No. 24-

IN THE

Supreme Court of the United States

GIORGI RTSKHILADZE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE AND ROBERT S. MUELLER, III, SPECIAL COUNSEL FOR THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After deciding that the salacious Footnote 112 in the Mueller Report defamed Petitioner and remanding his equitable claim, the circuit court held that his Privacy Act damages claim was forfeited. Did Petitioner forfeit his claim for damages, where:

(i) the damages issue was fully briefed in both lower courts, and

(ii) the decision finds no support in the caselaw of the Court, the circuit court or any other federal appellate court?

PARTIES TO THE PROCEEDING

The Petitioner (plaintiff-appellant in the court of appeals) is Giorgi Rtskhiladze. Respondents (defendants-appellees in the court of appeals) are the U.S. Department of Justice and Robert S. Mueller, III, Special Counsel for the Investigation of Russian Interference in the 2016 Presidential Election.

RELATED PROCEEDINGS

Rtskhiladze v. Mueller and U.S. Dept. of Justice, No. 1-20-cv-01591, U.S. District Court for the District of Columbia. Judgment entered on September 1, 2021.

In re Grand Jury Proceedings, No. 1:21-cv-00048, U.S. District Court for the District of Columbia. Memorandum Opinion and Order entered on April 8, 2021.

Rtskhiladze v. Mueller, et al., Nos. 21-5243 (L) & 22-3037 (Consolidated). Judgment entered on August 9, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Giorgi Rtskhiladze respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-17a) is reported at 110 F.4th 273. The memorandum opinion of the district court (App. 18a-58a) in 1-20-cv-01591 is reported at 2021 WL 3912157.[1] On October 16, 2024, the court of appeals denied the petition for rehearing (App. 60a).

JURISDICTION

The judgment of the circuit court was entered on August 9, 2024, reversing in part and affirming in part the dismissal of Petitioner's Amended Complaint. The court reversed and remanded the dismissal of Petitioner's claim for equitable relief and affirmed the dismissal of his claim for damages under the Privacy Act. (App. 2a-17a) The Petition for Rehearing or Rehearing En Banc was denied on October 16, 2024. (App. 60a)

The United States District Court for the District of Columbia had jurisdiction under 28 U.S.C. § 1331. The United States Court of Appeals for the District of

1. The memorandum opinion of the district court in No. 1:21-cv-00048 is reported at 2022 WL 1063005. Petitioner does not seek review of the circuit court's decision related to the grand jury proceeding.

Columbia Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Privacy Act provides in 5 U.S.C. § 552a(g) that:

(1) Whenever any agency

. . .

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to qualifications character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual;

. . .

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

. . .

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

> (A) actual damages sustained by the individual as a result of the refusalor failure, but in no case shall a person entitled to recover receive less than the sum of $1,000;. . . .

STATEMENT

Petitioner's Efforts to Foster Ties between the United States and Former Soviet Bloc Countries

This case is about the needless destruction of the business and personal reputation of an American businessman, a resident of Connecticut, a husband and a father of three young children unlucky enough to be caught in a crossfire between two titanic American political forces—Donald Trump and Hillary Clinton.[2] The source of this enduring harm is Footnote 112, Vol. II, of Special Counsel Robert S. Mueller III's Report on the Investigation into Russian Interference in the 2016 Presidential Election (Mueller Report or Report).[3] Footnote 112 addressed the Steele Dossier and Petitioner's purported connection to the purported scandalous video recordings.

Petitioner—a naturalized citizen of the United States—emigrated to the United States in 1991 from the Republic of Georgia, shortly before the Soviet Union

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2. DE 19-1 (Amended Complaint) at ¶¶ 6-7.

3. The redacted Mueller Report was released on April 18, 2019. Report on the Investigation into Russian Interference in the 2016 Presidential Election (Mueller Report)—Content Details—(govinfo.gov).

collapsed.[4] Upon arrival in the United States, Petitioner dedicated his career to fostering closer commercial and cultural ties between the United States—his adoptive country—and former Soviet Bloc countries.[5] At the time the Mueller Report was released, Petitioner was under consideration for bestowal of the title "Honorary Consul" by the Republic of Georgia for his efforts in this regard and was involved in numerous worthwhile and profitable business undertakings furthering those efforts.[6] Just before the 2016 presidential election, he succeeded in persuading Mr. Trump to build a Trump Tower in Batumi, Republic of Georgia.[7] The project was abandoned after Donald Trump won the election.[8]

In early October 2016, the unflattering *Access Hollywood* audio tapes of Mr. Trump were released to the public.[9] The release of the tapes triggered a telephone call to Petitioner from an acquaintance, Sergey Khokhlov, who lives in Moscow.[10] Mr. Khokhlov told him that, while

4. DE 19-1 (Amended Complaint) at ¶¶ 3, 6. Petitioner's life in Soviet Georgia was one of resolute resistance to Soviet Russian suppression. *Id.* at ¶ 8. Several of his childhood friends were executed for trying to leave the Soviet Union without permission and his uncle spent twelve years in the Soviet gulag solely because of his political convictions. *Id.*

5. *Id.* at ¶¶ 9-10.

6. *Id.* at ¶ 17.

7. *Id*. at ¶¶ 18-19.

8. *Id*. at ¶ 19.

9. *Id*. at ¶¶ 37-38.

10. *Id.* at ¶ 41; *see also* Senate Report, *infra*.

he was dining out, he overheard a person at an adjacent table bragging about some tapes of Mr. Trump from a trip to Russia.[11] Mr. Khokhlov passed this rumor along to Petitioner because he knew Petitioner was involved in efforts to have a Trump Tower built in Batumi.[12]

After the call, Petitioner was naturally concerned about the image of the Trump brand. Just days before the presidential election, therefore, Petitioner initiated a brief series of text exchanges on October 30, 2016, with Trump lawyer Michael Cohen, the point person for the Trump Tower Batumi project with whom Petitioner had been working.[13] The relevant transcript of a somewhat awkward exchange of text messages reads:

- Rtskhiladze: "Stopped flow of some tapes from Russia but not sure if there's anything else. Just so u know . . . "

- Cohen: "Tapes of what?"

- Rtskhiladze: "Not sure of the content but person in Moscow was bragging had tapes from Russia trip. Will try to dial you tomorrow but wanted to be aware. I'm sure it's not a big deal but there are lots of stupid people."

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11. *Id.*; *see also* Report of the Select Committee on Intelligence U.S. Senate on Russian Active Measures Campaigns in the 2016 Election, Vol. 5: Counterintelligence Threats and Vulnerabilities (Link: Report_volume5.pdf) at 639, 659.

12. *Id*. at 659.

13. DE 19-1 (Amended Complaint) at ¶ 31.

- Cohen: "You have no idea"

- Rtskhiladze: "I do trust me."

(ellipsis original).[14]

Footnote 112 of the Mueller Report Defamed Petitioner

In May 2017, Robert S. Mueller III was appointed as special counsel to investigate whether Russia actively interfered in the 2016 presidential election.[15] In April 2018, two FBI agents appeared unannounced at Petitioner's home and asked if he would answer a few questions.[16] He invited them into his home. During the visit, they handed him a copy of the text exchange. Petitioner explained that a call from a friend in Moscow triggered the text exchanges.[17] As they were leaving, the agents served Petitioner with a grand jury subpoena for documents and testimony.[18] In response, Petitioner produced approximately 25,000 pages of documents and testified before the grand jury a month later in May 2018.[19]

Almost a year later, Special Counsel Mueller in March 2019 sent a two-volume report to Attorney General

14. *Id.*

15. *Id.* at ¶ 24.

16. *Id.* at ¶ 25.

17. *Id.*

18. *Id.*

19. *Id.* at ¶¶ 26, 27.

Barr.[20] The Attorney General informed the public that information in the Report that could harm the reputation of "peripheral third parties" would be redacted before release.[21] *Petitioner was one of those third parties.* On April 18, 2019, the Department of Justice made public a redacted Mueller Report.[22] Footnote 112 of Volume II, however, was not redacted. The footnote was tied to a sentence reading: "Comey [FBI Director] then briefed the President-Elect on the sensitive material in the Steele Dossier":

> . . . Comey's briefing included the Steele reporting's unverified allegation that the Russians had compromising tapes of the President involving conduct when he was a private citizen during a 2013 trip to Moscow for the Miss Universe Pageant. During the 2016 presidential campaign, a similar claim may have reached candidate Trump. On October 16, 2016, Michael Cohen received a text from Russian businessman Giorgi Rtskhiladze that said, "Stopped flow of tapes from Russia but not sure if there's anything else. Just so you know. . . ." 10/30/16 Text Message, Rtskhiladze to Cohen. Rtskhiladze said "tapes" referred to compromising tapes of Trump rumored to be held by persons associated with the Russian

20. *Id.* at ¶ 28.

21. What's being redacted from the Mueller report, and why | PBS News (Attorney General Barr told Congress that information potentially damning to "peripheral third parties" would be redacted.).

22. DE 19-1 (Amended Complaint) at ¶ 28.

> real estate conglomerate Crocus Group, which had helped host the 2013 Miss Universe Pageant in Russia. 4/4/18 302, at 12. Cohen said he spoke to Trump about the issue after receiving the texts from Rtskhiladze. Cohen 9/12/18 302, at 13. Rtskhiladze said he was told the tapes were fake, but he did not communicate that to Cohen. Rtskhiladze 5/10/18 302, at 7.[23]

Footnote 112 defamed Petitioner by (i) characterizing him pejoratively as a "Russian businessman," given that Petitioner's native country is the Republic of Georgia and Russia invaded Georgia in 2008, and still occupies about twenty percent of the country with resulting hostility,[24] (ii) misquoting the text exchange, changing "stopped the flow of some tapes" to "stopped the flow of tapes," (iii) omitting parts of the exchange showing context, (iv) implying that he had first-hand information about the content of the purported salacious tapes, (v) implying that he took active steps to suppress them in Russia before the election so as not to harm Trump's election prospects, and (vi) wrongly stating that he was told the tapes were fake but did not tell Mr. Cohen.

The Mueller Team's Senior Prosecutor Had Both Motive and Opportunity to Defame Petitioner.

The Mueller team—including the senior prosecutor Jeannie Rhee, who interviewed Petitioner in person and by e-mail exchanges and who questioned him before the

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23. *Id*. at ¶ 29.

24. Marking 16 Years Since Russia's Invasion of Georgia—United States Department of State

grand jury—was well aware that Petitioner was not a "Russian businessman." The topic was discussed bluntly during a pre-testimony interview. And during his grand jury testimony, Petitioner interrupted and corrected Ms. Rhee several times when she nevertheless persisted in characterizing him as such.[25] Petitioner pointedly told Ms. Rhee during his testimony that he was a citizen of the United States and an American businessman originally from the Republic of Georgia (Russia invaded Georgia in 2008).[26]

The footnote not only misquoted the text exchange but left out the parts that would have informed the reader that Petitioner had no personal knowledge of any tapes. Nor did the footnote inform the reader that Petitioner's information was based solely on a call from a friend, Sergey Khokhlov, telling Petitioner that he overheard someone bragging about tapes.[27] Khokhlov called Petitioner because he knew he was involved in an attempt

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25. Even though his grand jury transcript is under seal, nothing precludes Petitioner from providing his general recollection of what happened before the grand jury. *See In re Grand Jury*, 490 F.3d 978, 989 (D.C. Cir. 2007) ("A grand jury witness is legally free to tell, for example, his or her attorney, family, friends, associates, reporters, or bloggers what happened in the grand jury. For that matter, the witness can stand on the courthouse steps and tell the public everything the witness was asked and answered.").

26. DE 19-1 (Amended Complaint) at ¶ 9.

27. *Report of the Select Committee on Intelligence U.S. Senate on Russian Active Measures Campaign and Interference in the 2016 Election, Vol. 5 (Counterintelligence Threats and Vulnerabilities) (Senate Report)* (Report_volume5.pdf (senate.gov)) at 639, 659.

to have a Trump Tower build in Georgia. Further, as is made clear in the Senate Report discussed below, there is no support for the damaging statement that Petitioner was told the tapes were fake but did not tell Mr. Cohen.

Senior prosecutor Rhee had both motive and opportunity to draft Footnote 112 in a manner that implied Petitioner had first-hand knowledge about the purported tapes and took active steps to suppress their public release in order to assist candidate Trump in his election efforts. Ms. Rhee had ties to Democratic candidate Hillary Clinton.[28] She represented former Secretary of State Clinton in an investigation related to her purported use of a personal email server for official State Department affairs.[29] Ms. Rhee also represented the Clinton Foundation in a civil action alleging the Clintons engaged in so-called pay-for-play in connection with affairs affecting U.S. policy.[30] And Ms. Rhee made the maximum permissible contributions to Secretary Clinton's unsuccessful 2016 campaign for the presidency

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28. Jeannie Rhee—Wikipedia ("Previously, Rhee represented Hillary Clinton during the 2015 lawsuit regarding her private emails. Rhee also represented ex-Obama National Security Adviser Ben Rhodes and the Clinton Foundation in a 2015 racketeering case."https://en.wikipedia.org/wiki/Jeannie_Rhee—cite_note-controversy-11). Petitioner's Rule 60(b) Motion materials, including his Declaration prepared from notes of his review of his grand jury transcript, is under seal. DE 37 (Motion for Relief for Judgment) (DE 37-3 is Petitioner's Declaration). The transcript of Petitioner's grand jury testimony is filed under seal. DE 46.

29. *Id.*

30. *Id.*

against Mr. Trump.[31] Importantly, as revealed by Special Counsel Mueller during his testimony before Congress about the findings of the investigation, Ms. Rhee failed to disclose these obvious conflicts of interest to Mr. Mueller prior to being made the senior prosecutor on the Mueller team.[32]

What is more, the subject of Footnote 112 has its genesis in investigative work by Fusion GPS that was originally funded by the Clinton campaign.[33] The Steele Dossier raised the possibility that the Russian Government would use the purported video recordings as leverage against Mr. Trump should he win the election. After BuzzFeed published the Steele Dossier in January 2017—several months after the election and shortly before Mr. Trump's inauguration—there was massive, worldwide media interest in whether the Mueller Report would address whether the video recordings existed, whether they were authentic, and whether they had been suppressed in Russia prior to the election.[34]

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31. Donor Lookup • OpenSecrets

32. Transcripts of the Mueller Hearings: House Committee on the Judiciary & House Permanent Select Committee on Intelligence Hearings (July 24, 2019), at 139.

33. Steele dossier—Wikipedia ("Steele, a former head of the Russia Desk for British Intelligence (MI6), was writing the report for the private investigation firm Fusion GPS, that was paid by Hillary Clinton's campaign and the Democratic National Committee (DNC).").

34. Steele dossier—Wikipedia ("It was published by *BuzzFeed News* on January 10, 2017, without Steele's permission.").

Footnote 112 Abruptly Ended Petitioner's Career

The media immediately seized upon Footnote 112 and broadcast its defamatory implications worldwide. For example, ABC news published an article titled the "10 Best Footnotes in the Mueller Report."[35] The first footnote the article discussed was Footnote 112:

> **1. Those tapes: Footnote 112 (Volume II pg 27-28) describes conversations between Trump associates about rumored video recordings of the candidate in a Russian hotel room with prostitutes:**
>
> In 2016, a dossier compiled by former British intelligence officer Christopher Steele brought to light the possible existence of a Russian-recorded video of Trump during a 2013 visit to Moscow showing Trump cavorting with prostitutes in his suite at a Moscow Ritz hotel. A footnote in the Mueller Report discusses the unverified allegation, which Trump maintains is false.
>
> Two weeks before the election, the report says that Trump's personal attorney Michael Cohen received text *from a Russian businessman Giorgi Rtskhiladze that said, "Stopped flow of tapes from Russia but not sure if there's anything else. Just so you know. . . ."*

35. DE 19-1 (Amended Complaint) at ¶ 45; *see also id*. ¶¶ 43-44, 49.

(Bolding original; Emphasis added.).[36] The ABC report also stated that "[t]he report and footnote do not give information on Trump's response to Cohen's alleged briefing on the matter, nor does it explain why Rtskhiladze wouldn't have told Cohen the tapes were fake."[37]

Another example of the media coverage of Footnote 112 was a monolog that aired on MSNBC's *Rachel Maddow Show* on April 24, 2019:

> According to the Mueller Report, it turns out before the election and well before any Steele Dossier or anything like that claim ever saw the light of day, a guy Trump actually did know from Russian connections in the former Soviet Union actually did get in touch with Michael Cohen to tell him to tell Trump that he was stopping flow of some tapes from Russia. Person in Moscow bragging "had tapes of Russia trip." Oh, good, he stopped the tapes from getting out of Russia.
>
> And according to Mueller, Cohen then told Trump about that before the election. *So that means Trump knew that somewhere in the former Soviet Union, a business buddy of his [Petitioner] had taken action to make sure tapes, supposedly from Trump's trip to Russia, those tapes weren't going out. Don't worry, all taken care of, I took care of that for you, right?*[38]

36. *Id.* at ¶ 45.

37. *Id.*

38. *Id.* at ¶ 47 (Emphasis added.).

ABC News and the show on MSNBC read Footnote 112 precisely the way the prosecutors—and Ms. Rhee as the lead prosecutor had the pen—wanted the media and the public at large to read it, *i.e.*, an associate of Mr. Trump worked with a foreign national—a "Russian businessman"—to suppress salacious videos of Mr. Trump that are noted in the Steele Dossier; and, further, that plaintiff knew the tapes were fake and did not disclose that information to Mr. Cohen.[39] The misquotes, omissions and blatant implications in Footnote 112 led the public to believe that the assertion in the unverified and later debunked Steele Dossier that Russia held compromising salacious tapes of Mr. Trump was credible.

The negative impact of Footnote 112 on Petitioner's personal and business reputation was immediate and severe. Aside from the enormous impact on his family, the footnote destroyed Petitioner's ability to continue his efforts to increase commercial and cultural ties between the United States and former Soviet Bloc countries, including Georgia.[40] The Republic of Georgia abruptly abandoned the process of bestowing the status of "Honorary Consul" on Petitioner and, as cataloged in the Amended Complaint, numerous ongoing or planned business ventures were cancelled or indefinitely postponed.[41]

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39. *Id.* at ¶ 46.

40. *Id*. at ¶¶ 50-51, 60-61.

41. *Id*. at ¶ 52; see also ¶¶ 50-51, 60-61.

A Subsequent Senate Report Was Both Accurate and Complete

Unlike Footnote 112, a subsequent Senate Report—published long after Footnote 112 destroyed Petitioner's livelihood and personal reputation—accurately reported that Petitioner had no actual knowledge about the purported salacious tapes and certainly, therefore, could not have taken steps to suppress them before the election.

In August 2020—nearly a year and a half after the release of Footnote 112—the Senate Select Committee on Russian Active Measures Campaigns and Interference in the 2016 U.S. Elections issued a redacted version of its Report.[42] The Senate Report received much less media attention than Footnote 112 of the Mueller Report. And the Senate Report provided the overall context related to the purported tapes, noting that Mr. Cohen routinely heard rumors about compromising and shocking tapes related to a trip of Mr. Trump to Russia in 2013. Mr. Cohen said that over the course of several years a number of people contacted him about compromising tapes but that he could not corroborate any of the rumors.[43]

The Senate Report explained that "[s]eparate from *Steele's memos, which the Committee did not use for support*, the Committee became aware of three general sets of allegations:"[44]

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42. *Report of the Select Committee on Intelligence U.S. Senate on Russian Active Measures Campaign and Interference in the 2016 Election, Vol. 5 (Counterintelligence Threats and Vulnerabilities) (Senate Report)* (Report_volume5.pdf (senate.gov)).

43. *Id*. at 638, 639, 658-59.

44. *Id*. at 638 (Emphasis added.).

(i) a person named David Geovanis who was reported to have "information about Trump's relationship with women in Moscow,"[45]

(ii) *a rumor Giorgi Rtskhiladze heard about during a telephone call at his home in Connecticut from a friend in Moscow*,[46] and

(iii) an individual who was an executive with Marriott International who purportedly overheard two other Marriott executives in an elevator at the Ritz Carlton Moscow discussing how to handle a tape of Trump with women.[47]

Unlike Footnote 112, the Senate Report accurately identified Petitioner as "a U.S. businessman originally from the country of Georgia . . . "[48] The Report also stated accurately that the only source of Petitioner's information was from a telephone call he received at his home in Connecticut from a friend in Moscow:[49]

> The second set of allegations relate to a Moscow-based businessman, Sergey Khokhlov, who overheard two people in Moscow, in October 2015 [sic] [2016], discussing sensitive tapes of a Trump visit to Russia. He relayed

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45. *Id.*

46. *Id.* at 639, 659 (Emphasis added).

47. *Id.* at 639.

48. *Id.* at 658 n.4271.

49. *Id.* at 639, 659.

> what he heard to Giorgi Rtskhiladze, a friend and business associate of Michael Cohen. In October 2016, Rtskhiladze informed Cohen of the alleged tapes in Moscow, and Cohen informed Trump and several others. Cohen has said that there was no additional action taken, and that he had been aware of other similar allegations that began shortly after Trump's travel to Moscow in 2013, none of which Cohen was able to corroborate.[50]

The Senate Report also included Petitioner's recollection of the call:

> During an October 2015 [sic] [2016] phone call that Mr. Rtskhiladze had with a friend and former business associate, Sergei Khokhlov, Mr. Khokhlov stated that while having dinner in a restaurant, Mr. Khokhlov overheard a stranger at a table next to him discuss tapes from Donald Trump's visit to Russia. The overheard dinner conversation was not important to Mr. Rtskhiladze and Mr. Khokhlov so he did not discuss this matter again. Mr. Khokhlov was aware that Mr. Rtskhiladze and his Georgian partners were in business with the Trump Organization.[51]

Unlike Footnote 112, the Senate Report faithfully included enough of the text exchange to provide

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50. *Id.*

51. *Id.* at 659.

the innocuous context.[52] The Report also noted that Petitioner—like the public at large—was unaware in late October of 2016 of the existence of the Steele Dossier—and the disturbing but unverified tapes mentioned in it. The Report explained, therefore, that Petitioner's text was not based upon the still confidential Steele Dossier; rather, it was based on the intense media coverage during the first part of October related to unflattering tapes of Mr. Trump while on the set of *Access Hollywood*:

> Due to the news about the *Access Hollywood* tapes and its potential impact on Mr. Trump's reputation, Rtskhiladze sent a text message to Mr. Cohen to inform him that an individual was overheard discussing sensitive tapes of Mr. Trump's trip to Russia.[53]

The Senate Report explained that although Rtskhiladze did not have personal insight into the matter, he assessed that if compromising material existed the Crocus Group—which sponsored the 2013 Miss Universe Pageant in Moscow—would likely be responsible.[54] The Report stated that Petitioner did not pass along subsequent speculation that the tapes were fake because he knew that Mr. Cohen regularly heard unverified rumors of compromising tapes for years but could not confirm them.[55]

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52. *Id.* at 660.

53. *Id.* (emphasis added).

54. *Id.*

55. *Id*. at 658.

The Senate Report noted that the day after the Steele Dossier was published, Petitioner texted his publicist. The text confirms that he had no tangible information about the purported tapes and obviously, therefore, could not have taken action to suppress them: "told MC [Michael Cohen] there was something there b 4 election."[56] This text message is wholly inconsistent with the implication in Footnote 112 that Petitioner had personal knowledge that tapes existed and took active steps to suppress them before the 2016 election. The publicist responded, "I recall" to which Petitioner replied, "well that's what happens when you visit crocus I guess."[57] This statement also demonstrates that Petitioner was not involved in any efforts to suppress the purported tapes—"I guess" can only be interpreted to mean that Petitioner was simply speculating.[58]

District Court Procedural History

In August 2020, the district court granted Petitioner's unopposed motion to amend the Complaint.[59] As pertinent here, Count III of the Amended Complaint sought equitable relief under the Privacy Act.[60] It alleged that Footnote 112 violated 5 U.S.C. § 552a(g)(1)(C) because it was not sufficiently accurate, relevant, timely, or complete as necessary to assure fairness in determinations

56. *Id.* at 660.

57. *Id.*

58. *Id*.

59. DE 19.

60. DE 19-1 (Amended Complaint) at ¶¶ 75-76.

relating to Petitioner's qualifications, character, rights, opportunities or benefits that may be made on the basis of Footnote 112 and has caused adverse determinations regarding Petitioner. Count IV asserted a claim for "actual damages" under 5 U.S.C. § 552a(g)(4) for violation of section 552a(g)(1)(C), alleging that the defamation and defamatory implications of Footnote 112 was "intentional or willful."[61]

In September 2020, the Department of Justice and Special Counsel Mueller filed separate motions to dismiss and in October 2020, Petitioner filed a response in opposition to them. Petitioner's request for oral argument was denied.[62] One year later, on September 1, 2021, the district court dismissed the case.[63]

The Decision of the District Court

In deciding the motions to dismiss, the district court was required to determine whether the Amended Complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[64] The court began by accurately noting that the substance of Petitioner's claim was that he was defamed by Footnote 112:

> Rtskhiladze's ongoing injuries derive from the continued availability of false statements

61. *Id*. at ¶¶ 77-79.

62. DE 24.

63. DE 32 (App 18a-58a).

64. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570(2007)).

> generated and endorsed by a high-profile federal investigation. Rtskhiladze takes specific issue with the implications that he was aware of the tapes referred to in the Steele Dossier, that he had a connection with the Crocus Group, and that he had a reputation as someone who would be familiar with those matters. *See*, *e.g.*, FAC at § 36-40. He argues that these implications combined to paint him as a figure 'engaged in shadowy conspiratorial and covert activities' which raised red flags for potential business partners.[65]

The court then concluded that Petitioner plausibly pled that his harm stemmed from Footnote 112 and that the harm was fairly traceable and redressable:

> [B]ecause his theory of causation centers on the connection drawn in the footnote between himself, the Crocus Group, and the tapes, the Court finds it plausible that Footnote 112 is the sole source of that connection in the Mueller Report. Moreover, assuming that the implications contained in the footnote were false, Rtskhiladze's portrayal in the footnote could have given associates and potential partners a negative impression of his character due to his close contact with a high-profile scandal. The Court thus finds that Rtsdkhiladze has plausibly alleged that the harms to his business and reputation are fairly traceable

65. App. 45-46a; 2021 WL 3912157, at *10.

> to the presence of these implications in the footnote.[66]

Quizzically, the court then wrongly concluded that the issuance of a Senate Report on the same subject nearly a year and a half later meant that Petitioner "ha[d] only shown causation for harms that occurred prior to the release of the Senate Select Committee on Intelligence in August 2020."[67] The court then held that equitable relief was no longer available after the issuance of the Senate Report.[68]

Not only did the district court wrongly conclude that the Senate Report precluded equitable relief under the Privacy Act, but it also proceeded wrongly to limit his damage claim to the period from the date of the publication of Footnote 112 to the date the Senate Report was released. Then, *ipse dixit*, the court illogically dismissed the damages claim. It reasoned that Petitioner's claim that the material in Footnote 112 was "so nakedly defamatory that it could only have been included intentionally and willfully . . . is not plausible given the Senate Report's publication of largely the same information, and his concession that the material contained in the Senate Report is accurate."[69]

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66. App. 43a; 2021 WL 3912157, at *9.

67. App. 43-44a; 2021 WL 3912157, at *10.

68. App. 34a, 45a-47a; 2021 WL 3912157, at *7, *11.

69. App. 35aa; 2021 WL 3912157, at *7.

Simply stated, the district court first held that the Amended Complaint established that Footnote112 plausibly caused harm to Petitioner. The court nevertheless found that it lacked jurisdiction over the claim for prospective relief because a subsequent Senate Report erased the traceability of the harm caused by the release of Footnote 112. On damages, the district court first held that it had jurisdiction over the claim for damages but narrowed the damages window to between the release date of the Mueller Report and the release date of the subsequent Senate Report. It then proceeded to dismiss the damages claim for failure to state a claim upon which relief could be granted, again relying on the subsequent Senate Report to do so, concluding the allegations of "intentional or willful" conduct were no longer plausible. On both scores, the district court decision was obviously flawed.

The Decision of the Circuit Court

Equitable Claim. The court of appeals reversed and remanded the district court's jurisdictional holding on prospective relief and held Petitioner has standing to pursue such relief. After noting that the government does not challenge the allegations of the harm inflicted upon Petitioner by Footnote 112, the circuit court rejected the conclusion of the district court that the "(accurate) Senate Report eliminated the ongoing effects of the (inaccurate) Mueller Report."[70] It explained that "the Senate cannot retract a report issued by DOJ, nor did the Senate Report purport to do so" and that "[a] government report (like the Senate Report) does not extinguish the harm from the earlier government report (like the Mueller Report)

70. App. 7a;110 F.4th 273, 277 (D.C. Cir. 2024).

'where reputational injury derives directly form an unexpired and unretracted government action.'"[71]

Damages Claim. For the same reason, the circuit court rejected the district court's holding that the jurisdictional window on damages was limited to the period between the release of Footnote112 and the Senate Report:

> Like the district court, we hold that Rtsdhiladze has standing to seek damages for injuries that DOJ allegedly inflicted ***before*** the Senate Report's release. Unlike the district court, we hold that Rtskhiladze also has standing to seek damages for injuries inflicted ***after*** that point.[72]

Then, however, the court of appeals incongruously and cursorily held that Petitioner forfeited his damage claim because "he cites common-law defamation precedents, and the Privacy Act's explicit text requires Rtskhiladze to allege 'intentional or willful' conduct. . . . So here, common law cases are not on point."[73] The circuit court ignored Petitioner's argument and citation to relevant Privacy Act caselaw on damages. What is more, the court further ignored that Petitioner's appellate briefing where he argued (*with no reference to defamation law!*) that it was the district court's erroneous consideration of the Senate Report (not any failure to apply defamation law principles) that led to its erroneous restriction of damages to the period prior to publication of the Senate Report—a conclusion with which the circuit court agreed.

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71. *Id*.

72. App. 9a; 110 F.4th at 278 (Emphasis original).

73. App. 11a;110 F.4th at 279.

REASONS FOR GRANTING THE PETITION

Although the Court rarely vacates appellate decisions purely because they are—or are perceived to be—politically motivated or unsound, it does intervene when lower courts sidestep critical legal questions, particularly in a politically sensitive case such as this one.[74] By doing so, the Court helps preserve the integrity of the judicial system, requiring decisions to be based on the legal principles presented by the parties rather than external pressures.[75] The circuit court improperly used forfeiture to sidestep the politically sensitive question of whether the conflict of interest of the Mueller team's lead prosecutor was sufficient (combined with other identified circumstances) to establish the plausibility at the pleading stage that the defamation in the footnote was "intentional or willful." The decision is blatantly contrary to well-settled caselaw in the Court, the circuit court, and all other

74. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865-66 (1992) (stating that "[t]he Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. The underlying substance of this legitimacy is of course the warrant for the Court's decisions in . . . [the] sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. . . . The "Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.").

75. *Id.*

federal circuit courts. There simply are no cases where a circuit court—including the D.C. Circuit—has deemed a legal position forfeited where the issue was fully briefed in both the district and appellate courts.

I. The Forfeiture Decision Is Anathema to All Federal Judicial Precedent.

A. Nothing in the Jurisprudence of the Court Supports Forfeiture in These Circumstances.

Unlike a knowing waiver of a legal issue which appellate courts cannot reach, forfeiture is an extreme penalty that is exercised sparingly and, even if warranted, sound prudential practice often dictates restraint.[76] In *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991), the Court observed that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." The circuit court's forfeiture decision regarding Petitioner's claim for damages under the Privacy Act cannot be squared

76. *Stokes v. Stirling*, 64 F. 4th 131, 136 n. 3. (4th Cir. 2023) (noting that forfeiture refers to a party's inadvertent failure to raise an argument and a court has discretion to reach a forfeited issue); *United States v. Jarvis*, 499 F.3d 1196, 1202 (10th Cir. 2007) ("Although a litigant's failure to raise an argument before the district court generally results in forfeiture on appeal, forfeiture is not jurisdictional. [citations omitted]. Whether to address the argument despite the litigant's failure to raise it below is subject this court's discretion based on the circumstances of individual case."); *A Helping Hand, LLC v. Baltimore City*, 515 F. 3d 356, 369 (4th Cir. 2008) (explaining that an appellant's forfeiture may be excused to avoid a "miscarriage of justice").

with *Kamen*. As explained below, the caselaw applicable to plausibly pleading that a violation of the Privacy Act was "intentional or willful" was briefed in both the district court and the court of appeals.

B. Nothing in the Caselaw of the Circuit Court Mandated Forfeiture of the Damages Claim.

The circuit court decision is contrary to its own precedent. Consistent with *Kamen*, the court has observed that—although it is the responsibility of an appellant to proactively present an issue to be decided supported by legal authority, legal reasoning, and citations to facts in the record—"not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research."[77] The court then explained, however, that "where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, 'important questions of far-reaching significance' are involved."[78]

Based upon these principles of appellate review, by far, most claim-forfeiture cases involve the failure of an appellant to raise an issue with the district court before raising the issue on appeal or an appellant raising an argument only in the reply brief.[79] Even then, there is "no

77. Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983).

78. *Id.* (quoting Alabama Power Co. v. Gorsuch, 672 F.2d 1, 7 (D.C.Cir.1982)).

79. *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (argument forfeited for failing to raise it in the opening brief) (quoting *Schneider v. Kissinger*, 412 F.3d 190 n.1 (D.C. Cir. 2005);

bright line test."[80] To be sure, there are a few cases holding that a claim or argument has been forfeited because it was raised only in a cursory way in the appellate brief. In *Schneider v. Kissinger*,[81] the circuit court warned that:

> It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

There, the circuit court found that the mere mention in a complaint that a plaintiff did not intend to waive an *ultra vires* argument was insufficient to preserve it.[82]

But this case is not remotely like *Schneider*. There are no decisions in the circuit court holding a claim forfeited where a party, as Petitioner did here, (i) raised and argued an issue in the district court, (ii) raised it as the first issue in the opening appellate brief, (iii) included the issue as the

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Govt. of Manitoba v. Bernhardt, 923 F.3d 173, 179 (D.C. Cir. 2019) (hold that a theory of injury supporting standing forfeited, stating that "[a]bsent exceptional circumstances, a party forfeits an argument by failing to press it in district court").

80. *MBI Group, Inc. v. Credit Foncier Du Cameron*, 616 F.3d 568 (D.C. Cir. 2016).

81. 412 F.3d 190, 200 (D.C. Cir. 2005).

82. *Id* at 199.

first argument in the opening appellate brief, (iv) argued the issue in the appellate reply brief, and (v) argued the issue at oral argument before the circuit court.[83]

C. The Decision Is Contrary to the Caselaw of the Other Circuit Courts.

An exhaustive search has not uncovered a single case in the federal appellate system where an issue was held forfeited in these circumstances.[84] The cases below provide the general context in which an argument will be deemed forfeited and cannot be read to support forfeiture here.

In *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991), the court observed that arguments that are

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83. The results of a search of decisions in the D.C. Circuit includes, but is not limited to: *Govt. of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) (argument forfeited where not raised first in the district court), Herron v. Fannie Mae, 861 F.3d 160, 165 (D.C. Cir. 2017) (argument forfeited where not raised in the opening brief), *Schneider v. Kissinger*, 412 F.3d 190, 200 & n.1 (D.C. Cir. 2005) (issue forfeited where the party made only a vague reference in the complaint about not intending to waive an argument), *Iowaska v. Church of Healing v. Werfel*, 105 F.4th 402, 414 (D.C. Cir. 2024) (argument forfeited where only vaguely raised in a footnote), *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607 (D.C. Cir. 2019) (argument forfeited where raised only vaguely in the opening brief and then fully developed in the reply brief), *Gerlich v. DOJ*, 711 F.3d 161, 173 (D.C. Cir. 2013) (argument forfeited where incorporated by reference to an argument made at an earlier stage of the litigation), and *Abdelfattah v. U.S. Dept. of Homeland Security*, 787 F.3d 524 (D.C. Cir. 2015) (declining to address an argument that seemed to suggest a liberty right where the court had to guess if that is what is being argued).

84. Cases often conflate "waiver" with "forfeiture."

perfunctory and undeveloped or arguments unsupported by pertinent authority are forfeited. There, appellant failed to mention the necessary analysis, cited no pertinent authority, ignored the issue in the reply brief, and made no attempt to refute the government's analysis either legally or factually at oral argument.

In *City of Syracuse v. Onondaga County*, 464 F.3d 297, 308 (2d Cir. 2006), the court held an argument was forfeited because the issue was raised only in an argument heading and in a footnote.

In *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), the court stated that "[a]n issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue . . . will not suffice to bring the issue before the court." There, the appellant addressed the arbitration issue only in its reply brief. In *McDeavitt v. McCarthy*, 767 Fed. Appx. 365, 367 (3d Cir. 2019), the court held that an argument was forfeited because:

> The only argument the McDeavitts advance to support that they have stated a claim is a single sentence asserting "[t]hey alleged facts which must be viewed in the light most favorable to them and they certainly plead enough facts to permit their claim to proceed." Appellants' Br. 3.

II. The Circuit Court Had No Reason Even to Reach the Claim for Damages under the Privacy Act.

Not only was forfeiture contrary to every federal appellate decision on the subject, the circuit court's

reasoning in reversing the district court's dismissal of the equitable claim mandated as well that the dismissal of the damages claim be reversed and remanded. In reversing the district court's dismissal of the equitable claim, the circuit court emphatically rejected any relevance of the Senate Report, holding that the later report "cannot retract a report issued by DOJ, nor did the Senate Report purport to do so."[85] Because the district court applied the same flawed reasoning to dismiss the damages claim, the circuit court should have reached the same result as it did on the equitable claim. The only reason the district court gave for finding Petitioner had not plausibly pled that the violation of the Privacy Act was "intentional or willful" was the later issuance of the Senate Report. Having concluded that reasoning was fatally flawed, the appellate court should have reversed and remanded both claims, not just the equitable claim. Indeed, the circuit court recognized that the district court's flawed reasoning infected its holdings regarding the damages claim: "Unlike the district court, we hold that Rtskhiladze also has standing to seek damages for injuries inflicted ***after*** that point."[86]

III. In both the District Court and the Circuit Court Petitioner Demonstrated Plausible Culpability to Support Damages at the Pleading Stage.

A. District Court

Petitioner argued in the district court that under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that a "claim

85. App. 8a; 110 F.4th 273, 277-78.

86. App. 9a;110 F.4th at 278 (Emphasis original.).

has 'facial plausibility' when plaintiff pleads factual content that allows a court to draw an inference that defendant is liable for the misconduct alleged."[87] Petitioner then discussed the caselaw defining "intentional or willful" conduct needed to support a Privacy Act damages claim:

> The D.C. Circuit and other circuit courts have interpreted "intentional or willful" to be met "by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act."[88]

Petitioner argued that the allegations demonstrated the "facial plausibility" that the author(s) of Footnote 112 acted with the requisite culpability:

> Footnote 112 is pure fantasy. The full exchange of texts and the circumstances that led to them—all known to the special prosecutors—demonstrate that there was nothing remarkable about the exchange.
>
> In crafting Footnote 112, the prosecutors (i) altered the part of the exchange of texts that was included in Footnote 112, (ii) failed to include a contemporaneous follow-up text that explained that plaintiff did not know the content of the tapes, all he knew is that he was told by a friend that someone at a dinner

87. DE 22 at 23 (Petitioner's Opp. Br.) (Note: All page cites are to the internal page number—not the DE page number.).

88. *Id*. at 34-35 (quoting *Albright v. United States*, 732 F.2d 189 (D.C. Cir. 1984)).

> party was bragging about compromising tapes, and that he was sure it was no big deal, (iii) misrepresented plaintiff, and American citizen [and longtime American businessman], as a "Russian businessman," (iv) tied plaintiff to the unverified and debunked Steele Dossier [when the Dossier did not become public until after the 2016 election but the *Access Hollywood* tapes had], and (v) accused plaintiff of knowing the content of the so-called golden-rain tapes . . . and then failing to disclose his knowledge to Mr. Cohen [something for which there is no support]. . . ."[89]

The government did not raise the Senate Report until its reply brief and, even then, it incorrectly represented to the court that it was released contemporaneously with the Mueller Report.[90] Petitioner filed a sur-reply informing the court that the Senate Report was issued long after Petitioner's career was destroyed.[91] The sur-reply also argued that, far from making Petitioner's claim disposable, it strengthened it because it "Confirms the Allegations about the False, Reckless, and Misleading Nature of Footnote 112."[92]

B. Circuit Court

In the opening appellate brief, Petitioner (i) cited caselaw discussing the correct standard for determining

89. *Id.* at 2.

90. DE 26 at 4 (DOJ Reply).

91. DE 28-1 at 5 (Pet. Sur-Reply).

92. *Id.* at 6.

whether conduct related to a violation of the Privacy Act was sufficiently "intentional or willful" to support a claim for damages and (ii) argued that the allegations supported the plausibility that the conduct of the author(s) met that standard at the pleading stage. Petitioner argued—as he had in the district court—that under the precedent of the circuit court, "intentional or willful" "means conduct slightly more egregious than gross negligence, *i.e.*, where a person is defamed through the reckless disregard of their rights under the [Privacy] Act."[93] He also argued that:

> Dismissal was particularly improper here because the Court long ago held that the standard for proving 'intentional or willful' within the meaning of the Privacy Act requires conduct that is only slightly more culpable than "gross negligence." *Freeman v. Fed. Bureau of Prisons*, 2020 WL 4673412 (D.D.C. 2020) (citing *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987); *Laningham v. United States*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). ***Actual intent or willful conduct is not a required element***.[94]

In *Tijerina v. Walters*, the circuit court held that "the standard does not require the official to set out purposely to violate the Act; if the standard were so viewed, damages would be a rare remedy indeed."

Petitioner asserted that the allegations support facial plausibility on the issue of culpability: "Here, the

93. Petitioner's Open Br. at 20 (Summary of Argument).

94. *Id.* at 28 (Emphasis original).

'particular manner' or 'language' in which facts were mixed with misrepresentations and omissions of relevant facts suggests that there was intent to defame."[95] "[The Amended Complaint] . . . plausibly pled that he was injured by the mischaracterization, inaccuracies, and material omissions in Footnote 112. . . ."[96]

All of these inaccuracies and material omissions are cataloged in the Statement of the Case section of Petitioner's opening appellate brief.[97] Indeed, Petitioner dedicated four pages of the Statement of the Case (at 10-14) to the Senate Report's complete and accurate treatment of the relevant facts and then argued that:

> As a matter of logic there is no way a Senate Report that did not defame GR [Petitioner] makes the continuing harm caused by Footnote 112 no longer "fairly traceable" or "redressable."[98]
>
> . . .
>
> [T]he court also erred in concluding that the later issuance of the Senate Report cut off any further damage to GR's career and, therefore, damages could not be recovered after its release. Nonsense. As a matter of logic, a later utterance by some third party that does not

95. *Id.* at 27.

96. *Id.*

97. *Id.* at 3-14.

98. *Id.* at 21.

> defame the plaintiff cannot cut off the continued traceability of the defamation or obviate redressability in the form of damages.[99]

Petitioner also argued that the conclusion that the Senate Report erased equitable jurisdiction

> is an anomalous result given that the Senate Report did not defame GR [Petitioner] and, *a fortiori*, any continuing harm to GR's business and reputation would remain traceable to Footnote 112 . . . Simply put, ***the court got it exactly backwards***: Only if the Senate Report had defamed GR [Petitioner] would there be an argument that it was no longer possible to "trace" the harm caused by Footnote 112.[100]

IV. The Circuit Court's Conclusion that the Circuit's Common Law Test for Plausible Culpability Was "Not on Point" Did Not Warrant Forfeiture.

A. Petitioner Did Not Propose the Adoption of the Circuit Court's Test for Plausible Culpability in Common Law Defamation Cases in a Vacuum.

Nothing required forfeiture of the damages claim simply because the circuit court disagreed with the utility of its two-part test in common-law defamation by implication cases. *Petitioner did not argue that because his Privacy Act claim for damages was based on defamation that the same elements as a common law defamation*

99. *Id.* at 29.

100. *Id.* at 30-31 (Emphasis original).

case applied.[101] As shown above, Petitioner plainly argued the correct standard for determining "intentional or willful" culpability in a Privacy Act damages case. He also cataloged how the allegations in the Amended Complaint are sufficient to establish the facial plausibility that the footnote was written "intentionally or willfully," *i.e.*, in flagrant disregard of Petitioner's privacy interests.

The salient part of *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990), is that it differentiates between a communication that can be dismissed even though it may carry defamatory implications and a communication that cannot be dismissed because it "supplies additional, affirmative evidence suggesting that the defendant **intends** or **endorses** the defamatory inference. . . ."[102] Petitioner argued that Footnote 112 was of the latter type.

B. Even if Claim Forfeiture Was Otherwise Warranted, the Exception to the Rule Applies Here.

Even if somehow forfeiture was otherwise appropriate, the exception to the forfeiture rule should have been applied. In *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293, 298-99 (D.C. Cir. 2020), the court explained

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101. That an argument may be less than crystal clear is not a sufficient reason to deem the claim forfeited. *Cf. United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022) (quoting *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (when deciding a "question of law," a court "should . . . use its full knowledge of its own [and other relevant] precedents").

102. *Id.* (Emphasis original).

that a court "may . . . consider an issue antecedent to and ultimately dispositive of the dispute before" us, even one the parties fail to identify and brief." And in *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010), the court recognized that the exception is particularly appropriate where the "issue involves a straightforward legal question, *and both parties have fully addressed the issue on appeal*." (Emphasis added.). Here, of course, both parties briefed and argued the relevance of the Senate Report in the district court and on appeal.

CONCLUSION

For the foregoing reasons, the Petition should be granted, followed by full briefing and oral argument. Alternatively, the Petition should be granted, the decision summarily vacated, and the case remanded with instructions to decide the damages issue on the merits.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5243
Consolidated with 22-3037

GIORGI RTSKHILADZE,

Appellant,

v.

ROBERT S. MUELLER, III, SPECIAL COUNSEL FOR THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION AND UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.

Appeals from the United States District Court
for the District of Columbia.
(No. 1:20-cv-01591)
(No. 1:21-gj-00048).

November 30, 2023, Argued
August 9, 2024, Decided

Appendix A

Before: SRINIVASAN, *Chief Judge*, WALKER and PAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALKER.

WALKER, *Circuit Judge*: In 2017, Special Counsel Robert S. Mueller III began investigating allegations of Russian government interference in the previous year's presidential election. To that end he empaneled a grand jury. One of the witnesses who testified before it was Giorgi Rtskhiladze.[1]

When the Department of Justice released a redacted version of Mueller's final report, it included information that allegedly injured Rtskhiladze. So he sued, seeking both equitable and monetary relief. He also filed a separate application to obtain a copy of the transcript of his grand jury testimony.

The district court decided that Rtskhiladze lacked standing to bring his equitable claims; that he failed to state a claim for damages; and that he was not entitled to obtain a copy of the transcript.[2]

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1. Rtskhiladze is pronounced "Ske-LAHD-zuh" in the audio version of his memoir. https://www.youtube.com/watch?v=XJd9eWU8qgk.

2. Rtskhiladze brought a separate damages claim against DOJ and Special Counsel Mueller personally. But the district court held that Rtskhiladze abandoned this claim before appeal, and in any event, he forfeited all arguments about this claim in his appellate brief.

We hold that Rtskhiladze has standing to bring all his claims. So we remand for the district court to consider the merits of the equitable claims that it dismissed for lack of standing. However, we agree with the district court that Rtskhiladze has failed to state a claim for damages. We also agree with the decision to deny Rtskhiladze's request to obtain a copy of the transcript of his grand jury testimony.

I. Background

Giorgi Rtskhiladze was born in the Republic of Georgia, which was then part of the Soviet Union. In the 1990s, he moved to the United States and later became an American citizen.

In 2016, rumors surfaced of "tapes" in Russia that might create difficulties for Donald Trump's presidential campaign. JA 51. That year, Rtskhiladze sent a text message to Michael Cohen, an attorney for candidate Trump. The text said Rtskhiladze had: "Stopped flow of some tapes from Russia." JA 50 ¶ 31.

After President Trump's election, DOJ appointed Special Counsel Robert S. Mueller III to investigate allegations that Russia had interfered in the election. Mueller empaneled a grand jury and called Rtskhiladze as a witness. He then wrote a report to DOJ about his findings. DOJ released a version of the report to the public, which redacted (among other things) references to grand jury materials.

Appendix A

The public report discusses Rtskhiladze in several places, including footnote 112. *See* Special Counsel Robert S. Mueller, III, Report on the Investigation into Russian Interference in the 2016 Presidential Election, Volume II at 27 n.112 (March 2019), https://perma.cc/LBG3-8CHQ ("Mueller Report"). That footnote contained several inaccuracies.

First, it falsely called Rtskhiladze "Russian" when he is a Georgian-American. *Id.* Second, it inaccurately quoted the text that Rtskhiladze sent to Michael Cohen.[3] Third, Rtskhiladze says the footnote was vaguely drafted and created false insinuations about his conduct.[4]

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3. *Compare* Mueller Report, Volume II at 27 n.112, *with* JA 50 ¶ 31 (emphases added to illustrate discrepancy).

Inaccurate: "Stopped flow of tapes from Russia but not sure if there's anything else. Just so you know . . . ."	Accurate: "Stopped flow of <u>some</u> tapes from Russia but not sure if there's anything else. Just so <u>u</u> know . . ."

4. The footnote reads:

> Comey 1/7/17 Memorandum, at 1-2; Comey 11/15/17 302, at 3. Comey's briefing included the Steele reporting's unverified allegation that the Russians had compromising tapes of the President involving conduct when he was a private citizen during a 2013 trip to Moscow for the Miss Universe Pageant. During the 2016 presidential campaign, a similar claim may have reached candidate Trump. On October 30, 2016, Michael Cohen received a text from Russian businessman Giorgi Rtskhiladze that said, "Stopped flow of tapes from Russia but not sure if there's

According to Rtskhiladze, the Mueller Report's deficiencies harmed his reputation and cost him several business deals — not the least because footnote 112 garnered widespread media attention. He also alleges the deficiencies altered the Georgian government's plans to name Rtskhiladze an "Honorary Consul," which fell through after the report's release. JA 85.

Rtskhiladze later sued Mueller and DOJ. Invoking the Administrative Procedure Act, the Declaratory Judgment Act, and the Privacy Act, Rtskhiladze sought equitable relief: specifically, a declaration that footnote 112 was inaccurate and an order requiring DOJ to amend it. He also sought damages under the Privacy Act.

While the suit was pending, the United States Senate issued its own report about whether Russia interfered in the 2016 presidential election. The Senate Report included new details about Rtskhiladze, correctly identified him as a

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> anything else. Just so you know . . . ." 10/30/16 Text Message, Rtskhiladze to Cohen. Rtskhiladze said "tapes" referred to compromising tapes of Trump rumored to be held by persons associated with the Russian real estate conglomerate Crocus Group, which had helped host the 2013 Miss Universe Pageant in Russia. Rtskhiladze 4/4/18 302, at 12. Cohen said he spoke to Trump about the issue after receiving the texts from Rtskhiladze. Cohen 9/12/18 302, at 13. Rtskhiladze said he was told the tapes were fake, but he did not communicate that to Cohen. Rtskhiladze 5/10/18 302, at 7.

Mueller Report, Volume II at 27 n.112.

Georgian-American, and properly quoted the relevant text message. *See* Senate Select Committee on Intelligence, 116th Cong., Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Volume V at 658-660 (November 2020), https://perma.cc/M4FL-75QV.

Reasoning that the Senate Report "is an independent and unchallenged source of" the Mueller Report's "facts and implications," the district court dismissed Rtskhiladze's equitable claims for lack of standing. JA 108. For the same reason, the district court held that Rtskhiladze lacked standing to seek damages for harms inflicted after the Senate Report's publication. As for damages before that point, the district court held that Rtskhiladze had failed to state a claim.

Rtskhiladze appealed those decisions.

To prepare for his appeal, Rtskhiladze started a second action. He asked the district court for permission to review a transcript of his grand jury testimony, take notes about it, and prepare a declaration summarizing it for the court in his first action. The district court granted each of those requests, which are not in dispute.

Rtskhiladze also sought to obtain a copy of the transcript of his grand jury testimony. His plan was to share that copy with the public. *See* Oral Arg. Tr. at 6, 9-10. The district court denied his request.

Rtskhiladze appealed that decision as well.

II. Analysis

We consider three issues: (1) Rtskhiladze's equitable claims; (2) his damages claim; and (3) his alleged right to obtain a copy of the transcript of his grand jury testimony.

A. Equitable Claims

Rtskhiladze has standing to bring his equitable claims. *See* U.S. Const. art. III.[5]

To establish standing, a plaintiff must demonstrate he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

DOJ does little to dispute that Rtskhiladze has alleged an injury caused by the Mueller Report. More saliently, DOJ says that the court cannot equitably redress any such injury. According to DOJ, the (accurate) Senate Report eliminated the ongoing effects of the (inaccurate) Mueller Report.

We disagree. A government report (like the Senate Report) does not extinguish the harm from an earlier government report (like the Mueller Report) "where

5. Our review is de novo. *Center for Law & Education v. Department of Education*, 396 F.3d 1152, 1156, 364 U.S. App. D.C. 416 (D.C. Cir. 2005).

reputational injury derives directly from an unexpired and unretracted government action." *Foretich v. United States*, 351 F.3d 1198, 1213, 359 U.S. App. D.C. 54 (D.C. Cir. 2003). "Case law is clear" in other contexts that such an "injury satisfies the requirements of Article III standing to challenge that action" — and the same is true here in the Privacy Act context. *Id.*; *cf.* 5 U.S.C. § 552a(d)(2)(B)(i), (g)(2)(A).

The Mueller Report remains "unexpired and unretracted." *Foretich*, 351 F.3d at 1213. That's because the Senate cannot retract a report issued by DOJ, nor did the Senate Report purport to do so. So the Mueller Report could continue to harm Rtskhiladze in at least two ways. First, someone may find the Mueller Report but not the Senate Report — in which case the Mueller Report would still cause Rtskhiladze's alleged injury. Alternatively, readers of both reports may continue to believe Mueller. After all, Congress neither speaks for DOJ, nor speaks infallibly. Either way, a court could redress the ongoing injury by ordering DOJ to correct the Mueller Report.

Such readers are not hypothetical here: Rtskhiladze presented evidence that one of his reputational harms could be solved by a "retraction" issued "from the Attorney General." *See* JA 120 n.2 (cleaned up). In other words, the alleged and ongoing injury is traceable to DOJ's Mueller Report, and it could still be redressed by an order to correct it.

DOJ argues that Rtskhiladze has no right to a full retraction of the Mueller Report's references to

him because some are accurate, and it's the accurate information that's harming Rtskhiladze's reputation. Perhaps. But in a defamation suit, truth is a *defense* — not an impediment to standing. *See White v. Fraternal Order of Police*, 909 F.2d 512, 518, 285 U.S. App. D.C. 273 (D.C. Cir. 1990). And though this is not a defamation suit, the same logic applies. The (partial) truth of the Mueller Report is a defense for DOJ — not a barrier to stop Rtskhiladze from bringing his equitable claims.

We therefore reverse the district court's decision to dismiss Rtskhiladze's equitable claims for lack of standing and remand to the district court to address DOJ's motion to dismiss them for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).[6]

B. Damages Claim

Like the district court, we hold that Rtskhiladze has standing to seek damages for injuries that DOJ allegedly inflicted *before* the Senate Report's release. Unlike the district court, we hold that Rtskhiladze also has standing to seek damages for injuries inflicted *after* that point.

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6. The district court did not consider the merits of Rtskhiladze's equitable claims (unlike his damages claim). Though DOJ briefed merits arguments about why the equitable claims fail, we see no reason to deviate from our "general practice" of remanding for the district court to address those arguments in the first instance. *See Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 956, 427 U.S. App. D.C. 174 (D.C. Cir. 2016).

As we explained above, the Mueller Report could still harm Rtskhiladze regardless of what is in the Senate Report. So for the same reasons Rtskhiladze has standing to seek equitable relief to redress ongoing injuries, he has standing to seek monetary relief for those injuries.[7]

That said, Rtskhiladze has failed to plausibly state a claim for monetary relief. *See* Fed. R. Civ. P. 12(b)(6).[8]

Recall that he sued for damages under the Privacy Act. That Act requires plaintiffs seeking damages to show (among other things) that a federal agency's conduct was "intentional or willful." 5 U.S.C. § 552a(g)(4). The conduct "must be so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful." *Laningham v. United States Navy*, 813 F.2d 1236, 1242, 259 U.S. App. D.C. 115 (D.C. Cir. 1987) (cleaned up).

On appeal, Rtskhiladze has forfeited any argument that he plausibly alleged "intentional or willful" conduct

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7. On appeal, DOJ tries to rebut the district court's analysis by offering an alternative source of Rtskhiladze's alleged injury — an August 2017 *New Yorker* article discussing Rtskhiladze's connection to President Trump. But that argument is belied by the facts. The Georgian government began the process of appointing Rtskhiladze as an "Honorary Consul" in the "summer and fall of 2017," and terminated his candidacy once the Mueller Report was released almost two years later. JA 45, 85. The district court was right to conclude that, given this timeline, Rtskhiladze plausibly alleged that the Mueller Report (and not the article) harmed him.

8. Our review is de novo. *See Momenian v. Davidson*, 878 F.3d 381, 387, 433 U.S. App. D.C. 404 (D.C. Cir. 2017).

by DOJ. Instead, he cites common-law defamation precedents. But this is not a defamation suit, and the Privacy Act's explicit text requires Rtskhiladze to allege "intentional or willful" conduct. 5 U.S.C. § 552a(g)(4). So here, common law cases are not on point.

Because Rtskhiladze has not even attempted to meet the Privacy Act's requirements, we affirm the district court's dismissal of his damages claim.

C. Obtaining the Grand Jury Transcript

The district court did not err by denying Rtskhiladze's request to obtain a copy of the transcript of his grand jury testimony. By "obtain," we mean gaining control of a transcript copy rather than accessing one already in the government's control. *See* Fed. R. Crim. P. 6(e)(1). And by "copy," we mean a transcript not prepared by a witness (or his attorneys) taking notes while he accesses the transcript of his testimony.

1. Burden of Proof

Before assessing the district court's decision, we must resolve a threshold dispute. DOJ says Rtskhiladze bears the burden of demonstrating a need to obtain a copy of the transcript of his grand jury testimony. But Rtskhiladze says the burden is on DOJ to establish why his request should be denied.

Rtskhiladze's argument relies on two of our cases. But neither provides the support he needs.

The first is *In re Sealed Motion*, 880 F.2d 1367, 279 U.S. App. D.C. 294 (D.C. Cir. 1989). There, we held that "a grand jury 'witness' in an independent counsel proceeding" was "entitled to a copy of his testimony" when "no indictment was returned and the Final Report ha[d] been filed." *Id.* at 1368. But that case was unique because the Independent Counsel Act was "*sui generis*." *Id.* at 1369.

Students of the 1980s and '90s may remember that the Act provided for an independent counsel with special powers insulating him from executive-branch control, including removal protections. *See* 28 U.S.C. § 596(a). "Because of an independent counsel's special powers, Congress provided *special procedures* . . . to ensure fairness to the targets of such investigations and to those touched by investigations." *In re Sealed Motion*, 880 F.2d at 1369-70 (emphasis added). And those procedures implied an exception to "the general rule of grand jury secrecy." *Id.* at 1370.

Because the Independent Counsel Act expired long ago, *In re Sealed Motion* does not control here. Though Mueller was a special counsel, he was not an independent counsel. He lacked some of the "special powers" enjoyed by the independent counsels of the '80s and '90s — including statutory protections against at-will removal. *Id.* at 1369; *see also* 28 U.S.C. § 596(a)(1).

Outside of the independent counsel process, proceedings are governed by "the general rule of grand jury secrecy" in Federal Rule of Criminal Procedure 6(e).

See In re Sealed Motion, 880 F.2d at 1370; Fed. R. Crim. P. 6(e)(2)(B) ("Unless these rules provide otherwise," grand jurors, government attorneys, and other specified personnel "must not disclose a matter occurring before the grand jury . . . ."). Thus Rule 6(e) — and not the special procedure outlined in the Independent Counsel Act — governs here.

Rtskhiladze relies on a second case: *In re Grand Jury*, 490 F.3d 978, 377 U.S. App. D.C. 25 (D.C. Cir. 2007). It held that grand jury "secrecy rules" — the provisions of Federal Rule of Criminal Procedure 6(e) — "are no justification for denying witnesses *access to their own transcripts*." *Id.* at 989 (emphasis added in part).

But on appeal, Rtskhiladze does not seek "access" to his transcript — he already got that. And *In re Grand Jury* limited its holding to "access" — not to obtaining a copy of the transcript, which Rtskhiladze could keep as a record and release to the public. *See* 490 F.3d at 987 (noting commentators' failure to "distinguish[ ] between having access and obtaining a copy"); *see also* Oral Arg. Tr. at 6, 9-10. In fact, *In re Grand Jury* expressly left open the question of what factors "would justify denying copies of transcripts." 490 F.3d at 989-90.

To answer that open question, we apply the same framework used in *In re Grand Jury*. We "weigh the competing interests of the Government and grand jury witnesses" given "the open-ended text of Rule 6(e)(3)(E)(i) and the general analytical approach of the cases." *Id.* at 987; *see also* Fed. R. Crim. P. 6(e)(3)(E) ("The court may

authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding . . . .").[9]

First consider a witness's interest in obtaining a copy of his grand testimony. It is minimal — at least when, as here, he has already received access to the transcript and has been afforded a discretionary opportunity to take notes. *See In re Grand Jury*, 490 F.3d at 990 ("We leave to the sound discretion of the district court whether . . . to allow the witnesses or their attorneys to take notes."). Unless the district court says otherwise, such a witness could even write out his own version of the transcript in his notes. He could take this self-made transcript, walk outside, and "stand on the courthouse steps [to] tell the public everything the witness was asked and answered." *Id.* at 989. That kind of witness can, in other words, do just about everything that he might want to do by obtaining a copy.

Now consider the relevant interest of DOJ. That interest is primarily in limiting "the possibility of witness intimidation" to encourage honest testimony. *Id.* When it comes to a witness *obtaining* a transcript of grand jury testimony, that interest is significant. "[I]f a witness could

9. Rtskhiladze notes that Federal Rule of Criminal Procedure 6(e) imposes secrecy requirements on the government, but not on witnesses who testify before the grand jury. *See In re Grand Jury*, 490 F.3d at 989. True enough. But that does not mean we can ignore Rule 6(e) in this case, or abandon the interest-balancing approach we have developed when applying the Rule. *See id.* at 980, 987-88.

routinely obtain a copy of the grand jury transcript," a third party could "pressure the witness to obtain the transcript and to give it to that third party." *Id.* And the "fear of being forced to disclose the transcript to a threatening third party could deter witnesses from testifying freely and candidly in the first place." *Id.*

DOJ's interest is far less significant when the issue is transcript *access* (what Rtskhiladze was granted) rather than *obtaining* a copy of the transcript (what Rtskhiladze was denied). Witnesses with access remain free to protect themselves by misleading any third parties who threaten them. Consider that someone like a court reporter preparing a transcript copy has every incentive to be complete and accurate. Conversely, if a witness transcribes the transcript in his notes, he could alter or omit details if needed to protect himself. So "denying witnesses access to their own transcripts to help prevent witnesses from talking to others makes little sense." *Id.*; *see also id.* at 990 ("Grand jury witnesses are not substantially more likely to face pressure to divulge information about their grand jury testimony if they can review their transcript in private than if they have to recall their testimony from memory.").

That difference — between DOJ's interest in blocking transcript access (*In re Grand Jury*) and its interest in blocking a witness from obtaining a copy of the transcript (this case) — explains why the interest balancing is not identical in the two cases.

To sum up, the district court should weigh the interests of the government against those of the witness when deciding whether a witness can obtain a copy of his grand jury transcript. So the district court was correct when it refused to create a rule automatically permitting witnesses to obtain a copy of their grand jury transcripts. The burden is on the witness to provide an interest of his own for the district court to consider. And when the district court weighs that interest against the government's, we will review its decision for an abuse of discretion. *See id.* at 990.

2. Review of the District Court's Exercise of Discretion

Applying abuse-of-discretion review, we have little trouble affirming the decision of the district court.

Rtskhiladze's interest in obtaining a copy of his transcript is minimal. He fails to convincingly explain what he would gain by obtaining a copy of a transcript he has already accessed and could have transcribed. While we do not rule out the possibility that some future witness might provide a convincing reason for obtaining a copy of the transcript of his grand jury testimony, Rtskhiladze has provided none here. In contrast, DOJ has a significant interest in not chilling the testimony of future grand jury witnesses.[10]

10. Rtskhiladze says he should be allowed to publish a copy to counteract DOJ's alleged publication of other parts of his testimony that portray him a negative light. But he never identifies where DOJ made those disclosures. None of footnote 112 was redacted to block

We therefore hold that the district court did not abuse its discretion when it denied Rtskhiladze's request to obtain a copy of his grand jury transcript.

III. Conclusion

The district court held that Rtskhiladze lacked standing to bring his equitable claims. We reverse that decision and remand those claims.

We agree with the district court that Rtskhiladze has standing to bring his damages claim for alleged injuries suffered *before* the Senate Report's release. But unlike the district court, we conclude that Rtskhiladze also has standing to sue for damages for alleged harms *after* the Senate Report's release.

Though Rtskhiladze has standing to sue for damages, he has failed to state a claim for which relief can be granted. So we affirm the district court's dismissal of that claim.

Finally, the district court concluded that Rtskhiladze is not entitled to obtain a copy of his grand jury transcript. That decision was not an abuse of discretion, so we affirm.

So ordered.

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grand jury information — though much of the Mueller Report is redacted for that reason — and the footnote does not cite grand jury testimony at any point. And the footnote contains citations to other sources that Rtskhiladze does not challenge.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 1, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 20-cv-1591 (CRC)

GIORGI RTSKHILADZE,

Plaintiff,

v.

ROBERT S. MUELLER III, AND UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

MEMORANDUM OPINION

There's an old saying that reputation arrives on foot but leaves on horseback. If that holds true in this case, the question is who opened the stable door.

Georgian-American businessman Georgi Rtskhiladze claims to have suffered reputational damage and lost business opportunities because of information published in a footnote to former Special Counsel Robert Mueller's April 2019 report on Russian interference in the 2016 presidential election. The footnote recounts Rtskhiladze's pre-election contacts with Michael Cohen, then-candidate Donald Trump's lawyer, about the possible existence of

compromising video tapes of Trump recorded in Russia. Rtskhiladze acknowledges discussing the would-be tapes with Cohen. He nonetheless complains that the footnote sullied his reputation as an upstanding businessman by falsely associating him with representatives of a shadowy Russian real estate conglomerate who were rumored to hold the tapes. Riskhiladze has sued Mr. Mueller in his individual capacity for his role in drafting the report and the Department of Justice for its role in publishing it. He seeks $100 million in damages and a range of equitable relief including retraction and deletion of the offending footnote.

DOJ and Mr. Mueller have separately moved to dismiss the case. DOJ principally argues that Rtskhiladze lacks standing because his alleged reputational injuries are not fairly traceable to any inaccuracies in Mr. Mueller's report and thus cannot be redressed by any ruling of this Court. The Department contends that neither it nor Mr. Mueller opened the stable door, as it were, because Rtskhiladze's Russian business connections and his communications with Cohen about the rumored tapes are the subject of other widely-published reports, most notably an account by the Senate Select Committee on Intelligence whose accuracy Rtskhiladze does not challenge. Mr. Mueller, for his part, argues that Rtskhiladze has failed to plead a cognizable individual-capacity claim against him and, in any case, that Rtskhiladze has conceded the motion to dismiss by not responding to that argument in his opposition brief.

Concurring with both defendants, the Court will grant their motions and dismiss the case.

Appendix B

I. Background

The Court draws the following background from Rtskhiladze's amended complaint and materials it references. *See Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (citations omitted). The Court must accept the complaint's allegations as true in deciding the motions to dismiss. *Id.*

A. Rtskhiladze's activities prior to the publication of the Mueller Report

Giorgi Rtskhiladze was born in then-Soviet Georgia and immigrated to the United States in 1991, at the age of 21. Professing affection for both his native and adopted lands, he claims to have devoted his career to "strengthening the bonds between the United States and Georgia." First Am. Compl. ("FAC") at ¶ 9. To that end, Rtskhiladze has been involved in an array of organizations at the intersection of investments, nonprofits, and foreign relations. *Id.* at ¶¶ 9-17. Most relevant here is Rtskhiladze's role as a "strategic advisor" to an investment company known as the Silk Road Group. *Id.* at ¶ 3.

As part of his work for the Silk Road Group, from 2010 to 2015 Rtskhiladze cultivated a relationship with then-businessman Donald Trump and his former attorney Michael Cohen. *Id.* at ¶¶ 18-20. During that period, Trump pursued a number of real estate investments in Georgia, most prominently a Trump Tower project planned for the coastal city of Batumi. *Id.* Rtskhiladze worked closely with the Trump Organization on a licensing arrangement for

the Batumi project and communicated with Cohen about "several other Trump Tower licensing projects," including one in Moscow. *Id.* at ¶¶ 18, 20. Rtskhiladze and Cohen remained in touch as Trump began his political career. *See id.* at ¶¶ 20-21.

1. Rtskhiladze's correspondance with Cohen regarding certain "tapes" from Russia

In October 2016, Rtskhiladze received a telephone call from an unnamed friend. The friend apparently had attended a dinner party the night before where he overheard someone "bragging about some tapes related to a trip by Mr. Trump to Moscow." *Id.* at ¶ 21. The friend knew that Rtskhiladze had worked with the Trump Organization and decided to pass along the gossip. *Id.* The next day, Rtskhiladze texted Cohen that he had "[s]topped flow of some tapes from Russia." *Id.* at ¶ 31. He indicated that he was "not sure if there's anything else[,]" but was reaching out "[j]ust so u know . . . ." *Id.* Cohen asked, "[t]apes of what?" Rtskhiladze replied, "[n]ot sure of the content but person in Moscow was bragging had tapes from Russia trip." *Id.* He promised to "try to dial [Cohen] tomorrow but wanted [Cohen] to be aware[,]" adding, "I'm sure it's not a big deal but there are lots of stupid people." *Id.* Cohen responded, "[y]ou have no idea," and Rtskhiladze commiserated with a brief "I do[,] trust me." *Id.*

This exchange came to the attention of former Special Counsel Robert Mueller during his investigation into potential Russian interference in the 2016 election. *See id.*

at ¶¶ 24-27. Mr. Mueller's team interviewed Rtskhiladze several times in 2018, and he provided the investigation with various documents, including the text messages quoted above. *Id.*

2. Press coverage of Rtskhiladze and the Silk Road Group prior to the publication of Footnote 112

Rtskhiladze's representation of the Silk Road Group in its dealings with the Trump Organization also drew the attention of the press. *See id.* at ¶ 53. Most notably, this work was the subject of an August 2017 *New Yorker* article by Adam Davidson, entitled "Trump's Business of Corruption." *See id.* The article centered on the relationship between the Silk Road Group and then-President Trump in the years leading up to his election. Adam Davidson, *Trump's Business of Corruption*, The New Yorker, Aug. 14, 2017, https://www.newyorker.com/magazine/2017/08/21/trumps-business-of-corruption. It discussed Trump Tower projects in Georgia, Moscow, and Kazakhstan and recounted large loans made to the Silk Road Group by a Kazakh bank that was embroiled in a money laundering scandal. *See id.* The article quoted Rtskhiladze extensively and described him as "broker[ing]" the relationship between the Silk Road Group and Trump. *Id.* The piece questioned the relationship between the Silk Road Group and Trump's businesses, noting potential money laundering risks. *Id.* It also described Rtskhiladze as playing a key role in the deal that brought a Trump Tower to Georgia, as well as facilitating meetings between Cohen and Kazakh

government officials in 2011. *Id.* The magazine rebuffed the Silk Road Group's demand for a retraction. *See* FAC at ¶ 53.

In the wake of the *New Yorker* article, and shortly before the Mueller Report was published, the Overseas Private Investment Corporation ("OPIC") cancelled a loan guarantee with the Silk Road Group. *Id.* at ¶¶ 54-58. Rtskhiladze's complaint alleges "upon information and belief that OPIC was advised of the contents of Footnote 112 before it was formally delivered to Attorney General Barr, and further, that OPIC's awareness of the content of Footnote 112 led to OPIC's decision on March 13, 2019 to formally cancel [the] loan agreement." *Id.* at ¶ 59.

B. The publication of the Mueller Report

The Department of Justice released a redacted version of the Mueller Report to the public in April 2019. *Id.* at ¶ 28. Rtskhiladze featured in several sections of the report describing his work on the Trump Tower Moscow project as well as his connections with the Crocus Group, a real estate firm owned by Russian billionaire Aras Agalarov. *See* Special Counsel Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Election*, Vol. 1, at 70 (2019) ("*Mueller Report*"). Agalarov, in turn, was identified as having cohosted the 2013 Miss Universe pageant in Moscow with Trump and having engaged in negotiations with the Trump Organization for the construction of a Trump Tower Moscow. *See, e.g., id.* at 67. The report noted that Rtskhiladze had offered to arrange meetings between Trump and "the highest level

of the Russian Government" in order to garner "worldwide attention" for the Trump Tower project. *Id.* at 70. And it recounted Rtskhiladze's extensive involvement in the project, including his drafting of a letter to the mayor of Moscow touting the project's benefits. *Id.*

In these sections, the report variously describes Rtskhiladze as a "business executive," a "U.S.-based executive of the Georgian company Silk Road Group," and an "[e]xecutive of the Silk Road Transatlantic Alliance, LLC." *Id.* at 70; *Mueller Report*, Vol. 2 at App. B-9.

1. Footnote 112

In addition to the sections of the report describing Rtskhiladze's work on behalf of the Silk Road Group and the Trump Tower Moscow project, Rtskhiladze features in Footnote 112 of volume two of the Mueller Report. That footnote appears in a section of the report describing interactions between President Trump and former FBI Director James Comey regarding the allegations contained in an investigation report prepared by former British intelligence official Christopher Steele ("the Steele Dossier"). *Mueller Report*, Vol. 2 at 27-28 n.112. The sentence in the text corresponding to Footnote 112 states "Comey then briefed the President-Elect on the sensitive material in the Steele reporting." *Id.* at 27. After citing the source material for that statement, the footnote reads in full:

> Comey's briefing included the Steele reporting's unverified allegation that the Russians had

> compromising tapes of the President involving conduct when he was a private citizen during a 2013 trip to Moscow for the Miss Universe Pageant. During the 2016 presidential campaign, a similar claim may have reached candidate Trump. On October 30, 2016, Michael Cohen received a text from Russian businessman Giorgi Rtskhiladze that said, "Stopped flow of tapes from Russia but not sure if there's anything else. Just so you know . . . ." 10/30/16 Text Message, Rtskhiladze to Cohen. Rtskhiladze said "tapes" referred to compromising tapes of Trump rumored to be held by persons associated with the Russian real estate conglomerate Crocus Group, which had helped host the 2013 Miss Universe Pageant in Russia. Rtskhiladze 4/4/18 302, at 12. Cohen said he spoke to Trump about the issue after receiving the texts from Rtskhiladze. Cohen 9/12/18 302, at 13. Rtskhiladze said he was told the tapes were fake, but he did not communicate that to Cohen. Rtskhiladze 5/10/18 302, at 7.

Id. at 27-28 n.112.

Rtskhiladze alleges that, in addition to conveying various negative implications discussed below, the footnote both misquoted his exchange with Cohen—Rtskhiladze had used the construction "some tapes" in his texts, rather than "tapes" as quoted—and erroneously described him as "Russian" rather than Georgian. FAC at ¶¶ 30, 33. Because the tapes referenced in Footnote 112 had

already been the subject of media speculation, the report's descriptions of Rtskhiladze's activities in connection with "compromising tapes"—as well as its characterization of him as "Russian"—appeared in several press articles following the report's release. *Id.* at ¶¶ 29, 43-49.

Rtskhiladze alleges that he suffered numerous harms following the public disclosure and ensuing media coverage of the Mueller Report. In particular, he claims that the Government of Georgia rescinded its offer of an "Honorary Consul" position. *Id.* at ¶ 52. And he identifies various business opportunities he claims to have lost due to allegedly false perceptions created by Footnote 112, namely: (1) the cancellation of a $50 million transaction which was to generate $2.5 million in fees; (2) his "forced [] withdraw[al]" from a transaction to purchase a communications company which would have earned him $200,000 in "annual income" and a commission on the transaction; (3) his "forced [] abandon[ment]" of work involving "raising hundreds of millions of dollars in Euro bonds," for which he was to earn a cut of the transaction value; (4) the suspension of a "highly paid strategic advisor" role with a "major financial institution"; (5) the non-renewal of an agreement with a "large energy corporation" that had earned Rtskhiladze "hundreds of thousands of dollars annually"; and (6) "[n]umerous [other] business opportunities because no . . . financial institutions will meet with him once they Google his name." *Id.* at ¶¶ 60, 61.

C. The current suit

Following the publication of the Mueller Report, Rtskhiladze submitted a Privacy Act request to the Department of Justice demanding that it amend the report to delete all references to him. *Id.* at ¶¶ 62-65. The Department denied the request in June 2020 on the ground that the report was not maintained in a system of records from which information is retrieved using a personal identifier, as required for a Privacy Act claim. *See Id.* at ¶ 65. Rtskhiladze filed an administrative appeal of this determination, arguing that the Privacy Act's system-of-records requirement did not apply to his request. *Id.* at ¶ 66. Receiving no response, Rtskhiladze filed this suit in June 2020. *See id.* at ¶ 66-67. He amended his complaint in August 2020.

The amended complaint advances four claims: *first*, a Fifth Amendment claim alleging government defamation, which seeks damages against Mr. Mueller in his individual capacity on the grounds that the "publication of false, reckless, and misleading statements in Footnote 112 without providing plaintiff with an opportunity to be heard" violated Rtskhiladze's procedural due process rights, *id.* at ¶¶ 1, 70; *second*, a "name-clearing" claim under the Administrative Procedure Act ("APA") and the Declaratory Judgment Act on the grounds that the statements in Footnote 112 were "defamatory . . . arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law, and unconstitutional," *id.* at ¶¶ 1, 74; *third*, a claim under the Privacy Act

seeking an amendment of Footnote 112 due to alleged inaccuracies that have caused Rtskhiladze to suffer "adverse determinations," *id.* at ¶ 76; and *fourth*, a claim under the Privacy Act seeking damages against DOJ for "intentional or willful" failures to comply with the statute, *id.* at ¶¶ 78-79.

D. The Senate Select Committee on Intelligence Report

After Rtskhiladze filed this suit but before DOJ and Mr. Mueller moved to dismiss, the Senate Select Committee on Intelligence released Volume V of its report on "Russian Active Measures Campaigns and Interference in the 2016 Election." S. Rep. No. 116-290, Vol. 5 (2020) ("*Senate Report*"). This volume discusses the same contacts between Rtskhiladze and Cohen discussed in Footnote 112 of the Mueller Report. In a section on "[a]llegations, and [p]otential [m]isinformation, [a]bout [c]ompromising [i]nformation," the Senate Report states that the committee's investigation was prompted by "[a]llegations that the Russian government had compromising information on then-candidate Trump," which "emerged in 2016, and were more fully made public in early 2017, through memos produced by Christopher Steele," as well as certain allegations that "in some cases predated both Steele's memos and the 2016 U.S. presidential campaign." *Id.* at 636. The Senate Report discusses Rtskhiladze's activities at length in the course of its heavily redacted discussion of the various allegations.

The Senate Report first identifies Rtskhiladze's contacts with Cohen as part of "three general sets of allegations" regarding "Russian government collected

kompromat on Trump" that were "[s]eparate from Steele's memos." *Id.* at 638. Discussing those allegations, the report indicates that "Cohen has testified that he became aware of allegations about a tape of compromising information in late 2013 or early 2014 . . . related to Trump and prostitutes." *Id.* at 658. As a result, Cohen "asked a friend, Giorgi Rtskhiladze, to see if Rtskhiladze could find out if the tape was real." *Id.* It adds that "Cohen . . . would have been willing to pay . . . to suppress the information if it could be verified." *Id.* The Senate Report then summarizes a response offered by Rtskhiladze to the Select Committee in 2019:

> During an October 2015 phone call that Mr. Rtskhiladze had with his friend and former business associate, Sergei Khokhlov, Mr. Khokhlov stated that while having dinner at a restaurant, Mr. Khokhlov overheard a stranger at a table next to him discuss tapes from Donald Trump's visit to Russia. The overheard dinner conversation was not important to Mr. Rtskhiladze and Mr. Khokhlov so they did not discuss this matter again. Mr. Khokhlov was aware that Mr. Rtskhiladze and his Georgian partners were in business with the Trump Organization. Due to the news about the Access Hollywood tapes and its potential impact on Mr. Trump's reputation, Mr. Rtskhiladze sent a text message to Mr. Cohen to inform him that an individual was overheard discussing sensitive tapes of Mr. Trump's trip to Russia.

Id. at 659.

The Senate Report proceeds to quote the full exchange of texts between Rtskhiladze and Cohen from October 2016, including those recounted above, and indicates that the two also had a "telephone conversation, possibly the following day, regarding the alleged tape." *Id.* at 660. While the report does state that "Rtskhiladze has said that Khokhlov subsequently called and stated that the tapes were fake," it goes on to note that "Rtskhiladze said this information was not conveyed to Cohen." *Id.* The Senate Report also quotes an email dated the day after the Steele Dossier allegations were published in 2017, in which Rtskhiladze wrote to a publicist that he had "told [Cohen] there was something there b 4 election," adding, "well that's what happens when you visit crocus I guess." *Id.* at 660. The report concludes its discussion of Rtskhiladze's involvement with the rumored tapes by stating, "[t]hough Rtskhiladze did not have personal insight into the matter, he assessed that if compromising material existed, Crocus Group would likely be responsible." *Id.* Other sections of the Senate Report note that "Rtskhiladze . . . [has] contacts connected to the Kremlin, particularly the office of Dimitri Peskov," whom the report alternatively describes as "a senior Kremlin official and key advisor to [Russian President Vladimir] Putin," "spokesperson for the Kremlin," and "Putin's press secretary." *Id.* at 283, 408, 422. Rtskhiladze told Cohen that Peskov was his "good friend." *Id.* at 422.

II. Legal Standards

DOJ and former Special Counsel Mueller have moved to dismiss Rtskhiladze's claims for lack of standing under

Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

A. Motions to Dismiss for lack of standing under 12(b)(1)

Standing is a jurisdictional matter. As such, a complaint may be dismissed for lack of standing under Federal Rule of Civil Procedure 12(b)(1). *See, e.g., Kareem v. Haspel*, 986 F.3d 859, 865, 866 n.7, 451 U.S. App. D.C. 1 (D.C. Cir. 2021). As with other jurisdictional issues, the plaintiff bears the burden of establishing standing by a preponderance of the evidence at the motion to dismiss stage. *Whiteru v. Wash. Metro. Area Transit Auth.*, 258 F. Supp. 3d 175, 182 (D.D.C. 2017) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000) (internal citations omitted). However, a court ruling on a 12(b)(1) motion should give "closer scrutiny" to the factual allegations and may look to documents outside the complaint to determine if jurisdiction exists. *Delta Air Lines Inc. v. Export-Import Bank of U.S.*, 85 F. Supp. 3d 250, 259 (D.D.C. 2015). "[T]hreadbare recitals of the elements of [standing], supported by mere conclusory statements, do not suffice." *Arpaio v. Obama*, 797 F.3d 11, 19, 418 U.S. App. D.C. 163 (D.C. Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)) (second alteration in original). Neither do "inferences that

are unsupported by the facts set out in the complaint." *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732, 375 U.S. App. D.C. 93 (D.C. Cir. 2007).

A plaintiff establishes Article III standing by showing that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (internal quotation marks omitted). Because Rtskhiladze's complaint "seeks prospective declaratory and injunctive relief," he cannot "rest on past injury" but instead "must establish an ongoing or future injury." *Arpaio*, 797 F.3d at 19 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," particularly "in the fields of intelligence gathering and foreign affairs." *Clapper*, 568 U.S. at 408-09 (internal quotations omitted); *see also Kareem*, 986 F.3d at 865-66.

B. Motions to Dismiss under 12(b)(6)

In analyzing a motion to dismiss under Rule 12(b)(6), the Court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim

to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is "facial[ly] plausib[le] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A court must "treat the complaint's factual allegations as true [and] must grant plaintiff the benefit of all reasonable inferences from the facts alleged." *Trudeau v. FTC*, 456 F.3d 178, 193, 372 U.S. App. D.C. 335 (D.C. Cir. 2006) (citation omitted) (alteration in original).

III. Analysis

Rtskhiladze's suit centers on what he alleges are defamatory statements and implications contained in Footnote 112 of the Mueller Report. In particular, Rtskhiladze takes issue with the portions of Footnote 112 that discuss his 2016 communications with the Trump campaign regarding rumors of salacious videos of then-candidate Trump taken during Trump's travels to Russia. Rtskhiladze admits he had contacts in 2016 with the Trump campaign and that those contacts included text messages with Trump's then-attorney, Michael Cohen, in which Rtskhiladze indicated that he had stopped the "flow of some tapes from Russia." He nonetheless contends that Footnote 112 misquoted some of his statements and falsely implied that he was both closely connected with the alleged purveyors of the supposed tapes and aware of their contents. He claims that these misrepresentations, amplified by the prominence of the Special Counsel's investigation, have caused him harms ranging from the

loss of business opportunities to the denial of honorary awards by the Georgian government. His amended complaint seeks damages under the Privacy Act and the Fifth Amendment, and equitable relief under the Administrative Procedure Act, the Declaratory Judgment Act, and the Fifth Amendment to redress his allegedly ongoing reputational injuries. DOJ and Mr. Mueller have moved to dismiss Rtskhiladze's complaint. The Court will grant the defendants' motions for three related reasons.

First, with respect to his requests for injunctive and declaratory relief, Rtskhiladze has not established standing. A plaintiff lacks standing to bring claims for prospective injunctive and declaratory relief if the requested relief would not redress an ongoing harm. Here, Rtskhiladze cannot show that the equitable relief he seeks—a "name-clearing" hearing under the Privacy Act and retraction and deletion of Footnote 112—will redress his alleged injuries given the publication of Volume V of the Senate Select Committee on Intelligence's report on Russian interference in the 2016 election. The Senate Report contains essentially the same material and implications as Footnote 112 yet was derived from an independent investigation. To the extent that there are any differences between Footnote 112 and the Senate Report, these distinctions could not plausibly have caused any of Rtskhiladze's purported injuries. The disputed material in Footnote 112 will thus remain in the public record and bear the imprimatur of an official federal investigation regardless of any relief ordered here, making Rtskhiladze's asserted injuries not redressable by the equitable relief he requests in this case.

Second, with respect to his claim for damages under the Privacy Act, Rtskhiladze must plausibly allege that the publication of the allegedly incorrect material was intentional or willful. He has not done so. The Senate Report contains essentially the same information as Footnote 112 and thus similarly implicates Rtskhiladze's reputation. Rtskhiladze's entire claim of willfulness rests on the argument that the material in Footnote 112 was so nakedly defamatory that it could only have been included intentionally or willfully. That inference is not plausible, however, given the Senate Report's publication of largely the same information, and Rtskhiladze's concession that the material contained in the Senate Report is accurate. The Court will therefore dismiss Rtskhiladze's claim for damages under the Privacy Act for failing to plausibly allege that the publication of the allegedly false information in Footnote 112 was done intentionally or willfully.

Finally, Rtskhiladze's argument in his briefing that he is entitled to damages against DOJ under the Fifth Amendment fails because he did not include that claim in his amended complaint. And his damages claim against Special Counsel Mueller fails because he has conceded Mr. Mueller's arguments against it.

The Court elaborates below.

A. Standing

The precise beefs that Rtskhiladze has with Footnote 112 bear repeating. The amended complaint alleges that Footnote 112: (1) "wrongfully [tied] [Rtskhiladze] to the

Steele Dossier," including by falsely implying that he knew that the tapes he was discussing with Cohen were the same as those mentioned in the Steele Dossier; (2) "falsely identif[ied] him as a 'Russian Businessman'"; (3) omitted the modifier "some" prior to "tapes" in its quotation of one of his texts with Cohen; (4) wrongfully implied that he had contacts with the Russian real estate conglomerate "Crocus Group"; and (5) "speciously declar[ed] that [he] . . . withheld information that the tapes were fake from Mr. Cohen." FAC at ¶¶ 33, 36, 50. These purported misstatements and implications, Rtskhiladze alleges, caused him a variety of financial and reputational harms.

The parties appear to agree that Rtskhiladze's alleged financial and reputational injuries are sufficiently concrete to satisfy standing. They spar, however, over whether Rtskhiladze's alleged injuries are "fairly traceable" to the publication of Footnote 112 and whether they can be redressed by a ruling in his favor.

Rtskhiladze's injuries and requested relief fall into two categories—past injuries which would be redressed by an award of damages, and ongoing injuries which would be redressed by injunctive or declaratory relief.

As explained below, Rtskhiladze has established standing to bring the first category of claims by plausibly alleging that at least some of the harms to his business opportunities and reputation prior to September 2020 are fairly traceable to the publication of Footnote 112. Damages, where available, are an adequate remedy for such harms. *See City of Los Angeles v. Lyons*, 461 U.S.

95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Although the Court will dismiss Rtskhiladze's damages claims for other reasons, they do not fail for lack of standing.

The Court reaches a different result on Rtskhiladze's claims for declaratory and injunctive relief. In his telling, Rtskhiladze's ongoing injuries derive from the continued public availability of the allegedly material facts and implications contained in Footnote 112. *See* Pl.'s Resp. to DOJ Mot. to Dismiss at 18-20. Rtskhiladze thus must show that his ongoing injuries are fairly traceable to Footnote 112 and would be redressed by the equitable remedy of declaring it defamatory and (somehow) deleting it from existing and future versions of the Mueller Report. *See Lyons*, 461 U.S. at 108-09; *Arpaio*, 797 F.3d at 19. He can do neither because the Senate Select Committee on Intelligence Report, published in August 2020, is an independent and unchallenged source of these same facts and implications that would not be affected by a decision in Rtskhiladze's favor in this case.

1. Causation and redressability of injuries for which Rtskhiladze seeks damages

Rtskhiladze asks for damages to redress his past economic and reputational injuries. DOJ organizes Rtskhiladze's injuries into three categories and contends that none of them are properly attributable to Footnote 112: (1) harms caused by negative press Rtskhiladze received prior to the release of the Mueller Report, (2) harms caused by Rtskhiladze's voluntary choices, and (3) harms that are not plausibly related to the disclosures

contained in Footnote 112. *See* DOJ Mot. to Dismiss at 7-9, 13. Rtskhiladze links all three categories to Footnote 112 and has submitted a declaration detailing the alleged harms and their causes. *See* Pl.'s Decl. While the Court agrees with DOJ that some alleged harms which occurred prior to the publication of Footnote 112 are not fairly traceable to that footnote, it finds that Rtskhiladze has plausibly alleged that at least some business and reputational harms he purportedly suffered between the releases of the Mueller Report in April 2019 and the Senate Report in August 2020 are fairly traceable to Footnote 112.

a. Harms prior to the publication of Footnote 112

Beginning with the alleged harms stemming from the negative press regarding Rtskhiladze's relationship with the Silk Road Group prior to the publication of Footnote 112, the Court concludes DOJ is correct that at least one alleged harm—OPIC's cancellation of a loan guarantee—is not fairly traceable to Footnote 112. As noted previously, Rtskhiladze featured prominently in the 2017 *New Yorker* article on the Silk Road Group's legally suspect dealings with the Trump Organization. *See* Adam Davidson, *Trump's Business of Corruption*, THE NEW YORKER, August 14, 2017. Although the Silk Road Group protested purported inaccuracies in the article, *The New Yorker* declined to issue a retraction. FAC at ¶ 53. Prior to the publication of the Mueller Report, the Silk Road Group had investment support from OPIC, including a $10 million loan guarantee for a hotel project in Georgia. *Id.*

at ¶¶ 53-56. The amended complaint alleges that OPIC canceled the loan guarantee on March 13, 2019—weeks prior to the public release of the Mueller Report. *See id.* at ¶¶ 53-59.

DOJ argues that, because the cancellation of the loan guarantee occurred prior to the publication of the disputed material, the cancellation cannot have been caused by the Mueller Report's publication and is more accurately explained by the prior publication of negative facts in *The New Yorker* and other press outlets. See DOJ Mot. at 7, 20. Rtskhiladze responds by pointing to the allegation in the Amended Complaint that "upon information and belief [] OPIC was advised of the contents of Footnote 112 before it was formally delivered to Attorney General Barr." FAC at ¶ 59. His theory, then, is that someone leaked a draft of the Mueller Report to OPIC prior to its communication to the Attorney General or the public, and that OPIC relied on Footnote 112 to cancel the loan guarantee.

DOJ has the better of the argument. Where a plaintiff's theory of harm relies on implausible causal linkages substantiated only "upon information and belief," a court may be justified in rejecting the linkage even at the motion to dismiss stage. *See Tooley v. Napolitano*, 586 F.3d 1006, 1007-1010, 388 U.S. App. D.C. 327 (D.C. Cir. 2009). Although "information and belief" pleading remains permissible post-*Twombly*, the "belief" still must be "based on factual information that makes the inference of culpability plausible." *Evangelou v. Dist. of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012) (quoting *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir.

2010)). Here, Rtskhiladze's allegation lacks any factual information from which to infer that someone leaked the content of Footnote 112 to OPIC. He posits only that "the OPIC agreement was abrogated apparently for political reasons." FAC at ¶ 59. But an allegation that a government actor "apparently" acted for "political" purposes does not support a plausible inference that that action was based on the intentional leaking of an internal DOJ report. *See Twombly*, 550 U.S. at 551, 565-67 (rejecting as insufficient an allegation of a "contract, combination or conspiracy" based only "upon information and belief"); *Kareem*, 986 F.3d at 865-69 (finding no standing for suit challenging plaintiff's inclusion on a U.S. target list where the plaintiff had been present during several missile attacks but allegation of inclusion on target list was based solely upon "information and belief"). Accordingly, Rtskhiladze has not carried his burden to show that OPIC's cancellation of its agreement with the Silk Road Group was "fairly traceable" to Footnote 112.

b. Harms caused by Rtskhiladze's voluntary conduct

A plaintiff may not base standing on a self-inflicted injury. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919, 420 U.S. App. D.C. 366 (D.C. Cir. 2015). DOJ argues that several of Rtskhiladze's injuries were caused by his own decision to withdraw from various ventures following the publication of Footnote 112. *See* DOJ Mot. at 7-8. In particular, DOJ casts as voluntary Rtskhiladze's withdrawal from a telecommunications agreement and certain Eurobond transactions. *See, e.g.*, FAC at ¶ 61;

Pl.'s Decl. at ¶ 29 (explaining that Rtskhiladze and Silk Road's chairman had "agreed" that he would "pull out of all our business ventures"). In most cases, however, Rtskhiladze's complaint or subsequent declaration avers either that he was "forced" by a counterparty to withdraw from a proposed transaction, or that the loss of business resulted from unilateral action by another party. *See, e.g.*, FAC at ¶ 61; Pl.'s Decl. at ¶¶ 18, 23. As such, these alleged injuries do not constitute self-inflicted harms.

c. Harms not plausibly related to Footnote 112's disclosures

DOJ further argues (1) that it is broadly implausible that the alleged inaccuracies in Footnote 112 would have caused anyone to have a negative view of Rtskhiladze and (2) that other discussions in the Mueller Report of his activities undermine the conclusion that the footnote's specific representations caused him harm. *See* DOJ Mot. at 7-9.

At points in his complaint, Rtskhiladze specifically alleges that his reputation has suffered due to Footnote 112's misidentification of his nationality as "Russian" (rather than Georgian) and the omission of "some" before "tapes" in the footnote's quotation of his texts with Cohen. FAC at ¶¶ 33, 50. As to these two alleged misrepresentations, the Court agrees with DOJ; it is simply not plausible that anyone would have ended a business relationship with Rtskhiladze over what appears to be simply an error regarding his nationality. To the extent Rtskhiladze's nationality was material to any business

relationship or honorary awards, his U.S. residency and Georgian background were hardly a secret. Indeed, other portions of the Mueller Report accurately refer to him as a "U.S.-based executive of [a] Georgian company." *See Mueller Report*, Vol. 1 at 70 n.313. And his associates in the business community or in the Georgian government surely would have been aware of his citizenship from their dealings with him and his extensive public presence. It is also implausible that the omission of "some" before "tapes" in Footnote 112 gave any reader the wrong impression regarding Rtskhiladze's knowledge of the tapes' content. The presence or absence of "some" prior to "tapes" reveals nothing about the state of Rtskhiladze's knowledge of what the tapes may have depicted.

Rtskhiladze's complaint is not limited to these specific errors, however. As explained elsewhere, Rtskhiladze's argument is less focused on these particular inaccuracies than the overall impression that the footnote conveys—namely, that Rtskhiladze was generally aware of salacious tapes involving Trump, that he was connected with the alleged purveyors of those tapes, and that he hid his knowledge of the veracity of the tapes from Cohen.[1] *See, e.g.*, FAC at ¶ 50. Because the tapes received extensive media coverage, Rtskhiladze argues that his appearance in the footnote subjected him to unique harm. While it is a close call, the Court agrees with Rtskhiladze that it is at least plausible that such implications could cause him reputational harm.

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1. Again, the Court at this stage must accept Rtskhiladze's allegations that all of these implications are false.

To begin, none of the other references to Rtskhiladze in the Mueller Report deal with the tapes discussed in Footnote 112, undermining DOJ's argument that these other references may have been the source of any harm. This is particularly true in light of the media attention the tapes received. That being said, the unchallenged sections of the Mueller Report describe Cohen as originally speaking with Rtskhiladze regarding the proposed Trump Tower Moscow "in part because Rtskhiladze had pursued business ventures in Moscow, including a licensing deal with the Agalarov-owned Crocus Group." *Mueller Report*, Vol. 1 at 70. Although Rtskhiladze's complaint mostly objects to Footnote 112's suggestion that he dealt with the Crocus Group regarding the rumored tapes, the presence of other passages tying Rtskhiladze to the Crocus Group reduces the plausibility that the discussion of the Crocus Group in Footnote 112 caused him any harm. Still, because his theory of causation centers on the connection drawn in the footnote between himself, Crocus, and the tapes, the Court finds it plausible that Footnote 112 is the sole source of that connection in the Mueller Report. Moreover, assuming that the implications contained in the footnote were false, Rtskhiladze's portrayal in the footnote could have given associates and potential partners a negative impression of his character due to his close contact with a high-profile scandal. The Court thus finds that Rtskhiladze has plausibly alleged that the harms to his business and reputation are fairly traceable to the presence of these implications in the footnote.

But these conclusions only take Rtskhiladze so far. As explained below, Rtskhiladze has only shown causation

for harms that occurred prior to the release of the Senate Select Committee on Intelligence Report in August 2020. Thus, the injuries identified above as fairly traceable to Footnote 112 can only be used to substantiate his claims for retrospective monetary relief, and only for the period between the publication of Footnote 112 and the publication of the Senate Report in 2020. Anything else is either not fairly traceable to the publication of Footnote 112 or not redressable by any action this Court could take. These harms thus provide no basis for standing. *See Lujan*, 504 U.S. at 560-61. Nonetheless, as to the claimed business and reputational injuries during the relevant time period, the Court finds that Rtskhiladze has plausibly alleged that these harms are fairly traceable to the allegedly false representations contained in the footnote. Rtskhiladze thus has standing to seek damages to redress those injuries. *Lyons*, 461 U.S. at 108-09.

2. Causation and redressability of Rtskhiladze's ongoing injuries

Again, to establish standing a plaintiff must show that the requested relief is likely to redress the injury in question. *Davis*, 554 U.S. at 733. And he must do so for each form of relief requested. *Id.* at 734. Standing "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). The line between the causation and redressability prongs of standing can become blurred

in cases where an ongoing harm has multiple sufficient and independent sources, only some of which would be redressed by the court's ruling.

Starting with causation, because Rtskhiladze seeks forward-looking injunctive and declaratory relief, "past injuries alone are insufficient to establish standing." *Dearth v. Holder*, 641 F.3d 499, 501, 395 U.S. App. D.C. 133 (D.C. Cir. 2011); *see also Arpaio*, 797 F.3d at 19. He instead must show that he "suffer[s] an ongoing injury or faces an immediate threat of injury." *Dearth*, 641 F.3d at 501. "[I]f the injury complained of is 'the result of the independent action of some third party not before the court,'" the causal link between the alleged harm and the challenged conduct may be too attenuated for standing purposes. *Bennett v. Spear*, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quoting *Lujan*, 504 U.S. at 560-61) (internal citations and alterations omitted). Similarly, the "redressability" prong requires a showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). But a plaintiff obviously cannot make this showing when the source of the claimed harm is not before the court or within its remedial powers.

While the Court has found that Rtskhiladze has shouldered his burden with respect to some of his damages claims, it reaches a different conclusion on his requests for declaratory and injunctive relief to redress his alleged ongoing reputational injuries. As he describes them, Rtskhiladze's ongoing injuries derive from the continued

availability of false statements generated and endorsed by a high-profile federal investigation. Rtskhiladze takes specific issue with the implications that he was aware of the tapes referred to in the Steele Dossier, that he had a connection to the Crocus Group, and that he had a reputation as someone who would be familiar with those matters. *See, e.g.*, FAC at ¶ 36, 50. He argues that these implications combined to paint him as a figure "engaged in shadowy conspiratorial and/covert activities," which raised a red flag for potential business partners. *Id.* at ¶ 36. In Rtskhiladze's view, because these implications appeared in a prominent governmental investigation, the damage to his reputation is ongoing as long as they remain uncontroverted. *See id.* at ¶ 49 (stating "once the information about such a high-profile investigation is accessible on the internet the damage is done—the bell cannot be un-rung"). Rtskhiladze must show that these ongoing injuries are fairly traceable to, and would be redressed by correcting, Footnote 112.

A fatal flaw in Rtskhiladze's argument on both points is that Volume V of the Senate Select Committee Report, released in 2020, comes with all the same official attributes of the Mueller Report and equally implicates Rtskhiladze in the imbroglio surrounding the Russian government's rumored possession of compromising tapes of Trump. What's more, in an effort to contrast the Senate Report with his portrayal in Footnote 112, Rtskhiladze concedes the accuracy of the former. *See, e.g.*, Pl.'s Sur Reply at 6 (noting that "[t]he Senate Report—unlike Footnote 112—provides the overall context related to the purported tapes of Mr. Trump . . ."). As an independent, sufficient,

unchallenged, and admittedly accurate source of those same injuries that would not be affected by any decision or relief ordered in this matter, the Senate Report defeats Rtskhiladze's claim for prospective equitable relief. The Court elaborates below.

a. The Senate Report contains substantially the same—and in some cases worse—information about Rtskhiladze's activities

First, the section of the Senate Report discussing Rtskhiladze's contacts with Cohen is expressly concerned with evaluating various claims that compromising tapes of Trump existed and played a factor in the 2016 election. That section introduces Rtskhiladze by noting that "Cohen . . . in 2014 or 2015 [] asked a friend, Giorgi Rtskhiladze, to see if Rtskhiladze could find out if the tape was real." *Senate Report* at 658. That rumored "tape" apparently "related to Trump and prostitutes." *Id.* This clearly identifies Rtskhiladze as someone who Cohen believed would know about any such tapes and directly connects Rtskhiladze to tapes rumored to portray Trump liaising with prostitutes, the same subject as the tapes mentioned in the Steele Dossier and Footnote 112. *See* FAC at ¶ 45 (quoting media coverage which states "Footnote 112 . . . describes conversations between Trump associates about rumored video recordings of the candidate in a Russian hotel room with prostitutes . . ."). One of Rtskhiladze's main complaints about Footnote 112 is the false implication that he knew or at least suspected that the tapes were salacious. *See, e.g.*, FAC at 4. The Senate Report's direct

connection of Rtskhiladze to tapes involving "Trump and prostitutes" and its statement that Cohen asked him to investigate the rumors, *Senate Report* at 658, necessarily undermines any inference that Footnote 112 uniquely implies his connection with such matters.

Second, the Senate Report makes clear that Rtskhiladze did, in fact, suspect that the rumored Steele Dossier tapes were the same tapes discussed in his October 2016 text conversation with Cohen. The Report quotes an exchange from the day after the Steele Dossier was made public in which Rtskhiladze stated that he had "told [Cohen] there was something there b 4 election," adding "that's what happens when you visit crocus I guess." *Id.* at 660. Rtskhiladze protests that "it is beyond credulity to suggest—as Footnote 112 does—that [he] was referring to the tapes mentioned in the Steele Dossier" in his texts with Cohen. FAC at ¶ 37. But the Senate Report demonstrates that Rtskhiladze himself suggested that very thing, in writing, just the day after the Steele Dossier was made public. *Senate Report* at 660. Rtskhiladze's own words as reproduced in the Senate Report show that he, at the very least, suspected in 2017 that the tapes referred to in his texts with Cohen and the tapes mentioned in the Steele Dossier were one and the same. *Id.*

Third, Rtskhiladze's statement "that's what happens when you visit crocus I guess," *id.*, in the exchange noted above demonstrates that any implied linkage between him and the Crocus Group in relation to the rumored tapes is not unique to Footnote 112. Indeed, the Senate Report goes on to note that "[t]hough Rtskhiladze did not have personal insight into the matter, he assessed

that if compromising material existed, Crocus Group would likely be responsible." *Id.* This closely resembles Footnote 112's statement that "Rtskhiladze said 'tapes' referred to compromising tapes of Trump rumored to be held by persons associated with the Russian real estate conglomerate Crocus Group[.]" *See Mueller Report*, Vol. 2 at 27-28 n.112. While the Senate Report includes a caveat that "Rtskhiladze did not have personal insight into the matter," Senate Report at 660, the use of the word "rumored" in Footnote 112 when discussing the Crocus Group conveys the same impression regarding Rtskhiladze's degree of knowledge about the group's involvement, *Mueller Report*, Vol. 2 at 27-28 n.112.

Fourth, and more prosaically, the Senate Report quotes the exact same text messages between Cohen and Rtskhiladze that the Mueller Report does. *See Senate Report* at 660. And while the Senate Report includes further text messages that Rtskhiladze claims are necessary to provide full context, it also includes other communications by Rtskhiladze that, as discussed above, further implicate him in the affair surrounding the tapes to the same, or greater, extent as Footnote 112. *See id.* The Senate Report also goes much further than Footnote 112 in describing Rtskhiladze's relationships with Kremlin insiders, including Vladimir Putin's press secretary. *Id.* at 422. These allegations do more to connect Rtskhiladze to prominent members of the Russian government than the relatively weak tea of Footnote 112.

In fact, reading the two reports in concert gives a consistent, rather than discordant, view of Rtskhiladze's activities. Both discussions link Rtskhiladze's text

conversation with Cohen to efforts to suppress tapes involving alleged sexual escapades on the part of the former President; both link this conversation to the Steele Dossier; both suggest that Rtskhiladze suspected that the Crocus Group was behind any tapes; and both rely on substantially the same source material in doing so. While the Senate Report offers more detail regarding Rtskhiladze's activities, those activities are entirely consistent with the picture painted by Footnote 112. If anything, the Senate Report is significantly more inculpatory as to Rtskhiladze's knowledge of and involvement with the tapes, including a direct quotation from Rtskhiladze at the time of the Steele Dossier's disclosures acknowledging having "told [Cohen] there was something there b 4 election." Senate Report at 660. Rtskhiladze thus cannot show that any ongoing reputational harm from these implications is traceable to Footnote 112 rather than to the Senate Report.

Rtskhiladze's responses to these points are unpersuasive. He argues that the Senate Report, unlike Footnote 112, shows that he was unaware of the contents of the tapes mentioned in his texts with Cohen. And he insists that the Senate Report uniquely suggests that his contact with Cohen was motivated by a concern that the tapes in question could have a similar effect as the then-recent "Access Hollywood" tape, released in October 2016. *See* Pl.'s Sur Reply at 7-8. While it is true that the Senate Report describes Rtskhiladze's contact with Cohen as arising contemporaneously with the release of the Access Hollywood tape, *Senate Report* at 659, that description is not at all inconsistent with the tapes having potentially

scandalous contents along the lines suggested in the Steele Dossier. Indeed, according to the Senate Report, the tapes discussed in his texts with Cohen "related to Trump and prostitutes" and only presented an issue to the extent they were scandalous. *Id.* at 658. As the Senate Report notes, Cohen had been motivated to contact Rtskhiladze because he believed Rtskhiladze would be able to share information regarding potentially scandalous tapes involving Trump. *Id.* That Cohen reached out specifically to Rtskhiladze to investigate their existence and that, as the Senate Report says, Cohen was prepared to work to suppress any and all tapes that Rtskhiladze identified, further implies that the tapes were at least potentially scandalous and that Rtskhiladze knew as much. *See id.*

Finally, Rtskhiladze argues that the Senate Report, unlike Footnote 112, did not imply that he had contacts with the Crocus Group and clearly indicated that he thought the rumored tapes were fake. However, the Senate Report's statements regarding the Crocus Group and Rtskhiladze are nearly identical to Footnote 112—both mention the organization as a possible source of compromising material. *Compare id.* at 660 ("Though Rtskhiladze did not have personal insight into the matter, he assessed that if compromising material existed, Crocus Group would likely be responsible . . . ."), *with Mueller Report*, Vol. 2 at 27 n.112 ("Rtskhiladze said 'tapes' referred to compromising tapes of Trump rumored to be held by persons associated with the Russian real estate conglomerate Crocus Group . . . ."). As for Rtskhiladze's professed belief that the tapes were fake, that suggestion is somewhat undercut by Rtskhiladze's statement, only

present in the Senate Report, suggesting that the tapes may have been real, and that they were "what happens when you visit crocus I guess."[2] *Senate Report* at 660.

Footnote 112, even if read in the light least charitable to Rtskhiladze, contains no information that is not similarly contained in the Senate Report. As a result, Rtskhiladze cannot show that his ongoing injuries are caused by Footnote 112 or that they would be remedied by an injunction or declaratory relief aimed only at that footnote. He has therefore failed to carry his burden to show both causation and redressability for his claims seeking prospective equitable relief. The Court therefore will dismiss these claims.

B. Rtskhiladze's claim for damages under the Privacy Act

For similar reasons, Rtskhiladze cannot maintain his action for damages under the Privacy Act. The Privacy Act authorizes monetary damages when an agency "fails to

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2. Rtskhiladze's declaration recounts at least one instance in which he was told that "obtain[ing] a retraction" from the Attorney General was central to restoring his reputation, and, as a result, business or honorary relationships going forward. Pl.'s Decl. at ¶ 19. However, the declaration describes this harm as resulting from "[b]eing labeled as a 'Russian businessman' working with a Russian oligarch to tamper with compromising tapes of the sitting U.S. President." *Id.* While the Senate Report does not misidentify Rtskhiladze's nationality, the Senate Report contains that same implications regarding Rtskhiladze's activities. The statements recounted in the declaration thus do not defeat the Court's conclusion that the unchallenged Senate Report is an ongoing source of his claimed injuries.

maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual." 5 U.S.C. § 552a(g)(1)(C). To receive damages under the Privacy Act, a plaintiff must plead and prove facts showing that "that the agency acted in a manner which was intentional or willful" and that, as a result, the plaintiff suffered "actual damages." 5 U.S.C. § 552a(g)(4). An agency's conduct "must be so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful." *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242, 259 U.S. App. D.C. 115 (D.C. Cir. 1987) (internal quotation marks omitted). Satisfying this standard requires a showing "somewhat greater than gross negligence, or, an act committed without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act." *Waters v. Thornburgh*, 888 F.2d 870, 875, 281 U.S. App. D.C. 173 (D.C. Cir. 1989), *abrogated on other grounds by Doe v. Chao*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004) (internal citation omitted). The intent element is "a high hurdle to clear." *Hurt v. D.C. Ct. Servs. & Offender Supervision Agency*, 827 F. Supp. 2d 16, 20 (D.D.C. 2011). Here, Rtskhiladze has not plausibly alleged that anyone involved with Footnote 112 acted with the requisite state of mind to intentionally deprive him of his rights under the Privacy Act.[3]

3. In its motion to dismiss, DOJ vigorously contests all elements of Rtskhiladze's Privacy Act claims, both equitable and

To begin, Rtskhiladze admits the accuracy of the Senate Report's recounting of his conduct. *See* Pl.'s Sur Reply at 6-10 (describing the Senate Report as "wholly consistent with the allegations in the Amended Complaint . . ."). This admission dooms any plausible inference of intentional disregard of his rights on behalf of the author(s) of Footnote 112. As discussed above, the Senate Report contains the same (and in some cases substantially worse) facts and implications regarding Rtskhiladze's conduct surrounding the tapes. Even if some sliver of daylight exists between the two descriptions *and* this difference caused Rtskhiladze to suffer an "adverse determination" within the meaning of the Privacy Act, 5 U.S.C § 552a(g)(1)(C), the fact that he concedes the accuracy of the Senate Report shows that any miniscule differences in content are not plausibly attributable to a culpable mental state "somewhat greater than gross negligence," *Waters*, 888 F.2d at 875. Taken as a whole, Rtskhiladze's position is at most consistent with some careless drafting by the author(s) of Footnote 112. But given the almost complete overlap between the footnote and Senate Report, Rtskhiladze has failed to plausibly allege facts supporting any intentional or willful disregard of his rights under the Act.[4]

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legal. Because the Court holds that Rtskhiladze cannot make out a claim for equitable relief, and that Rtskhiladze's claim for damages under the Privacy Act does not plausibly allege willfulness, it need not reach these other arguments.

4. Given Rtskhiladze's acceptance of the Senate Report's accuracy, he would be hard pressed to show the level of falsity of Footnote 112 necessary to support his claims. The Court need not decide this point, however, given its conclusions regarding standing (*supra* at III.A.2) and intent (*supra* at III.B).

The only clear factual errors uniquely present in the text of Footnote 112—the misidentification of Rtskhiladze as "Russian" rather than Georgian, and the omission of the word "some" before "tapes" in the quoted texts between Rtskhiladze and Cohen—are similarly not plausibly chalked up to intentional malfeasance on behalf of DOJ or Special Counsel Mueller's team. The much more obvious explanation is a mere drafting error. And, as the Court has already explained, these specific errors would not plausibly result in the claimed harm. *See supra* at III.A.1.c.

C. Rtskhiladze's remaining claims for damages

1. Claims against former Special Counsel Mueller

Count I of Rtskhiladze's amended complaint states that he seeks an "award of compensatory and exemplary damages" against former Special Counsel Mueller "for the violation of procedural guarantees in the Due Process Clause of the Fifth Amendment." FAC at 29; *id.* at ¶¶ 1, 70. In other words, he seeks money damages against a federal officer acting under color of law for the denial of a constitutional right, as permitted by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Mr. Mueller moved to dismiss this claim on the grounds that, *inter alia*, this suit did not fall into one of the existing *Bivens* causes of action and that special factors counseled against extending *Bivens* to this new context. Mueller Mot. to Dismiss at 5-17. In his opposition to the motion, Rtskhiladze shifts gears, indicating that he is not in fact bringing a damages claim against Mr. Mueller, but

rather seeks "a name-clearing hearing in Count II under the Declaratory Judgment Act." Pl.'s Reply to Mueller Mot. at 1-2.[5] The Court has rejected Rtskhiladze's request for such prospective, equitable relief. *See supra* at III.A.2. And, "[i]t is 'axiomatic' that a party may not amend his complaint through an opposition brief." *Singh v. Dist. of Columbia*, 55 F. Supp. 3d 55, 70 (D.D.C. 2014); *see also, e.g., Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984).[6] The Court will thus reject Rtskhiladze's attempt to recast his complaint through briefing.

Considering just the claims that are present in the amended complaint, Count I asserts a claim for damages against Mr. Mueller in his personal capacity under the Fifth Amendment. However, "[i]t is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments

5. Such a hearing is typically the equitable remedy ordered as redress for a so-called "stigma-plus" or "reputation-plus" claim brought under the Fifth Amendment to challenge government defamation in conjunction with termination from federal employment. *See Peter B. v. CIA*, 620 F. Supp. 2d 58, 70-71 (D.D.C. 2009) (identifying "name-clearing hearing" as "well-settled remedy" for both claims (quoting *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102, 243 U.S. App. D.C. 354 (D.C. Cir. 1985)).

6. Even if the Court were to accept Rtskhiladze's belated reframing of his claims against Mr. Mueller, it would still dismiss all claims against him because the "name-clearing" claim in Count II seeks relief only against DOJ, not Mr. Mueller.

that the plaintiff failed to address as conceded." *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) *aff'd sub nom. Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, United Methodist Church*, 98 F. App'x 8 (D.C. Cir. 2004). Rtskhiladze has waived any objection to the dismissal of his purported *Bivens* claim in Count I by failing to oppose the arguments for dismissal offered by Mr. Mueller. As Count I is the only claim in the amended complaint asserted against Mr. Mueller, the Court will dismiss Rtskhiladze's suit against him in its entirety.[7]

2. Claims against DOJ

For similar reasons, the Court will dismiss Rtskhiladze's remaining claims for damages against DOJ. In his amended complaint, Rtskhiladze's only request for damages against DOJ, in Count IV, arises under the Privacy Act. *See* FAC at ¶ 78; *id.* at 29. The Court dealt with this claim above. *See supra* at III.A.2. However, in his reply to Mr. Mueller's motion to dismiss, Rtskhiladze claims that he has "assert[ed] *two* damages claims against DOJ," his claim under the Privacy Act, and "a defamation-

7. Mr. Mueller has also, understandably, moved to dismiss on the grounds that he is entitled to absolute or qualified immunity. *See* Mueller Mot. at 18-24. The Court reecognizes that these defenses likely have merit. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (outlining standards for absolute prosecutorial immunity); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (explaining that plaintiffs must allege facts showing violations of clearly established constitutional rights). But the Court does not reach them because it dismisses all the claims against Mr. Mueller on other grounds.

plus claim (Count I)." Pl.'s Reply to Mueller Mot. at 1-2 & 1 n.1 (emphasis added). Count I is the *Bivens* claim, which the Court found above was brought solely against Mr. Mueller. Again, Rtskhiladze cannot amend his complaint through briefing. *See, e.g., Singh*, 55 F. Supp. 3d at 70.

More generally, Rtskhiladze's arguments on these last two claims appear to be attempts to duck and weave around the defendants' briefing. The Court rejects these efforts, holds Rtskhiladze to his amended complaint, and will thus dismiss his claims.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motions to Dismiss Rtskhiladze's Amended Complaint. A separate Order shall accompany this Memorandum Opinion.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: September 1, 2021

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED OCTOBER 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5243

September Term, 2024

1:20-cv-01591-CRC

Filed On: October 16, 2024

GIORGI RTSKHILADZE,

Appellant,

v.

ROBERT S. MUELLER, III, SPECIAL COUNSEL FOR THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION AND UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.

Consolidated with 22-3037

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

Appendix C

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk