NO. 20-_____

In the Supreme Court of the United States

JOHN DOES 1 THROUGH 10,

Petitioner,

v.

DEBRA HAALAND AND ELIZABETH WARREN,

Respondents.

On Petition for a Writ of Certiorari to the United States Supreme Court for the Sixth Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is election to Congress a license to libel anyone, anywhere, anytime, even when the libel is not in response to a press inquiry, does not concern pending legislation, does not occur in the halls of Congress, and concerns private citizens, minor children, from a jurisdiction neither member of Congress represents?

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 19-6347

John Does 1–10, *Plaintiffs-Appellants, v.*
Debra Haaland; Elizabeth Warren,
Defendants-Appellees.

Date of Final Opinion Judgment: September 3, 2020

Date of Final Judgment: September 3, 2020

United States District Court for the Eastern District of Kentucky Northern Division at Covington

Civil Action No. 2:19-00117

John Does 1 through 10, *Plaintiffs, v.*
Debra Haaland, et al., *Defendants.*

Memorandum Opinion and Order: November 5, 2019

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The United States District Court for the Eastern District of Kentucky Northern Division at Covington on November 5, 2019, denied Petitioners' motion to remand this matter to state court and granted Respondents' motion to dismiss on sovereign immunity grounds. (App.24a). On September 3, 2020, the Sixth Circuit affirmed the District Court's order. (App.1a), which is published as *John Does 1-10 v. Debra Haaland et al.,* 973 F.3d 591 (6th Cir. 2020).

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 2020. (App.1a). This Court's jurisdiction rests on 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Article I, Section 6:

The Speech and Debate clause of the US Constitution states that members of both Houses of Congress:

> . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either

House, they shall not be questioned in any other Place.

28 U.S.C. § 2671—Definitions

As used in this chapter and sections 1346(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

STATEMENT OF THE CASE

A prominent Senator (and would-be President) and a high-profile member of Congress (now nominated Cabinet member), voluntarily chose to libel a bunch of minor children from Covington, Kentucky, through their broad followings on their social media accounts, and instigated a social media lynch mob that led to threats against these children's lives, families, and future, including death threats, threats of arson, and Hollywood movie directors showing the children shoved through large-scale shredders. After suit in state court, both Defendants removed the case to federal court, claiming it was their "duty" as member of Congress to libel these private citizen minor children, and that the Westfall Act gave members of Congress a license to libel, even when the statements were gratuitously made on social media to millions of people about private citizen minor children from a different jurisdiction and that did not even concern any matter pending before Congress.

1. Factual Background

On January 18, 2019, Petitioners, all minor school children from Covington, Kentucky, joined a larger group of classmates on a trip to Washington, D.C. to attend the March for Life. After the march, the Covington children (Petitioners) gathered near the Lincoln Memorial to await buses to return to Kentucky. While there, members of the religious group known as the Black Hebrew Israelites began taunting the Covington

children with profane insults. Some of the Covington children sought permission from chaperones to recite school cheers to drown out the taunts.

Shortly after the children began their school cheers, they were approached by Native American activist Nathan Phillips. He walked up to and into the crowd of Covington kids while beating a drum. As can be seen in video recordings of the event, nothing of note occurred while Nathan Phillips was in the crowd of Covington kids (Petitioners). Nobody was harmed, nobody was threatened, and not a single one of the Covington kids uttered so much as a rude word towards Nathan Phillips. Indeed, this incident was so mundane and peaceful that the highlight of it was a short period of time when Nathan Phillips stood in front of Nicholas Sandmann, a Covington kid who is not part of this case, while beating his drum. Nathan Phillips then left the area, with nothing meaningful occurring.

Soon, though, while the minor children (Petitioners) slept on their school bus returning home, Respondents Senator Elizabeth Warren, Representative Deb Haaland, and other Defendants named in the underlying action, instigated a social media lynch mob against the children (Petitioners) by using their millions of social media followers to lie about and libel them, triggering threats of violence against the children by the time they arrived home.

Petitioners' defamation claims against Respondent Warren arise from Warren's statements on her Twitter account that: "Omaha elder and Vietnam War veteran Nathan Phillips endured hateful taunts with dignity and strength, then urged us all to do better. Listen to his words," followed by a link to a SPLINTER

NEWS post covering the incident, which identified the Petitioners individually by image. Each of the statements complained of herein was known by the friends, family and associates of each or the Petitioners, to be about them individually. Indeed, they were individually identified as the subject of the statements complained of herein, causing death threats, hate mail, threatening phone calls, threatening emails, and other personal attacks on them each individually. The Petitioners were known to be the subject of the statements complained of herein as they were identified by photo image throughout the world, and each of the statements was interpreted by their friends, family and associates as about them personally. Petitioners' defamation claims against Respondent Haaland arise from her statements on her Twitter account that: "This Veteran put his life on the line for our country. The Covington children's blatant display of hate, disrespect, and intolerance is a signal of how common decency has decayed under this administration. Heartbreaking." (App.31a). Haaland made the following tweet of and concerning the Petitioners: "A Native American veteran was seen being harassed and mocked by a group of MAGA hat-wearing teens." (App.31a.). In that tweet, Haaland included a link to a HUFFINGTON POST article titled, *Native American Veteran Speaks Out After MAGA Hat-Wearing Teens Harass Him*. *Id*.

Respondents Warren, a leading Democratic candidate for the Presidency and a sitting United States Senator, and Haaland, a United States Representative from New Mexico at the time (and newly appointed U.S. Secretary of Interior), used their big social media followings to falsely tell their followers and the media that the Petitioners had engaged in morally abhorrent

and hateful conduct, omitting the true facts: that the Petitioners never ever interrupted an indigenous march, never stopped and blocked a Native American elder and Vietnam War-era veteran (Phillips served stateside as a refrigeration technician) from continuous participation in that event, never surrounded him in a threatening manner, never taunted him as a Native American elder, and never chanted "build the wall" at him to mock an elderly Native American in the middle of an indigenous march. Despite multiple and myriad requests to merely correct the statements without any suit or financial remedy requested, both Defendants refused any retraction, refused any correction, and refused any remedy, and their libelous statements still exist on their social media to this very day.

2. Procedural History

Petitioners filed their lawsuit on August 1, 2019. On August 14, 2019, Petitioners filed an Amended Complaint, alleging causes of action for defamation and several state law claims against Respondents Warren, Haaland, and other Defendants in that action.

On August 28, 2019, Respondent Warren filed a Notice of Removal to the United States District Court for the Eastern District of Kentucky, Covington Division, claiming that the conduct alleged against her in the Amended Complaint qualified for removal under 28 U.S.C. § 1442(a).

On September 4, 2019, Respondent Warren filed a Motion to Dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Alternatively, Warren's motion moved this Court to dismiss Petitioners' claims pursuant to Rule

12(b)(6) of the Federal Rules of Civil Procedure, arguing that Petitioners have failed to state a claim for any of the causes of action that they allege. Alternatively, Warren moved this Court pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss Petitioners' claims against her for lack of subject matter jurisdiction.

On September 26, 2019, Petitioners responded with a motion to remand back to Kenton County Circuit Court. The District Court, on November 5, 2019, denied Petitioners' motion to remand and entered a Memorandum Opinion and Order finding that removal was proper. (App.24a). Additionally, the District Court granted Respondents Warren and Haaland's Motions to Dismiss upon finding that the Respondents acted within the scope of their employment in issuing their respective tweets, and because Petitioners failed to identify any waiver of sovereign immunity for their claims against the Respondents. The District Court then declined to exercise supplemental jurisdiction over the remaining claims against the ten other Defendants and remanded the matter to state court. Petitioners appealed the District Court's Order granting Defendants' Motions to Dismiss and denying Petitioners' Motion to Remand.

On September 3, 2020, the Sixth Circuit affirmed the District Court's order and held that the United States was properly substituted as Defendant in this case and the District Court correctly dismissed Respondents Warren and Haaland from the suit. (App.1a).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with the decisions of fellow federal Circuit courts, conflicts with the decisions of this court, and conflicts with state supreme courts on the scope of legislative immunity any legislator can Constitutionally enjoy. As important, this case concerns a critically important federal question of pure law: is election to Congress a license to libel, slander, and defame anyone, anywhere, any time with absolute immunity, unlimited to legislative duties or press inquiry? Can Congress immunize itself for crimes next?

I. THE CASE BELOW CONFLICTS WITH THIS COURT'S HOLDINGS THAT THE WESTFALL ACT DOES NOT EXPAND IMMUNITY BEYOND WHAT EXISTED PRIOR TO THE WESTFALL DECISION, WHICH LIMITED IMMUNITY FOR MEMBERS OF CONGRESS TO THAT AUTHORIZED BY THE SPEECH AND DEBATE CLAUSE OF THE CONSTITUTION.

This Court already limited the scope of the Westfall Act: to "return Federal employees to the status they held prior to the Westfall decision." *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). Notably, the express intention to "return Federal employees to the status they held prior to the Westfall decision" would mean the express intention of Congress was to restore the scope of immunity to the immunity afforded under the Speech and Debate Clause, since that is what would "return Federal employees to the status they held prior to the Westfall decision." What was that immunity "status they held prior to the Westfall

decision?" It was limited to legislative tasks. *See Proxmire*, *Gravel, et al. Hutchinson v. Proxmire*, 443 U.S. 111 (1979), *Gravel v. United States*, 408 U.S. 606 (1972). Of note, this is in conformity to the scope of legislative immunity sister state courts also repeatedly recognize. *See e.g.*, *Cooper v. Glaser*, 228 P.3d 443, 445 (Mont. 2010); *Gugliotta v. Wilson*, 168 A.D.3d 817 (N.Y. App. Div. 2019); *Janiszewski v. Belmont Career Center*, 86 N.E.3d 613 (Ohio Ct. App. 2017); *Miller v. Wyatt*, 457 S.W.3d 405 (Tenn. Ct. App. 2014); *Anderson v. Hebert*, 830 N.W.2d 704, 708 (Wis. Ct. App. 2013); *Isle of Wight County v. Nogiec*, 704 S.E.2d 83 (Va. 2011); *Clark v. Jenkins*, 248 S.W.3d 418 (Tex. Ct. App. 2008); *Hillman v. Yarbrough*, 936 So.2d 1056 (Ala. 2006); *Meyer v. McKeown*, 641 N.E.2d 1212 (Ill. App. 1994).

In 1988, the Supreme Court added a qualification to judicially crafted official immunity for the actions of federal officials: the requirement the immunized act be within the discretionary authority of the official. *Westfall v. Erwin*, 484 U.S. 292 (1988). Congress reacted by passing a law named after the decision, the Westfall Act, that removed that qualification, and engrafted the court's pre-Westfall judicially crafted common law immunity into legislatively granted statutory immunity. As subsequent courts and scholars alike concurred, the law merely put the pre-Westfall immunity case law back into effect, and made it legislation. The decision below conflicted with this legislative history, and this Court's adjudication of it.

The Speech and Debate clause of the U.S. Constitution states that members of both Houses of Congress:

> . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session

> of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. Article I, Section 6 Clause 1.

The jurisprudence of the Speech and Debate Clause constitutionally constrict the contours of immunity Congress can afford itself. As the Court reiterated in *Gravel*: "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Gravel v. United States*, 408 U.S. 606 (1972).

This conforms to this Court's recognition that Congress cannot engraft onto itself additional immunities beyond that afforded by the Constitution. Immunity should not preclude prosecutions "which, though . . . founded on a criminal statute of general application, [do] not draw in question the legislative acts of the defendant Member of Congress or his motives for performing them." *United States v. Johnson*, 383 U.S. 169, 185 (1966). In *United States v. Brewster*, 408 U.S. 501 (1972), the Court drew a distinction between a prosecution that caused an inquiry into the motivation for performance of legislative acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not.

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. . . . Nor is inquiry into a legislative

> act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch.

Brewster at 526.

In other words, it is the fact of having taken a bribe, not the act the bribe is intended to influence, which is the subject of the prosecution, and the Speech and Debate Clause interposes no obstacle to this type of prosecution. The same analysis is applicable here where the statements of libel themselves, not any purported legislative actions related thereto, is the subject of the underlying suit.

Expanding immunity without express statutory direction to do so contradicts this court's precedents concerning immunity, and the statutory interpretation related thereto. The Supreme Court made clear that a "statute must be read in harmony with general principles of tort immunities and defenses rather than in derogation of them" and discouraged redefining the scope of immunity based on some claim a statute "somehow eliminated" the scope of immunity law "by covert inclusion in the general language" of a statute. *Rehberg v. Paulk*, 566 U.S. 356, 361-362 (2012) (internal citations and quotations omitted). After all, courts must assume Congress is familiar with existing case law on immunity, and intended to include them and continue them, absent express language to the contrary. *Rehberg v. Paulk*, 566 U.S. 356, 362 (2012).

The decision of the lower court violates the precedents of this Honorable Court set forth above. Said plainly, this court has already decided that: "[l]egislatures may not of course acquire power by unwarranted extension of privilege" *Tenney v. Brandhove*, 341 U.S. 367 (1951), but here as Thomas Jefferson so noted, the "tyranny of the legislatures" is threatening to raise its formidable head, and must be stopped.

II. THE CASE BELOW CONFLICTS WITH FELLOW FEDERAL CIRCUITS LIMITING IMMUNITY TO LEGISLATIVE TASKS, SUCH AS ANSWERING PRESS QUESTIONS ABOUT THEIR OFFICE OR THEMSELVES PERSONALLY.

Fellow federal Circuit courts never went as far as the Circuit below in applying immunity so broadly. First, most federal Circuit courts have not approved of applying the Westfall Act to be broader and beyond the scope of immunity provided in the Constitution's Speech and Debate Clause; the court below did. Second, the few federal circuits to address this issue constricted the immunity to only statements that were made in response to press inquiries concerning their job as members of Congress or personal questions about themselves as members of Congress, not to statements gratuitously made on social media to millions of followers to whip up a social media lynch mob. Third, this Court previously held that the Westfall Act only restored the level of immunity existing prior to the Westfall decision, and Congress members' immunity for libel was limited to the same limits as the Speech and Debate Clause prior to the act.

Of note, most Circuits have not approved of the lower court's decision. The few Circuits to address the issue limited immunity to circumstances not present here. A scattering of cases across a few Circuits extended immunity only to a few acts outside of Congress: 1) answering questions from the media, and 2) concerning pending matters before Congress or personal issues about the Congressmen themselves. In the other Circuit cases relied upon by the court below, the conduct was in response to a reporter's inquiry about matters within their authorized duties or about them individually. Responding to questions about their job has been the only category of claims found immune from tortious libels outside of legislative duties or the legislative chamber.

In the primary case cited to expand immunity beyond the scope of the Speech and Debate clause, the courts emphasized the statements at issue were in response to press inquiries, and notably not "made gratuitously" to serve personal political interests. *Operation Rescue Nat. v. U.S.*, 975 F.Supp. 92, 108 (D. Mass 1997). Courts implicitly rejected that acts meant to enhance popularity, increase fundraising, or improve candidacy are not the official duties of a member of Congress. *Id.*

In *Council on American Islamic Relations v. Ballenger*, 366 F.Supp.2d 28, 32 (D.D.C. 2005) the Congressman was deemed to be acting, at least in part, for the purpose of preserving his effectiveness, the court found he was thus acting within the scope of his employment at the time of the incident in question.

Unlike the statements in *Williams*, which were made in the context of an interview addressing Con-

gress' appropriation of money for the restoration of the Battleship Texas, or statements made in *Operation Rescue Nat. v. U.S.*, 975 F. Supp. 92 (D. Mass. 1997) which were specifically concerning pending legislation, the statements in this case were not made within the context of any pending congressional action whatsoever. Additionally, unlike the statements in *Ballenger*, they were not made for the purpose of preserving the Senator's "effectiveness" as they were not pure opinions, but libels and lies masquerading as the result of an independent inquiry by a Senator in her legislative tasks, citing as its source an article with multiple false statements of facts she implied were also true, including false allegations of what would constitute criminal harassment in the state of Kentucky. Lies about minors are not OK because a Senator says them outside of her legislative duties.

Federal courts find comparable intentional tortious conduct outside the protections of immunity. *See e.g., Bergeron v. Henderson*, 47 F.Supp.2d 61 (D. Me. 1999); *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994); *Mobley v. Coby*, 1996 WL 250655 (D. Md. 1996); *Baggio v. Lombardi*, 726 F.Supp. 922 (E.D.N.Y. 1989); *Allstate Ins. Co. v. Quick*, 254 F.Supp.2d 706 (S.D. Ohio 2002); *Greene v. Rubin*, 1997 WL 535893 (E.D. Pa. 1997); *Counts v. Guevara*, 328 F.3d 212 (5th Cir. 2003); *McHugh v. University of Vermont*, 966 F.2d 67 (2d Cir. 1992); *Nadler v. Mann*, 951 F.2d 301 (11th Cir. 1992); *Melo v. Hafer*, 1992 WL 396816 (E.D. Pa. 1992).

Finally, in the other Circuit decisions, the Attorney General certified the claim arose under the defendant's official duty; that never occurred here. The Westfall Act only offers protection to a government actor when that actor was acting within the scope of his or

her employment "at the time of the incident out of which the [tort] claim arose." 28 U.S.C. § 2679(d)(1). When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." § 2679(d)(1), (2). Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. No such certification ever occurred, or was even sought, by the defendants in this case, another critical conflict with the decision of the few Circuits to extend immunity at all.

The case below directly conflicts with the Circuit decisions on the issue, which limit a federal employee's immunity to statements about their federal office made to the press. No Circuit, until this Circuit, ever extended immunity to any libel, any place, anywhere, anytime, regardless of the statement's nexus to pending legislation or a reporter's inquiry. The gratuitous voluntarily instigated statements on social media that intended to cause and did cause a social media lynch mob against a bunch of minors from Kentucky, was not within the official legislative duties of either defendant, nor within their Constitutionally protected prerogative of immunized speech, nor even with the certification of the Attorney General. As such, the decision below conflicted with the decisions of fellow federal Circuits, just as it conflicted with the precedents of this Court.

III. THE CASE BELOW CONFLICTS WITH STATE SUPREME COURTS ON THE SCOPE OF LEGISLATIVE IMMUNITY A LEGISLATOR CAN CONSTITUTIONALLY ENJOY.

Sister state supreme courts also conflict with the decision of the Circuit below. In order for immunity to apply, it must be the case that "the legislator was engaged in a legislative function when he or she spoke." *Cooper v. Glaser*, 228 P.3d 443 445 (Mont. 2010). "Whatever imprecision there may be in the term "legislative activities," it is clear that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber." *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979). "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by ensuring the independence of individual legislators." *Id.*

Courts routinely decline immunity claims where the defendant tried to shield libel behind an official proceeding or their duties when their comments do not relate by either subject or place. *Gugliotta v. Wilson*, 168 A.D.3d 817 (N.Y. App. Div. 2019) "Absolute immunity should not be extended to members of city council, where there is no pending legislation relating to the subject matter of the alleged defamation and where the publication is beyond the legislative forum; instead, statements made other than in a legislative session or related meeting should be afforded a qualified privilege." *Janiszewski v. Belmont Career Center*, 86 N.E.3d 613 (Ohio Ct. App. 2017). "Legislative privilege does not give a member of a subordinate legislative body

the right to use his or her position as a forum for private slanders against others." *Miller v. Wyatt*, 457 S.W.3d 405 (Tenn. Ct. App. 2014). A legislator "cannot claim a legislative privilege before a body that is not legislating." *Anderson v. Hebert*, 830 N.W.2d 704, 708 (Wis. Ct. App. 2013). There can be no immunity where the legislator's statement was not made in legislative capacity. *Isle of Wight County v. Nogiec*, 704 S.E.2d 83 (Va. 2011). Statements made outside of the legislative session not concerning pending legislation were not protected statements. *Clark v. Jenkins*, 248 S.W.3d 418 (Tex. Ct. App. 2008). Statements outside of legislative function are not immune from suit even though made by a legislative official. *Hillman v. Yarbrough*, 936 So.2d 1056 (Ala. 2006). No immunity for legislative comments outside of legislative functions. *Meyer v. McKeown*, 641 N.E.2d 1212 (Ill. App. 1994).

The same logic that limited immunity in the decisions of federal Circuits and this court, reverberate through the state supreme courts as well: election to legislative office is not a license to libel anyone, anywhere, anytime, unrelated and unconstrained by the legislative tasks authorized of a legislator. Election to office is not an unlimited license to libel.

IV. THIS CASE CONCERNS A CRITICAL CONSTITUTIONAL QUESTION OF PURE LAW: IS ELECTION TO CONGRESS A LICENSE TO LIBEL THE CITIZENRY WITHOUT LIMIT AND WITHOUT CONSEQUENCE?

This Writ should be granted because the issues raised herein are of great nationwide importance, raise questions of pure law, and clarity is needed from this Court.

Is election to Congress a license to libel anyone, anywhere, any time? The Constitution already carefully balances the need for risk-free speech made by members of Congress in the halls of Congress and in their Congressional duties as legislators. The statute already immunizes public statements in response to press inquiries concerning their Congressional duties. Extending and expanding Congressional immunity to anything they say, anywhere, anytime, contradicts the Constitution and exceeds the statutory immunity of their office.

The Supreme Court long ago rejected election to Congress as a license to libel. *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979). A quartet of cases reinforced this principle. *See e.g., Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Doe v. McMillan*, 412 U.S. 306, 324 (1973); *United States v. Brewster*, 408 U.S. 501, 512 (1972); *Gravel v. United States*, 408 U.S. 606 (1972).

Constitutional issues arise if the Westfall Act is interpreted to contradict both the Speech and Debate Clause, as well as contradict the pre-Westfall jurisprudence it presumably reinstated. "Legislatures may not of course acquire power by unwarranted extension of privilege." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). "'The tyranny of the legislatures is the most formidable dread at present and will be for long years.'" *Id.*, at 375 n. 4, quoting Thomas Jefferson.

This case allows this court to clarify that the Westfall Act does not extend official duties of a member of Congress beyond legislative duties (if members of Congress are intended to be covered by the Westfall Act, at all), and Congress does not have the authority, and cannot be Constitutionally granted the authority, to immunize itself beyond legislative actions. Under

the dangerous logic of the decision below, Congress could immunize its members for anything (without even expressly telling anyone, including their constituents at the time, that they even did so).

Could Congress members immunize themselves from criminal prosecution next? Are there any limits? Right now, a member of Congress can sue a citizen for lying about that member of Congress, but a citizen cannot sue a member of Congress for lying about that citizen, even when the lie does not concern any legislative task of that member of Congress. Imagine: get elected to Congress, and now you can libel your neighbor, your ex, your business competitor, and even children. You don't have to be within Congress; you can use your millions of followers on social media to create real-time social media lynch mobs with devastating outcomes. Such a conflict in power between the citizen and their "representative" unbalances the very balance the Constitution carefully constructed. This case begs for this Court's clarity. Election to Congress cannot Constitutionally be a license to libel anyone, anywhere, anytime.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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FEBRUARY 1, 2021

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OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 3, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES 1–10,

Plaintiffs-Appellants,

v.

DEBRA HAALAND; ELIZABETH WARREN,

Defendants-Appellees.

No. 19-6347

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 2:19-cv-00117—William O. Bertelsman,
District Judge.

Before: CLAY, WHITE, and READLER,
Circuit Judges.

CLAY, Circuit Judge. Plaintiffs, ten unidentified minors, appeal the district court's order dismissing two Defendants, Senator Elizabeth Warren and Representative Debra Haaland, from this defamation suit. Plaintiffs claim that Senator Warren and Representative Haaland committed libel against them by issuing a series of tweets in response to a widely publicized

incident on the National Mall in which Plaintiffs were involved. The district court found that Plaintiffs' defamation claims were barred by sovereign immunity. For the reasons provided in this opinion, we AFFIRM the district court's order.

BACKGROUND

Plaintiffs are ten unnamed minors who, at the time of the events in question, attended Covington Catholic High School, a private school in Park Hills, Kentucky. According to Plaintiffs' complaint, on January 18, 2019, Plaintiffs joined a larger group of classmates on a trip to Washington, D.C. to attend the anti-abortion March for Life. After attending the demonstration, Plaintiffs gathered near the Lincoln Memorial to await buses to return to Kentucky. While there, members of the religious sect known as the Black Hebrew Israelites allegedly taunted the students with profane insults. Some of the students purportedly sought permission from chaperones to recite school cheers to drown out the taunts.

After this interaction, Native American activist Nathan Phillips approached Plaintiffs. Phillips had participated in the Indigenous People's March—a political rally near the Lincoln Memorial—earlier in the day. According to Plaintiffs, Phillips "joined the students as they engaged in school cheers." R. 34-3, First Am. Compl., PageID # 429. These cheers included renditions of the Haka—a traditional Maori dance—and the "sports chant of the Florida State Seminoles and the Atlanta Braves, with their famous tomahawk chop." *Id.* at PageID # 429–30. Plaintiffs claim that in doing so they "joined with Phillips"—who was

beating a drum and chanting a traditional Native American song. *Id.* at PageID # 429.

A video of Plaintiffs' interaction with Phillips was posted online and it swiftly spread. It depicts Phillips beating his drum and chanting while backed by a small number of Native American activists who are in turn surrounded by a larger circle of Covington students (identifiable by their Covington apparel), some of whom are also wearing clothing and hats displaying President Trump's "Make America Great Again" campaign slogan. A number of students are performing the "tomahawk" chop and one student is standing close to Phillips and staring at him.

Several politicians, journalists, and others with large social media followings shared versions of the video as well as articles that discussed it, many with commentary disapproving of Plaintiffs' actions. Numerous other individuals and media outlets also publicized the video. Plaintiffs complained of severe online harassment in response to the video's dissemination, including calls for their physical harm, expulsion, and for the public disclosure of their identities.

The public statements regarding the video that are relevant on appeal are those sent by Representative Debra Haaland and Senator Elizabeth Warren. On January 19, 2019, Representative Haaland sent a tweet from her official Congressional Twitter account that read: "This Veteran [Nathan Phillips] put his life on the line for our country. The students' display of blatant hate, disrespect, and intolerance is a signal of how common decency has decayed under this administration. Heartbreaking." *Id.* at PageID # 465. She later sent a tweet from her campaign Twitter account

that linked to a Huffington Post article about the incident that included a video interview with Phillips following his interaction with the students, in which he stated that they were chanting "build that wall." *Id.* at PageID # 471. Her tweet stated: "A Native American Vietnam War veteran was seen being harassed and mocked by a group of MAGA hat-wearing teens." *Id.* Elected in 2018, Representative Haaland was one of the first Native American women elected to Congress. According to public reports, she attended the Indigenous People's March earlier in the day on January 18.

On January 19, Senator Elizabeth Warren sent a tweet from her official Senate Twitter account that stated "Omaha elder and Vietnam War veteran Nathan Phillips endured hateful taunts with dignity and strength, then urged us all to do better. Listen to his words." *Id.* at PageID # 473. This was followed by a link to a Splinter News article about the incident. The article shared by Senator Warren also included a version of the video interview with Phillips in which he stated that he heard chants of "[b]uild that wall" from the crowd of Covington students. Sen. Warren's Br. at 9 (citing @splinter_news, Twitter (Jan. 19, 2019, 6:18 PM), https://twitter.com/splinter_news/status/1086764784706560001?lang=en).

On August 1, 2019, eight of the unnamed Plaintiffs filed suit in Kentucky court against Defendants, twelve individuals who sent tweets regarding the incident and Plaintiffs' participation therein. On August 14, 2019, Plaintiffs filed an amended complaint to add two more unnamed students as Plaintiffs. Each Defendant was accused of defamation, intrusion upon seclusion, and negligent infliction of emotional distress;

while one (Kathy Griffin) was further accused of harassment via her online messages. Plaintiffs alleged that each Defendant made their statements:

> [K]nowing they both omitted true facts and implied false facts, including the false factual claim the Covington Boys interrupted an indigenous people's march, stopped, blocked and surrounded a native American elder war veteran for the purposes of taunting, harassing, and mocking him with chants of build the wall, aggregating these lies into public denunciations, calls for public doxing, and public demands of school expulsion, to induce public contempt upon the plaintiffs.

R. 34-3, First Am. Compl., PageID # 439. Plaintiffs asked for damages "in an amount not less than $15,000 but not more than $50,000" per Defendant. *Id.* at PageID # 463.

On August 28, 2019, Senator Warren removed the case to federal district court, citing the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), as the basis for removal. Then on September 4, 2019, Senator Warren filed a motion to dismiss for lack of jurisdiction and for failure to state a claim on which relief could be granted. Representative Haaland subsequently filed her own motion to dismiss. On September 26, 2019, Plaintiffs filed a motion to remand to state court.

The district court issued an opinion and order in which it found that removal was proper under the Federal Officer Removal Statute, denied Plaintiffs' motion to remand, and granted Senator Warren's and Representative Haaland's motions to dismiss. It concluded that regardless of whether one agrees with

Warren's and Haaland's communications, they were "intended to convey the politicians' views on matters of public interest to their constituents." R. 80, Dist. Ct. Order, PageID # 1081. Therefore, "the statements were made within the scope of defendants' employment as elected representatives" and they were entitled to the benefit of sovereign immunity pursuant to 28 U.S.C. § 2679(b)(1). *Id.* This meant that the United States was substituted as Defendant in their place. However, because the United States has not waived its immunity to libel and slander suits, *id.* § 2680(h), the defamation claim could not proceed against the United States either. With no federal defendants left before it, the court lacked subject matter jurisdiction over the action. It then declined to exercise supplemental jurisdiction over Plaintiffs' state law claims against the remaining Defendants because those claims involved "unique issues of state law." *Id.* at PageID # 1082 (citing 28 U.S.C. § 1367(c)). It thus remanded the remaining claims to state court. This timely appeal followed.[1]

DISCUSSION

We review a district court's order dismissing an action for lack of subject matter jurisdiction *de novo*. *See, e.g.*, *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne*

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[1] On appeal, Plaintiffs do not challenge the district court's dismissal of their intrusion upon seclusion and negligent infliction of emotional distress claims against Defendants. Plaintiffs also fail to argue that the district court erred in denying their motion to remand. Consequently, those claims have been forfeited on appeal. *See, e.g.*, *Enertech Elec., Inc. v. Mahoning Cnty. Comm'rs*, 85 F.3d 257, 259 (6th Cir. 1996) (holding that issues not raised in an appellant's opening brief will not be considered on appeal).

Joint Solid Waste Mgmt. Dist., 166 F.3d 835, 837 (6th Cir. 1999).

I. Sovereign Immunity

Plaintiffs mistakenly frame Defendants' claim for immunity from libel suits as one premised on the Speech and Debate Clause, which states "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. This clause provides Congressmembers a limited form of legislative immunity from suit. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("It . . . protects Members against prosecutions that directly impinge upon or threaten the legislative process.") However, the clause only protects speech made in the context of "legislative activities" and the "legislative process." *See, e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979) (holding that the Speech and Debate Clause's protection "does not extend beyond what is necessary to preserve the integrity of the legislative process" (quoting *United States v. Brewster*, 408 U.S. 501, 517 (1972))). This provides meaningful limits on an otherwise broad grant of immunity.

In the present case, Plaintiffs contend that "[r]esponding to questions about their job [as Congressmembers] has been the only category of claims found immune from tortious libels outside of legislative duties or the legislative chamber," and so Defendants' tweets are not protected by the Speech and Debate Clause. Appellants' Br. at 15. Whatever the merits of Plaintiffs' argument, neither Senator Warren nor Representative Haaland have cited the Speech and Debate Clause—in either their motions to dismiss

below or in their filings before this Court—to demonstrate the lack of federal subject matter jurisdiction over this action. Consequently, Plaintiffs' arguments on this point are irrelevant to the issue presented in this case.

Instead, Defendants rely on the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671 *et seq.*, as amended by the Westfall Act, 28 U.S.C. § 2679(b)(1), to undergird their immunity claim. "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). The FTCA waives the United States' sovereign immunity for certain torts committed by federal employees while acting in the scope of their employment. 28 U.S.C. §§ 1346, 2671 *et seq.* In general, the FTCA provides federal district courts exclusive jurisdiction over claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" by federal employees acting within the scope of their employment. *Id.* § 1346(b)(1). It does not, however, waive sovereign immunity for claims "arising out of . . . libel [and] slander." *Id.* § 2680(h).

Prior to 1988 litigants could sue federal tortfeasors in their individual capacity, subject to specific exceptions created by Congress to protect certain classes of employees from personal liability. *See United States v. Smith*, 499 U.S. 160, 170 & n.11 (1991). In 1988, Congress abandoned this piecemeal approach and passed broad legislation to extend the benefit of sovereign immunity to all federal employees. This law,

the Federal Employees Liability Reform and Tort Compensation Act (*i.e.*, the Westfall Act), amended the FTCA to provide that "[t]he remedy against the United States provided [in the FTCA] . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter *against the employee whose act or omission gave rise to the claim* or against the estate of such employee." 28 U.S.C. § 2679(b)(1) (emphasis added); *see also Levin v. United States*, 568 U.S. 503, 509 (2013) (holding that the Westfall Act "makes the remedy against the United States under the FTCA exclusive for torts committed by federal employees acting within the scope of their employment").

"Under the Act, the United States shall be substituted for the employee as a defendant in any common law tort action initiated against an employee if the employee was acting within the scope of employment." *Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1147 (6th Cir. 1994). Moreover, as interpreted by the Supreme Court, the Westfall Act immunizes individual federal employees even where the FTCA bars a suit against the United States as well. *Smith*, 499 U.S. at 166; *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("If . . . an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party.").

A. Applicability of the Westfall Act to Members of Congress

To prevail, Defendants must demonstrate that members of Congress are protected by the Westfall Act. They must first show that Congressmembers are

"employee[s] of the Government." 28 U.S.C. § 2679(b)(1). Plaintiffs contend that "there is zero evidence the Westfall Act was about Congressmembers at all." Appellants' Reply Br. at 6–7.

Although we have not yet considered this issue, the First Circuit has squarely held that members of Congress are government employees for purposes of the FTCA. *Operation Rescue Nat'l v. United States*, 147 F.3d 68, 70–71 (1st Cir. 1998). The Fifth Circuit has reached the same conclusion. *See Williams v. United States*, 71 F.3d 502, 505 (5th Cir. 1995) ("A Member of Congress who holds an office in the U.S. House of Representatives is clearly an employee or officer of the legislative branch of the federal government."). We agree with our sister circuits.

The plain text of the FTCA, as amended by the Westfall Act, compels this interpretation. The statute provides that "'[e]mployee of the government' includes . . . officers or employees of any federal agency." 28 U.S.C. § 2671. "[T]he term 'Federal agency' includes the executive departments, the judicial and legislative branches," and other governmental entities. *Id.* And the Supreme Court held in *Lamar v. United States*, 241 U.S. 103, 111–12 (1916), that a Representative is "an officer acting under the authority of the United States" for purposes of a criminal statute that punishes individuals who "falsely assume or pretend to be an officer or employee acting under the authority of the United States." This was based on several factors, including common dictionary definitions of the term "officer," historical evidence that Representatives have been consistently considered "legislative officers" or "civil officer[s]," and prior state and federal precedent indicating as much. *Id.* at 113; *see also, e.g.*, *The Ku*

Klux Cases, 110 U.S. 651, 664 (1884) ("[T]he constitution . . . created the office of member of congress."). We see no reason why the term "officers" in the Westfall Act should be construed more narrowly than the same term in the statute at issue in *Lamar*, especially because the Westfall Act specifically expands sovereign immunity to the entire legislative branch.

Moreover, while contemporary legislative history from the passage of the Westfall Act does not directly address this question, as the First Circuit queried "[w]hy would Congressmen vote to exclude themselves from a universal grant of immunity given to all others; to all employees below them; to all officers, up to the president, above them?" *Operation Rescue Nat'l*, 147 F.3d at 70–71; *see also id.* at 71 ("If the *Westfall* Act clearly and carefully intended to exclude Congressmen from the FTCA's otherwise universal benefits, would there not have been, at the least, some Congressmen who would have remonstrated?"); *Williams*, 71 F.3d at 505 ("If Congress intended to exclude Members of Congress from the protection of the FTCA, it could have expressly done so within the language of the Act."). We agree that it is highly unlikely that Congress would exclude itself, *sub silentio*, from such a broad grant of immunity. This conclusion, coupled with the unambiguous text of the statute, makes clear that members of Congress—Representatives and Senators alike—enjoy the benefits of the FTCA as amended by the Westfall Act.

B. Scope of Employment

We turn now to the central question presented by this appeal: whether Senator Warren and Representative Haaland were acting within the "scope of

[their] office or employment" when they sent the allegedly defamatory tweets. 28 U.S.C. § 2679(b)(1). If they were, then they are entitled to the protections of the Westfall Act.[2]

For purposes of the Westfall Act, "whether the federal employee was acting within the scope of his or her employment, is governed by the agency law of the forum state." *Dolan v. United States*, 514 F.3d 587, 593 (6th Cir. 2008); *see also Henson*, 14 F.3d at 1147 ("A determination of whether an employee was acting within the scope of employment is a question

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[2] Plaintiffs emphasize that neither Senator Warren nor Representative Haaland have received certification from the Attorney General ("AG") that their conduct was within the scope of their employment. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) (observing that the Westfall Act "empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose'" and that "[u]pon certification, the employee is dismissed from the action and the United States is substituted as defendant" (quoting 28 U.S.C. § 2679(d)(1))).

It does not appear from the record that either Defendant sought AG certification prior to filing their motion to dismiss under the Westfall Act. Regardless, Plaintiffs do not suggest that this failure to seek AG certification precludes Defendants from prevailing on their theory of sovereign immunity. Instead, all Plaintiffs request is that we not defer to the district court's independent finding that Defendants were within the scope of their employment. *See* 28 U.S.C. § 2679(d)(3) (empowering district courts to "to find and certify that the employee was acting within the scope of his office or employment" upon motion of the employee). But Plaintiffs are already receiving the most favorable standard of review they can ask for on appeal because our review of the district court's order to dismiss for lack of subject matter jurisdiction is *de novo*.

of law, not fact, made in accordance with the law of the state where the conduct occurred.")

In the present case, the forum state is Kentucky and the conduct—*i.e.*, the allegedly defamatory tweets—occurred in Kentucky because Plaintiffs live in Kentucky and the tweets were accessible in that state. *See Williams*, 71 F.3d at 506 (finding Texas law governed scope-of-employment inquiry even though allegedly defamatory interview occurred in Washington, D.C., because plaintiff was domiciled in Texas and because the interview broadcast occurred in Texas, "[t]hus, the alleged defamation . . . and any resulting harm essentially took place in the State of Texas"); *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011) (observing that "in a sense, the internet operates 'in' every state regardless of where the user is physically located"). We therefore apply Kentucky law to determine whether Defendants were acting within the scope of their employment.[3] Additionally, Plaintiffs only contend that Kentucky law applies. If Plaintiffs cannot demonstrate that Defend-

[3] This conclusion of course has no bearing on whether Defendants have sufficient contacts with Kentucky to confer personal jurisdiction on the court. In the context of electronic communications that inquiry examines factors beyond where, strictly speaking, the communication is accessible. *See Shrader*, 633 F.3d at 1240 ("[I]t is necessary to adapt the analysis of personal jurisdiction to this unique circumstance [of electronic communications] by placing emphasis on the internet user or site *intentionally directing* his/her/its activity or operation *at* the forum state rather than just having the activity or operation accessible there."). We do not reach the question of personal jurisdiction in this case, however, because "expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of [subject matter jurisdiction] first." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587–88 (1999).

ants' conduct was outside their scope of employment as understood by Kentucky law, then Plaintiffs cannot prevail in this appeal.

Kentucky law focuses on an employee's motive to determine whether she was acting within the scope of her employment when committing intentional torts, including libel. The Kentucky Supreme Court has held that an employee acts within the scope of his employment when his "purpose, however misguided, is wholly or in part to further the master's business." *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 500, 505 (5th ed. 1984)). In *Patterson v. Blair*, the court concluded that an employee who shot the tires on the plaintiff's truck while attempting to repossess it for his employer was acting within the scope of his employment. *Id.* at 372 ("Clearly, in confronting [plaintiff] and shooting out the truck's tires, [the employee] was acting to further the business interests of [his employer]. At the very least, his conduct was at least incidental to the conduct that was authorized by [the employer]."); *see also Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000) ("[T]o be within the scope of its employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized."). In *Osborne v. Payne*, the Kentucky Supreme Court found that a priest who engaged in adultery with a married woman whom he was counseling was not acting within the scope of his employment. 31 S.W.3d at 915. This "abuse by the priest of his position. . . exceeds the scope of his employment" because it was "beyond question that Osborne was not advancing any cause of

the diocese or engaging in behavior appropriate to the normal scope of his employment." *Id.*

Neither Kentucky courts nor this Court have decided whether statements such as those at issue—unsolicited comments by elected officials on an event of widespread public interest—are within the "scope of employment" of members of Congress. However, out-of-circuit precedent involving situations closely aligned to the facts of this case strongly supports finding that these tweets were within the scope of Defendants' employment as officers of the United States.

In *Operation Rescue National v. United States*, the First Circuit found that Senator Ted Kennedy was protected by the Westfall Act when, in the course of responding to a reporter's question pertaining to a bill he was sponsoring that addressed access to women's health clinics, he said that anti-abortion organizations like the plaintiff had a "national policy [of] firebombing and even murder." 147 F.3d at 69 (alteration in original). Although the plaintiff did not appeal the district court's finding that Senator Kennedy was acting within the scope of his employment when he made the remarks, the First Circuit affirmed the district court's reasoning "[i]n all respects." *Id.* at 71. The district court applied Massachusetts law, as the comments were made in Senator Kennedy's home state. *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 106 (D. Mass. 1997). Similar to Kentucky, Massachusetts law looks to see if the employee was authorized to engage in the conduct complained of and whether she was acting in the interests of her employer to determine whether the employee was acting in the scope of her employment. *Id.* The district court found, in relevant part, that because "Senator

Kennedy was providing political leadership and a basis for voters to judge his performance in office—two activities that public officials are expected, and should be encouraged, to perform," his comments were within the scope of employment. *Id.* at 108. In this sense, the Senator's employer was his constituents and he served them by fully informing them of his views and working to pass legislation he believed would benefit them.

Moreover, in *Williams v. United States*, the Fifth Circuit determined whether Congressman Jack Brooks' allegedly defamatory statements about a lobbyist and his firm were within the scope of his employment under Texas' vicarious liability regime, which, like Kentucky's, focuses on whether the employee was authorized to perform the action complained of and whether it furthered her employer's interests. 71 F.3d at 506. Congressman Brooks made the statements in a press interview about Congress' appropriation of certain federal monies, including funding for the restoration of a battleship in Texas which the lobbyist had advocated for. *Id.* at 504 & n.1. The court held that the statements were made in the scope of Congressman Brooks' employment because "a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents." *Id.* at 507. His statements, including the allegedly defamatory ones, were made in performance of his duty to "inform[] constituents and the public at large of issues being considered by Congress." *Id.* Consequently, the court held that the Westfall Act granted Congressman Brooks immunity from the lobbyist's defamation suit. *Id.*

Additionally, in *Council on American Islamic Relations v. Ballenger*, the D.C. Circuit found that a Congressman's comments to the press on his pending separation from his wife were within the scope of his employment because "[a] Member's ability to do his job as a legislator effectively is tied, as in this case, to the Member's relationship with the public and in particular his constituents and colleagues in the Congress." 444 F.3d 659, 665 (D.C. Cir. 2006). By commenting on his private life, the Congressman was seeking to maintain his constituents' trust in him and thereby discharge his legislative responsibilities more effectively. *Id.* at 665–66.

In the present case, the articles shared by Senator Warren and Representative Haaland discussed an interview in which Nathan Phillips recollected hearing chants of "[b]uild that wall" emanating from the crowd of students. This reasonably relates the political subtext of the incident to President Trump's well-known campaign promise to build a border wall with Mexico. As Senator Warren observes, the border wall was at the time of the incident—January 2019—the "subject of extensive debate" in Congress, surrounding both the partial government shutdown and pending legislation. Sen. Warren's Br. at 23 (citing Fund and Complete the Border Wall Act, H.R. 85, 116th Cong. (introduced Jan. 3, 2019); Border Wall Trust Fund Act, H.R. 200, 116th Cong. (introduced Jan. 3, 2019)).

This context aligns their tweets with Senator Kennedy's comments in *Operation Rescue* and Congressman Brooks' statements in *Williams*: each comment constituted a condemnation of a political adversary's public acts. Senator Warren and Representative Haaland were criticizing supporters of

President Trump, in part, for their alleged deployment of a topical and polarizing political issue (*i.e.*, the border wall) in their purported harassment of Phillips. Senator Kennedy was criticizing an organization at odds with the goals of his bill and Congressman Brooks was criticizing a lobbyist in connection with Congressional appropriations. In each case, the allegedly defamatory statements were made in the context of informing constituents of the Congressmembers' views and as part of their advocacy—whether for or against—current legislation. If anything, Senator Kennedy's allegations of domestic terrorism and murder were closer to the outer bounds of his scope of employment than Senator Warren's and Representative Haaland's less inflammatory tweets. Defendants were reasonably connecting Plaintiffs' rhetoric and clothing to President Trump in order to comment on an event that had received widespread press attention and that resonated with the pressing issue of funding for the border wall.

Plaintiffs respond that the *Operation Rescue National*, *Williams*, and *Ballenger* cases hinged on the statements at issue being "in response to press inquiries, and notably not 'made gratuitously' to serve personal political interests." *See* Appellants' Br. at 28 (citing *Operation Rescue Nat'l*, 975 F. Supp. at 108). However, it is the act of communicating one's views to constituents and not the manner of communication that justifies application of the Westfall Act. That is, Defendants' statements are protected whether they are freestanding or made in response to a press inquiry. Indeed, Plaintiffs cannot point to language in the case law that suggests speech is only within the scope of a Congressmember's employment when

that speech is in response to an interview question. Instead, the statements at issue in *Operation Rescue National*, *Williams*, and *Ballenger* were protected because the media interviews facilitated the kind of communication with constituents and the general public that the courts held to be within the scope of employment.

Far from being gratuitous, these tweets fit within the "wide range of legitimate 'errands' performed for constituents," which includes "preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Brewster*, 408 U.S. at 512.[4] Senator Warren and Representative Haaland sought to oppose the President and his legislative goals by putting on record their opposition to Plaintiffs' actions. Although the foregoing cases examining whether similar statements were protected by the Westfall Act largely preceded the advent of Twitter, social media websites are the "modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). There is no meaningful difference between tweets and the other kinds of public communications between an elected official and their constituents that have been held to be within the scope-of-employment under the Westfall Act.

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[4] Although the Supreme Court held that these "errands" are not protected by the Speech and Debate Clause because "they are political in nature rather than legislative," *Brewster*, 408 U.S. at 512, the Westfall Act protects more conduct than the Speech and Debate Clause. Cases like *Williams* and *Ballenger* illustrate that the Westfall Act extends to these sorts of "political" activities because they are integral to a Congress member's duties to communicate with their constituents and publicly discuss political matters.

With this understanding of the scope of a Congressmember's employment and how tweets can fit into her duties, we return to Kentucky law. Applying that law, it is clear that the tweets were made in furtherance of the interests of Defendants' employers. *See Patterson*, 172 S.W.3d at 369. They were calculated to serve the interests of Defendants' constituents (*i.e.*, employers) by informing them of Defendants' views regarding a topical issue and related legislation. This was accomplished through considerably more appropriate and commonplace means—messages sent via Twitter—than the attempted repossession via handgun in *Patterson*. Yet the *Patterson* court still found that firing a gun at a delinquent purchaser's car was within the scope of his employment because the violent conduct was at least incidental to his authorized work. *Id.* at 372. The nexus between Defendants' tweets and their constituents' interests in understanding their views is considerably greater than that.

Moreover, unlike the priest in *Osborne*, Plaintiffs were "engaging in behavior appropriate to the normal scope of [their] employment." 31 S.W.3d at 915. Congressmembers routinely broadcast their views on pending legislation and related current events through press releases, televised speeches, interviews, and, as in the present case, through social media postings. Defendants' statements were made within the scope of their employment. Therefore, the United States was properly substituted as Defendant in this case and the district court correctly dismissed Senator Warren and Representative Haaland from the suit. That the United States has not waived its immunity to libel suits is of no moment. *See Gutierrez de Martinez*, 515 U.S. at 420 ("If . . . an exception to the

FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party."). Plaintiffs may wish to pursue their claims for relief against the remaining Defendants in state court.

CONCLUSION

For the reasons provided above, we AFFIRM the district court's order.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 3, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES 1–10,

Plaintiffs-Appellants,

v.

DEBRA HAALAND; ELIZABETH WARREN,

Defendants-Appellees.

No. 19-6347

On Appeal from the United States District Court for the Eastern District of Kentucky at Covington.

Before: CLAY, WHITE, and READLER, Circuit Judges.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's dismissal of Plaintiffs' action for lack of subject matter jurisdiction is AFFIRMED.

Entered by Order of the Court

/s/ Deborah S. Hunt
Clerk

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY NORTHERN DIVISION AT COVINGTON (NOVEMBER 5, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

JOHN DOES 1 THROUGH 10,

Plaintiffs,

v.

DEBORAH HAALAND, ET AL.,

Defendants.

Civil Action No. 2:19-00117 (WOB-CJS)

Before: William O. BERTELSMAN,
United States District Judge.

This matter is before the Court on various motions to dismiss (Docs. 10, 26, 38, 39, 47, 50, 65), a motion to remand by plaintiffs (Doc. 34), and a motion for admission pro hac vice (Doc. 62). The Court has reviewed these motions and concludes that oral argument is unnecessary.

ANALYSIS

A. Removal

The Court first notes that this matter was properly removed by defendant Elizabeth Warren pursuant to 28 U.S.C. § 1442(a)(1), which provides, in part, that any officer or agency of the United States may remove an action from state court when sued "for or relating to any act under color of such office." This statute is construed broadly and, where its requirements are satisfied, the right to removal is absolute. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969).

As a member of Congress, Warren is an "officer of the United States." *See Hill Parents Ass'n v. Giamo*, 287 F. Supp. 98, 99 (D. Conn. 1968).

Second, in order to satisfy the "under color of such office" requirement, Warren need only demonstrate a "causal connection" between her official position and the claim against her. *Willinghan*, 395 U.S. at 409. Here, it is abundantly clear that Warren's statement posted via her official Twitter account on a matter of national interest—an incident on the National Mall with perceived political ramifications—was meant to communicate her position on the event as an elected representative. *See, e.g., Giamo*, 287 F. Supp. At 100 (removal proper under 28 U.S.C. § 1442 as defendant Congressman was acting under color of office when making allegedly libelous statement to media).

Finally, Warren has asserted a colorable federal defense of sovereign immunity, as next discussed.

Therefore, removal was proper, and plaintiffs' motion to remand on this basis is not well taken.

B. Sovereign Immunity

Both Warren and defendant Deborah Haaland, who is a United States Representative from New Mexico, raise the defense of sovereign immunity to plaintiffs' claims against them.

It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction. *U.S. v. Mitchell*, 463 U.S. 206, 212 (1983). Sovereign immunity "extends to agencies of the United States" or "federal officers [acting] in their official capacities." *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993).

On the other side of the sovereign immunity coin is the Federal Tort Claims Act (FTCA). The FTCA functions as a limited waiver to sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). In fact, if acting "within the scope of employment," the FTCA is the exclusive remedy for claims against employees of the United States. 28 U.S.C. § 2679(b)(1).

If the FTCA applies, then the plaintiff must first exhaust administrative remedies before proceeding against the defendant. 28 U.S.C. § 2675(a). The plaintiff must first present their claim to the "appropriate federal agency"; the plaintiff can then proceed after six months have passed or if the claim is denied. *Id.*

The Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, authorizes the Attorney General to certify that the federal employee acted "within the scope of his or her office or employment" at the time of the incident giving rise to the claim. 28 U.S.C. § 2679(d)(1)-(3).

If the Attorney General so determines, or a court so determines after the Attorney General refuses to certify, then the United States is substituted in as the party-defendant and the federal employee is dismissed from the suit. *Id.* However, the United States specifically did not waive sovereign immunity as to several types of torts, including libel and slander. 28 U.S.C. § 2680(h). Thus, a plaintiff in this situation is effectively without a remedy. *See United States v. Smith*, 499 U.S. 160 (1991).

Thus, the crux of the issue for the applicability of the FTCA is whether the party was acting within the scope of her office or employment. For purposes of the Westfall Act, a "determination of whether an employee was acting within the scope of employment is a question of law, not fact, made in accordance with the law of the state where the conduct occurred." *Henson v. National Aeronautics and Space Admin.*, 14 F.3d 1143, 1147 (6th Cir. 1994); 28 U.S.C. § 1346(b)(1) (" . . . in accordance with the law of the place where the act or omission occurred.").

In Kentucky, "scope of employment" is a determination that focuses on the "motive of the employee in determining whether he or she was acting within the scope of employment." *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005). The employee acts within the scope of his employment when his "purpose, however misguided, is wholly or in part to further the master's business." *Id.* at 366. "Thus, if the servant "acts from purely personal motives . . . which [are] in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the master is not liable." *Id.*

The Kentucky Supreme Court has also held that "to be within the scope of its employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 566–67 (6th Cir. 2008) (quoting *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000)).

The Court concludes that the challenged statements by defendants Warren and Haaland—whether one agrees with them or finds them objectionable—are communications intended to convey the politicians' views on matters of public interest to their constituents. As such, the statements were made within the scope of defendants' employment as elected representatives.

Courts from a variety of jurisdictions have so concluded in similar circumstances. *See, e.g., Wuterach v. Murtha*, 562 F.3d 375, (D.C. Cir. 2009); *Williams v. United States*, 71 F.3d 502, 506-07 (5th Cir. 1995); *Chapman v. Rahall*, 399 F. Supp. 2d 711, 714-15 (W.D. Va. 2005); *Council On American Islamic Relations, Inc. v. Ballenger*, 366 F. Supp. 2d 28, 31-32 (D.C. 2005); *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 107-08 (D. Mass. 1997).

For these reasons, plaintiffs have failed to identify any waiver of sovereign immunity for their claims against defendants Warren and Haaland. These defendants must therefore be dismissed.

C. The Remaining Defendants

After reviewing the pending motions to dismiss filed by defendants other than Warren and Haaland, the Court concludes that it should decline to exercise

its supplemental jurisdiction over the claims against them.

Under the provisions of 28 U.S.C. § 1367(c), the Court "may decline to exercise supplemental jurisdiction over a claim" if it "raises a novel or complex issue of State law," or if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(1), (3).

These motions raise unique issues of state law, including application of the Kentucky long-arm statute and state libel law. Further, given the early stage of the proceedings, these matters are better left to the state court where this Court no longer has any federal issues before it.

Therefore, having reviewed this matter, and the Court being advised,

IT IS ORDERED that:

(1) The motions to dismiss by defendants Warren and Haaland (Docs. 10, 38) motion (Doc. 27) be and are hereby, GRANTED on the basis that the claims against them are barred by sovereign immunity under the Federal Tort Claims Act;

(2) The remaining motions to dismiss (Docs. 26, 39, 47, 50, 65) be, and are hereby, DENIED AS MOOT;

(3) Plaintiffs' motion to remand (Doc. 34) be, and is hereby, DENIED on the grounds stated therein;

(4) The motion for admission pro hac vice (Doc. 62) be, and is hereby, DENIED AS MOOT;

(5) The Court, pursuant to 28 U.S.C. § 1367(c)(1), hereby DECLINES TO EXERCISE ITS SUPPLEMENTAL JURISDICTION over the remaining defendants; and

(6) This matter be, and is hereby, REMANDED TO KENTON CIRCUIT COURT.

This 5th day of November 2019.

/s/ William O. Bertelsman
United States District Judge

TWEETS

EXHIBIT A TO PLAINTIFF'S COMPLAINT

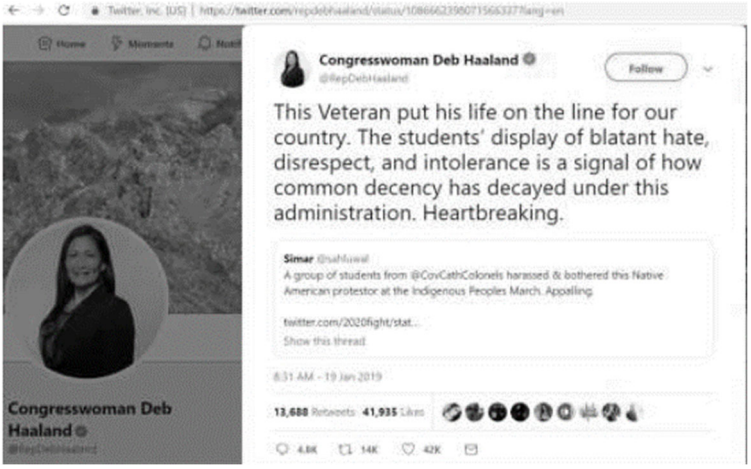

Exhibit G to Plaintiff's Complaint

Exhibit I to Plaintiff's Complaint

Exhibit L to Plaintiff's Complaint

BRIEF OF PLAINTIFFS-APPELLANTS
(JANUARY 29, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES 1–10,

Plaintiffs-Appellants,

v.

DEBRA HAALAND, ET AL.,

Defendants-Appellees.

No. 19-6347

On Appeal from the United States District Court
for the Eastern District of Kentucky

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 34(a), Plaintiffs-Appellants hereby respectfully request oral argument on the present appeal. This appeal raises issues of national importance and statutory interpretation that will impact millions of Americans, and a Democratic presidential candidate.

STATEMENT OF JURISDICTION

The parties dispute whether the District Court had subject matter jurisdiction over this case.

The Court of Appeals has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1291. On November 5, 2019, the District Court issued a Memorandum Opinion and Order granting dismissal of Defendants Warren and Haaland. On December 3, 2019, Plaintiffs filed a timely Notice of Appeal with the District Court.

STATEMENT OF ISSUE FOR REVIEW

Whether members of Congress are immune from defamation liability merely because they were elected to public office, when their tortious statements were not made in Congress or as part of their Congressional duties?

STATEMENT OF THE CASE

I. Statement of Facts

A group of minor boys from Covington, Kentucky visited Washington, D.C. on a school field trip. While on their way back home from D.C. to Kentucky, Defendant Senator Elizabeth Warren issued a tweet

directed at the minor boys, that fed and led a social media lynch mob against the minor boys that led to threats of doxxing,[1] violence, dismissal from school, denial of admission to college, and scarlet-lettering their reputations forever. (Amended Complaint, RE 34-3, 435, 473.) Warren directed this comment at a group of minors she never met, in a state she does not represent, about a situation she did not witness, concerning a matter that was not pending before the Senate and that was not in response to any media inquiry. Warren's actions led to calls for public punishment of the Plaintiffs, including doxxing them, shaming them publicly, and "punch[ing] them in the face."

Plaintiffs' defamation claims against Warren arise from Warren's statements on her Twitter account that: "Omaha elder and Vietnam War veteran Nathan Phillips endured hateful taunts with dignity and strength, then urged us all to do better. Listen to his words," followed by a link to a Splinter News post covering the incident, which identified the Plaintiffs individually by image. (Amended Complaint, RE 34-3, 435, 473.) Warren's statements were well known by the friends, family and associates of each minor to be about them individually. Indeed, the Plaintiffs were individually identified as the subject of the statements and received death threats, hate mail, threatening phone calls and emails, and other personal attacks on them each individually. The Plaintiffs were known to be the subject of the statements complained of herein as they were identified by photo image throughout the world, and each of the statements

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[1] To "dox" is generally the threat or action of searching for and publishing private or identifying information about a particular individual on the Internet, typically with malicious intent.

was interpreted by their friends, family and associates as about them personally.

Warren, a leading Democratic candidate for the Presidency, used her prominent public stature to imply the Plaintiffs engaged in morally abhorrent conduct. Essentially, Warren accused the Plaintiffs of criminal conduct, namely harassment as defined in Kentucky law. Warren hid the factual basis of her opinion, knowing her Presidential candidate status would both imply credibility to her opinion, and imply the facts she knew meant these kids had committed a crime against a Native American elder (and *purported* Vietnam War veteran). Critically, Warren omitted the true facts, which cleared the minors of the very claims she made against them. Warren's false tweet damaged Plaintiffs' reputation in the form of death threats, hate mail, threatening phone calls and emails and other personal attacks on them each individually. (*Ibid.)* Warren refuses to retract, but instead Warren claimed complete immunity as a member of Congress.

Notably, Warren volunteered her statements on social media. Warren did not make the statements in the Senate or at the Senate. Warren's statements did not concern any matter pending before the Senate. Warren was not responding to a press inquiry when she made her statements. Warren was not answering questions about herself when she made her statements. Warren sent her statement to the entire world on social media, and did not limit the audience that received the message by any means available to her. Warren sent the statement to individuals in Covington and in Kentucky. Warren led the social media lynch

job of these minor boys for national notoriety. Warren is currently a candidate for the Presidency.

Defendant Deb Haaland, a United States Representative from New Mexico's 1st Congressional district, equally used her social media standing to attack these minor boys. (*See* Amended Complaint, RE 34-3, 440, 471.) Haaland also omitted the true facts. Haaland's conduct also contributed to the threats against the minor boys, including doxxing, dismissal, denial of college admission, and death threats. Haaland also did not make her statements in the House, or at the House, or about any matter concerning the House, or in answering press inquiries, or at a press conference, or about herself. Haaland also chose to make the statement to the world, without limiting her statements to any group, and for national notoriety, not for any act of Congress.

II. Procedural History

Ten John Does filed suit against Warren and Haaland, amongst other defendants, in state court in Kentucky. Warren removed the action to federal court in the Eastern District of Kentucky. Warren's basis for removal was her claim of federal immunity. Haaland joined the removal. Plaintiffs opposed the removal, and moved for remand. Warren also moved to dismiss the action on grounds of immunity, which Haaland joined. Both claimed all of their statements are statements of the United States, and thereby enjoy immunity from suit. Of note, the Attorney General never certified that either defendant's actions were within the scope of their official duties, nor did either defendant sue the Attorney General for a declaration related thereto.

The district court accepted removal, did not remand the action to state court concerning Warren and Haaland, dismissed both Warren and Haaland on grounds of official immunity, and then remanded the remainder of the claims against the other defendants to state court.

SUMMARY OF ARGUMENT

This case will decide one big question: is election to Congress a license to libel?

The effect of the district court's order is to grant those elected to Congress a complete license to lie and libel outside of any legislative duties and away from the legislative chamber, concerning matters that neither concern them, Congress, nor their constituents. Get elected to Congress, and you can lie about your business competitors, lie about your neighbors, lie about your ex-wife, lie about anyone you want, anytime you want, anyplace you want. Indeed, you would have an exceptional edge in elections, because you could libel anyone opposing you, but sue any opponent who libels you. The law authorizes no such licentious license.

Supreme Court precedent, sister state supreme court precedent, and sound public policy all require reversal.

ARGUMENT

Warren claims she is immune from her libels because once she was elected to the Senate she became *a sovereign* immune from suit for her tortious conduct for anything she said about anyone at any time in any place. Warren is wrong.

Election to Congress is not a license to voluntarily, gratuitously libel minor kids from Covington, Kentucky, based on an event the defendant did not witness, concerning kids the defendant did not know, that did not involve a matter pending before Congress or concern the Congress members themselves, and was not in direct response to a press inquiry. Importantly, leading reputational lynch mobs on social media against kids is not within the official duties of a member of Congress.

I. Standard of Review

"We review a district court's judgment on the pleadings using the same de novo standard of review employed for a motion to dismiss under Rule 12(b)(6)." *Boulger v. Woods* 917 F.3d 471 (6th Cir. 2019) (citing and quoting *Fed. Deposit Ins. Corp. v. Amfin Fin. Corp.,* 757 F.3d 530, 533 (6th Cir. 2014). On a motion to dismiss under Rule 12, this Court must "construe the complaint in the light most favorable to the nonmoving party" and must also "accept the well-plead factual allegations as true." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.,* 508 F.3d 327, 336 (6th Cir. 2017). A complaint states a "valid claim" if it contains either "direct" or "inferential allegations" under "some viable legal theory." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.,* 508 F.3d 327, 336 (6th Cir. 2017). The district court also wholly ignored the Supreme Court's demand that any claim of immunity from tort "beyond what is needed to protect legislative independence" must "be closely scrutinized." *Hutchinson v. Proxmire,* 443 U.S. 111 (1979) ("*Proxmire*").

II. Election to Congress Is Not a License to Libel Anyone, Anywhere, Anytime

The Constitution already carefully balances the need for risk-free speech made by members of Congress in the halls of Congress and in their Congressional duties as legislators. The statute already immunizes public statements in response to press inquiries concerning their Congressional duties. Extending and expanding Congressional immunity to anything they say, anywhere, anytime, contradicts the Constitution and exceeds the statutory immunity of their office.

A. The Westfall Act Should Be Read In Conjunction with the Speech & Debate Clause

In 1988, the Supreme Court added a qualification to judicially-crafted official immunity for the actions of federal officials: the requirement the immunized act be within the discretionary authority of the official. *Westfall v. Erwin,* 484 U.S. 292 (1988). Congress reacted by passing a law named after the decision, the *Westfall Act,* that removed that qualification, and engrafted the court's pre-*Westfall* judicially crafted common law immunity into legislatively granted statutory immunity. As subsequent courts and scholars alike concurred, the law merely put the pre-*Westfall* immunity case-law back into effect, and made it legislation.

The law referenced all officers of the federal government in that capacity. At the time, Congress knew the Supreme Court repeatedly ruled that members of Congress were not immune from suit for tortious libels made outside of their legislative duties or the legislative chamber. Congress made no reference to this issue at all in the statute or its legislative history,

nor is there any evidence anyone intended to reverse precedent that in the statute. The statute did not even expressly reference members of Congress at all.

Yet, the defendants below insisted Congress actually did something radically different: made election to Congress a license to libel anyone you wanted, any time you wanted, in any place you wanted, without limit of place, person or subject. Nothing in the legislative history justifies their claim. The plain language of the statute does not even mention members of Congress. This expansive interpretation of the statute conflicts with the Constitutional limits on speech-based immunity for members of Congress.

Under defendant's theory, any statements made by a member of Congress are acts of the United States. Indeed, under the defendant's theory they identify no limits to the immunity for tortious conduct that defames others. Even if the statute is read to immunize members of Congress for their Congressional speech, it should be read in conformity with the case-law the Act intended to reinstate: speech outside of Congress is only immune from suit if it would be immune under the Speech and Debate Clause. The Supreme Court expressly applied the Speech Clause limitations on immunity to their judicially-crafted federal "official duty" immunity analysis for members of Congress.

A scattering of cases outside this Circuit extended immunity only to a few acts outside of Congress: 1) answering questions from the media, and 2) concerning pending matters before Congress or issues about the Congressmen themselves. In the cases relied upon by the defendants and the court below, the conduct was during regular work hours in response to a reporter's inquiry about matters within their authorized duties.

Responding to questions about their job has been the only category of claims found immune from tortious libels outside of legislative duties or the legislative chamber.

Expanding immunity without express statutory direction to do so contradicts our precedents concerning immunity, and the statutory interpretation related thereto. The Supreme Court made clear that a "statute must be read in harmony with general principles of tort immunities and defenses rather than in derogation of them" and discouraged redefining the scope of immunity based on some claim a statute "somehow eliminated" the scope of immunity law "by covert inclusion in the general language" of a statute. *Rehberg v. Paulk,* 566 U.S. 356, 361-362 (2012) (internal citations and quotations omitted). After all, courts must assume Congress is familiar with existing case-law on immunity, and intended to include them and continue them, absent express language to the contrary. *Rehberg v. Paulk,* 566 U.S. 356, 362 (2012).

Constitutional issues arise if the Westfall Act is interpreted to contradict both the Speech & Debate Clause, as well as contradict the pre-Westfall jurisprudence it presumably reinstated. "Legislatures may not of course acquire power by unwarranted extension of privilege." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). "'The tyranny of the legislatures is the most formidable dread at present and will be for long years.'" *Id.,* at 375 n. 4, quoting Thomas Jefferson.

Could, for example, Congress pass laws making themselves immune from criminal prosecution for all time? Tolerating this power in light of the fact that no one in the 100th Congress that passed the *Westfall Act* even knew, since the legislative record contains

not a trace, that Congress was being endowed with a license to libel?

B. The Limits of Immunity From the Speech & Debate Clause

Consider the contradiction of the lower court's decision: members of Congress can libel private citizens at will, but members of Congress can sue any private citizen they think libeled them. The Speech & Debate Clause carefully balanced these interests by limiting immunity to statements made in a legislative capacity or made in the legislative chambers. Election to Congress is not a roaming license to libel.

To that end, the Supreme Court long ago rejected election to Congress as a license to libel. *See Hutchinson v. Proxmire,* 443 U.S. 111 (1979) ("*Proxmire*"). A quartet of cases reinforced this principle. *See e.g., Hutchinson v. Proxmire,* 443 U.S. 111 (1979) ("*Proxmire*"); *Doe v. McMillan,* 412 U.S. 306, 324 (1973) ("*McMillan*"); *United States v. Brewster,* 408 U.S. 501, 512 (1972) ("*Brewster*"); *Gravel v. United States,* 408 U.S. 606 (1972) ("*Gravel*").

The *Chastain* opinion of the D.C. Circuit thoroughly examines all precedent on the issue of official immunity (including the roots of that doctrine set forth in English common law), as well as the public policy as elucidated in that precedent. *Chastain v. Sundquist,* 833 F.2d 311 (D.C. Cir. 1987) ("*Chastain*"). *Chastain* concludes that the statements by Congress member Sundquist were not covered by the Speech and Debate Clause or the Official Immunity Doctrine:

> When [members of Congress] move beyond the requirements of their legislative respons-

> ibilities, they do so as volunteers, and at their own risk, however important their myriad other activities may be in the texture of contemporary political life . . . .Elected representatives, in the deepest sense, represent the people. Beyond the necessary privileges granted by the Constitution to legislators, the people ought not to be immunized against themselves.

(*Chastain, supra*, 833 F.2d at 328.)

Warren's personal comments on social media about minors simply waiting for a bus on the steps of the Lincoln Memorial were not "part of the legislative function or deliberations that make up the legislative process" in the Senate. Warren's statements were blatant personal attacks, on minors outside her state, for events for which she had no personal knowledge, and that did not concern any matter pending before the Senate. Getting elected to the Senate is not a license to lie, libel and lead a public lynch mob against a group of minors.

The court noted that the scope of official immunity could not be separate from the Speech and Debate Clause. In *Chastain,* the court thoroughly examined the Official Immunity Doctrine, in the context of a Congress member's statements to the press about the plaintiff. In doing so, the Chastain court observed "... the pivotal point that the question of congressional common law immunity for libel cannot be considered independently of the Speech or Debate Clause" (*Chastain, supra*, 833 F.2d at 317.) In fact, "the Supreme Court in two modern cases expressly supports the principle of congressional liability for defamation arising outside the ambit of the Speech or Debate

Clause. [citing *Proxmire,* 443 U.S. at 123-33 and *Doe v. McMillan,* 412 U.S. 306, 311-25 (1973)]" *Id.* at 316.

In this regard, the Supreme Court stated:

> "The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the sphere of legitimate legislative activity, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen."

Doe v. McMillan, 412 U.S. 306, 324 (1973) ("McMillan").

All applicable precedent on the issue establishes that defamatory statements made outside of legislative activities or functions simply do not immunize Congressmembers. (*Chastain, supra*, 833 F.2d 311; *see also Proxmire, supra*, 443 U.S. at 123-33; *McMillan, supra*, 412 U.S. at 324; *United States v. Brewster,* 408 U.S. 501, 512 (1972).) The Court took note of this:

> "The authors of our Constitution were well aware of the history of both the need for the privilege *and the abuses that could flow from two sweeping safeguards.* In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, *but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process*."

Hutchinson v. Proxmire 443 U.S. 111, 127 (1979).

This conforms to the most respected scholastic treatises on the subject. J. Story, *Commentaries on the*

Constitution § 863, p. 329 (1833); *see also* L. Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* 604, p. 244 (1st ed. reprint 1971). "Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; *yet, if he publishes his speech, and it contains libelous matter, he is liable to an action and prosecution therefore, as in common cases of libel*." J. Story, Commentaries on the Constitution § 863, p. 329 (1833) (emphasis added).

The Supreme Court repeated and reaffirmed this rule of law in successive precedents. *Doe v. McMillan* 412 U.S. 306, 311-25 (1973); *Gravel v. United States.* "A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district." *Doe v. McMillan.* Why? "The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which Members participate in committee and House proceedings.'" *Doe v. McMillan*.

"A speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was "essential to the deliberations of the Senate" and neither was part of the deliberative process." *Hutchinson v. Proxmire* 443 U.S. 111, 130 (1979).

The district court, while ignoring these Supreme Court precedents, relied upon an argument expressly and explicitly rejected by the Supreme Court:

> "The other sense of the term, and the one relied upon by respondents, perceives it to be the duty of Members to tell the public about their activities. Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process."

Hutchinson v. Proxmire 443 U.S. 111, 133 (1979).

The jurisprudence of the Speech and Debate Clause constitutionally constrict the contours of immunity Congress can afford itself. As the Court reiterated in *Gravel*: "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Gravel v. United States,* 408 U.S. 606 (1972) ("*Gravel*").

C. Libeling Minor Children on Social Media & Leading a Social Media Lynch Mob Is Not Acting within the Scope of a Congress member's Duty

This case poses unprecedented questions of unprecedented scope: whether a defendant sued in their individual capacity for their unofficial conduct taken outside their duties and away from their office, is still immune from suit when the Attorney General refuses to certify their conduct as official acts of the United States. Additional reasons exist to reject immunity in this case: the fact the case was pending at the pleadings stage of the case when the nature of Kentucky law makes the scope of employment a

question typically for the jury, given the role motive has in the scope of employment analysis. Independent thereof, fellow federal courts in analogous intentional torts occurring outside the place of employment reject immunity just as sister state courts reject immunity in near identical circumstances of legislators claiming immunity for acts taken outside of the legislative duties and away from their legislative office. Courts concur: election to the legislature is not a license to gratuitously libel, on matters outside of legislative duties and when away from the legislative chamber, and when not in response to specific press inquiry.

i. No Presumption of Official Action Applies When the Attorney General Never Certified Defendants' Conduct Was an Official Government Act

The Westfall Act provides for the Attorney General to substitute the United States for an employee when the employee acted for the United States. *See* 28 U.S.C. § 2679. That did not occur here. The Attorney General here did not certify that either Congressperson defendant was acting on behalf of the United States when they used their social media accounts to defame kids. In the cases relied upon by the defendants and district court below, those courts emphasized that the Attorney General in both cases certified the conduct was official, thus the standard of review was much more differential, and the burden shifting different than here. The district court's opinion below failed to note this critical distinction.

ii. The Issue of the Scope of Duty Should Not Have Been Decided at the Pleading Stage

Generally speaking, whether an act was within the scope of the duty of employment depends on questions best decided by a jury, not at the pleading stage of the case. As this is a matter of Kentucky law, it provides useful guidance: "The issue of whether the statements were made within the scope of Dr. Shah's agency such that they could give rise to vicarious liability was a factual one for the jury." *Williams v. Seven Counties Services, Inc.* 2015 WL 2445509, at *7 (Ky. Ct. App., May 22, 2015).

iii. Kentucky Law Discourages Immunity for Intentional Torts

The district court's order also overlooked that Kentucky law disfavors including intentional torts within the scope of employment. "Spalding's and Wathen's alleged actions qualify as intentional torts under Kentucky law and are therefore generally considered outside the scope of their employment. *See id.* at 51–52 (scope of the employment issue turns primarily on whether behavior was intentional); *see also Booker v. GTE. net LLC,* 214 F.Supp.2d 746, 749–50 (E.D.Ky.2002) (applying four factors for scope of employment question, but noting "as a general rule, intentional torts are deemed to fall outside the scope of employment")." *Young v. U.S. Dept. of Agriculture,* 2011 WL 4543083, at *6 (W.D. Ky., Sept. 28, 2011).

iv. Kentucky Law Focuses on Motive

The district court's order also overlooked the role of motive in determining issues of scope of employment

in Kentucky, which is why the issue is usually reserved for the jury, not decided at the pleading stage of the case. The applicable Kentucky law requires consideration of the employee's motive. *Kenney v. Harvey,* 2009 WL 395775 (E.D. Ky., Feb 17, 2009). As this Circuit reiterated, in "determining whether an employee's action is within the scope of employment, Kentucky courts consider the following factors: (1) whether the conduct was similar to that which the employee was hired to perform; (2) whether the action occurred substantially within the authorized spatial and temporal limits of the employment; (3) whether the action was in furtherance of the employer's business; and (4) whether the conduct, though unauthorized, could have been anticipated in view of the employee's duties." *Coleman v. U.S.,* 91 F.3d 820, 823–24 (6th Cir. 1996).

"The focus of the court in determining scope-of-employment issues should be on the employee's motive for his conduct." *Patterson v. Blair,* 172 S.W.3d 361, 369 (Ky. 2005). Indeed, "we have, with few exceptions, focused on the motive of the employee in determining whether he or she was acting within the scope of employment." *Patterson v. Blair* 172 S.W.3d 361, 369 (Ky. 2005). Without doubt, "[w]here the conduct of the servant is unprovoked, highly unusual, and quite outrageous, there has been something of a tendency to find that this in itself is sufficient to indicate that the motive was a purely personal one . . . " *Patterson v. Blair* 172 S.W.3d 361, 371 (Ky. 2005).

Kentucky law is clear that a statement is only within the scope of employment if it "was engaged in furthering his employer's business or interests, without any deviation by the employee to a pursuit of his own business or interest . . . . " *Wood v. Southeastern Grey-*

hound Lines, 302 Ky. 110, 194 S.W.2d 81, 83 (1946). If an employee deviates from the employer's business, for however short of a time period, to do acts which are not connected with the employer's business, the relationship is suspended and the employee is not acting within the scope of his employment. *Collins v. Appalachian Research and Defense Fund of Kentucky, Inc.* 409 S.W.3d 365, 369 (Ky. Ct. App. 2012). Indeed, the defendant must have been engaged in activity that furthered the employer's business or interests, without deviation by the employee "to pursue her own personal benefit." *Collins v. Appalachian Research and Defense Fund of Kentucky, Inc.* 409 S.W.3d 365, 370 (Ky. Ct. App. 2012). "A principal is not liable under the doctrine of respondent superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment." *Patterson v. Blair* 172 S.W.3d 361, 368 (Ky. 2005). *"Ordinarily, an employer is not vicariously liable for an intentional tort of an employee not actuated by a purpose to serve the employer." Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005). As the Kentucky Supreme Court held:

> "And now, in collating these authorities and principles, it seems clear to us that in order to hold an employer responsible to a third person for the tortious act of an employee of the former, such act must have been committed while the employee was engaged in furthering his employer's business or interests, without any deviation by the employee to a pursuit of his own business or interest, and there must have been a general similar-

> ity between the tortious act committed and the usual, ordinary, everyday acts commonly pursued by the employee in prosecuting the regular routine of his employment."

Patterson v. Blair (Ky. 2005) 172 S.W.3d 361, 368

How is it "furthering the interest" of the United States for the defendants gratuitously to use social media to libel minor kids concerning a matter that did not concern either pending legislation or them personally? How isn't the defendants' conduct "deviation by the employee to pursuit of [their] own business or interest"? How is libeling minor children and leading social media lynch mobs "the usual, ordinary, everyday acts commonly pursued by the employee in prosecuting the regular routine of his employment"? It isn't. Reverse.

v. Federal Decisions in Comparable Contexts Deny Immunity

A judge is immune from suit for actions taken in his judicial capacity; that is not a license for the judge to go on his social media and libel someone. An attorney is immune from suit for actions taking in advocating for a client in court proceedings under the litigation privilege; that is not a license for the attorney to go on his social media and libel someone. Even the President has been sued for defamation for statements he made on social media.

Federal courts find comparable intentional tortious conduct outside the protections of immunity. *See e.g., Bergeron v. Henderson,* 47 F.Supp.2d 61 (D. Me. 1999); *Jamison v. Wiley,* 14 F.3d 222 (4th Cir. 1994); *Mobley v. Coby,* 1996 WL 250655 (D. Md. 1996); *Baggio v.*

Lombardi, 726 F.Supp. 922 (E.D.N.Y. 1989); *Allstate Ins. Co. v. Quick,* 254 F.Supp.2d 706 (S.D. Ohio 2002); *Greene v. Rubin,* 1997 WL 535893 (E.D. Pa. 1997); *Counts v. Guevara,* 328 F.3d 212 (5th Cir. 2003); *McHugh v. University of Vermont,* 966 F.2d 67 (2d Cir. 1992); *Nadler v. Mann,* 951 F.2d 301 (11th Cir. 1992); *Melo v. Hafer,* 1992 WL 396816 (E.D. Pa. 1992).

In the only cases to expand immunity beyond the scope of the Speech & Debate clause, the courts emphasized the statements at issue were in response to press inquiries, and notably not "made gratuitously" to serve personal political interests. *Operation Rescue Nat. v. U.S.,* 975 F.Supp. 92, 108 (D. Mass 1997). Courts implicitly rejected that acts meant to enhance popularity, increase fundraising, or improve candidacy are not the official duties of a member of Congress. *Operation Rescue Nat. v. U.S.,* 975 F.Supp. 92, 108 (D. Mass 1997).

There is no precedent for what happened here-voluntarily using social media to libel a bunch of kids on a matter not concerning legislation or the legislator.

vi. Sister State Courts Deny Immunity in Comparable Contexts

Sister state supreme courts concur. In order for immunity to apply, it must be the case that "the legislator was engaged in a legislative function when he or she spoke." *Cooper v. Glaser* 228 P.3d 443 445 (Mont. 2010). "Whatever imprecision there may be in the term "legislative activities," it is clear that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber." *Hutchinson v. Proxmire* 443

U.S. 111, 127 (1979). "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Hutchinson v. Proxmire* 443 U.S. 111, 127 (1979).

The first source for guidance about the duties of Members of Congress must be the United States Constitution, which provides, in Article 1 § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." What about voluntarily, gratuitously libeling a bunch of minor kids from Covington, Kentucky on social media outside of the Senate or House constituted part of the "legislative powers" of either defendant? Is leading social media lynch mobs a duty of Congress?

Immunity must track the function it is intended to protect. *Rehberg v. Paulk,* 566 U.S. 356, 364 (2012). Hence, a witness is not immune for statements they make when not acting as a witness. *Rehberg v. Paulk,* 566 U.S. 356 (2012); *see also Toker v. Pollak,* 376 N.E.2d 163 (NY App. 1978). The duty of a member of Congress is not roaming commentary on social media concerning minor children.

Federal courts find intentional tortious conduct often outside the protections of immunity. *See e.g, Bergeron v. Henderson,* 47 F.Supp.2d 61 (D. Me. 1999); *Jamison v. Wiley,* 14 F.3d 222 (4th Cir. 1994); *Mobley v. Coby,* 1996 WL 250655 (D. Md. 1996); *Baggio v. Lombardi,* 726 F.Supp. 922 (E.D.N.Y. 1989); *Allstate Ins. Co. v. Quick,* 254 F.Supp.2d 706 (S.D. Ohio 2002); *Greene v. Rubin,* 1997 WL 535893 (E.D. Pa. 1997);

Counts v. Guevara, 328 F.3d 212 (5th Cir. 2003); *McHugh v. University of Vermont,* 966 F.2d 67 (2d Cir. 1992); *Nadler v. Mann,* 951 F.2d 301 (11th Cir. 1992); *Melo v. Hafer,* 1992 WL 396816 (E.D. Pa. 1992). Publishing defamatory statements online was not part of an official duty warranting immunity. *Becker v. Kroll,* 2009 WL 3181977 (D. Utah 2009). Statements made by a prosecutor that "did not address his official duties", were not immune. *Del Fuoco v. O'Neill,* 2011 WL 601645 (M.D. Fla. 2011).

Sister state courts throughout this Circuit concur for decades of undisturbed case-law. *See e.g., Miller v. Wyatt* (Tenn. Ct. App. 2014) 457 S.W.3d 405; *Janiszewski v. Belmont Career Center* (Ohio Ct. App. 2017) 86 N.E.3d 613; *Domestic Linen Supply & Laundry Co. v. Stone,* 314 N.W.2d 773 (Mich. 1981).

Sister courts across the country concur. *See e.g., Sanchez v. Coxon,* 854 P.2d 126 (Ariz. 1993); *Grady v. Scaffe,* 435 So.2d 954 (Fla. App. 1983); *Williams v. School Dist.,* 447 S.W.2d 256 (Mo. 1969); *Blair v. Walker,* 349 N.E.2d 385, 389 (Il. 1976); *Gugliotta v. Wilson,* 168 A.D.3d 817 (N.Y. App. Div. 2019); *Clark v. Jenkins,* 248 S.W.3d 418 (Tex. Ct. App. 2008); *Hillman v. Yarbrough,* 936 So.2d 1056 (Ala. 2006); *Anderson v. Hebert* 830 N.W.2d 704, 708, (Wis. Ct. App. 2013); *Schroeder v. Poage,* 707 P.2d 1240 (Oreg. App. 1985). *Isle of Wight County v. Nogiec,* 704 S.E.2d 83 (Va. 2011); *Mehau v. Gannett Pacific Corp.* 658 P.2d 312 (Ha. 1983).

Court after court constricted legislators' immunity to legislative functions, with a focus on the context of the statement, including especially the location. *Sanchez v. Coxon,* 854 P.2d 126 (Ariz. 1993); *Grady v. Scaffe,* 435 So.2d 954 (Fla. App. 1983); *Williams v.*

School Dist., 447 S.W.2d 256 (Mo. 1969); *Domestic Linen Supply & Laundry Co. v. Stone,* 314 N.W.2d 773 (Mich. 1981). Immunity has only been extended when the subject matter was indisputably and incontrovertibly "legitimately related to matters committed to his responsibility." *Blair v. Walker,* 349 N.E.2d 385, 389 (Il. 1976). Libeling minor kids who are private citizens on social media is not a legislative function at a legislative location.

Courts routinely decline immunity claims where the defendant tried to shield libel behind an official proceeding or their duties when their comments relate to neither by either subject or place. *Gugliotta v. Wilson,* 168 A.D.3d 817 (N.Y. App. Div. 2019) "Absolute immunity should not be extended to members of city council, where there is no pending legislation relating to the subject matter of the alleged defamation and where the publication is beyond the legislative forum; instead, statements made other than in a legislative session or related meeting should be afforded a qualified privilege." *Janiszewski v. Belmont Career Center* 86 N.E.3d 613 (Ohio Ct. App. 2017). "Legislative privilege does not give a member of a subordinate legislative body the right to use his or her position as a forum for private slanders against others." *Miller v. Wyatt* 457 S.W.3d 405 (Tenn. Ct. App. 2014). A legislator "cannot claim a legislative privilege before a body that is not legislating." *Anderson v. Hebert* 830 N.W.2d 704, 708 (Wis. Ct. App. 2013). There can be no immunity where the legislator's statement was not made in legislative capacity. *Isle of Wight County v. Nogiec,* 704 S.E.2d 83 (Va. 2011). Statements made outside of legislative session not concerning pending legislation were not protected statements. *Clark v.*

Jenkins, 248 S.W.3d 418 (Tex. Ct. App. 2008). Statements outside of legislative function are not immune from suit even though made by a legislative official. *Hillman v. Yarbrough,* 936 So.2d 1056 (Ala. 2006). No immunity for legislative comments outside of legislative functions. *Meyer v. McKeown,* 641 N.E.2d 1212 (Ill. App. 1994).

Immunity is limited by time and place of publication when it concerning legislative officials. *Schroeder v. Poage,* 707 P.2d 1240 (Oreg. App. 1985). But every kind of public business is not potentially a subject for legislation by the people; it must be legislative in character. *Adamson v. Bonesteele* 671 P.2d 693, 701 (Oreg. 1983). Thus, where an allegedly defamatory remark came in a speech delivered to a group of Windward Oahu businessmen by a lawmaker whose constituency resided in Waikiki and Kapahulu, his remarks were not immune. *Mehau v. Gannett Pacific Corp.* 658 P.2d 312 (Ha. 1983). Where there was no pending legislation relating to subject matter of alleged defamation and where publication is beyond legislative forum, an absolute privilege should not be extended to members of local governing bodies. *Costanzo v. Gaul*, 403 N.E.2d 979 (Ohio 1980); *see also Stafney v. Standard Oil Co.*, 299 N.W. 582, 583 (Ohio 1941). "The publication of a resolution of a city council attacking the character of a private citizen is not within the scope of the official authority of the city council, and hence is not privileged." *Trebby v. Transcript Pub. Co.*, 76 N.W. 961, 961 (Minn. 1898).

Kentucky law follows the same: statements made at legislative proceedings while "performing legislative duties" limit the scope of immunity for slander. *Smith v. Martin,* 331 S.W.3d 637 (Ky. App. 2011).

One of the seminal decisions in this area of the law was in the very state of the lead defendant. The sister state court there denied immunity, noting the statement was made concerning a subject that "was not then under consideration, was not before the house" and additionally was not made in the legislative chamber as the "defendant was not in his place, did not address the house, nor the speaker... and being wandering from his *place and duty,* forfeited, for the time, his claim of privilege." *Coffin v. Coffin* 4 Mass. 1, 16–17 (Mass. 1808).

In this unprecedented claim of unprecedented immunity, this court should follow the guidance of the analogous decisions of the Speech and Debate Clause, or any of the many state and federal court decisions simply applying official immunity analysis, and reject the extraordinary claim that election to Congress is a license to libel.

CONCLUSION

For the foregoing reasons, the minor Doe Plaintiffs request that the Court of Appeals reverse the District Court's dismissal of Defendants Warren and Haaland and be directed to remand all defendants to the state court where the matter is currently pending.

Respectfully submitted,

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