . ." Ex. B at 4; *see also* Ex. AJ ¶ 5. "Soon after, . . . he called again, and picked her up again at the same spot." Ex. B at 4.

The article then sets forth Ms. Corfman's account of what happened on that second visit to Mr. Moore's home. As *The Post* recounts, Ms. Corfman "was lying on a blanket on the floor" and "remembers Moore disappearing into another room and coming out with nothing on but 'tight white' underwear." *Id*. At that point, Mr. Moore "kissed her, . . . took off her pants and shirt, and . . . touched her through her bra and underpants." *Id*. He then "guided her hand to his underwear and . . . she yanked her hand back." *Id*. Ms. Corfman "remembers thinking, 'I don't want to do this' and 'I need to get out of here.' She says that she got dressed and asked Moore to take her home, and that he did." *Id*. *See also* Compl., ¶¶ 5–6; Ex. AJ ¶ 6. Ms. Corfman avoided further meetings with Mr. Moore. *See* Ex. B at 4.

Soon after Mr. Moore's sexual abuse of her, Ms. Corfman told friends about her encounters with an older man and identified the man—to at least one friend—as Mr. Moore. *See id*.; *see also* Compl., ¶ 7; Ex. C (Declaration of Betsy Rutenberg Davis), ¶ 3; Ex. D (Declaration of Cynthia Tabb), ¶¶ 3–4; Ex. E (Sexton Dep. Tr.), 44:20–46:22; Ex. AJ ¶¶ 7–8.

The article also includes the accounts of three other women concerning alleged encounters with Mr. Moore in the late 1970s and early 1980s. First, "Gloria Thacker Deason says she was 18 and Moore was 32 when they met in 1979 at the Gadsden Mall," "that they dated off and on for several months," and "that Moore would pick her up for dates at the mall or at college basketball games" and take her "out for dinners at a pizzeria . . . or at a Chinese restaurant" where he bought her alcoholic drinks. Ex. B at 5. Second, "Wendy Miller says that Moore approached her at the

mall . . . in 1979, when she was 16" and "began asking her out on dates in the presence of her mother," who remembered refusing "to grant Moore permission to date her 16-year-old daughter," saying "'You're too old for her . . . let's not rob the cradle . . . .'" *Id.* Third, and finally, "Debbie Wesson Gibson says that she was 17 in the spring of 1981 when Moore . . . asked her out," leading to them dating for "two to three months" during which "he took her to his house, read her poetry and played his guitar," and kissed her "once in his bedroom and once by the pool at a local country club." *Id.*

Additional women came forward in the days following the *Post* article. On November 13, 2017, Beverly Young Nelson released a statement regarding alleged sexual misconduct by Mr. Moore behind the Olde Hickory House restaurant when she was 16 years old. *See* Ex. F (Moore Dep. Ex. 48); Ex. A, 300:12–301:5. On November 15, 2017, Kelly Harrison Thorp described Mr. Moore asking her out when she was 17 years old, and explaining that he went "out with girls [her] age all the time." Ex. G (Moore Dep. Ex. 49) at 4; Ex. H (Declaration of Kelly Thorp), ¶ 2 ("When I told him that I was 17 years old, Moore told me that he went out with girls my age all of the time.").

Also on November 15, 2017, *The Post* reported Gena Richardson's statement—corroborated by a friend and co-worker—that Mr. Moore asked her out when she was a high school senior working at Sears in the Gadsden Mall, including a call to reach her at her high school; they eventually met "at a movie theater in the mall after she got off work, a date that ended with Moore driving her to her car in a dark parking lot behind Sears and giving her what she called an unwanted, 'forceful' kiss that left her scared." Ex. I (Moore Dep. Ex. 50) at 2, 5.

B. Defendants' Defamatory Statements About Ms. Corfman

In the November 9, 2017 *Washington Post* article reporting his sexual abuse of Ms. Corfman, Mr. Moore issued a statement that "[t]hese allegations are completely false and are

a desperate political attack by the National Democrat Party and the Washington Post on this campaign." Ex. B at 2; *see also* Compl., ¶ 14.

From that moment forward, Defendants relentlessly attacked Ms. Corfman, repeatedly accusing her—as Mr. Moore did in his initial statement—of lying about her sexual abuse to advance a political agenda, for financial reward, or both. *See* Compl., ¶¶ 14, 16, 45–93.[3]

1. Mr. Moore's Defamatory Statements

On November 10, 2017, the day after publication of the initial *Post* article, Mr. Moore appeared on *The Sean Hannity Show*, a nationally syndicated radio program. *See* Compl., ¶ 45; Ex. O (Moore Dep. Ex. 34); Ex. A, 122:14–123:11. During that interview, Mr. Moore stated:

> I don't know Miss Corfman from anybody. I never talked to her. I've never had any contact with her. Allegations of sexual misconduct with her are completely false. I believe they are politically motivated. I believe they're brought only to stop a very successful campaign. And that's what they're doing. I've never known this woman or anything with regard to the other girls.

Ex. O at 2. *See also* Ex. A, 128:2–5. He then reiterated, "[i]t's a direct attack on this campaign and it involves a 14 year old girl which I would have never had any contact with . . . ." Ex. O at 3. *See also id*. at 5 ("I never knew this woman. I never met this woman and these charges are politically motivated."); Compl., ¶¶ 45–49.

Tellingly, although Mr. Moore claimed that he did not "generally" date girls as young as 18, Ex. O at 3, Mr. Moore admitted that he "dated a lot of young ladies," *id*. at 2, "during this period 1977 to 1982," Moore Dep. 128:10–13. He further admitted to knowing 17 year-old Debbie Wesson Gibson, and although he did not "remember going out on dates" with her, "[i]f we did go

[3] Defendants do not deny that they made the alleged defamatory statements set forth in the Complaint. *See*, *e.g.*, Moore Br. at 3–6; Ex. J (Hobson Dep. Tr.), 56:3–12; Ex. K (Armistead Dep. Tr.), 79:9–80:4; Ex. L (DuPré Dep. Tr.), 140:17–141:7; Ex. M (Porter Dep. Tr.), 90:17–20; Ex. N (Young Dep. Tr.), 251:15–254:9.

(continued…)

out on dates then we did." Ex. O at 2. Mr. Moore also conceded that he knew 18 year-old Gloria Thacker Deason, but insisted that he could not have bought her alcohol because Etowah was "a dry county" at the time. *Id*. at 3.[4]

Mr. Moore made additional statements casting Ms. Corfman as a politically and financially motivated liar over the following days.

In a November 11, 2017, video-broadcast campaign speech, Mr. Moore described Ms. Corfman's account of her sexual abuse as "a desperate attempt to stop my political campaign . . . . These attacks involve a minor and they're completely false and untrue." Moore Dep. 350:11–18. *See also* Compl., ¶ 50; *id*., ¶¶ 51, 53 (stating Ms. Corfman's account was "false" on November 12 and 16); Moore Dep. 198:14–200:4, 186:17–188:7.

On November 21, Mr. Moore stated that "there is not one ounce of truth in [Ms. Corfman's] accusations" and insisted that he never "dated or engaged in any inappropriate conduct with an underage girl." Moore Dep. 376:14–377:10. *See also id*. at 378:16–18; *id*. at 153:3–5 (testifying that "underage" is a girl "[u]nder 19").

On November 27, he continued the theme that Ms. Corfman's "completely false" and "malicious" account of her sexual abuse was "simply dirty politics" and "a sign of the immorality of our time." *Id*. at 289:16–290:11.

And, speaking at a Baptist Church on November 29, Mr. Moore stated, among other things, that "liberals" were intent upon stopping his campaign, including through "false and . . . malicious" claims of "sexual immorality," *id*. at 379:6–381:9, that are "fables, without any proof," *id*. at 196:13–197:10; Compl., ¶ 59. *See also* Compl., ¶ 58 ("I do not know any of these women, did not

[4] Mr. Moore's assertion that Etowah County was dry at the time is incorrect. *See infra* p. 46.

date any of these women, have not engaged in any sexual misconduct with anyone. This is . . . simply dirty politics'").

Mr. Moore concluded his campaign with similar statements leading into the December 12, 2017 special election. On December 10, he again stated that he did "not know" and "had no encounter with" Ms. Corfman and that therefore her statement was "not true." *Id*. at 189:3–190:12. *See also* Compl., ¶ 61 (stating "these allegations are completely false. I did not date underage women"). On the night before the election, Mr. Moore concluded that Ms. Corfman's account of her sexual abuse was "fake news," Compl., ¶ 62, for use "on a political advertisement and . . . national television," Ex. A, 381:10–382:23.

Mr. Moore's defamatory statements did not end with the special election.[5] On December 27, 2017, Defendants filed suit against Alabama state and county officials, seeking to enjoin certification of the Senate election results on the basis of alleged "systematic election fraud." *See* Ex. P (Moore Dep. Ex. 28), ¶ 1; *Roy S. Moore et al. v. John H. Merrill et al.*, No. 03-CV-2017-902015.00 (Cir. Ct. of Montgomery Cty.) (hereinafter, "Election Fraud Lawsuit"). That suit includes a gratuitous and unrelated allegation that Mr. "Moore [had] successfully completed a polygraph test confirming that the representations of misconduct made [by Ms. Corfman] against him during the campaign are completely false." Ex. P, ¶ 22.[6] Defendants attached an affidavit in which Mr. Moore concludes with the untrue and defamatory characterization of Ms. Corfman's account as a "false and malicious attack[]." *Id*. at Attachment 1 (Affidavit of Roy S. Moore); *see also* Ex. Q (December 27, 2017 Affidavit of Roy S. Moore).

[5] On June 20, 2019, Mr. Moore officially announced that he is again running for a seat in the United States Senate during the 2020 election.

[6] Mr. Moore's statements concerning the polygraph exam he took are inaccurate. *See infra* n.18.

(continued…)

2. The Moore Campaign Committee's Defamatory Statements

Through its representatives, the Moore Campaign Committee followed Mr. Moore's lead by making false statements characterizing Ms. Corfman as a liar whose account of sexual abuse was improperly motivated.[7] *See* Compl., ¶¶ 25, 79.

On November 14, 2017, Mr. Moore's campaign manager, Richard Hobson, appeared on an *American Pastors Network* radio program and referred to Ms. Corfman's account of her sexual abuse as "just a string of lies" because Mr. Moore has "never known her." *See* Ex. J, 56:3-12, 91:4–9. *See also id*. at 91:20–22 ("They are lies. It did not happen, and they're trying to ruin the reputation of a great man . . . ."). Mirroring Mr. Moore, Mr. Hobson referred to Ms. Corfman's account as "dirty politics of the worst kind." *Id*. 97:22–98:6.

At a televised press conference the next day, Mr. Moore's campaign chairman, William Armistead, stated that Mr. Moore had been "falsely accused of some things that he did not do forty years ago" and then reiterated that Ms. Corfman's account of sexual abuse amounted to "false charges." Ex. K, 79:9–80:4.

During a subsequent interview with *The Weekly Standard*, Mr. Armistead also attempted to cast doubt on Ms. Corfman's account by portraying her as "a problem child." Ex. R (Armistead Dep. Ex. 142) at 5. *See also* Ex. K, 81:17–84:17.

At a November 21, 2017 press conference, an agent speaking for the Moore Campaign Committee, Benjamin DuPré, stated that Ms. Corfman's account of sexual abuse was "false," Ex. L, 140:17–142:10, *see also infra* pp. 35–39, and made factual challenges—to Ms. Corfman

[7] At the summary judgment stage, it is reasonable to conclude that "the campaign" of Roy Moore for U.S. Senate and the Moore Campaign Committee are coterminous in either fact or appearance, and the Moore representatives were agents authorized to speak on behalf of the Moore Campaign Committee. *See infra* pp. 35–39.

speaking on a telephone in her bedroom, to the existence of a custody hearing in February 1979, and to the location of her parents' residences—intended to discredit Ms. Corfman's account. *See* Compl., ¶ 86. *See also* Ex. L, 127:13–21, 144:12–20, 148:2–11, 151:11–22, 158:11–15. But those factual challenges were not in any way "inconsistent with Ms. Corfman's account of Mr. Moore's sexual abuse of her when she was 14 years old." Compl., ¶¶ 83–86.

Janet Porter, an agent speaking for the Moore Campaign Committee, *see infra* pp. 35–39, continued the attacks on Ms. Corfman's veracity during a December 5, 2017 television appearance on CNN. *See* Ex. S (Porter Dep. Ex. 66); Ex. M, 90:17–20; Ex. K, 104:8–105:4. Mrs. Porter stated that Ms. Corfman's descriptions of her sexual abuse by Mr. Moore were "false" and "baseless," Ex. M, 100:7–23, and "an Academy Award performance," *id*. at 106:23–107:17. Mrs. Porter also sought to discredit Ms. Corfman's account of her sexual abuse with purported factual inconsistencies—Ms. Corfman speaking on a phone in her bedroom and the impact the sexual abuse had on Ms. Corfman. *See id*. 91:19–92:7.

Mrs. Porter followed up this appearance with further interviews on CNN in which she touted Mr. Moore's purported polygraph results and claimed that Mr. Moore "didn't know" Ms. Corfman. *Id*. at 129:1–19, 133:16–17. *See also id*. 128:20–133:13; Ex. AL (Porter Dep. Ex. 71); Compl., ¶¶ 90–91.

Finally, the Moore Campaign Committee's chief political strategist, *see* Ex. AI (Young Dep. Ex. 101) (confirming that Young was "campaign strategist"); *see also infra* pp. 35–39, Dean Young, stated in a December 10, 2017 interview on ABC's *This Week* that "Leigh Corfman's not telling the truth . . . . Zero evidence[.]" Compl., ¶ 93; Ex. N (Young Dep. Tr.), 251:15–254:9.

Members of the public "[f]ollow[ed] the example set by Mr. Moore and the Moore Campaign," Compl., ¶ 95, and both repeated and expanded the Defendants' false and defamatory statements, *see id*., ¶ 28; *id*., ¶¶ 97, 99.

C. Defendants' Prior Motions Challenging Ms. Corfman's Defamation Claims

Having suffered through these public attacks on her truthfulness and motivations for nearly two months, Ms. Corfman filed her Complaint on January 4, 2018, stating a claim for defamation against Mr. Moore and the Moore Campaign Committee. Ms. Corfman alleges that Defendants defamed her through their public statements by accusing her of lying "and questioning her motivation for publicly disclosing [in *The Washington Post*] that Mr. Moore sexually abused her in 1979 when she was a 14-year-old high school freshman and he was a 32-year-old assistant district attorney." *Id*., ¶ 1. In each instance, Defendants made a "defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*., ¶ 105. Ms. Corfman accordingly asked the Court for "a declaration that Defendants' denials of Mr. Moore's sexual abuse of her and their characterization of her account as 'false,' 'malicious,' and 'immoral' . . . are defamatory." Compl., ¶ 32; *see also id*, Prayer for Relief, ¶ 1.

Defendants quickly challenged Ms. Corfman's Complaint.

First, on February 2, 2018, Defendants moved for a change of venue pursuant to Alabama's *forum non conveniens* statute. *See* Mot. for Change of Venue (Doc. 46), at 1. Among other things, Defendants argued that their Election Fraud Lawsuit could not support venue in Montgomery County because the alleged defamatory statements were absolutely privileged as statements "made in the course of judicial proceedings." *Id*. at 3. Defendants again asserted this litigation privilege in a Rule 12(b)(3) motion to dismiss Ms. Corfman's Complaint for improper venue. *See* Rule 12(b)(3) Mot. to Dismiss (Doc. 51), at 5–7. Defendants further argued that venue is improper in Montgomery County because federal law restricts the Moore Campaign Committee—which was

headquartered in Montgomery—to "receiv[ing] contributions or mak[ing] expenditures on behalf of the campaign," and to making certain filings with the Federal Election Commission ("FEC"). *See id*. at 2. Thus, Defendants argued, the Moore Campaign Committee is legally separate from "the campaign" and the defamatory statements of its representatives. *See id*. at 3–4.

Ms. Corfman's responses demonstrated that venue is proper in Montgomery County. First, the privilege for statements made in judicial proceedings does not apply where the defamatory statements are not relevant to the proceeding in which they are made—as here in the Election Fraud Lawsuit. *See* Opp. to Mot. to Change Venue (Doc. 85), at 67; Opp. to Rule 12(b)(3) Mot. to Dismiss (Doc. 90), at 5–6. Second, the Moore Campaign Committee was registered as doing business in Montgomery County when the Complaint was filed, and at least one of the agents speaking for the Committee made a challenged defamatory statement. *See id*. at 7–8.

On February 5, 2018, Defendants also moved to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6). *See* Initial Rule 12(b)(6) Mot. to Dismiss (Doc. 56), at 1. In addition to again asserting a litigation privilege for the Election Fraud Lawsuit, *see id*. at 8–10, Defendants argued that Ms. Corfman's claims "violate the Defendants' First Amendment rights to refute, defend and deny claims made against a political candidate in a political campaign." *Id*. At bottom, Defendants argued that their false and defamatory statements "merely denied the truth of [Ms. Corfman's] accusations and sought to defend his reputation," but "laid no accusation of wrongdoing against [Ms.] Corfman." *Id*. at 4. On the basis of that mischaracterization of both the Complaint and Defendants' defamatory falsehoods impugning Ms. Corfman, Defendants argued that they were protected by "a qualified privilege of self-defense." *Id*. at 5–7.

In response, Ms. Corfman demonstrated that the Complaint states a defamation claim under Alabama law, *see* Opp. to Initial Rule 12(b)(6) Mot. (Doc. 88), at 4–5, and explained that

Ms. Corfman's allegations that Defendants spoke with actual malice precludes First Amendment protection and any qualified privilege of self-defense, which, in any event, no Alabama court has ever recognized, *see id*. at 6–10.

In a March 28, 2018 Order issued by Judge Shaul, the Court denied Defendants' initial Rule 12(b)(6) motion and the two venue motions. *See* Order (Doc. 101).[8]

Nearly a year later, Defendants filed a renewed motion to dismiss the Complaint pursuant to Rule 12(b)(6).[9] Defendants restated their prior argument that Mr. Moore's statements are not defamatory as a matter of law because they (1) were mere denials of Ms. Corfman's account of sexual abuse protected by a qualified self-defense privilege, *see* Renewed Mot. to Dismiss (Doc. 511), at 20–21, (2) did not refer to Ms. Corfman, *see id*. at 21–22, or (3) were "commentary on Ms. Corfman's motivations" and thus "protected opinion" under the First Amendment, *see id*. at 21–22. Defendants further argued that the Moore Campaign Committee's challenged statements were not defamatory as a matter of law because each utterance either did not refer to Ms. Corfman, was true, a protected statement of opinion, or rhetorical hyperbole. *See id*. at 2–5, 12–20.

Ms. Corfman's opposition demonstrated that Defendants' asserted defenses are contrary to well-established First Amendment principles. *See* Opp. to Renewed Mot. to Dismiss (Doc. 591). Among other things, Defendants' false statements made express and implied literal assertions of

[8] The Alabama Supreme Court denied Defendants' petition for a writ of mandamus on the venue motions. *See Ex parte Moore*, No. 1170638, 2018 WL 3947715 (Ala. Aug. 17, 2018). Defendants' petition again relied on the alleged litigation privilege and alleged federal statutory proscription against the Moore Campaign Committee having representatives, but the Supreme Court refused to express an opinion "on the merits" of Ms. Corfman's claims. *See id*. at 9 n.5.

[9] During the interval between Defendants' motions to dismiss, the parties engaged in discovery, including depositions of Mr. Moore, Mr. Hobson, Mrs. Porter, Mr. DuPré, and Mr. Young. Of those alleged to have made defamatory statements about Ms. Corfman, only Mr. Armistead had not been deposed before the Defendants filed the Renewed Motion to Dismiss; Mr. Armistead was deposed before briefing concluded on that motion.

fact about Ms. Corfman and are therefore appropriately classified as defamatory under the First Amendment. *See id*. at 11–26.

Following a hearing, the Court denied Defendants' Renewed Motion to Dismiss on March 10, 2019. *See* March 10, 2019 Order (Doc. 632).

ARGUMENT

"Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability." *Herbert*, 441 U.S. at 158. So long as a state law defamation claim satisfies the "required proof" under the First Amendment, "liability for defamation abridges neither freedom of speech nor freedom of the press." *Id.* at 160. In short, although a defamation claim implicates First Amendment values, a reviewing court "must not lose sight of" the well-settled standards for reviewing legal claims on summary judgment. *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3rd Cir. 1988).

Because "all of the other summary judgment rules still apply" in a defamation suit, *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)), "[t]he burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact," *Grimes v. Saban*, 173 So. 3d 919, 922 (Ala. 2014) (quotation omitted), and a "judge must deny summary judgment if the opponent shows any 'genuine issue' of 'material fact,'" *Zerangue*, 814 F.2d at 1071 (quoting Fed. R. Civ. P. 56(c)). In making the requisite assessment of genuine issues of material fact in a defamation case, as in any other case, "the non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." *Schiavone*, 847 F.2d at 1090 (quotation and alteration omitted). *See also*, *e.g.*, *Pelfrey v. Smith*, 714 So. 2d 305, 307 (Ala. Civ. App. 1998) ("It is well settled that the moving party has the burden of

establishing that no genuine issue of a material fact exists and that all reasonable uncertainties regarding the existence of a genuine issue of a material fact must be resolved against the moving party." (citation omitted)).

As set forth below, Defendants' motions for summary judgment largely restate—albeit, occasionally in different form—legal challenges to Ms. Corfman's defamation claims that have already (often repeatedly) been rejected by the Court. Those challenges are unaffected by the record or the progression from review for dismissal under Rule 12(b)(6) to review for summary judgment under Rule 56. Defendants' legal arguments should therefore be rejected again.

Although Defendants also raise new, record-based challenges to the Moore Campaign Committee's liability for the defamatory falsehoods made by its representatives, those challenges founder upon consideration of the full record developed through discovery, the standard of review, and well-established legal principles under the First Amendment.

I. Defendants' False And Defamatory Statements Are Actionable.

As demonstrated in Ms. Corfman's Opposition to Defendants' Renewed Motion to Dismiss, Ms. Corfman has stated a *prima facie* claim for defamation. *See* Opp. to Renewed Mot. to Dismiss at 10–13. Defendants' Renewed Motion to Dismiss unsuccessfully challenged Ms. Corfman's *prima facie* claim by asserting that the alleged defamatory statements did not refer to Ms. Corfman or that Defendants' statements were true. *See* Renewed Mot. to Dismiss at 2.

On summary judgment, Defendants have largely—and wisely, *see* Opp. to Renewed Mot. to Dismiss at 11—abandoned the specious argument that their statements do not refer to Ms. Corfman. The exceptions are two statements by Mr. Moore that Defendants now allege fail to refer to Ms. Corfman. *See* Moore Br. at 9–10, 14–16. These new arguments fare no better.

In each instance, Defendants' argument depends on parsing Mr. Moore's statement into component parts and then reading those parts in isolation. *See id*. at 9–10 (separating phrase "it's

political" from "it involves a fourteen-year-old girl"); *id*. at 14–16 (separating "[a]ttacks" and statements about "sexual misconduct" with "these women" from statements about "liberals" and "fables").

But an alleged defamatory statement must be viewed in its "entirety[,] rather than, as [Defendants] ha[ve] done, considering only a selective part . . . ." *Fed. Credit, Inc. v. Fuller*, 72 So. 3d 5, 11 (Ala. 2011). Read as a whole, the statements plainly refer to Ms. Corfman's account of sexual abuse by Mr. Moore, which identify Ms. Corfman as the subject of the statement. *See* Moore Br. at 9 (asserting "it's political, it's a direct attack on this campaign and it involves a fourteen-year-old girl"); *id*. at 14, 15 (asserting "[a]ttacks have been false," and "I do not know any of these women . . ., have not engaged in any sexual misconduct"). *See also* Ex. A, 97:1–22 ("allegations of sexual misconduct were only made by" Ms. Corfman in the *Post* article).

Although the Moore Campaign Committee continues to allege that statements by Mr. Armistead and Mr. DuPré are true, *see* Campaign Committee Br. at 12, Defendants' arguments are identical—in fact, restate nearly verbatim, *compare id*. at 16–19 *with* Renewed Mot. to Dismiss at 16–19—to the arguments made in the Renewed Motion to Dismiss that Ms. Corfman has already refuted and that the Court has rejected. Defendants point to no material facts of record that would change the outcome on summary judgment even though it is Defendants' burden to make a *prima facie* showing that no genuine issue of material fact is present. *See supra*.[10]

[10] Defendants could not make such a showing in any event. Ms. Corfman disputes that the statements are true in any respect, *see* Opp. to Renewed Mot. to Dismiss at 11–13; Compl., ¶¶ 84–86, 94, and Defendants' errors are not "minor inaccuracies," but rather "'would have a different effect on the mind of the reader from that which the pleaded truth would have produced,'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991) (quoting Robert Sack, *Libel, Slander, and Related Problems* 138 (1980)).

For his part, Mr. Moore now speciously claims that portions of two statements are not actionable because they are true. *See* Moore Br. at 13–14, 17. Reading Mr. Moore's "selective" statements with the remainder of the quotations, *see Fuller*, 72 So. 3d at 11, however, belies the alleged truthfulness. Whether or not Mr. Moore had experience with abuse cases as a judge and prosecutor, *see* Moore Br. at 12, or the *Washington Post* article was published 40 years after his sexual misconduct, *see id*. at 17, Mr. Moore made both statements to discredit Ms. Corfman's account of her sexual abuse as part of a larger claim by Mr. Moore that Ms. Corfman's account is "completely false." *Id*. at 12. Because Mr. Moore's entire statements constitute a defamatory attack on Ms. Corfman's truthfulness, they are actionable in defamation.

Having failed to show that Ms. Corfman's claim lacks the requisite elements of defamation, Defendants contend that the First Amendment or other privileges immunize their defamatory falsehoods. *See id*. at 6–21; Campaign Committee Br. at 13–20.

Again, Defendants largely repeat arguments previously rebutted by Ms. Corfman and rejected by the Court. Because Defendants' re-arguments raise questions of law and, at any rate, point to no record evidence that could change the legal conclusion on summary judgment, Defendants' claims fail once more.

A. The First Amendment Does Not Protect Defendants' False And Defamatory Statements.

Where, as here, a person is subjected to defamatory falsehoods, the "victim's right to recovery for defamation trumps the defamer's First Amendment interests because, when it comes to *defamatory* falsehoods, 'the truth rarely catches up with a lie' so the 'opportunity for rebuttal seldom suffices to undo harm.'" *United States v. Alvarez*, 617 F.3d 1198, 1211 (9th Cir. 2010) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974)). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) ("[W]e have regularly acknowledged the important social

values which underlie the law of defamation, and recognized that society has a pervasive and strong interest in preventing and redressing attacks upon reputation." (quotation and alterations omitted)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."); *Herbert*, 441 U.S. at 161 ("false information" lacks "First Amendment credentials").

Defendants' scattershot First Amendment arguments reflect a nearly verbatim repetition of the Moore Campaign Committee's rejected claims from the Renewed Motion to Dismiss, *compare* Campaign Committee Br. at 13–20 *with* Renewed Mot. to Dismiss at 13–20, but now assert the same legally meritless grounds of First Amendment protection for Mr. Moore's defamatory falsehoods, *see* Moore Br. at 6–17. At bottom, Defendants contend that their false statements are not defamatory because they constitute either opinion or rhetorical hyperbole shielded from defamation liability by the First Amendment. *See id*.; Campaign Committee Br. at 13–20.

But "[a] decision whether a statement is reasonably capable of a defamatory meaning is a question of law." *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 346 (Ala. 2007). *See also*, *e.g.*, *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 177 (2nd Cir. 2000) ("Whether particular words are defamatory presents a legal question to be resolved by the court[s] in the first instance." (citation omitted)); *id*. at 178 ("The court must also decide as a matter of law whether the challenged statement is opinion."). That question is resolved on the meaning that "would be ascribed to the language by a reader or listener of average or ordinary intelligence, or by a common mind." *Camp v. Yeager*, 601 So. 2d 924, 927 (Ala. 1992) (quotation omitted); *St.*

Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1317 (3rd Cir. 1994) ("In defamation actions, words should be construed as they would be understood by the average reader.").

In other words, the Court's previous rejection of Defendants' arguments that their statements are not defamatory as a matter of law under the First Amendment is dispositive because the contents of Defendants' statements have not changed.[11] Nevertheless, because Mr. Moore has now claimed similar First Amendment protection for his false statements—and for ease of reference in the Court's renewed disposition of the Moore Campaign Committee's statements—as set forth (again) below, Defendants' arguments cannot square with the contents of their defamatory statements or the well-established contours of First Amendment protection.

1. Defendants' Defamatory Falsehoods Are Actionable Express or Implied Assertions of Fact About Ms. Corfman.

As an initial matter, there is no merit to Defendants' argument that the First Amendment precludes Ms. Corfman's defamation claim because Defendants' defamatory remarks purportedly reflect statements of personal opinion rather than statements of fact.

Although the United States Supreme Court has "recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions," *Milkovich*, 497 U.S. at 16, the Court has refused to "create a wholesale defamation exemption for anything that might be labeled 'opinion,'" *id*. at 18. *See also id*. at 13 (at common law, "defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion"). Among other things, such an exemption would "ignore the fact that expressions of

[11] Even if Defendants' statements are not defamatory as a matter of law, the question of their defamatory nature is a question for the jury as trier of fact. *See Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 178 (2nd Cir. 2000) ("If the words are reasonably susceptible of multiple meanings . . . it is then for the trier of fact, not for the court acting on the issue solely as a matter of law, to determine in what sense the words were used and understood." (quotation omitted)).

'opinion' may often imply an assertion of objective fact." *Id*. at 18. Thus, a statement is actionable if it (1) "might reasonably be construed to state or imply factual assertions that are both false and defamatory," *Masson*, 501 U.S. at 518; *see also Milkovich*, 497 U.S. at 20 (statement protected if it "cannot reasonably be interpreted as stating actual facts about an individual" (quotation omitted)), and is (2) "sufficiently factual to be susceptible of being proved true or false," *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 151 (2d Cir. 2000) (quoting *Milkovich*, 497 U.S. at 21). If these conditions are met, a statement is not protected even if it is "couch[ed] . . . in terms of opinion." *Milkovich*, 497 U.S. at 19.

Here, "whether a reasonable factfinder could conclude that the statements" at issue express or "imply an assertion" of defamatory fact about Ms. Corfman, *id*. at 21, depends on the content of the statement and the context in which it was made, *see Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001). Notably, a statement casting its subject as a liar has been described by the United States Supreme Court as outside First Amendment protection:

> 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. Even 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, 497 U.S. at 18–19. *See also*, *e.g.*, *Herbert*, 441 U.S. at 156 (considering defamation claim alleging that defendant "falsely and maliciously portrayed [plaintiff] as a liar").

The same is true here for Defendants' express or implied statements that Ms. Corfman lied. *See* Campaign Committee Br. at 13 (citing Compl., ¶¶ 77–78); *id*. at 14–15 (citing Compl., ¶ 80); *id*. at 16 (citing Compl., ¶¶ 81–82); *id*. at 17–19 (citing Compl., ¶¶ 83, 86); *id*. at 19 (citing Compl., ¶¶ 87–91); *id*. at 20 (citing Compl., ¶¶ 92–93); *see also* Moore Br. at 11 (statement that article recounting Ms. Corfman's account of sexual abuse is "fake news"); *id*. at 17 (same). Because Mr. Moore "was the perpetrator in the events" of sexual abuse described by Ms. Corfman, Compl.,

¶ 63; *see also* Ex. B at 2–4, "it would not be unreasonable" for a listener to believe that his statements—and those of the Moore Campaign Committee, which worked for and was supervised by Mr. Moore—either expressly or implicitly characterizing Ms. Corfman as a politically or financially motivated liar were made with "some factual basis and to conclude that the statement[s] did indeed state facts" about Ms. Corfman. *Flamm*, 201 F.3d at 152. *See also*, *e.g.*, *Bennett v. Hendrix*, 325 F. App'x 727, 741 (11th Cir. 2009) (false statement in flyer supporting sheriff's reelection that an opponent was "convicted criminal" reasonably could be taken literally by reader). In this context, a reasonable listener could have concluded that Defendants "had access to information about the specifics" of the sexual abuse and that they therefore "based [their] opinion on . . . knowledge of these objective facts." *Presley v. Graham*, 936 F. Supp. 2d 1316, 1325 (M.D. Ala. 2013) (police department attorney's statement that officer was "supervisor's nightmare" not protected because statement by person with knowledge of department implied knowledge of objective facts).

Mr. Moore's statements regarding Ms. Corfman's "motivation" in describing her sexual abuse by Mr. Moore, *see* Moore Br. at 7–8, 10, suffer from the same fatal flaw. Like any other expression of opinion, false statements regarding motivation lack First Amendment protection if they "imply knowledge of objective facts," *Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343, 365 (D. Mass. 2017). *See also Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015) ("Merely couching a statement as an opinion . . . will not automatically shield the speaker from liability where the statement implies the existence of underlying defamatory facts."). Each of Mr. Moore's allegedly protected statements relate to his assertion that Ms. Corfman's public account of her sexual abuse was "politically motivated" as part of a liberal conspiracy to defeat his Senate campaign, *see* Moore

Br. at 7–8, 10, and his claim for First Amendment protection ignores the remainder of these defamatory statements, which characterize Ms. Corfman as a liar, *see id*.

In this context, it does not "seem unreasonable to imagine a juror interpreting a statement about the intentions" of Ms. Corfman "as a statement of fact." *Manufactured Home Comtys., Inc. v. Cty. of San Diego*, 544 F.3d 959, 964 (9th Cir. 2008). For example, Mr. Moore's accusation that Ms. Corfman's disclosure of her sexual abuse was politically motivated as part of a liberal conspiracy implies facts about, among other things, Ms. Corfman's political beliefs and connections with other conspirators.[12] Ultimately, such factual questions are properly addressed to a jury. *Cf. Camp*, 601 So. 2d at 929 (actual malice determination, "because it concerns 'motive, intent, and subjective feelings and reactions,'" necessitates "a jury's opportunity to weigh and determine credibility and subjective intent").

Moreover, "[u]nlike a subjective assertion[,] the averred defamatory language is an articulation of an objectively verifiable event." *Milkovich*, 497 U.S. at 22 (quotation omitted). Mr. Moore either called and picked up a 14-year old high school freshman and sexually abused her at his home or he did not. The parties have made different representations about these underlying facts. *Compare Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'rs Servs., Inc.*, 175 F.3d 848, 854–56 (10th Cir. 1999) (bond rating service's statement regarding school district's financial outlook was protected opinion where school district did not challenge accuracy of factual assertions reasonably implied by statement). It is for the factfinder to determine the facts. *See Manufactured Home Comtys.*, 544 F.3d at 964 ("[W]e cannot declare as a matter of law that no reasonable person could construe [the challenged statements] as provably false."). Given the

[12] Indeed, Mr. Moore has filed suit in Etowah County to prove these accusations of a liberal conspiracy. *See* First Amended Compl. ¶¶ 31, 69, *Roy Moore, et al. v. Richard Hagedorn, et al.*, No. 31-CV-2018-900346.00 (Etowah Cty.) (Doc. 62).

context, however, "[i]t does not seem unreasonable to imagine, for instance, that a juror could conclude [Defendants] meant as a matter of fact that" Ms. Corfman "had lied" or had done so out of a political motivation. *Id*. (reversing district court's order striking complaint's allegations as challenging protected statements of opinion and rhetorical hyperbole). *See also Clifford v. Trump*, 339 F. Supp. 3d 915, 926 (C.D. Cal. 2018) (President's statement that plaintiff "is engaging in a 'con job' or is lying" about alleged threats contains verifiable statements of fact).[13]

Defendants' cited authorities are not to the contrary. As an example, *Murray v. HuffingtonPost.com, Inc.*, 21 F. Supp. 3d 879 (S.D. Ohio 2014), *see* Campaign Committee Br. at 20; Moore Br. at 8, did not apply the First Amendment, but rather a state constitutional provision that affords broader protections to opinion than does the First Amendment. *See Murray*, 21 F. Supp. 3d at 884 ("[T]he Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press.").

Similarly, the facts in *Independent Living Aids, Inc. v. Maxi-Aids, Inc.*, 981 F. Supp. 124 (E.D.N.Y. 1997), *see* Campaign Committee Br. at 15–16; Moore Br. 8, and *Sanders v. Smitherman*, 776 So. 2d 68 (Ala. 2000), *see* Campaign Committee Br. at 12; Moore Br. at 9, are not comparable to Defendants' defamatory falsehoods.

In *Independent Living Aids*, the alleged defamatory statement—that competitors accusing a businessman of improper business practices were liars—was included within stories of the

[13] The context of Mr. Moore's statements also defeats Defendants' separate and legally unsupported assertion that Mr. Moore's use of the phrase "false and malicious" reflects "a legal term of art" that cannot be defamatory. *See* Moore Br. at 12–13; *see also id*. at 14–15. The question is the meaning that would be ascribed to a statement by an average listener, *see v. Yeager*, 601 So. 2d 924, 927 (Ala. 1992), read in context, *Fed. Credit, Inc. v. Fuller*, 72 So. 3d 5, 11 (Ala. 2011). Here, the charge that Ms. Corfman's account was "false and malicious" was delivered to a general audience (including at a church) and paired with further assertions that the charges were political. *See* Moore Br. at 12, 14.

underlying business practices, and the only question was whether those practices were in fact improper. *See* 981 F. Supp. at 128 ("The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader."). *See also Ayyadurai*, 270 F. Supp. 3d at 360 ("The articles at issue provide all of the relevant facts on which defendants rely in reaching the [allegedly defamatory] conclusion that plaintiff's claim [to have invented e-mail] is false.").

Likewise, in *Sanders*, the parties did not dispute the underlying facts of a state senator's conduct, but rather the question was whether that conduct violated state ethics laws. *See* 776 So. 2d at 70, 73–74 (allegation of ethics violation protected because "[t]he underlying facts, which are the basis for [defendant's] opinion, are the relevant area of inquiry and . . . they have not been refuted").

Here, by contrast, Defendants' statements imply knowledge of, and dispute, the facts regarding Ms. Corfman's sexual abuse by Mr. Moore. *See supra*. The First Amendment provides no shield for such statements. *See Milkovich*, 497 U.S. at 18–19.

2. Defendants' Defamatory Falsehoods Are Actionable Literal Assertions of Fact About Ms. Corfman.

Nor are Defendants' statements protected as rhetorical hyperbole. *See* Campaign Br. at 13–14, 17, 19; Moore Br. at 14, 15, 17. Defamation "liability may not be based on 'statements that cannot reasonably be interpreted as stating actual facts about an individual,' including statements of 'imaginative expression' or 'rhetorical hyperbole.'" *Flamm*, 201 F.3d at 150 (quoting *Milkovich*, 497 U.S. at 20). But to trigger this exception, the statement's language, context, or "general tenor" must "negate[] the impression that [the] challenged statements imply defamatory facts about the plaintiff." *Flamm*, 201 F.3d at 150. *See also Presley*, 936 F. Supp. 2d at 1325 ("Where there is rhetorical hyperbole, the language itself negates the impression that the

writer was seriously maintaining that the plaintiff committed the act described." (quotation and alterations omitted)).

The question then is "whether a reasonable factfinder could conclude the challenged statements imply an assertion that 'is sufficiently factual to be susceptible of being proved true,'" *Bennett v. Hendrix*, 325 F. App'x 727, 739 (11th Cir. 2009) (quoting *Milkovich*, 497 U.S. at 21), in view of the language employed and "the circumstances in which the statements were expressed," *id*. *See also*, *e.g.*, *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002). But only "non-literal assertions of 'fact'" are protected under this standard. *Id*. at 701.

Here, *The Washington Post* recounted Ms. Corfman's statements of literal fact regarding her sexual assault—an objective event—by Mr. Moore, *see supra* pp. 2–5; *see also* Pl.'s Fifth Supp. Responses to Mr. Moore's First Set of Interrogs., at 3–9, and Defendants responded to Ms. Corfman's literal statements by calling her a liar engaged in a politically motivated conspiracy to derail Mr. Moore's Senate campaign, *see supra* pp. 5–11; Moore Br. at 3–6. In context, a factfinder could reasonably conclude that Defendants' statements challenging Ms. Corfman's literal statements regarding an objective event were, themselves, literal assertions of fact that Ms. Corfman is a politically motivated liar. *Compare Horsley*, 292 F.3d at 702 (defendants' statements were rhetorical hyperbole where, *inter alia*, both plaintiff and defendant used "non-literal, figurative language in expressing their views" during televised debate).

Defendants' arguments to the contrary again mischaracterize the alleged defamatory statements and the governing legal standards. First, to claim protection as mere rhetoric, Defendants divorce isolated defamatory statements—that Ms. Corfman's account of sexual abuse is "outlandish," Campaign Committee Br. at 13 (Compl., ¶ 77), and "an Academy Award performance," *id*. at 19 (quoting Compl., ¶ 88), as part of "dirty politics," Moore Br. at 13–14, and

"fake news," *id*. at 17—from their context. First Amendment protection does not turn on Defendants' creative parsing of their defamatory statements by phrases or sentences. Rather, Defendants' statements must be viewed in their entirety and in context. *See Fuller*, 72 So. 3d at 11 (statement must be viewed in "entirety"); *Bennett*, 325 F. App'x at 739 (statement must be viewed in context). Properly viewed, each of these fractional statements are part of a broader communication that either expressly, *see* Ex. S; Compl., ¶¶ 87–88 (characterizing Ms. Corfman's account as "false" and "baseless"), or impliedly, *see* Compl., ¶¶ 77–78 (stating that "[a]fter 40 years of public service, if any of these allegations were true, they surely would have been made public long before now"); Moore Br. at 12 (calling sexual misconduct allegations "completely false"); *id*. at 17 (stating that Ms. Corfman shared her account "to be on a political advertisement and . . . on national television"), cast Ms. Corfman as a liar. In short, nothing "suggest[s] that the content" of the overall defamatory statements was "not meant to be understood as a literal statement about" Ms. Corfman. *Clifford*, 339 F. Supp. 3d at 926.

Instead, Defendants were "seriously maintaining," *Milkovich*, 497 U.S. at 21, that Ms. Corfman is a politically motivated liar intent on undermining Mr. Moore's election bid and that Ms. Corfman's account was "fake news" that amounted to little more than "dirty politics." Moore Br. at 12, 17. Indeed, Mr. Moore subsequently filed a complaint in the Etowah County Circuit Court alleging that Ms. Corfman's account of her sexual abuse is false and that she publicized her account as part of a larger "liberal conspiracy." *See* First Amended Compl. ¶¶ 31, 69, *Roy Moore, et al. v. Richard Hagedorn, et al.*, No. 31-CV-2018-900346.00 (Etowah Cty.)

(Doc. 62) (alleging that Ms. Corfman's "account . . . was false and malicious" and that the defendants conspired to "destroy[] Judge Moore's prospects for election to the U.S. Senate").[14]

Contrary to Defendants' assertion, *see* Campaign Committee Br. at 15–16; Moore Br. at 7–8, 20, Defendants' characterization of Ms. Corfman as a "liar" is not itself protected rhetorical hyperbole. Words such as "liar" are neither *per se* protected or unprotected by the First Amendment; it depends on the context in which they are used. *See also supra* p. 20 (quoting Supreme Court's explanation that "liar" may be defamatory).

This principle is illustrated in the cases on which Defendants rely. As explained above, *see supra* pp. 23–24, the alleged defamatory statement in *Independent Living Aids* was included within stories of the plaintiff's underlying actions—the only dispute was whether those acts constituted unfair business practices. 981 F. Supp. at 128. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974), likewise turned on the context of challenged statements: In that case, a letter carrier's union listed non-members in the unit as "scabs" and included a definition of "The Scab" attributed to author Jack London that effectively equated a scab to a traitor. *See id*. at 268–69. Because, in this context, it was "impossible to believe that any reader . . . would have understood the newsletter to be charging the [plaintiffs] with committing the criminal offense of treason," the Supreme Court found the statement protected rhetorical hyperbole. *Id*. at 285–86. At the same time, the Court observed that "there might be situations where . . . similar rhetoric . . . could be actionable" if the context suggests its presentation "to convey a false representation[s] of fact." *Id*. at 286–87. *See also Finebaum v.*

[14] *Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co., Inc*., 190 So. 3d 895, 911–12 (Ala. 2015) (court could take judicial notice of another court's records for limited purpose of establishing existence, parties, and subject matter of other litigation); *Williams v. Williams*, 91 So. 3d 56, 60 (Ala. Civ. App. 2012) (trial court could take judicial notice of pleadings in related domestic-relations action involving same parties).

Coulter, 854 So. 2d 1120, 1122–23, 1129 (Ala. 2003) (reasonable listener could not reasonably interpret radio host's characterization of sportscaster's obsequious relationship with college sports coach, in context of discussion of similar relationships between other sportscasters and coaches, was "intended to imply that [the sportscaster] is a homosexual").

Viewed in context, Defendants' defamatory statements imply a knowledge of objective facts that differs from Ms. Corfman's account and, thereby, literally assert that Ms. Corfman is a liar with improper motivations. *See supra* pp. 5–11. Defendants identify nothing in the statements or their context that "would alert a reasonable" listener that the express and implied defamatory assertions "are other than verifiable facts" about Ms. Corfman. *Weyrich*, 235 F.3d at 626. Because the Defendants' alleged statements could "reasonably be interpreted as representing actual facts," they are not protected rhetorical hyperbole. *Finebaum*, 854 So. 2d at 1125 (citing *Milkovich*, 497 U.S. at 20).[15]

B. Defendants' So-Called Self-Defense Privilege Does Not Protect Defendants' Defamatory Statements.

For the third time in seeking dismissal of Ms. Corfman's claims, Defendants argue that Mr. Moore's "denials of [Ms.] Corfman's allegations" are protected by an allegedly "well-established qualified privilege to defend one's reputation . . . ." Moore Br. at 19. *See also id*. at

[15] Indeed, as the Complaint alleges, listeners believed that Defendants' statements were literal assertions of fact about Ms. Corfman and repeated them on social media and at a political rally. *See* Compl., ¶¶ 97, 99. The Complaint does not seek to "attribute," Moore Br. at 22–25, these statements to Defendants, but rather to demonstrate the manner in which they were interpreted. *Compare Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 12–14 (1970) (term "blackmail" protected where, *inter alia*, "the record is completely devoid of evidence that anyone . . . thought [plaintiff] had been charged with a crime" and term was included in articles that parties conceded "were accurate and truthful reports of what had been said at the public hearings" where term was used to describe plaintiff). Nor are they comparable to President Trump's "'Lock her up!' chants at campaign rallies," Moore Br. at 25, which were based on publicly reported facts about Secretary Clinton and not, as here, implicit knowledge of other objective facts.

7–17 (arguing that alleged defamatory statements reflect "general denial[s]" of Ms. Corfman's account of sexual abuse). Defendants simply restate (often verbatim) arguments unsuccessfully raised in their initial Rule 12(b)(6) motion to dismiss, and Renewed Motion to Dismiss, *see supra* pp. 11–14. *Compare* Moore Br. at 19–21 *with* Renewed Mot. to Dismiss at 5–9, 20–21 *and* Initial Rule 12(b)(6) Mot. to Dismiss at 4–8. Because the question "whether a statement is privileged is a question of law for the trial judge," *Atkins Ford Sales, Inc. v. Royster*, 560 So. 2d 197, 200 (Ala. 1990), Defendants' attempt to reargue a qualified self-defense privilege should be rejected.

At any rate, Defendants' novel qualified self-defense privilege is inapplicable here.

First, Defendants cite no Alabama precedent for such a privilege, and there is no indication that any Alabama court has ever adopted or recognized a self-defense privilege to a defamation claim. *See Herbert*, 441 U.S. at 175 (explaining that "[e]videntiary privileges in litigation are not favored" in rejecting proposed First Amendment privilege for newspaper editorial process).

Second, under well-settled First Amendment principles, a qualified privilege to engage in expressive activity does not apply where the defendant acts with actual malice by making false statements with knowledge or reckless disregard. *See*, *e.g.*, *Ex parte Blue Cross & Blue Shield of Ala.*, 773 So. 2d 475, 478 (Ala. 2000) (qualified privilege, there between insurer and insured, "suffices against only claims for innocent or mistaken defamation"); *Green v. Cosby*, 138 F. Supp. 3d 114, 141 (D. Mass. 2015) (self-defense privilege "does not permit a defendant to knowingly publish false statements of fact"); *Restatement (Second) of Torts* § 593 (conditional privileges are abused if person "knows the matter to be false" or "acts in reckless disregard as to its truth or falsity"); *see also Neuros Co., Ltd. v. KTurbo, Inc.*, 698 F.3d 514, 519 (7th Cir. 2012) ("[Qualified] privilege, whatever its precise boundaries, is forfeited if the statement is made with knowledge of

its falsity or with reckless disregard for the truth."); *Herbert*, 441 U.S. at 164 (privileges can be overcome "upon a showing that the defendant acted with improper motive").

"[B]ecause [Mr. Moore] was the perpetrator" in the sexual abuse Ms. Corfman described to *The Washington Post*, the Complaint alleges that Mr. Moore's denials were made with actual malice. Compl., ¶ 63; *see also id*., ¶¶ 23–24. Defendants' motions do not directly dispute—let alone raise record evidence disputing—Ms. Corfman's allegations of actual malice by Mr. Moore. To be sure, Mr. Moore's alleged defamatory statements contend that he does "not know" Ms. Corfman. *See*, *e.g.*, Ex. A, 376:14–377:15; Moore Br. at 7, 10. Because the objective fact of Ms. Corfman's sexual abuse by Mr. Moore is in dispute between the two witnesses to the event, "[w]ere a trier of fact to believe" Ms. Corfman "and disbelieve Mr. Moore, "it could reasonably conclude that there was clear and convincing evidence that [Mr. Moore] had lied or recklessly disregarded the truth in making the assertion[s] in question." *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1270 (7th Cir. 1996).[16]

Having failed on their first two attempts to claim a qualified self-defense privilege, Defendants now attempt to rest such a privilege—still without supporting legal authority—on a purported "conce[ssion]" by Ms. Corfman's counsel that a general denial by Mr. Moore would not

[16] As a matter of Alabama law, it is not clear that the actual malice standard applies to a claimed qualified privilege. In *Gary v. Crouch*, 923 So. 2d 1130 (Ala. Civ. App. 2005), the Court of Civil Appeals explained that a claimed qualified privilege in a defamation case could not withstand a showing of common law malice, which "is distinguishable from constitutional malice . . . ." *Id*. at 1136. *See also id*. 1137–38 (noting Alabama Supreme Court rejected qualified privilege claim by considering evidence of common law malice). Common law malice "may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like . . . or by the violence of the defendant's language the mode and extent of publication, and the like." *Id*. at 1137 (quoting *Gary v. Crouch*, 867 So. 2d 310, 317 (Ala. 2003)). Mr. Moore's language impugning Ms. Corfman's character and casting her as an improperly motivated liar, *see supra* pp. 5–8, satisfies common law malice "and go[es] beyond what was necessary to respond," *Gary*, 867 So. 2d at 317, to Ms. Corfman's account of his sexual abuse of her as a 14-year old.

be actionable. *See* Moore Br. at 7. Rather than a concession, counsel mused that a defamation claim "maybe" would not have been available had Mr. Moore simply issued "a denial of the allegations made by Ms. Corfman." Renewed Mot. to Dismiss Hearing Tr. at 50:3–13. That comment was little more than speculation because Mr. Moore's public statements were ***not*** mere denials. To the contrary, Mr. Moore's statements characterized Ms. Corfman as an improperly motivated liar. *See supra* pp. 5–8. Mr. Moore's attempt to sidestep these characterizations depends on parsing solitary phrases of denial from his larger defamatory statements and arguing that those fractional portions are protected as general denials. *See* Moore Br. at 7–16. That a defamatory statement must be viewed as a whole, *see Fuller*, 72 So. 3d at 11, thus dooms Defendants' argument because Mr. Moore's denials must be read alongside the accompanying assertions that Ms. Corfman's account of sexual abuse is "completely false" and "politically motivated." Moore Br. at 7. "Words take on meaning in the company of other words. They are gregarious. They take on tone and color from syntax and context." *St. Surin*, 21 F.3d at 1317. Read in their full context, Mr. Moore's statements fail even Defendants' own self-defined privilege.[17]

C. Defendants' Defamatory Statements In The Election Fraud Lawsuit Are Not Protected By A Litigation Privilege.

Nor are Defendants' defamatory statements in the Election Fraud Lawsuit shielded by a litigation privilege. *See* Moore Br. at 18–19. The privilege for statements made in litigation "is

[17] Although Mr. Moore characterizes his statements that Ms. Corfman's account of her sexual abuse is "false" or "untrue" as "a simple denial," Moore Br. at 11, such statements—coming from the alleged perpetrator—imply literal assertions of fact, namely, that Ms. Corfman is lying, that are actionable as defamation. *See supra* Argument Section I.A. Similarly, Mr. Moore's statement in an open letter to Sean Hannity that he "adamantly den[ies] the allegations of Leigh Corfman," Moore Br. at 11, implies literal assertions of fact because, among other things, that statement was paired with the statement—which Mr. Moore does not quote—that he had "taken steps to begin a civil action for defamation" against Ms. Corfman. Ex. T (Moore Dep. Ex. 52).

not a license which protects every slanderous publication or statement made in the course of judicial proceedings." *O'Barr v. Feist*, 296 So. 2d 152, 157 (Ala. 1974).

Here, the privilege does not apply to the defamatory statement in Mr. Moore's Election Fraud Lawsuit affidavit because Mr. Moore's challenge to Ms. Corfman's truthfulness is irrelevant to that lawsuit. *Id*. (privilege "does not protect slanderous imputations plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant").

Defendants filed the Election Fraud Lawsuit seeking to enjoin certification of the Democratic candidate's election to the United States Senate on the basis of alleged "systematic election fraud." *See* Ex. P, ¶ 1. Defendants alleged: (a) an "implausible statistical discrepancy" in the percentage of votes received by the senatorial candidates in certain Jefferson County precincts, *id*., ¶ 28, (b) an "unusual discrepancy" in voter turnout in Jefferson County, *id*., ¶ 45, (c) a "sharp conflict" between exit polls and reported results, *id*., ¶ 51, (d) an "unusual, unexplained pattern of voters having out-of-state drivers' licenses," *id*., ¶ 52; *see also id*., ¶¶ 54–56, (e) an unknown number of "pre-marked sample ballots for Doug Jones," *id*., ¶ 62, and (f) an "attempt to intimidate voters" by a political action committee through advertisements that "falsely represented to the public that: 'Your vote is public record, and your community will know whether or not you helped stop Roy Moore,'" *id*., ¶ 58; *see also id*., ¶ 66.

Among these allegations of discrepancies in election day voting results and pre-election voter intimidation, the Election Fraud Lawsuit includes a gratuitous allegation that "Plaintiff Roy Moore [had] successfully completed a polygraph test confirming that the representations of misconduct made [by Ms. Corfman] against him during the campaign are completely false." *Id*., ¶ 22. Mr. Moore's attached affidavit concludes with the untrue and defamatory characterization

of Ms. Corfman's account as a "false and malicious attack[]" on the ground that the polygraph examination allegedly "reflected that [Mr. Moore] did not know, nor . . . ever had any sexual contact with" Ms. Corfman. *Id*., Affidavit of Roy Moore (emphasis omitted).[18] Within a complaint centered on voting statistics, this unrelated attack on Ms. Corfman's character and credibility is not privileged. *See*, *e.g.*, *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 393 (Ala. Civ. App. 1999) (litigation privilege not applicable where comments not relevant to litigation, but rather intended simply to "attack the integrity" of a person).

Although Defendants attempt to bridge the gap by arguing that Mr. Moore's defamatory statement is relevant to the Election Fraud Lawsuit's allegations that a political action committee ran allegedly "misleading" advertisements about Mr. Moore, *see* Moore Br. at 4–5, there is no allegation that Ms. Corfman had anything to do with these advertisements or anything else at issue in that litigation. Indeed, the sole alleged misleading advertisement in the Election Fraud Lawsuit does not mention Ms. Corfman or her account of Mr. Moore's sexual abuse. *See* Ex. P, ¶ 58 ("Your vote is public record, and your community will know whether or not you helped stop Roy Moore."). Thus, rather than Ms. Corfman's account of sexual abuse, which was a matter of public record independent of the political action committee, the "fraud" by the political action committee was its allegedly false warning aimed at intimidating voters against voting for Mr. Moore.

[18] The examiner who administered Mr. Moore's polygraph test, Clyde Wolfe, made clear that Mr. Moore's statement that the polygraph indicated he did not know Ms. Corfman is false because Mr. Wolfe did not test whether Mr. Moore knew Ms. Corfman. *See* Ex. U (Wolfe Dep. Tr.), 16:2–5, 131:13–132:3. With respect to Mr. Moore's denial of sexual contact with Ms. Corfman, the type of polygraph test administered to Mr. Moore is "more subjective than other types of polygraph examinations and, as such, less reliable," Ex. AK (Affidavit of Barry D. Colvert), ¶ 8, and "different examiners looking at the results can come to different conclusions," Ex. U, 96:17–97:11. Indeed, Mr. Wolfe informed Mr. Moore that the test is "not infallible," *id*. at 81:3–23, and a different polygraph expert has concluded that "to the extent it is appropriate to rely on [the type of] test" used with Mr. Moore, "the results indicate that Mr. Moore was being deceptive when asked relevant questions concerning Ms. Corfman," Ex. AK, ¶ 14. *See also id*., ¶¶ 15–19.

Compare Drees v. Turner, 45 So. 3d 350, 358 (Ala. Civ. App. 2010) (allegedly false allegations of domestic violence made in child custody case privileged because relevant to fitness of potential custodian).

II. At a Minimum, There Are Genuine Issues Of Material Fact.

Having failed (now, repeatedly) to show that Defendants' statements characterizing Ms. Corfman as an improperly motivated liar are not defamatory as a matter of law, *see supra* Argument Section I, Defendants contend that the Moore Campaign Committee is entitled to summary judgment because (1) the defamatory statements were not, in fact, made by agents of the Committee, and (2) none of the representatives spoke with actual malice. *See* Campaign Committee Br. at 3–11, 31–44.[19] Neither defense is appropriate for resolution on summary judgment.

"The existence and the scope of a principal-agent relationship is normally a question of fact to be determined by the jury." *Lawler Mobile Homes, Inc. v. Tarver*, 492 So. 2d 297, 304–05 (Ala. 1986). *See also Cook's Pest Control, Inc. v. Rebar*, 852 So. 2d 730, 738 (Ala. 2002) ("Agency is generally a question of fact to be determined by the trier of fact." (citation omitted)). Thus, in general, "summary judgment on the issue of agency would . . . be inappropriate." *Oliver v. Taylor*, 394 So. 2d 945, 946 (Ala. 1981).

[19] Although Defendants contend that Ms. Corfman must show actual malice because she is a limited purpose public figure, *see* Campaign Committee Br. at 21–31, who, among other things, "inject[ed] herself into a . . . public controversy," *id*. at 22, Ms. Corfman did not actively enter into a debate regarding Mr. Moore's qualifications for the U.S. Senate. Instead, she merely responded to questions from reporters who had sought her out, *see supra* n.2, and did so with hesitation, *see* Ex. E, 43:23–44:19 (Ms. Corfman "told" Mr. Sexton that she "really didn't want to do [the *Post*] article"); Ex. AJ ¶¶ 9–10. But, even assuming that Ms. Corfman is properly classified as a limited purpose public figure, Defendants' actual malice arguments fail. *See infra* Argument Section II.B.

Likewise, "[a]s a general proposition, questions concerning the state of mind a person had when he performed a particular act are unsuited for resolution on a motion for summary judgment." *Andrews v. Ala. Eye Bank*, 727 So. 2d 62, 65 (Ala. 1999) ("[M]alice in an action alleging defamation" and "a question of good faith generally cannot be decided on a motion for summary judgment."). For that reason, the Alabama Supreme Court has made clear that "[t]he issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition" before trial "because it concerns motive, intent, and subjective feelings and reactions," which necessitate "a jury's opportunity to weigh and determine credibility and subjective intent." *Camp*, 601 So. 2d at 929 (Ala. 1992) (quotation and citation omitted).

Although Defendants' request for summary judgment should be denied for this reason alone, even assuming that the Court could appropriately resolve the questions of agency and actual malice on Defendants' present motions, Defendant's arguments founder on the record and the standard of review. "[D]raw[ing] all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence," *Masson*, 501 U.S. at 520, the record is replete with genuine issues of material fact that preclude summary judgment.

A. The Record Demonstrates Genuine Issues Of Material Fact As To Whether The Moore Campaign Committee's Alleged Defamatory Statements Were Made By Its Agents.

"When a defendant's liability is to be based on agency, agency may not be presumed," but on a motion for summary judgment, the defendant must first make "a prima facie showing that there was no agency relationship." *Cook's Pest Control*, 852 So. 2d at 742 (quotation omitted). Only if Defendants make such a showing does Ms. Corfman shoulder "the burden of presenting substantial evidence of the alleged agency." *Id*. (quotation omitted).

Here, Defendants' purported *prima facie* case rests principally on the proposition that the Moore Campaign Committee is a finance body restricted by federal statute "to receiv[ing] contributions or mak[ing] expenditures on behalf" of a candidate for federal office. Campaign Committee Br. at 3 (quoting 52 U.S.C. § 30101(6)). In Defendants' view, therefore, the Moore Campaign Committee is legally precluded from having representatives authorized to speak on its behalf.

The law is to the contrary.

Mr. Moore registered the Moore Campaign Committee with the FEC as his "principal campaign committee." *See* Ex. V (Hobson Dep. Ex. 4) at 2; *see also* 52 U.S.C. § 30102(e)(1). Although the FEC requires that a committee be designated "to receive contributions or make expenditures on behalf of such candidate," 52 U.S.C. § 30101(6), it may play a larger role in "accumulating and disseminating information to [the candidate's] supporters and to voters in general," *Kean for Congress Comm. v. FEC*, 398 F. Supp. 2d 26, 38 (D.D.C. 2005).[20] In short, registration of the Moore Campaign Committee with the FEC does not preclude a finding that it has authorized representatives speaking on its behalf.

Although Defendants point to self-serving affidavits from Mr. Moore, Mr. Hobson, Mr. Armistead, and Mr. DuPré to claim that the Moore Campaign Committee was nevertheless separate from "the campaign" to elect Mr. Moore, *see* Campaign Committee Br. at 8–10; *see also id*. at 5 (Ms. Corfman's complaint "wrongly conflates the Committee with the campaign and the candidate"), "agency is to be determined from the facts, and not by how the parties characterize their relationship," *Pelfrey*, 714 So. 2d at 308 (quotation omitted).

[20] A political committee is restricted to fundraising activities if, contrary to the Moore Campaign Committee, the committee supports "more than one candidate." *See* 52 U.S.C. § 30102(e)(3)(ii).

A principal may be legally responsible for the acts of an agent acting under both actual or apparent authority. *See Cooper v. Alabama Farm Bureau Mut. Cas. Ins. Co., Inc.*, 385 So. 2d 630, 632 (Ala. 1980) (organization "may be held liable for a slanderous utterance made by one of its agents if the slanderous utterance was made within the line and scope of the agent's employment"); *Am. Soc. Of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565–66 (1982) ("[U]nder general rules of agency law, principals are liable when their agents act with apparent authority.").

Here, the facts of record include "substantial evidence," *Cook's Pest Control*, 852 So. 2d at 742, indicating that "the campaign" and the Moore Campaign Committee are coterminous in either fact or appearance, thus raising a genuine issue as to whether the defamatory statements of Mr. Armistead, Mr. Hobson, Mr. DuPré, Mrs. Porter, and Mr. Young (collectively, "Moore representatives") were made on behalf of the Moore Campaign Committee.[21]

First, the alleged distinction between "the campaign" and the only body allegedly permitted to expend funds on behalf of Mr. Moore's candidacy breaks down immediately on review of campaign practice. Despite the alleged financial distinction between the campaign and the Moore Campaign Committee, Mr. Armistead, the chairman of "the campaign," *see* Ex. K, 40:13–15; Campaign Committee Br. at 8; Affidavit of William Armistead, ¶ 1, testified that "one of the main things I did in the campaign was seek funding for the campaign," Ex. K, 18:20–22. Mr. Armistead

[21] Because Defendants have conceded that the Moore representatives "spoke during the campaign . . . as agents of the campaign or the candidate," Campaign Committee Br. at 5, their alleged defamatory statements are therefore, at least, attributable to Mr. Moore, *see*, *e.g.*, *Hydrolevel Corp.*, 456 U.S. at 566 ("[I]f an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement."), even if they were "volunteers," Campaign Committee Br. at 5; *see also*, *e.g.*, *Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 44–45 (7th Cir. 2000) ("[T]he liability is that of a "master" for the torts of his "servant" and it extends to situations in which the servant is not an employee, provided that he is acting in a similar role, albeit as a volunteer."). At any rate, Mr. Hobson was admittedly an agent of the Moore Campaign Committee, *see* Campaign Committee Br. at 9, and whether his defamatory statements were within the scope of that agency is a question for the jury, *see Lawler*, 492 So. 2d at 304–05.

also managed "the general direction we were spending money," *id*. at 49:15–20, and directed Mr. Hobson—the "[t]reasurer of the Committee," Campaign Committee Br. at 9—"to write checks" for the campaign and its staff, *see* Ex. J, 28:9–29:8.

For his part, Mr. Hobson was the treasurer "for the campaign," *id*. 76:2–5; he was likewise identified on the Moore Campaign Committee's FEC registrations as the treasurer, *see id*.; Ex. V.

This functional overlap at the top of the "campaign" and the Moore Campaign Committee raises a genuine issue regarding their relationship. *Cf. McLemore v. Hyundai Motor Mfg. Ala., LLC*, 7 So. 3d 318, 328 (Ala. 2008) (actual authority may be implied, and thus "circumstantially proved, or evidenced by conduct or inferred from course of dealing between the alleged principal and agent." (quotation omitted)).

The public presentation of the campaign and Moore Campaign Committee raises similar questions. The Moore Campaign Committee was organized "around the time that the campaign started," Ex. J, 73:1–74:2, and registered a post office box that was "the campaign's primary method of receiving written correspondence," *id*. at 74:20–75:5. The FEC registered name for the Moore Campaign Committee was "Judge Roy Moore for US Senate," *see* Ex. V, which was also the name of the campaign on its official Facebook page, *see* Ex. W (Young Dep. Ex. 98) ("Judge Roy Moore for U.S. Senate"); Ex. N, 57:11–58:18 (noting he was an administrator on the Facebook page, and confirming its name). To the public, the campaign and Committee thus presented the same face.

Melding the campaign's practice and public face with respect to Ms. Corfman's account of her sexual abuse further highlights the genuine issues of material fact. Before Mr. DuPré's November 21, 2017 press conference statements about Ms. Corfman, *see*, *e.g.*, Ex. L 142:7–10, he received the talking points he would use during the press conference in a memorandum from the

"Roy Moore for U.S. Senate Campaign," *id*. at 110:6–14; Exs. X, Y, Z, AA (DuPré Dep. Exs. 16–19)—the identity of both the Moore Campaign Committee and the purportedly separate "campaign." *Cf. Malmberg v. Am. Honda Motor. Co.*, 644 So. 2d 888, 890 (Ala. 1994) ("The test to be applied in determining whether there existed an agency relationship based on actual authority is whether the alleged principal exercised a right of control over the manner of the alleged agent's performance.").

Taken together, "view[ing] the evidence in the light most favorable" to Ms. Corfman, "a fair-minded person could reasonably understand" the Moore representatives to be agents authorized to speak on behalf of the Moore Campaign Committee. *S. Cleaning Serv., Inc. v. Essex, Ins. Co.*, 209 So. 3d 446, 454 (Ala. 2016). Given the functional overlaps and identical public face of the campaign, at the least, a genuine issue of material fact exists as to the alleged distinction between the admitted representatives of the "campaign" and the Moore Campaign Committee. *See Pelfrey*, 714 So. 2d at 305, 307–08 (genuine issue of fact precluded summary judgment on agency where, *inter alia*, alleged agent was client's point of contact with principal); *Essex Ins. Co.*, 209 So. 3d at 455–56 (evidence that, among other things, "all communication from the insurance [company] was routed through" alleged agent presented genuine issue as to existence of agency).

B. The Record Demonstrates Genuine Issues Of Material Fact As To The Moore Representatives' Actual Malice.

A public figure or limited purpose public figure, *see supra* n.19, may prevail on a defamation claim "[i]f a false and defamatory statement [about that figure] is published with knowledge of falsity or a reckless disregard for the truth[.]" *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Whether such "actual malice" is present depends on "case-by-case adjudication" of facts. *Id.* at 686. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971). When actual malice is addressed on summary judgment, *but see supra* pp. 34–35,

"[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Schiavone*, 847 F.2d at 1091 (quoting *Anderson*, 477 U.S. at 255). In short, even with respect to actual malice, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Id*. (quoting *Anderson*, 477 U.S. at 255). *See also Cottrell*, 975 So. 2d at 349 (viewing evidence on malice in light most favorable to non-movants).

Here, the Moore representatives made defamatory falsehoods regarding Ms. Corfman with (at least) reckless disregard for the truth. *See*, *e.g.*, Compl., ¶ 26. Although "the concept of reckless disregard cannot be fully encompassed in one infallible definition," *Connaughton*, 491 U.S. at 667 (quotation omitted), a finding of reckless disregard requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his" statement, *id*. at 688. In essence, Defendants argue that the Moore representatives did not entertain "serious doubts" because their statements were based on subjective "belief in [Mr.] Moore's veracity" when he generally denied Ms. Corfman's account of sexual abuse. Campaign Committee Br. at 32. *See also id*. at 40, 43, 44. But the Defendants' purported subjective belief is legally insufficient to foreclose the genuine issues of material fact demonstrated in the record.

1. Actual Malice is Evidenced by an Accumulation of Objective Circumstantial Evidence, not Defendants' Subjective Beliefs.

It is well-settled that "[a] defendant subject to the actual malice standard 'cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.'" *Schiavone*, 847 F.2d at 1089–90 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). "[O]n summary judgment [the Court] may, as a jury might, discount [Defendants'] assertions of subjective belief in the truth," *id*. at 1091, of Mr. Moore's general denials of sexual misconduct. *See also United States v. Brown*, 631 F.3d 638, 646 (3rd Cir. 2011)

("Good faith determinations under the First Amendment . . . are rendered, in the first instance, by the finder of fact. They are thus, necessarily, 'essentially factual' in nature.").

Indeed, because "[i]t may be that plaintiffs will rarely be successful in proving" awareness of falsehood or reckless disregard for the truth "from the mouth of the defendant himself," *see also Herbert*, 441 U.S. at 170, "a plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence," *Connaughton v. Harte Hanks Commc'ns, Inc.*, 842 F.2d 825, 844 (6th Cir. 1988), *aff'd*, 491 U.S. 657. *See also*, *e.g.*, *Herbert*, 441 U.S. at 160 ("[P]roof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred . . . ."); *Celle* 209 F.3d at 183 ("Although actual malice is subjective, a court typically will infer actual malice from objective facts." (quotation omitted)). "Such circumstantial evidence can override defendants' protestations of good faith and honest belief that the [statement] was true." *Schiavone*, 847 F.2d at 1090.

An endless variety of circumstances may demonstrate reckless disregard for the truth even where, as here, Defendants profess no subjective doubt in their statement's veracity. *See Herbert*, 441 U.S. at 165 ("Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant . . . ."). Among other things, "subjective awareness of probable falsity may be found if there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," *id*. at 156–157 (quotation and citation omitted), upon evidence of "motive and intent," *Celle*, 209 F.3d at 183, or a defendant's failure "to investigate a story weakened by inherent improbability, internal inconsistency, or apparently reliable contrary information," *Zerangue*, 814 F.2d at, 1070. *Cf. Brown*, 631 F.3d at 648 ("The absence of sufficient grounding to support an averment therefore constitutes an obvious reason for doubt . . ., allowing the court to

infer that an affiant acted with reckless disregard for the truth." (quotation and alteration omitted)).[22]

2. Substantial Circumstantial Evidence in the Record Raises a Jury Question on the Moore Representatives' Actual Malice.

Faced with the Moore Campaign Committee's motion for summary judgment on actual malice, the Court "must assume," "except where otherwise evidenced by the" record, that the Moore representatives spoke "with . . . reckless disregard." *Masson*, 501 U.S. at 520. Reviewing the "factual record in full," *Connaughton*, 491 U.S. at 688, and "marshalling all the arguments on behalf of the plaintiff[], and drawing all inferences in [Ms. Corfman's] favor," *Schiavone*, 847 F.2d at 1091, the record reflects sufficient evidence from which a jury might reasonably find clear and convincing evidence that the Moore representatives spoke with reckless disregard for the truth.

As an initial matter, the Moore representatives' reliance on Mr. Moore's public and private denials of misconduct fails to eliminate any genuine issue of material fact. Because the Moore representatives lack personal knowledge as to the truth of Ms. Corfman's account of her sexual abuse, *see*, *e.g.*, Ex. K, 30:5–8 (acknowledging he does "not know if Ms. Corfman's descriptions . . . are true"); Ex. M, 87:24–25, they each ground their defamatory statements on subjective opinions about Mr. Moore's credibility, *see* Campaign Committee Br. at 32–33, 40–44; Ex. K, 61:4–7 (knew "the truth . . . because I believe [Mr.] Moore"); Ex. J, 71:18–22 (Mr. Moore "told

[22] Although the failure to investigate does not, alone, constitute constitutional malice, such a failure may rise to constitutional levels where it "evidences purposeful avoidance, that is, an intent to avoid the truth." *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 349 (Ala. 2007) (quotation omitted). *See also Connaughton v. Harte Hanks Commc'ns, Inc.*, 842 F.2d 825, 843 (6th Cir. 1988) (defendant "intentionally avoided interviewing" key witness); *Babb v. Minder*, 806 F.2d 749, 755 (7th Cir. 1986) ("Reckless conduct may be evidenced in part by failure to investigate thoroughly and verify the facts particularly where the material is peculiarly harmful or damaging to the plaintiff's reputation or good name." (alterations omitted)).

me that they were untrue, and I have known him since 1993"); *id*. at 101:2–10; Ex. M, 78:19–79:1 (Mr. Moore's "statements were public, and I know him to be a truthful man . . . exhibiting integrity and righteousness, and so that was good enough for me."); Ex. L, 34:13–21. But the Moore representatives' "personal opinion that [the source] was credible" is not sufficient. *Connaughton*, 842 F.2d at 835. *See also Schiavone.*, 847 F.2d at 1074 (reporter acted with reckless disregard where, *inter alia*, he omitted exculpatory information from article because "he did not believe" it).

Here, the "motive and intent," *Celle*, 209 F.3d at 183, of the source—Mr. Moore—and the larger context in which both Mr. Moore's and the Moore representatives' statements were made demonstrate "obvious reasons to doubt the veracity" or accuracy of Mr. Moore's denials, *Herbert*, 441 U.S. at 210 (quotation omitted), or the other information on which the Moore representatives purportedly relied.

Mr. Moore had a personal stake in the revelation during his Senate campaign of his sexual abuse of Ms. Corfman when she was 14 years old. *See*, *e.g.*, Ex. A, 104:3–9 (admitting concern that Ms. Corfman's account "would damage [his] campaign"). *Compare St. Amant*, 390 U.S. at 733 (fact that source's statement was against his personal interest weighed against finding actual malice in speaker's reliance on source).[23] Yet Mr. Armistead, Mr. Hobson, and Mr. Young relied

[23] Many of the Moore representatives, moreover, had personal motives for supporting Mr. Moore and turning a blind eye to evidence that contradicted his denials. *See Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 186 (2d Cir. 2000) (finding "sufficient circumstantial evidence" of actual malice "in part on evidence indicating ill will and personal animosity"); Ex. N, 32:19–33:8 (noting "close" relationship to Mr. Moore, that Mr. Young "love[s] him to death," and if Mr. Moore "needs anything, I'll help him"); Ex. J, 33:22–39:1 (showing Mr. Hobson has been principally employed by Mr. Moore since 2001); Ex. L, 18:3–19:22 (showing he worked for Mr. Moore from 2001 through 2016); Ex. M, 82:2–9 ("It's all about the Supreme Court" and "the one who wins this race is the one who will decide the Supreme Court for the next 30 or 40 years"); *id*. at 83:24–85:1 (confirming support for Mr. Moore because, among other things, he would "cast a vote for a conservative justice who might . . . vote to overturn *Roe v. Wade*"); *id*. at 41:5–9 (confirming she has dedicated "[m]uch of" her life "to pro-life, anti-abortion agenda"); Ex. N, (continued…)

almost wholly on Mr. Moore's general denials of sexual misconduct without discussion of details alleged to be inaccurate in Ms. Corfman's account. *See*, *e.g.*, Ex. K, 35:1–12 ("[I]t was just a flat out denial" without discussion of "specific fact[s]"); Ex. J, 50:2–21; *id*. at 119:8–120:13 (Mr. Moore "just gave . . . a blanket denial" without "specifics"); Ex. N, 121:19–122:4; *id*. at 123:4–8 ("it was a general denial"); Ex. L, 33:13–34:5; *id*. at 55:6–17 (does not recall Mr. Moore "specifically denying any particular details," and "his categorical denial . . . already dealt with it"). Such reliance on a single, personally interested source "was unreasonable" and could support an inference of actual malice. *See Pemberton v. Birmingham News Co.*, 482 So. 2d 257, 266–67 (Ala. 1985) (citing *Hunt v. Liberty Lobby*, 720 F.2d 631, 634 (11th Cir. 1983)).

Reading Mr. Moore's "denial . . . in the context of other evidence," *Manzari v. Associated Newspapers, Ltd.*, 830 F.3d 881, 893 (9th Cir. 2016), available at the time of the defamatory statements offers further "obvious reasons" for doubt, *Herbert*, 441 U.S. at 156 (quotation omitted). The Moore representatives' defamatory statements regarding Ms. Corfman's account of her sexual abuse as a 14 year old high school freshman began on November 14 and 15, 2017. *See supra* pp. 9–10. By November 15, six women—including Ms. Corfman—had publicly accused Mr. Moore in either engaging, or attempting to engage, in a romantic relationship with them when he was in his 30s, and they were teenagers. *See supra* pp. 2–5; *see also* Ex. AJ. In other words, consistent accounts of Mr. Moore's conduct toward teenaged women were matters of public record before the Moore representatives blindly accepted Mr. Moore's blanket denials. *See*, *e.g.*, Ex. J, 88:13–89:4 (indicating that five women had described encounters with Mr. Moore as teenagers before Mr. Hobson's first defamatory statement).

233:11–22 (asserting "we need" Mr. Moore because, "number one, there's a Supreme Court justice that's thinking about retiring" and the Democratic candidate "stands for abortion").

That "independent sources with good bases for knowledge" confirmed aspects of Ms. Corfman's story further supports finding a reckless disregard for the truth. *Schiavone.*, 847 F.2d at 1091. *See also supra* p. 5 (describing corroboration of Ms. Richardson's story from her co-worker). Witnesses have attested to hearing Ms. Corfman's account of Mr. Moore's sexual abuse years (or, in some cases, decades) before the *Washington Post* article. *See* Declaration of Betsy Rutenberg Davis, ¶ 3; Declaration of Cynthia Tabb, ¶¶ 3–4; Ex. E, 44:20–46:22.[24] *See also* Compl., ¶ 8. Taken together, such corroboration raises genuine doubts about Mr. Moore's denials. *See Smith v. Huntsville Times Co.*, 888 So. 2d 492, 501 (Ala. 2004) (witness statement occurring "soon after the alleged incident" "weighs heavily" in actual malice inquiry); *compare Connaughton*, 491 U.S. at 691 ("five other witnesses" corroborated plaintiff's account of meeting); *Smith*, 888 So. 2d at 501 (writer "had little reason to doubt" story that included "three individuals who had ostensibly witnessed the incident" and where writer "personally spoke with" all parties involved).

Mr. Moore's own public statements provided additional corroboration for the women's accounts, or raised inconsistencies in his denials, that should have triggered additional genuine objective doubts. Most notably, during his interview with Sean Hannity on November 10, 2017—the day after the initial *Post* article—Mr. Moore stated only that he did not "generally" date girls as young as 18, Ex. O at 3, and admitted that he "dated a lot of young ladies," *id*. at 2, "during this period 1977 to 1982," Ex. A, 128:10–13.[25] Mr. Moore further (1) admitted to knowing 17 year-

[24] Ms. Davis's contemporaneous corroboration belies Mr. Hobson's and Mr. Young's dismissal of Ms. Corfman's account of her sexual abuse because she came forward nearly 40 years after the event. *See* Campaign Committee Br. at 40, 44.

[25] The Fox News commentary that followed Mr. Moore's interview noted inconsistencies in Mr. Moore's statements. *See* Ex. O at 6–8. *See also* Ex. N, 135:5–14 (Mr. Moore "got a little fuzzy at the Sean Hannity interview").

old Debbie Wesson Gibson and allowed that, "[i]f we did go out on dates then we did," Ex. O at 2, and (2) conceded that he knew 18 year-old Gloria Thacker Deason, but insisted that he could not have bought her alcohol because Etowah was "a dry county" at the time. *Id*. at 3. Notably, members of the Moore Campaign Committee knew the latter contention to be incorrect on November 10, *see* Ex. N 191:7–21 ("Etowah County was wet in 1979" and "Maters sold that kind of wine in 1979") (quoting Ex. AB (Young Dep. Ex. 124)).[26] Viewed as a whole, the record "raise[s] more than the possibility that a jury might disbelieve" Mr. Moore's denials on which the Moore representatives relied. *Zerangue*, 814 F.2d at 1072.

In the face of these materials reasonably calling Mr. Moore's general denials into question, most Moore representatives "made no investigation at all despite the seriousness of the allegations and their great potential for harm." *Babb v. Minder*, 806 F.2d 749, 756 (7th Cir. 1986). *See*, *e.g.*, Ex. N, 215:14–16 (conducted no "investigation into [Ms.] Corfman's allegations"); Ex. J, 58:4–7 (same); Ex. K, 80:5–20 (unable to recall "any further research or investigation into Leigh Corfman's allegations"). Among other things, they made no effort to contact the corroborating witness—Ms. Davis—identified in the *Washington Post* article. *See*, *e.g.*, Ex. K, 39:10–40:3.

"Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." *Connaughton*, 491 U.S. at 692. Indeed, the "discrepancies" in Mr. Moore's public statements could "give[] the jury the impression

[26] In his deposition, Mr. Moore confirmed additional details from Ms. Gibson's and Ms. Deason's reported accounts of dating Mr. Moore when they were teenagers. *Compare supra* pp. 4–5 *with* Ex. A, 90:14–20 (knew "Debbie Wesson and Gloria Thacker" "as friends"); *id*. at 130:7–13 ("remember[s] going to a restaurant with" Gloria Thacker); *id*. at 154:14–23 ("I might have taken Debbie Wesson or . . . Gloria Thacker to . . . a meal" and "will not deny" going to a restaurant with Debbie Wesson); *id*. at 284:2–9 (played the guitar and recited poetry "from memory" at the time); *id*. at 284:10–22 (went to the Attalla Country Club); *id*. at 331:20–332:9 ("[w]e as friends went places, like to a basketball game and I remember eating at the pizza place").

that the failure to conduct a complete investigation involved a deliberate effort to avoid the truth." *Id*. at 685. Having made "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of" Mr. Moore's account at the time, *id*., the resulting uninformed defamatory statements were made with reckless disregard for the truth.

Although Defendants argue that Mr. Dupré and Mrs. Porter both conducted investigations into Ms. Corfman's account that precludes a finding that they spoke with actual malice, *see* Campaign Committee Br. at 33–40, 41–43, those purported investigations confirm only their recklessness.

Mr. DuPré asserts that he "was just trying to . . . get the facts" on Ms. Corfman's account before speaking publicly, Ex. L, 30:3–18; *see also* Campaign Committee Br. at 34, but Mr. DuPré made his defamatory statements during a November 21, 2017 press conference—the day after he joined the campaign, *see* Ex. L, 35:21–36:5. *See also id*. at 60:19–21; *id*. at 66:13–14 ("[T]his was the first pushback against Leigh Corfman's story . . . ."). His abbreviated "investigation" simply involved reviewing the "case file" for Ms. Corfman's parents' divorce, and "information that had been sent to me by people that were researching [Ms. Corfman's] claims . . . ." *Id*. at 58:5–19. As to the latter, Mr. DuPré did not know who had prepared or gathered the information, *see id*. at 67:7–68:1 (campaign consultant "just said they had ***people*** up there that were researching" (emphasis added)), and "a reasonable juror could infer actual malice by clear and convincing evidence" where the speaker is "unable to identify the original source of th[e] specific" defamatory statement, *Celle*, 209 F.3d at 190.

Even Mr. DuPré's abbreviated investigation, however, identified information that corroborated Ms. Corfman's account of her sexual abuse and undermined Mr. DuPré's defamatory statements making purported factual challenges to Ms. Corfman's story. *See supra* pp. 9–10;

Compl.,¶ 86. *See also Schiavone*, 847 F.2d at 1090 (actual malice may be supported "[w]here the defendant finds internal inconsistencies or apparently reliable information that contradicts [the] libelous assertions, but nevertheless publishes those statements anyway"). For example, Mr. DuPré acknowledged, the day before the November 21 press conference, that his review of Ms. Corfman's parents' divorce file "answered the question that there probably was a hearing" on February 21, 1979 as described by Ms. Corfman. Ex. L, 74:6–75:21; Ex. AC (DuPré Dep. Ex. 9) at 1 (DuPré email stating that divorce file "DOES say there was an ore tenus hearing and testimony that day," which "corroborates" Ms. Corfman's account). Although Mr. DuPré speculated that a hearing may not have been necessary on a joint petition to modify a custody arrangement, the divorce file expressly states that an *ore tenus* hearing was held. Ex. AE (DuPré Dep. Ex. 13) at 15 (consent decree documenting *ore tenus* hearing).

Mr. DuPré's challenges to Ms. Corfman's description of the intersection where Mr. Moore picked her up in relation to her parents' residences, *see id*., ¶¶ 86(d)–(e), suffers similarly acknowledged flaws. To claim that Ms. Corfman could not have been picked up "at Alcott Road and Riley Street," *see* Ex. B at 4, Mr. DuPré relied on a document created by an unknown person that identifies only an address for Ms. Corfman's father in "July 1980," and an address for Ms. Corfman's mother with the notation "[t]his may need to be verified." Ex. AF (DuPré Dep. Ex. 10). The source of Mr. DuPré's information thus, on its face, provided obvious reasons for doubt. *See also* Ex. L, 80:3–6 (could not recall "ever receiv[ing] any documents suggesting where Leigh Corfman resided in 1979").

The divorce file likewise provided obvious reasons to doubt Mr. DuPré's subsequent statement that Ms. Corfman could not have been picked up by Mr. Moore because she resided with her father. *See* Compl., ¶ 86(e). The consent decree transferring custody of Ms. Corfman to her

father sets forth the visitation rights of her mother to include four weeks in June and August, and alternate weekends. *See* Ex. AE at 15. This mandated residence with Ms. Corfman's mother directly contradicts the implicit and defamatory assertion—that Ms. Corfman was necessarily at her father's when she claimed to be meeting Mr. Moore—of Mr. DuPré's statement.[27]

Finally, Mr. DuPré's challenge to Ms. Corfman talking to Mr. Moore on the telephone in her bedroom, *see* Compl., ¶ 86(c), is again contradicted by Mr. DuPré's purported source. Mr. DuPré relied on a Breitbart News article in which Ms. Corfman's mother stated that Ms. Corfman did not have a phone in her room. *See* Ex. L, 132:3–14; Ex. AG (DuPré Dep. Ex. 20) at 2. But, as Ms. Corfman's mother made clear in the article "the phone in the house could get through to her easily," *id*., because it had a long enough cord to reach Ms. Corfman's room, *see* Compl., ¶ 86(c). Mr. DuPré's pedantic suggestion that this statement did not corroborate Ms. Corfman's account of talking to Mr. Moore on "her phone in her bedroom," Ex. L, 135:3–10; Campaign Committee Br. at 37, founders on reason and the standard of review, in which all justifiable inferences are to be read in Ms. Corfman's favor. *See Masson*, 501 U.S. at 520.

Mrs. Porter's purported investigation fails to salvage her defamatory statements for similar reasons. As an initial matter, Mrs. Porter's claimed investigation, *see* Campaign Committee Br. at 43, amounted to little more than reading public newspapers and news broadcasts. *See* Ex. M, 59:19–60:3; *id*. at 101:1–18. *See also id*. at 101:22–102:2 (she did not "have to" conduct an investigation because Mr. Moore "had publicly already denied" the accounts).[28] That review

[27] In fact, it is entirely possible that Ms. Corfman's encounters with Mr. Moore occurred before she moved to her father's house.

[28] Mrs. Porter did not even discuss Ms. Corfman's account with Mr. Moore. *See* Ex. M, 78:19–79:1. Tellingly, Mrs. Porter seemingly recognized the significance of that lapse and preemptively prepared an answer to anticipated press inquiries on her failure to discuss the accounts of sexual misconduct with Mr. Moore. *See id*. at 167:23–168:13; Ex. AH (Porter Dep. Ex. 75).

revealed the same Breitbart news article that, on its face, contradicted Mrs. Porter's assertion about Ms. Corfman's telephone call in "her bedroom" no less than it did Mr. DuPré's. *See supra*; Ex. M, 91:21–7; *id*., 102:20–103:9. Beyond this public information, Mrs. Porter conducted no investigation and, indeed, failed even to discuss the accounts of sexual misconduct with Mr. Moore. *See id*. 60:10–11; *id*. at 78:19–21.[29]

In short, to the extent that any of the Moore representatives conducted an investigation into Ms. Corfman's allegations, that investigation turned up either facially unreliable or contradictory information. "This sort of willful blindness cannot immunize" the resulting defamatory statements. *Manzari*, 830 F.3d at 893.

* * *

Weighed against the "accumulation of the evidence and appropriate inferences," *Celle* 209 F.3d at 183, Defendants' protestations of innocence fail to eliminate genuine issues of material fact regarding the Moore representative's state of mind at the time of their defamatory falsehoods concerning Ms. Corfman. Rather, "[w]eighing the cumulative impact" of Defendants' motivations publicly (and hastily) to discredit Ms. Corfman's account of sexual abuse, the context of multiple consistent descriptions of Mr. Moore's conduct toward teenagers in the late 1970s and early 1980s, and the corroborating information in Mr. Moore's own statements and the Moore representatives own abbreviated investigations, *Connaughton*, 842 F.2d at 846, a reasonable jury could find clear and convincing evidence of actual malice in the Campaign Committee's statements.

At most, the Campaign Committee's arguments demonstrate that Mr. Moore and the Campaign Committee dispute—without evidence beyond Mr. Moore's general denials—

[29] Ms. Corfman's purported behavior as a teenager, *see* Campaign Committee Br. at 36, 42, is irrelevant to whether she was sexually abused by Mr. Moore.

Ms. Corfman's account of sexual abuse (and the accounts of the other women). "[O]nly a trial on the merits will resolve the factual dispute." *Manzari*, 830 F.3d at 891.

Summary judgment is therefore inappropriate, and this lawsuit should proceed toward trial. *E.g.*, *Masson*, 501 U.S. at 521 (credibility issues "create[] a jury question").

III. Declaratory Relief Is An Appropriate Remedy.

Having failed to justify summary judgment on the merits of Ms. Corfman's defamation claims, Defendants challenge the declaratory relief requested to remedy the harms visited on Ms. Corfman by Defendants' defamatory falsehoods characterizing her as a politically motivated liar. *See* Compl., ¶ 32 (requesting "a declaration that Defendants' denials of Mr. Moore's sexual abuse of her and their characterization of her account as 'false,' 'malicious,' and 'immoral' . . . are defamatory"); *see also id*, Prayer for Relief, ¶ 1.

Despite Defendants' vague references to "[t]he purpose of declaratory judgment," Moore Br. at 32–34, Alabama law requires the availability of declaratory judgments to "be liberally construed and administered," Ala. Code, § 6-6-221.

Likewise, contrary to Defendants' suggestions, "[d]eclaratory relief in defamation actions can be a substantial benefit to victims." *Hoesl v. United States*, 451 F. Supp. 1170, 1177 (N.D. Cal. 1978). *See also*, *e.g.*, *Sander*, 776 So. 2d at 70–71 (affirming declaratory judgment that First Amendment protected plaintiffs' statements). Indeed, declaratory judgment serves the purposes of defamation law and the First Amendment because "the aim" of liability for defamatory falsehoods is "to deter publication of unprotected material threatening injury to individual reputation." *Herbert*, 441 U.S. at 172.

Nor would declaratory judgment be available only if Ms. Corfman were herself in danger of becoming a tort defendant, *see* Moore Br. at 34, because the claims between Ms. Corfman and Defendants are not "hypothetical," "nebulous or contingent." *Carroll v. White*, No. 16-cv-229,

2016 WL 7238914, at *4 (M.D. Ala. Nov. 21, 2016). Ms. Corfman and Mr. Moore have lodged competing defamation claims arising from a single concrete set of facts. This dispute is not, in short, merely "an anticipated controversy," *Ex parte Valloze*, 142 So. 3d 504, 509 (Ala. 2013) (quotation omitted), but rather "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech*, 549 U.S. 118, 128 (2007).

Because a declaratory judgment "will serve a useful purpose in clarifying and settling" legal relations by making clear prospectively—particularly as Mr. Moore begins a new campaign for the U.S. Senate—that the statements about Ms. Corfman's veracity and motivations made by the Defendants are defamatory and "finalize the controversy and offer relief from uncertainty," *Dow Jones & Co., Inc. v. Harrods, Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003), it is appropriate in this case. *See MedImmune*, 549 U.S. at 127 n.7 (declaratory judgment may be appropriate where it would "finally and conclusively resolve the underlying controversy").

At any rate, to the extent that Defendants' arguments are valid (which they are not), Ms. Corfman would seek leave to amend her Complaint to seek nominal damages.

CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment should be denied.

August 22, 2019

Respectfully Submitted,

/s/ Melody H. Eagan
One of the Attorneys for
Plaintiff Leigh Corfman

Of Counsel:
Neil K. Roman
nroman@cov.com
Clara J. Shin*
cshin@cov.com
Megan L. Rodgers **
mrodgers@cov.com
Daniel W. Cho***
dwcho@cov.com

COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
(212) 841-1221 (telephone)
* San Francisco Office
** Silicon Valley Office
*** Washington D.C. Office

Harlan I. Prater IV
hprater@lightfootlaw.com
Melody H. Eagan
meagan@lightfootlaw.com
Jeffrey P. Doss
jdoss@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203
(205) 581-0700 (telephone)
(205) 581-0799 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2019, I electronically filed the foregoing with the Clerk of the Court using the ALAFILE system, which will send notification of such filing to the following registered persons, and those persons not registered with the ALAFILE system were served by email:

Melissa L. Isaak, Esq.
The Isaak Law Firm
P.O. Box 4894
Montgomery, AL 36103

Kenneth Shinbaum, Esq.
Julian L. McPhillips, Jr., Esq.
MCPHILLIPS SHINBAUM, LLP
516 South Perry Street
Montgomery, AL 36104

/s/ Melody H. Eagan
Of Counsel