

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

**JACOB GAVIN HILES,**

**Plaintiff,**

**v.**

**CABLE NEWS NETWORK, INC.,**

**Defendant.**

**Case No. 2:23-cv-351-AWA-LRL**

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Local Civil Rule 7, and Va. Code § 8.01-223.2, Defendant Cable News Network, Inc. (“CNN”), by and through undersigned counsel, hereby moves this Court for an order dismissing this action with prejudice. As grounds for its Motion, CNN states as follows:

1. This action arises out of a CNN news report published on October 15, 2021, about the indictment of a Capitol Police officer who had encouraged Plaintiff Jacob Hiles, a participant in the riot at the U.S. Capitol on January 6, 2021, to take down certain portions of a Facebook post in which Hiles had admitted to entering the Capitol building.

2. The Amended Complaint purports to state a cause of action for defamation by implication (Count I) and defamation *per se* (Count II).

3. CNN seeks dismissal of the Amended Complaint with prejudice under Rule 12(b)(6) for failure to state a claim. Hiles cannot state a defamation claim for each of the following independent reasons:

- a. Virginia’s fair report privilege fully protects CNN’s reporting as a matter of law because the challenged CNN news report fairly and accurately quoted

from and reported to the public about information included in court records.

- b. Because CNN quoted Hiles' own words in its news report, Hiles does not and cannot plausibly allege that CNN's report is false, let alone materially false.
- c. Hiles cannot state a claim for defamation-by-implication because the implication he alleges is not reasonably conveyed by CNN's reporting in the first instance and, in any event, nothing in the news report at issue reasonably suggests that CNN intended or endorsed any such implication.
- d. Hiles fails to allege any facts that, if proven, could plausibly establish that CNN published any of its challenged reporting with actual malice, which is the applicable standard of fault pursuant to Va. Code. § 8.01-223.2 because CNN's news report relates to a matter of public concern.

4. Pursuant to Va. Code § 8.01-223.2(C), CNN further seeks an award of the reasonable attorneys' fees and costs it has been forced to incur in defending this meritless action.

WHEREFORE, and for the reasons set forth more fully in the accompanying Memorandum of Law, CNN respectfully requests that the Court grant this Motion and enter an Order dismissing this action with prejudice and awarding to CNN its attorneys' fees and costs.

**MEET AND CONFER CERTIFICATION**

Pursuant to Local Civil Rule 7(E), undersigned counsel certify that they consulted with counsel for Plaintiff regarding the bases for this Motion on Wednesday, August 23, 2023. Counsel for Plaintiff advised the undersigned that a response would be provided by Friday, August 25, 2023. As of this filing, Plaintiff's counsel has not provided Plaintiff's position on this Motion.

Dated: August 28, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28th of August, 2023, I caused a copy of the foregoing to be filed electronically with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all interested parties.

*/s/ Jay Ward Brown*

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

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## PRELIMINARY STATEMENT

The classic example of chutzpah is “a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.” *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991). This case presents a new example, and the Amended Complaint (“Am. Compl.”), ECF No. 9, takes it to even greater heights. Plaintiff Jacob Hiles participated in the riot at the U.S. Capitol on January 6, 2021, “the most significant assault on the Capitol since the War of 1812.” *Trump v. Thompson*, 20 F.4th 10, 18-19 (D.C. Cir. 2021). The Department of Justice prosecuted Hiles for participating in the riot, and the government’s charging documents quoted from and included a screenshot of a photograph that Hiles had posted on Facebook, on the morning of January 6, with the caption, “Feelin cute...might start a revolution later, IDK – in Capitol Hill.” See Statement of Facts at 2-3, *United States v. Hiles* (“*Hiles*”), No. 21-cr-155-ABJ (D.D.C. Jan. 15, 2021), ECF No. 1-1. In September 2021, Hiles pleaded guilty to unlawfully parading, demonstrating, or picketing in the Capitol, and in doing so he admitted that (1) on the morning of January 6, he posted that “selfie-style photograph on Facebook,” and (2) his actions amounted to “[p]articipation in the January 6, 2021, Capitol Riot.” See Am. Compl. Ex. C (Statement of Offense, *Hiles*, ECF No. 24) ¶¶ 8-9.

The following month, Defendant Cable News Network, Inc. (“CNN”) reported that Hiles had “posted on his Facebook page, ‘Feelin cute . . . might start a revolution later,’ tagging himself on Capitol Hill, according to documents supporting his arrest.” See *id.* Ex. A (Katelyn Polantz et al., *US Capitol Police officer indicted on obstruction of justice charges in connection with January 6*, CNN (Oct. 15, 2021)).<sup>1</sup> Notwithstanding these undisputed facts, Hiles has sued

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<sup>1</sup> As discussed below, in a separate case the government charged a Capitol Police officer with obstruction for encouraging Hiles to delete portions of a Facebook post in which Hiles had admitted to entering the Capitol on January 6. See *infra* at 6-7.

CNN for defamation and defamation-by-implication, arguing that CNN should not have called him a “rioter” even though he admitted to participating in a riot, and claiming that CNN’s truthful reporting conveyed the allegedly false *implication* that he *personally* attacked people or destroyed property or otherwise carried out acts of physical harm at the Capitol.

Chutzpah aside, Hiles’ claims fail as a matter of law for multiple, independent reasons. First, because CNN fairly and accurately quoted from and reported to the public about information included in court records, Virginia’s fair report privilege fully protects that reporting as a matter of law. Second, because CNN quoted Hiles’ own words in its report, Hiles does not and cannot plausibly allege that CNN’s report is false, let alone materially false as the law of defamation requires. Third, Hiles cannot state a claim for defamation-by-implication because CNN’s reporting does not reasonably convey the implication Hiles alleges (*i.e.*, that he *personally* assaulted anyone or destroyed property), and because nothing in the reporting reasonably suggests that CNN *intended* or *endorsed* such an implication. Fourth, a recently revised section of the Virginia Code – Va. Code § 8.01-223.2 – protects speakers and publishers such as CNN from defamation liability where, as here, the plaintiff has not alleged (and cannot allege) that the challenged statements were published with actual malice fault. The same statute further empowers the Court to award to CNN its attorneys’ fees in this matter.

Each of these failures independently is fatal to this lawsuit, and the Court quite properly can and should resolve each of them at the motion to dismiss stage. Moreover, the Court can consider the challenged CNN report on this motion to dismiss because Hiles attached the report as an exhibit to his Amended Complaint, and the court records that CNN reported on and quoted from are likewise attached to the Amended Complaint or are otherwise properly subject to

judicial notice at the motion to dismiss stage. *Fairfax v. CBS Broad. Inc.*, 534 F. Supp. 3d 581, 585 n.2, 591 (E.D. Va. 2020), *aff'd*, 2 F.4th 286 (4th Cir. 2021).

For these reasons, as discussed more fully below, CNN respectfully requests that the Court grant its motion to dismiss and award to it the attorneys' fees incurred in defending this case.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **A. The January 6, 2021 Capitol Riot**

On November 3, 2020, Joseph R. Biden, Jr. was elected President of the United States. Then-President Trump, however, refused to concede, "claiming that the election was 'rigged' and characterized by 'tremendous voter fraud and irregularities[.]'" *Trump*, 20 F.4th at 17. "Over the next several weeks, President Trump and his allies filed a series of lawsuits challenging the results of the election. The courts rejected every one of the substantive claims of voter fraud that was raised." *Id.* (citations omitted). After these efforts failed, "a Joint Session of Congress convened on January 6, 2021 to certify the results of the election." *Id.*

"Shortly before noon on January 6th, President Trump took the stage at a rally of his supporters on the Ellipse, just south of the White House." *Id.* at 17-18. "[A]fter the speech, a large crowd of President Trump's supporters – including some armed with weapons and wearing full tactical gear – marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results." *Id.* at 18. "The mob quickly overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol." *Id.* "Police officers were attacked with chemical agents, beaten with flag poles and frozen water bottles, and crushed between doors and throngs of rioters." *Id.*

**B. Hiles' Participation In The Capitol Riot**

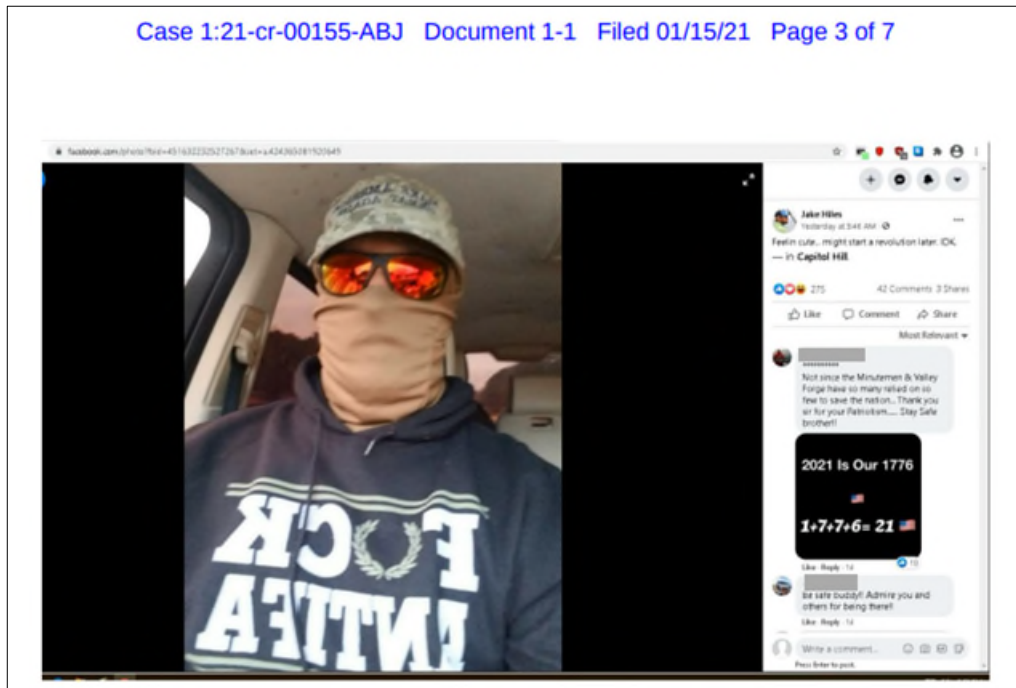
According to his Amended Complaint, on the morning of January 6, 2021, Hiles “arrived alone in Washington, D.C. after driving from his home in Virginia Beach to exercise his First Amendment rights.” Am. Compl. ¶ 8. In particular, Hiles “went to the U.S. Capitol that morning for the sole purpose of attending various political ‘pro-Trump’ rallies held in Washington, D.C. later that day.” *Id.* Just nine days later, on January 15, 2021, the Department of Justice filed a three-count Criminal Complaint against Hiles in the U.S. District Court for the District of Columbia, charging Hiles with (1) Knowingly Entering or Remaining in any Restricted Building or Grounds Without Lawful Authority; (2) Knowingly, With Intent to Impede Government Business or Official Functions, Engaging in Disorderly Conduct on Capitol Grounds; and (3) Parading, Demonstrating, or Picketing in the Capitol Buildings. *See* Crim. Compl., *Hiles*, ECF No. 1.

In support of that Criminal Complaint, the government filed a Statement of Facts sworn to by a Special Agent of the Federal Bureau of Investigation (“FBI”) who averred that, “[o]n January 6, 2021, multiple photographs and videos were posted to a Facebook account in the name ‘Jake Hiles’ . . . showing an individual identified as JACOB G. HILES participating in unlawfully entering the U.S. Capitol on January 6, 2021.” *See* Statement of Facts at 2, *Hiles*, ECF No. 1-1.<sup>2</sup> According to the Statement of Facts, the FBI “reviewed numerous pictures and videos posted to [that] Facebook account,” including “a picture of an individual [that] was posted to the Facebook account” on January 6, 2021, “accompanied by timestamp 5:46 AM and the

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<sup>2</sup> For the Court’s convenience, a copy of the Statement of Facts is attached to the accompanying Second Declaration of Jay Ward Brown (“2nd Brown Decl.”) as Exhibit 1.

caption, “Feelin cute...might start a revolution later, IDK – in Capitol Hill.” *Id.* The Statement of Facts included a screenshot of that photograph as well, as shown here:



*See id.* at 3. The government further asserted in the Statement of Facts that the FBI “has confirmed the identification of HILES as the person in the images and videos described above and posted on January 6, 2021.” *Id.* at 6. Based on this and other photographs and videos that the FBI reviewed, the Statement of Facts “submits that there is probable cause to believe that JACOB G. HILES” violated the three federal statutes under which he was charged. *Id.* at 7.

In September 2021, Hiles agreed to plead guilty to Parading, Demonstrating, or Picketing in a Capitol Building, pursuant to which he further agreed that a “Statement of Offense” filed with the court “fairly and accurately describes [his] actions and involvement in the offense to which [he] is pleading guilty.” Am. Compl. Ex. B (Plea Agreement, *Hiles*, ECF No. 23) at 1. The Statement of Offense expressly notes that on “[t]he morning of January 6, 2021, [Hiles] posted a selfie-style photograph on Facebook of him in his car geotagged to Capitol Hill.” *Id.* Ex. C (Statement of Offense, *Hiles*, ECF No. 24) ¶ 9. Significantly, the Statement of Offense

also expressly refers to Hiles' actions as "Participation in the January 6, 2021, Capitol Riot." *Id.* at 3.

In December 2021, the court sentenced Hiles to two years of probation. *See* Minute Entry of Dec. 6, 2021, *Hiles*. In its sentencing memorandum, the government noted once again that, on January 6, Hiles had "posted a selfie-style photograph of himself in a car on Facebook, geotagged to Capitol Hill, accompanied by the caption, 'Feelin cute...might start a revolution later, IDK.'" *See* Gov't's Sentencing Mem. at 3, *Hiles*, ECF No. 34. The government also stated that Hiles had "provided meaningful assistance to the United States with respect to two pending felony matters, warranting a probation sentencing recommendation." *Id.* at 1.

**C. Hiles' Communications With Capitol Police Officer Michael Riley**

One of the "pending felony matters" to which the government referred was the prosecution of Michael Riley, a Capitol Police officer charged with obstruction after the riot. *See* Indictment, *United States v. Riley* ("*Riley*"), No. 21-cr-628-ABJ (D.D.C. Oct. 14, 2021), ECF No. 1. As the government stated in court filings, Riley sent Hiles "a private direct message on Facebook" on January 7, urging Hiles to "[t]ake down" part of a Facebook message in which Hiles discussed "being in the [Capitol] building," because Riley knew that the government was "investigating and everyone who was in the building is going to be charged." *See* Gov't's Sentencing Mem. at 12, *Hiles*, ECF No. 34. Hiles thanked Riley "for the heads up" but wrote, "I don't think I did anything wrong at all yesterday and I am very sorry things turned out the way that they did. . . . I think when the fbi gets to investigating, they will find that these terroristic acts were committed in false flag attacks by leftists." *Id.* at 12-13.

When Hiles was arrested later in January 2021, he "voluntarily agreed to an interview with the FBI," during which he "indicated that following the riot he had become friends with a

Capitol police officer.” *Id.* at 14. After the FBI searched his phone and discovered Hiles’ communications with Riley, “Hiles answered questions regarding the timing, nature, and channels of communication with Riley,” and “[l]ater, Hiles voluntarily answered questions under oath regarding his contact with Riley, as well as his own participation in the breach of the U.S. Capitol on January 6, 2021.” *Id.* at 14-15.

The government unsealed the charges against Riley in October 2021, a month after Hiles had agreed to enter a guilty plea. *See* Minute Order of Oct. 15, 2021, *Riley*. Riley took his case to trial, however, and, in October 2022, Riley was convicted on one count of obstruction. *See* Minute Order of Oct. 28, 2022, *Riley*. Riley likewise received a sentence of two years of probation. *See* Minute Entry of Apr. 13, 2023, *Riley*.

**D. The October 15, 2021 CNN Report**

On October 15, 2021, the day the charges against Riley were unsealed, CNN published an online news report titled *US Capitol Police officer indicted on obstruction of justice charges in connection with January 6* (the “CNN Report”).<sup>3</sup> While the reporting speaks for itself, and the Court need not accept either party’s characterizations of it, the news report at issue can be summarized briefly as follows:

The CNN Report begins by noting that “[a] US Capitol Police officer was indicted on obstruction charges in connection to the January 6 insurrection at the US Capitol,” and that, “[a]ccording to the indictment, Michael A. Riley told a contact online to remove posts showing the person was in the Capitol building that day.” Am. Compl. Ex. A at 1. The report observes that “Riley’s arrest is notable among the more than 600 Capitol riot cases in that he becomes the

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<sup>3</sup> A copy of the CNN Report is attached as Exhibit A to the Amended Complaint, and it can also be found at <https://www.cnn.com/2021/10/15/politics/capitol-police-january-6/index.html>.



first police officer on duty on Capitol Hill on January 6 charged with allegedly attempting to help a rioter.” *Id.* The report then summarizes the government’s allegations against Riley, specifically concerning his communications with the rioter, and it quotes Riley’s attorney that he “look[s] forward to fighting the charges brought against him in court.” *Id.* at 2-3.

The report then discusses the rioter with whom Riley was communicating, Plaintiff Jacob Hiles. In the particular passage that Hiles has placed at issue in this lawsuit, the CNN Report states that, “[i]n selfies from January 6 found by the FBI on social media, Hiles wore a gaiter mask and ski goggles and a sweatshirt that said ‘F\*ck Antifa.’ He had also posted on his Facebook page, ‘Feelin cute...might start a revolution later,’ tagging himself on Capitol Hill, according to documents supporting his arrest.” *Id.* at 4. The report adds that Hiles ultimately “pleaded guilty to one federal charge, of parading or demonstrating inside the Capitol, according to court records,” and that “[h]e has agreed to pay \$500 for damage to the Capitol and could face a maximum of six months in prison when he is sentenced in December.” *Id.* Finally, the report concludes by quoting Hiles’ attorneys (including his attorney of record in this action), who stated that “‘Mr. Hiles has done everything he can to be cooperative throughout this entire investigation,’” and that “‘Mr. Hiles is receiving no benefit in exchange for his cooperation and he intends to do everything he can to put this incident behind him.’” *Id.*

#### **E. This Lawsuit**

On October 14, 2022 – one day before the expiration of the statute of limitations – Hiles filed this lawsuit against CNN in Virginia state court, alleging a single claim for defamation arising out of the CNN Report. In his original complaint, Hiles did not deny that he wrote the statement that he “might start a revolution later” and posted it to Facebook on the morning of the Capitol riot, but he alleged that the CNN Report amounts to “defamation *per se*” because the

report “accuse[s] and impute[s] to [Hiles] the intention to overthrow a sitting government which is one of the gravest felonies in the United States of America.” Compl. ¶ 32. Hiles sought \$37 million in compensatory damages for this alleged defamation, as well as punitive damages and court costs. *Id.* at 11 (prayer for relief).

Hiles did not serve the original complaint until approximately eight months later, on June 26, 2023, and CNN timely removed the action to this Court on July 17, 2023. *See* Notice of Removal, ECF No. 1. CNN then moved on July 24, 2023, to dismiss the original complaint for failure to state a claim. *See* CNN’s Mot. to Dismiss, ECF No. 5.

Hiles did not respond to that motion. Instead, three weeks later, Hiles filed the now-operative Amended Complaint, ECF No. 9. Hiles added a claim for defamation-by-implication (Count I), setting out his theory that CNN’s reporting conveyed the “connotation that [he] traveled to the U.S. Capitol on January 6, 2021, to overthrow the U.S. Government and engaged in violence, vandalism, and other crimes against the United States at the U.S. Capitol as part of a coordinated effort to achieve this end.” Am. Compl. ¶ 76. Hiles also continues to allege a claim for defamation *per se* (Count II), asserting that CNN’s reporting “falsely impute[d] to [him] the commission of a crime involving moral turpitude including, but not limited to, displaying written or printed matter advocating or advising of overthrowing the government.” *Id.* ¶ 87.

Hiles now seeks \$50 million in compensatory damages on each of the two counts, for a total demand of \$100 million, plus punitive damages, attorneys’ fees, and costs. *Id.* at 35, 38.

## ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain factual allegations that are “enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In other words, the “complaint must contain sufficient

factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *see also Liberty Counsel Inc. v. GuideStar USA, Inc.*, 737 F. App’x 171, 171 (4th Cir. 2018) (per curiam) (same).

The *Twombly/Iqbal* analysis requires courts to undertake a two-step process when reviewing motions to dismiss. First, courts should “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. Second, courts are to address the remaining well-pleaded allegations, “assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.” *Id.* This step requires facts showing “more than a sheer possibility that a defendant has acted unlawfully,” and it is not enough for a complaint to plead facts that are “merely consistent” with liability. *Id.* at 678. Such a complaint “stops short of the line between possibility and plausibility of entitlement to relief.” *Twombly*, 550 U.S. at 557 (cleaned up).

There are strong First Amendment and public policy rationales for the application of the plausibility standard to defamation complaints involving speech on matters of public concern. In such cases, “because the defense of baseless defamation claims imposes an additional cost, in the form of potentially deterred speech, federal courts have historically given close scrutiny to pleadings in libel actions.” *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 500 (W.D. Va. 2019).

“To state a claim for defamation under Virginia law, a plaintiff must plead (1) publication of (2) an actionable statement – that is, a statement that is both false and defamatory – with (3) the requisite intent.” *Fairfax*, 2 F.4th at 292. Moreover, while the existence or lack of a privilege is not an element of the defamation tort in Virginia, “[u]nder Virginia law, whether the fair report privilege applies and whether a statement is reasonably capable of conveying a

defamatory implication are matters of law to be decided on a motion to dismiss.”

*Agbapuruonwu v. NBC Subsidiary (WRC-TV)*, 821 F. App’x 234, 239 (4th Cir. 2020).

A claim for defamation-by-implication faces an additional and especially challenging threshold legal test on top of these elements. “Because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993).

Here, Hiles’ defamation claim fails on the principal basis that the CNN Report provided a fair and accurate account of official court records and thus is protected from liability by the fair report privilege. Moreover, Hiles fails to plausibly allege that CNN published anything about him that is materially false. Hiles also fails to plausibly plead (and as a matter of law could not prove) either that the implication he alleges is reasonably conveyed by CNN’s reporting or that, on its face, the reporting affirmatively suggests CNN intended to convey that implication. Finally, because the CNN Report addresses a matter of public concern, Virginia law requires Hiles to plead (and ultimately prove) that CNN published the challenged report with actual malice fault – *i.e.*, with knowledge that its statements about Hiles were false or despite a high degree of awareness that they were probably false – and Hiles does not and cannot plausibly carry that heavy burden.

In short, and as explained more fully below, based on the face of his Amended Complaint and the related materials the Court may properly consider, it is clear that Hiles has not stated and cannot state a plausible claim for defamation per se or defamation-by-implication as a matter of law. Accordingly, his Amended Complaint should be dismissed with prejudice.

## I. THE FAIR REPORT PRIVILEGE BARS HILES' CLAIM

As the Fourth Circuit has explained, “Virginia’s fair report privilege protects the publication of ‘accounts of public proceedings or reports’ – for example, records of judicial proceedings – ‘despite their defamatory nature.’” *Agbapuruonwu*, 821 F. App’x at 239 (quoting *Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988)). “The fair report privilege applies ‘so long as the report [is] accurate and either complete or fairly abridged.’” *Id.* (quoting *Chapin*, 993 F.2d at 1097). “Especially pertinent here, selective quotation from a report of an official proceeding constitutes a fair abridgement when it is a ‘substantially correct’ account.” *Id.* (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254 (4th Cir. 1988)). A report need not extensively explain every part of the government record for the privilege to apply, so long as its summary is substantially accurate. *Spirito v. Peninsula Airport Comm’n*, 350 F. Supp. 3d 471, 487 (E.D. Va. 2018) (“selective representation of the [governmental] report’s contents does not constitute abuse” of privilege); *see also Alexandria Gazette Corp. v. West*, 198 Va. 154, 163 (1956) (privilege applies even if “news article was not exactly correct,” where it “constituted no substantial departure from” the government record).

The fair report privilege exists to enable the press to fulfill its role “to inform citizens of what the government is doing.” *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712-13 (4th Cir. 1991). As the Fourth Circuit has observed, “[i]n return for frequent and timely reports on governmental activity, defamation law has traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document.” *Id.* Without the privilege, the press would be discouraged from reporting “regularly on government operations so that citizens can monitor them.” *Id.*; *see also Ditton v. Legal Times*, 947 F. Supp. 227, 230 (E.D. Va. 1996) (“[T]he availability of the privilege encourages the

media to disseminate official records – whether verbatim or in fair summaries – without fear of liability for any false, defamatory material that they might contain.”).

Because of this public policy underlying the privilege, a news organization sued for defamation is “entitled to dismissal” on a Rule 12(b)(6) motion if it is clear from a comparison of the government record and the challenged reporting that the privilege applies. *Spirito*, 350 F. Supp. 3d at 488. This allows the news organization to avoid incurring “further litigation costs, lest similar defamation claims have a chilling effect on government reporting.” *Id.* (granting media defendants’ motion to dismiss on ground of fair report privilege); *see also, e.g.*, *Agbapuruonwu*, 821 F. App’x at 239 (affirming Rule 12(b)(6) dismissal on Virginia fair report privilege, among other grounds); *Chapin*, 993 F.2d at 1097 (same); *Harvey v. CNN*, 48 F.4th 257, 274-75 (4th Cir. 2022) (same, under Maryland’s fair report privilege); *Nanji v. Nat’l Geographic Soc’y*, 403 F. Supp. 2d 425, 433-34 (D. Md. 2005) (same).

Here, the fair report privilege clearly applies to the CNN Report, which offers a fair and accurate account of an official record or proceeding, and wholly forecloses Hiles’ attempt to state a claim arising from that report. *Agbapuruonwu*, 821 F. App’x at 239.

First, the Statement of Facts that accompanied the Criminal Complaint against Hiles is indisputably an official court record. *See generally* 2nd Brown Decl. Ex. 1.

Second, the government’s Statement of Facts in the *Hiles* case asserts, *inter alia*:

On January 6, 2021, multiple photographs and videos were posted to a Facebook account in the name “Jake Hiles” . . . showing an individual identified as JACOB G. HILES participating in unlawfully entering the U.S. Capitol on January 6, 2021. As discussed further below, these videos and pictures include “selfie” style footage from areas your affiant recognizes as both inside and outside the U.S. Capitol, sometimes including geo-tags identifying the location of the post as “Capitol Hill” or “United States Capitol” and accompanied by captions written in the first person. Visible in the photographs and videos is a bearded individual wearing a dark

in color sweatshirt bearing the words “FUCK ANTIFA,” a tan in color neck gaiter, baseball cap, and tan in color goggles.

*Id.* at 2. The Statement of Facts further notes that “[o]n January 6, 2021, a picture of an individual was posted to the Facebook account accompanied by timestamp 5:46 AM and the caption, ‘Feelin cute...might start a revolution later, IDK – in Capitol Hill,’” and it includes the screenshot of that Facebook post, as shown above. *Id.* at 2-3.

Third, the CNN Report accurately quoted from and summarized that portion of the Statement of Facts. As CNN wrote, “In selfies from January 6 found by the FBI on social media, Hiles wore a gaiter mask and ski goggles and a sweatshirt that said ‘F\*ck Antifa.’ He had also posted on his Facebook page, ‘Feelin cute...might start a revolution later,’ tagging himself on Capitol Hill, according to documents supporting his arrest.” Am. Compl. Ex. A at 4.

The precision with which CNN quoted from official records in this case is actually *more* than Virginia law requires to satisfy the privilege. Although Hiles spends paragraph after paragraph of his Amended Complaint pointing out aspects of his activities on January 6 that he alleges CNN did not include in its reporting, *see* Am. Compl. ¶¶ 37-39, 43-46, 54-56, 61-63, in Virginia, the fair report privilege requires only that the report be a “fair and substantially correct” summary of official records, *see Alexandria Gazette Corp.*, 198 Va. at 159. The privilege does not require the inclusion of every detail contained in the government record. *See, e.g., Rushford*, 846 F. 2d at 254 (rejecting argument that quotations were “taken out of context,” and noting that “[t]he privilege does not require that the published report be verbatim of the official report but it must only be substantially correct”); *Spirito*, 350 F. Supp. 3d at 487 (“selective representation of” contents of government records “does not constitute abuse” of privilege); *Ditton*, 947 F. Supp. at 231 (rejecting argument that media defendant should have included “a more detailed

discussion of plaintiff's version of the facts"). Hiles' allegations regarding other details that he wishes CNN had also reported thus do nothing to weaken the fair report privilege's protection.

Because the CNN Report accurately quoted the government's pleading in reporting on Hiles' "revolution" statement, CNN's reporting is privileged as a matter of law and Hiles therefore has not and cannot to state a claim for defamation. The Amended Complaint accordingly should be dismissed with prejudice for this reason alone.

## **II. HILES DOES NOT PLAUSIBLY ALLEGE THAT THE CNN REPORT IS FALSE**

Although the Court properly may dispose of this matter on the basis of the fair report privilege alone, Hiles also fails to state a claim for defamation because he does not plead any facts sufficient to plausibly allege that the CNN Report is false, let alone materially false. Under settled First Amendment precedent, a defamation plaintiff bears the burden of establishing that the challenged publication is false. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 776 (1986); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 183 (4th Cir. 1998); *Va. Citizens Def. League v. Couric*, 2017 U.S. Dist. LEXIS 83308, at \*\*7-8 (E.D. Va. May 31, 2017), *aff'd on other grounds*, 910 F.3d 780 (4th Cir. 2018). Moreover, even literal falsity is insufficient: As the Supreme Court has explained, "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). Thus, a "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.*

To survive a motion to dismiss, Hiles cannot simply "couch[] . . . allegations of falsity in vague, conclusory terms[.]" *Chapin*, 993 F.2d at 1092. Rather, Hiles must "plead facts that, if proven, would allow a reasonable person to consider the statement false." *Edwards*, 378 F. Supp. 3d at 521; *see also Perry v. Isle of Wight Cnty.*, 2015 U.S. Dist. LEXIS 140037, at \*5



(E.D. Va. Oct. 13, 2015) (dismissing claim where “Plaintiff only alleges the falsity of Defendant’s statements in ‘vague, conclusory terms’ by merely stating that the statements are false”); *see also, e.g., Sunrise Pharm., Inc. v. Vision Pharma, LLC*, 799 F. App’x 141, 142 (3d Cir. 2020) (affirming dismissal where plaintiff “failed to plausibly plead [defendant] made a false statement”); *Swindol v. Aurora Flight Scis. Corp.*, 832 F.3d 492, 494-95 (5th Cir. 2016) (same); *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 247 (2d Cir. 2017) (“a plaintiff must plead facts demonstrating falsity to prevail on a motion to dismiss the complaint in federal court”).

The decision in *Dangerfield v. Wavy Broadcasting, LLC*, 228 F. Supp. 3d 696 (E.D. Va. 2017), offers a good example of the application of this principle. As the court explained there, when considering a motion to dismiss under Rule 12(b)(6), it should generally “credit the plaintiff’s allegation of the factual falsity of a statement,” but it may dismiss a lawsuit where “the allegation of falsity is vague and conclusory or contradicts an external document incorporated into the complaint.” *Id.* at 702. In that case the plaintiff took issue with a report that accurately stated he “was accused of rape” by the victim and by a law enforcement agency that was not directly responsible for investigating the crime. *Id.* The court rejected the plaintiff’s claim that, because he was “never formally accused of rape,” or at least not accused by the investigating law enforcement agency, this statement was false. *Id.* at 702-03. The court observed that generally, “allegedly defamatory words are to be taken in their plain and natural meaning” and, “[w]hile the word ‘accused’ may mean someone who has been formally indicted on criminal charges, it also broadly means ‘[s]omeone who has been blamed for wrongdoing.’” *Id.* (quoting Black’s Law Dictionary (10th ed. 2014)). Moreover, a search warrant issued by the investigating agency

showed that it “explicitly blamed Plaintiff for rape and requested a search warrant on the basis of that accusation.” *Id.* at 703.

Here, Hiles’ allegations likewise fall far short of plausibly pleading the CNN Report included any false statements about him. Indeed, though Hiles asserts that the CNN Report contains “numerous inaccuracies,” Am. Compl. ¶ 31, he identifies only three allegedly false statements of fact, none of which conceivably rises to the level of a *material* falsity.

First, Hiles alleges that, “[a]lthough [he] is referred to as a ‘rioter’ throughout the Article, [he] was never charged or even accused of rioting at the U.S. Capitol.” *Id.* ¶ 35. As part of his guilty plea, however, Hiles agreed that the Statement of Offense he signed “fairly and accurately describes [his] actions and involvement in the offense to which [he] is pleading guilty,” Am. Compl. Ex. B at 1, and in that Statement of Offense, Hiles’ actions are expressly described as “Participation in the January 6, 2021, Capitol Riot,” *id.* Ex. C at 3 (emphasis added). Hiles does not even attempt to explain how it could be false to label him a “rioter” after he thus admitted to participating in a riot. Instead, when he purports to quote from the Statement of Offense in his Amended Complaint, Hiles *omits* from what he presents as a block quotation the words that describe his actions as “Participation in the January 6, 2021, Capitol Riot.” *See* Am. Compl. at 7-8 (jumping from paragraph 6 of the Statement of Offense to paragraph 8, without indicating any omission).

Despite these liberties with the text, Hiles cannot deny that he participated in the Capitol riot. *See, e.g., Lowery v. Stovall*, 92 F.3d 219, 225 (4th Cir. 1996) (“Particularly galling is the situation where a criminal convicted on his own guilty plea seeks as a plaintiff in a subsequent civil action to claim redress based on a repudiation of the confession. The effrontery or, as some might say it, chutzpah, is too much to take. There certainly should be an estoppel in such a

case.”); *Straka v. NBC Universal Media, LLC*, 2023 U.S. Dist. LEXIS 137603, at \*12 (D. Neb. Aug. 8, 2023) (dismissing Capitol rioter’s defamation claim where plaintiff “is barred by the doctrine of judicial estoppel from disavowing the admissions he made in connection with the criminal case” and where, as here, “[t]he documents embraced by the complaint show that the challenged statements are not materially false”). And because there is no difference in “gist” or “sting” between describing Hiles as a “riot participant” or as a “rioter,” these statements in the CNN Report are substantially true and therefore non-actionable. *Masson*, 501 U.S. at 517.

Second, Hiles claims that it was false for CNN to report that he posted the statement, “Feelin cute...might start a revolution later” rather than “Feelin cute...might start a revolution later, *IDK*.” Am. Compl. ¶ 55 (emphasis added). As a matter of law, however, such an edit does not create an actionable falsehood unless it “results in a *material* change in the meaning conveyed by the statement.” *Masson*, 501 U.S. at 517 (emphasis added). Here, the “might” at the start of the phrase “might start a revolution later” expresses the same idea as “IDK” – slang for “I don’t know,” *see* Am. Compl. ¶ 53 – at the end of the phrase. This “slight edit,” as Hiles himself describes it, *id.* ¶ 55, thus cannot create an actionable falsehood because, either with or without the “IDK,” the statement clearly conveys Hiles’ own expressed belief that he *might* start a revolution.

Third, Hiles asserts it was false for CNN to report that he “said on social media that he traveled to Washington, DC, while thinking of starting ‘a revolution,’ according to investigators,” because he posted his “revolution” message “after [he] had already arrived in Washington,” and because only “a single FBI agent” included the “revolution” message in the Statement of Facts filed in support of his Criminal Complaint. Am. Compl. ¶¶ 48-52. This statement cannot give rise to a defamation claim, however, as a “statement is not considered

false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” *Masson*, 501 U.S. at 517 (internal marks omitted). CNN’s reporting would have had the same effect on the minds of reasonable readers if CNN had stated, as Hiles apparently prefers, that he said he was thinking of starting a revolution *after* he traveled to Washington, or if CNN had attributed that allegation to *an FBI agent* rather than to unnamed investigators. *See, e.g., Biospherics*, 151 F.3d at 185 (affirming dismissal of defamation claim where the alleged “misstatement is not actionable” because reporting the facts as plaintiff alleges them “clearly would not have altered the effect on the reader”).

As the Supreme Court has explained, “[t]he sine qua non of recovery for defamation . . . is the existence of falsehood.” *Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974). Because Hiles does not plausibly allege that any statements in the CNN Report amount to actionable falsehoods, he fails to state a claim for defamation. The Court should dismiss his Amended Complaint with prejudice for this independent reason as well.

### **III. HILES DOES NOT STATE A CLAIM FOR DEFAMATION-BY-IMPLICATION**

The principal difference between Hiles’ original complaint and his Amended Complaint is the addition of a defamation-by-implication claim, in which Hiles asserts that concededly true statements in CNN’s reporting convey the allegedly false *implication* that Hiles *personally* attacked people or destroyed property or otherwise carried out acts of physical harm at the Capitol. Am. Compl. ¶ 76. Hiles, however, fails to satisfy the Fourth Circuit’s particularly demanding standard for pleading such claims.

In *Chapin*, the Fourth Circuit held that, when a plaintiff bases a defamation claim on facts that are “literally true,” but alleges that that they nevertheless create a false and defamatory implication, he must, as a threshold matter, “make an especially rigorous showing” that the challenged language is (1) “reasonably read to impart the false innuendo,” and (2) “affirmatively

suggest[s] that the author *intends or endorses* the inference.” 993 F.2d at 1092-93 (emphasis added) (affirming Rule 12(b)(6) dismissal). This “especially rigorous showing” is required “because the constitution provides a sanctuary for truth.” *Id.*; *see also, e.g., Mirafuentes v. Estevez*, 2015 U.S. Dist. LEXIS 166157, at \*\* 13-14 (E.D. Va. Nov. 30, 2015) (following *Chapin* and dismissing libel-by-implication claim on Rule 12(b)(6) motion for failure to make this threshold showing); *Hanks v. Wavy Broad., LLC*, 2012 U.S. Dist. LEXIS 15729, at \*\*15-16 (E.D. Va. Feb. 8, 2012) (same); *Jenkins v. Snyder*, 2001 U.S. Dist. LEXIS 26921, at \*\*10-11 (E.D. Va. Feb. 6, 2001) (same). In making this assessment, a court must consider the publication as a whole and how a reasonable reader would interpret the challenged statements or implications, in context, using the ordinary meaning of words. *See, e.g., Chapin*, 993 F.2d at 1092, 1096 (courts should consider “the plain and natural meaning of the words used” and consider the challenged statements/alleged implications “in context”); *Swift v. Frontier Airlines*, 2014 U.S. Dist. LEXIS 198165, at \*3 (E.D. Va. Dec. 31, 2014) (granting Rule 12(b)(6) motion to dismiss defamation-by-implication claim after examining “specific statements alleged to support plaintiff’s defamation claim, within the overall context of the circumstances alleged” to conclude that “the statements alleged are legally insufficient to support the claim”). Hiles’ “conclusory statements” as to the alleged implications that he asserts are conveyed by the CNN Report “do not suffice” on their own to state a claim. *Iqbal*, 556 U.S. at 678.

The *Chapin* test thus does not require the Court to adjudicate on this motion what Hiles actually did on January 6 or what his intentions were in traveling to the Capitol that day. Instead, the *Chapin* test obliges the Court to review the challenged CNN Report in full and assess (1) what if any implication it *reasonably* conveys and (2) whether the report on its face affirmatively indicates that the publisher *intended* to convey that implication to readers. Here, the Court can

conclude its analysis of Hiles' defamation-by-implication claim after the first prong of the *Chapin* test, because the text of the CNN Report does not convey to reasonable readers that Hiles *personally* attacked people or destroyed property or otherwise carried out acts of physical harm at the Capitol. In the first half of the report, citing Riley's indictment, CNN reported that Hiles spoke with Riley on the telephone and thereafter Hiles "anticipate[d] *trespassing* charges" might be filed against him. Am. Compl. Ex. A at 2 (emphasis added). CNN further reported, again citing Riley's indictment, that Riley "was angry with" Hiles "after seeing video of [Hiles] smoking marijuana in the Capitol and 'acting like a moron.'" *Id.* at 3. These details – especially the concern over trespassing charges alone – portray Hiles as a non-violent participant in the Capitol riot. They do not reasonably imply that Hiles *personally* caused any physical injury.

The second half of the report, in which Hiles is identified by name, likewise does not affirmatively communicate to reasonable readers that Hiles' actions on January 6 were physically violent. Citing court records, CNN reported that Hiles (1) "attended the pro-Trump 'Stop the Steal' rally with his cousin from Ohio"; (2) "marched to the Capitol after Trump spoke"; (3) "was arrested on January 19 and released from custody with an order to stay away from Washington"; (4) "pleaded guilty to one federal charge, of parading or demonstrating inside the Capitol"; (5) "agreed to pay \$500 for damage to the Capitol"; and (6) "could face a maximum of six months in prison." *Id.* at 4. These facts about Hiles – particularly that he was promptly released from custody after his arrest and that he did not face the risk of long-term incarceration – do not reasonably convey that Hiles personally engaged in physical violence on January 6. *See, e.g., Webb v. Virginian-Pilot Media Cos.*, 287 Va. 84, 90-91 (2014) (just because readers may draw defamatory inference does not mean that inference is reasonable as a matter of law); *Harvey v. CNN, Inc.*, 520 F. Supp. 3d 693, 715 (D. Md. 2021) (dismissing defamation-by-

implication claim arising from statement that plaintiff's employer met with Ukrainian prosecutor because plaintiff "cannot meet [*Chapin*'s] rigorous standard and suggest that CNN meant to imply [plaintiff] also attended that specific alleged meeting"), *aff'd in relevant part*, 48 F.4th at 271.

Hiles' defamation-by-implication claim therefore fails the first prong of the *Chapin* test because CNN's reporting does not reasonably communicate to readers the implication that Hiles personally engaged in physical violence on January 6. Moreover, even if the Court were to proceed to the second part of the *Chapin* test, Hiles' claim would clearly fail that prong as well because the words of the CNN Report, as published, do not in any way indicate that CNN *intended* to convey that implication. CNN's reporting noted that Hiles was concerned only about trespassing charges; that he was not subject to pretrial detention; that he pleaded guilty only to parading or demonstrating in the Capitol, and that he faced a relatively minimal sentence and fine. *See generally* Am. Compl. Ex. A. Those elements of the CNN Report prevent any contention that the content of the report demonstrates that CNN intended to imply or endorsed an implication that Hiles personally engaged in violence on January 6, and thus Hiles' defamation-by-implication claim fails the second *Chapin* prong as well.

Finally, to the extent Hiles also argues that CNN's reporting conveyed the implication that he traveled to Washington to "overthrow the U.S. Government" or commit "crimes against the United States," *see* Am. Compl. ¶ 75, any such implication arises solely from Hiles' own statement about "revolution," not from CNN's reporting of it. On the morning of January 6, 2021, just hours before he would unlawfully enter the Capitol and join in disrupting the certification of the presidential election, Hiles wrote on Facebook that he "might start a revolution later." 2nd Brown Decl. Ex. 1 at 2. Black's Law Dictionary defines "revolution" as

“[a]n overthrow of a government, usu[ally] resulting in fundamental political change.” *See* “Revolution,” Black’s Law Dictionary (11th ed. 2019). The notion that Hiles intended to overthrow the government or commit crimes against the United States on January 6 thus arises, if at all, solely from *Hiles’ own* use of the phrase, “might start a revolution,” which the government quoted in multiple court records. *See supra* at 5-6. And where, as here, news reports do not “significantly change the implication that is *already* contained in” government records, dismissal on grounds of the fair report privilege, as discussed above, is proper. *Spirito*, 350 F. Supp. 3d at 487 (emphasis added); *see also Ramey v. Kingsport Publ’g Corp.*, 905 F. Supp. 355, 358 (W.D. Va. 1995) (privilege applies to reporting “reasonable inferences” contained in government documents).

**IV. HILES DOES NOT PLAUSIBLY ALLEGE THAT CNN PUBLISHED THE REPORT WITH ACTUAL MALICE FAULT, AS VIRGINIA LAW REQUIRES**

The Amended Complaint also should be dismissed for another independent reason: Hiles fails to allege any facts that, if proven, could plausibly establish that CNN published any of its challenged reporting with the requisite level of fault, which in this case is “actual malice.”

Virginia Code Section 8.01-223.2 provides immunity to publishers exercising their right to speak on matters of public concern. The statute provides, in relevant part, that “[a] person shall be immune from tort liability if the tort claim is based solely on statements . . . regarding matters of public concern that would be protected under the First Amendment to the Constitution of the United States made by that person that are communicated to a third party,” except where the speaker “knew or should have known” that those statements “were false or were made with reckless disregard for whether they were false.” *See* Va. Code Ann. § 8.01-223.2(A)-(B) (2023). The statute, which requires the plaintiff (regardless of his status as a public figure or a private figure) to plead and prove actual malice, reflects the Legislature’s strong support for free speech



on matters of public concern in the Commonwealth. It also reflects the public policy in Virginia that courts should swiftly dismiss baseless lawsuits attacking freedom of speech and of the press.

Here, it is clear that CNN's reporting about two defendants charged with federal crimes in connection with the Capitol riot, one of whom was a Capitol Police officer, relates to a "matter of public concern." *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (explaining that "commission of crime" and "judicial proceedings arising from" it "are without question events of legitimate concern to the public"). Thus, CNN is immune from liability at the outset unless Hiles has alleged facts that, if proven, would establish what is referred to as "actual malice" under the First Amendment. Va. Code § 8.01-223.2(A)-(B). Hiles has not done so.

Actual malice in this context does not mean ill will or spite; rather, a plaintiff required to plead and prove actual malice must show that the defendant subjectively believed, at the time of publication, that the challenged statements were false or that it published them despite having a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Actual malice is therefore "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). Indeed, neither a "departure from accepted standards," *Reuber*, 925 F.2d at 711-12, nor a "failure to investigate" standing alone constitutes actual malice, *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Moreover, a plaintiff cannot show actual malice by pleading a combination of allegations that themselves do not individually amount to knowledge of probable falsity. *See, e.g., Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 294-95 (1987); *see also, e.g., Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) (court considered plaintiff's 24 theories alleging actual malice and "rejected all of them"). The Fourth Circuit has acknowledged that the actual malice standard is thus "a difficult one for . . .

plaintiffs to meet,” but it has emphasized that, “in the effort to balance private rights to protection of reputation against the First Amendment rights of writers and publishers to print information on matters of interest to the public, the courts have, as they must, favored the latter.” *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980).

The Fourth Circuit has further held that the pleading standards adopted in *Iqbal* and *Twombly* apply in defamation actions, including specifically to the pleading of “actual malice.” See *Mayfield v. NASCAR*, 674 F.3d 369, 377-78 (4th Cir. 2012); *Fairfax*, 2 F.4th at 293. Hiles is therefore required to plead facts that, taken as true, would be sufficient for a plausible finding of actual malice. *Mayfield*, 674 F.3d at 378.

Under this standard, Hiles’ Amended Complaint does not and cannot state a claim for defamation because it fails to plausibly plead facts that, if proven, would show that CNN published any information about him that it knew to be false or probably false. Indeed, the only allegation of fact that Hiles makes with respect to fault is his assertion “that [his] former attorney . . . expressly notified [CNN] the same day these statements were published that they were both false and *per se* defamatory.” Am. Compl. ¶ 90. As the Supreme Court has explained, however, “such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.” See *Connaughton*, 491 U.S. at 691 n.37 (internal marks omitted). Other than that, the Amended Complaint offers only the “kind of conclusory allegation—a mere recitation of the legal standard—[that] is precisely the sort of allegation[] that *Twombly* and *Iqbal* rejected,” *Mayfield*, 674 F.3d at 378. See Am. Compl. ¶¶ 78, 89.

Finally, as to his defamation-by-implication argument, Hiles alleges that the CNN Report implies that he “had some premeditated plan to commit violence against the United States along

with other violent insurrectionists,” which CNN “knew [] was false at the time of publication.” Am. Compl. ¶ 32. This allegation also falls far short of the *Iqbal/Twombly* plausibility line, because Hiles essentially is trying to blame CNN for taking his own words at face value. On the morning of January 6, 2021, Hiles told the world that he “might start a revolution.” 2nd Brown Decl. Ex. 1 at 2. And later that day, according to the Statement of Offense to which Hiles admitted as part of his guilty plea, Hiles “unlawfully entered the U.S. Capitol,” even though he “knew at the time . . . that [he] did not have permission to enter the building.” See Am. Compl. Ex. C (Statement of Offense) ¶¶ 8, 11. Indeed, Hiles was sufficiently prepared for confrontation that he “brought goggles with him,” which he wore “to protect himself from tear gas being deployed by law enforcement against the crowd.” *Id.* ¶ 8 (emphasis added). These facts simply “do not raise an inference” that CNN “entertained serious doubts as to the truth” of Hiles’ claim that he had revolution in mind on January 6. *Fairfax*, 2 F.4th at 294 (quoting *St. Amant*, 390 U.S. at 731).

In sum, Virginia law requires Hiles to plead and ultimately prove that CNN published its challenged report with actual malice, and the Amended Complaint does not allege any facts that, if true, would be sufficient for a plausible finding of actual malice. Hiles therefore fails to state a claim for defamation or defamation-by-implication and the Court should grant CNN’s motion to dismiss his Amended Complaint for this independent reason as well.

#### **V. CNN SHOULD BE AWARDED ITS ATTORNEYS’ FEES**

The same provision of Virginia law that requires Hiles to prove actual malice in this case also empowers the Court to award to CNN its attorneys’ fees. Va. Code. Ann. § 8.01-223.2(C). This provision “permits, but does not require, a court to award attorney’s fees to a prevailing defendant.” *Fairfax*, 2 F.4th at 297. In these circumstances, however, the Court should exercise

its discretion to award to CNN the fees it has been forced to incur in defending this meritless action – an action in which the plaintiff challenges clearly privileged speech, essentially complains that he was accurately quoted in the press, and – in one more powerful example of chutzpah – seeks more than a hundred million dollars for the “damages” caused by his own words. *See Minnix v. Sinclair Television Grp., Inc.*, 2023 U.S. Dist. LEXIS 88343, at \*\*23-24 (W.D. Va. May 17, 2023) (awarding fees where, as here, “the defamation claim . . . lacks foundation in fact or law” and where, as here, “[g]ranting this request for attorney fees and costs . . . serves the statute’s purpose by deterring groundless defamation claims”). Moreover, an award of fees to CNN is especially appropriate here because, despite having been put on clear notice of his defective claims by CNN’s initial motion to dismiss, Hiles essentially re-filed the same complaint and failed to cure any of those fatal defects.

### CONCLUSION

For the foregoing reasons, CNN respectfully requests that the Court grant its motion to dismiss Plaintiff’s Amended Complaint with prejudice and award to CNN its attorneys’ fees pursuant to Va. Code § 8.01-223.2(C).

Dated: August 28, 2023

Respectfully submitted,

BALLARD SPAHR LLP

By: /s/ Jay Ward Brown

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*Attorneys for Defendant Cable News Network, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

**JACOB GAVIN HILES,**

**Plaintiff,**

**v.**

**CABLE NEWS NETWORK, INC.,**

**Defendant.**

**Case No. 2:23-cv-351-AWA-LRL**

**SECOND DECLARATION OF JAY WARD BROWN IN SUPPORT  
OF DEFENDANT CABLE NEWS NETWORK, INC.’S  
MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT**

I, Jay Ward Brown, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a partner in the law firm of Ballard Spahr LLP, counsel for Defendant Cable News Network, Inc. (“CNN”) in this action. I submit this declaration in support of CNN’s Motion to Dismiss Plaintiff’s Amended Complaint and have personal knowledge of the facts stated herein.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Statement of Facts in support of the Criminal Complaint filed in *United States v. Jacob Hiles*, Case No. 21-cr-155-ABJ (D.D.C. Jan. 15, 2021), ECF No. 1-1.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.

Dated: August 28, 2023

/s/ Jay Ward Brown

Jay Ward Brown

# Exhibit 1

Case 1:21-cr-00155-ABJ Document 1-1

Case: 1:21-mj-00070

Assigned to: Judge Zia M. Faruqui

Assign Date: 1/15/2021

Description: COMPLAINT W/ARREST WARRANT

## STATEMENT OF FACTS

Your affiant is a Special Agent with the Federal Bureau of Investigation (FBI) and has been so employed since January 2016. I am assisting in the investigation and prosecution of events that occurred at the United States Capitol on January 6, 2021. As a Special Agent with the FBI, I am authorized by law or by a Government agency to engage in or supervise the investigation of violations of Federal criminal laws. The U.S. Capitol is secured 24 hours a day by U.S. Capitol Police. Restrictions around the U.S. Capitol include permanent and temporary security barriers and posts manned by U.S. Capitol Police. Only authorized people with appropriate identification are allowed access inside the U.S. Capitol. On January 6, 2021, the exterior plaza of the U.S. Capitol was also closed to members of the public.

On January 6, 2021, a joint session of the United States Congress convened at the United States Capitol, which is located at First Street, SE, in Washington, D.C. During the joint session, elected members of the United States House of Representatives and the United States Senate were meeting in separate chambers of the United States Capitol to certify the vote count of the Electoral College of the 2020 Presidential Election, which had taken place on November 3, 2020. The joint session began at approximately 1:00 p.m. Shortly thereafter, by approximately 1:30 p.m., the House and Senate adjourned to separate chambers to resolve a particular objection. Vice President Mike Pence was present and presiding, first in the joint session, and then in the Senate chamber.

As the proceedings continued in both the House and the Senate, and with Vice President Mike Pence present and presiding over the Senate, a large crowd gathered outside the U.S. Capitol. As noted above, temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol Police were present and attempting to keep the crowd away from the Capitol building and the proceedings underway inside.

At such time, the certification proceedings still underway and the exterior doors and windows of the U.S. Capitol were locked or otherwise secured. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts.

Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m. Vice President Pence remained in the United States Capitol from the time he was evacuated from the Senate Chamber until the sessions resumed.

During national news coverage of the aforementioned events, video footage which appeared to be captured on mobile devices of persons present on the scene depicted evidence of violations of local and federal law, including scores of individuals inside the U.S. Capitol building without authority to be there.

Case 1:21-cr-00155-ABJ Document 1-1 Filed 01/15/21 Page 2 of 7

On January 6, 2021, multiple photographs and videos were posted to a Facebook account in the name “Jake Hiles” (hereinafter “the Facebook account”) showing an individual identified as JACOB G. HILES participating in unlawfully entering the U.S. Capitol on January 6, 2021. As discussed further below, these videos and pictures include “selfie” style footage from areas your affiant recognizes as both inside and outside the U.S. Capitol, sometimes including geo-tags identifying the location of the post as “Capitol Hill” or “United States Capitol” and accompanied by captions written in the first person. Visible in the photographs and videos is a bearded individual wearing a dark in color sweatshirt bearing the words “FUCK ANTIFA,” a tan in color neck gaiter, baseball cap, and tan in color goggles. The FBI interviewed W-1, who has known HILES for over five years and periodically interacts with HILES in-person. On January 6, 2021, multiple Facebook friends of W-1 shared videos and photographs from HILES’ Facebook page on W-1’s Facebook page. W-1 positively identified HILES as the individual depicted in the two “selfie” style videos posted to HILES’ account on January 6, 2021, further described below (Figure 3 and Figure 5).

Your affiant has reviewed numerous pictures and videos posted to the Facebook account, as well as another social media account. The videos and pictures I observed show the following:

- On January 6, 2021, a picture of an individual was posted to the Facebook account accompanied by timestamp 5:46 AM and the caption, “Feelin cute...might start a revolution later, IDK – in Capitol Hill” (see Figure 1 below). Your affiant knows “IDK” to stand for “I don’t know.”
- On January 6, 2021, a post to the Facebook account accompanied by timestamp 1:31 PM stated, “After being tear gassed for an hour, we entered the capitol, thousands of us. The fbi shot and killed a woman in front of us. We followed the trail of her blood out of the building” (see Figure 2 below).
- In a post timestamped 4:36 PM on January 6, 2021, a video was posted to the Facebook account appearing to show HILES outside a building your affiant recognizes as the U.S. Capitol. In the video, HILES explains his frustration to the camera and to others near him with respect to his assertion that the media was ignoring the fact that the FBI purportedly shot and killed a woman inside the building (see Figure 3 below).
- In the evening hours of January 6, 2021, a post to the Facebook account stated, “I’m not a smoker AT ALL, but when the cop asks you if you are gonna hit that, I ain’t gonna let it g...” Attached to this post was a “selfie” style video of HILES inside the U.S. Capitol building with a group of people. In the video, HILES appears to smoke an unidentified substance (see Figures 4 and 5 below).
- In the evening hours of January 6, 2021, a photograph was posted to the Facebook account appearing to show HILES inside the U.S. Capitol Building (see Figure 6 below).



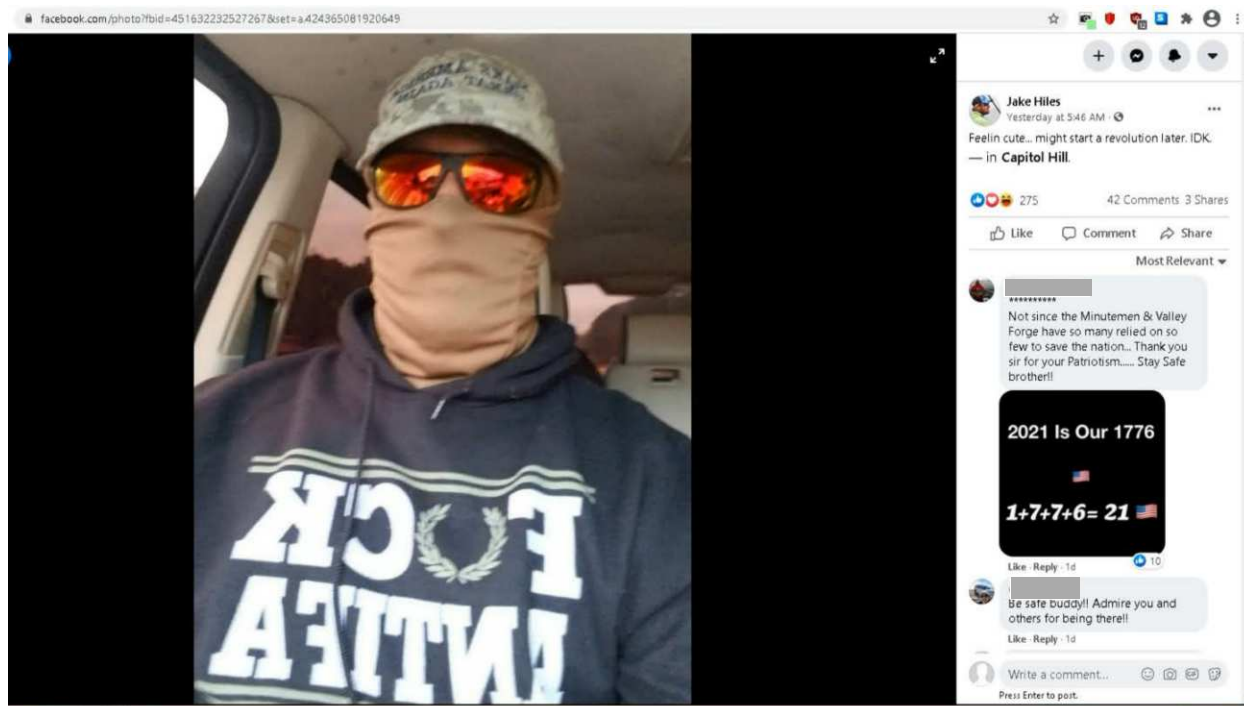


Figure 1

The photograph and commentary pictured in Figure 1 was posted to the Facebook account on January 6, 2021.

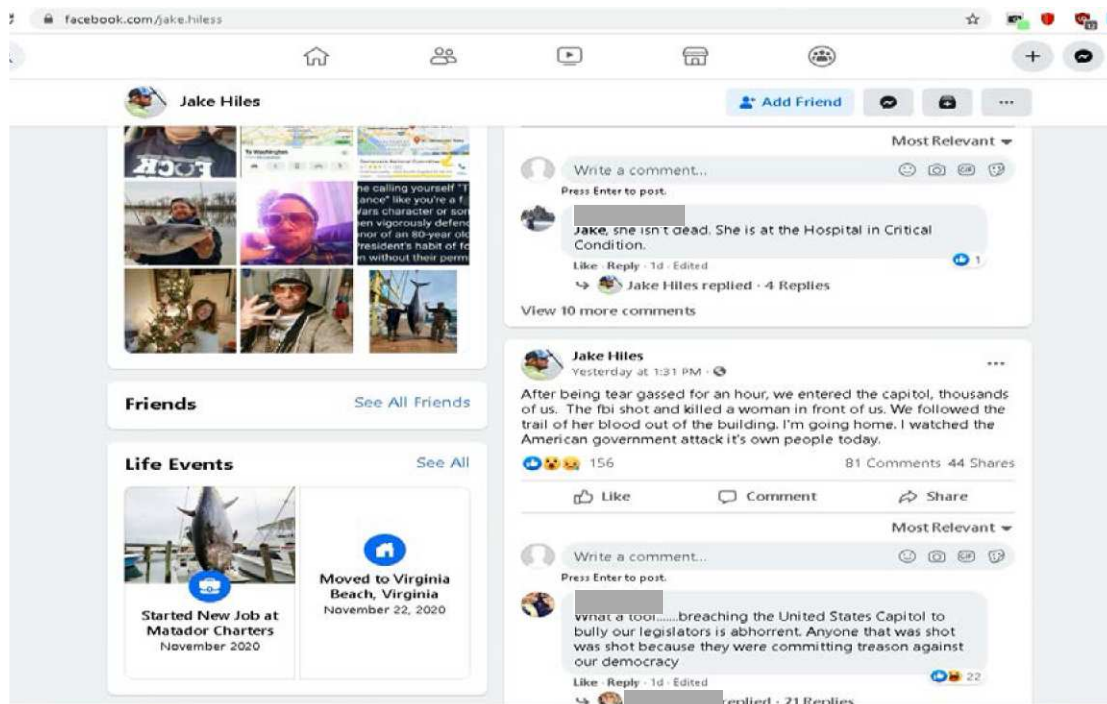
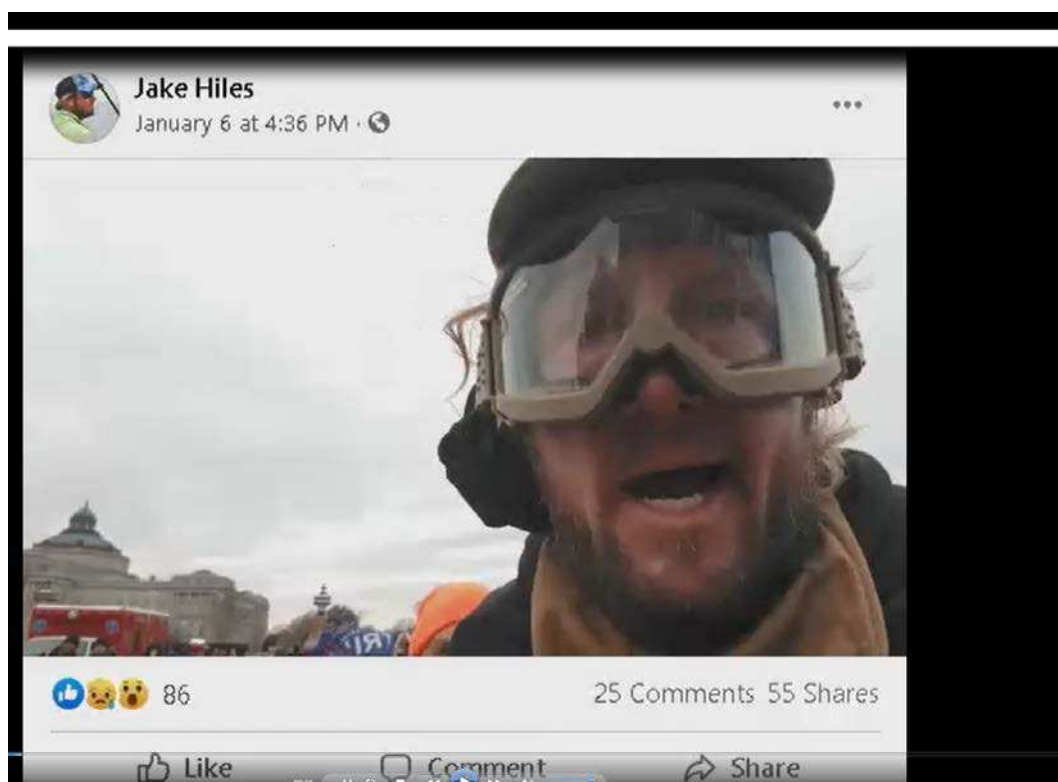


Figure 2

According to a post to the Facebook account, on January 6, 2021, HILES was tear gassed for an hour, then entered the U.S. Capitol Building, then followed a trail of blood as he exited the U.S. Capitol Building.



*Figure 3*

On January 6, 2021, a video of an individual outside the U.S. Capitol Building was posted to the Facebook account of an individual identified by W-1 as HILES wearing goggles in an area your affiant recognizes as surrounding the U.S. Capitol. Figure 3 is a screenshot of the video posted to the Facebook page.

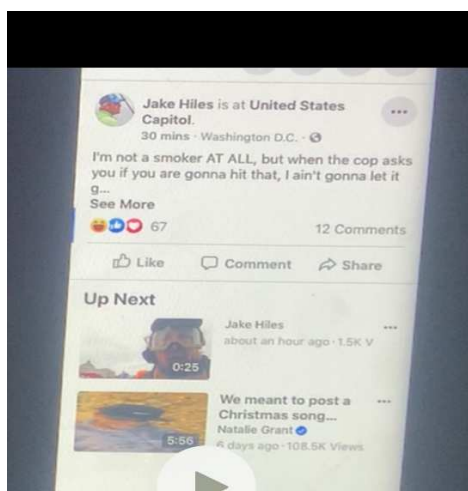
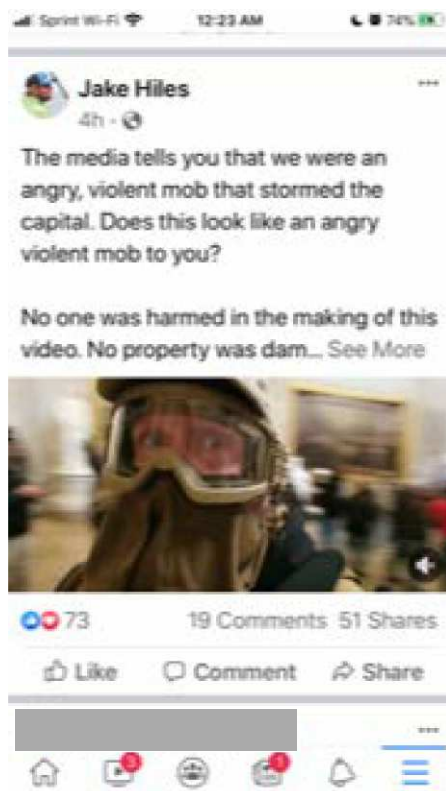


Figure 4



Figure 5

On January 6, 2021, a post was made on the Facebook account stating, "I'm not a smoker AT ALL, but when the cop asks you if you are gonna hit that, I ain't gonna let it g..." Figure 4 is a screenshot of the post. Accompanying the post in which is referenced taking a "hit" is a video of an individual inside the U.S. Capitol building with a group of people. In the video, an individual identified by W-1 as HILES can be seen smoking an unidentified substance. Figure 5 is a snapshot of the video posted to the Facebook account.



*Figure 6*

On January 6, 2021, a “selfie” style photograph was posted to the Facebook account of an individual wearing the same goggles and gaiter as pictures previously identified as HILES in an area your affiant recognizes as inside the U.S. Capitol Building. Based on numerous photographs and videos your affiant has reviewed, it is your affiant’s belief that the individual pictured in Figure 6 is HILES.


Your affiant has confirmed the identification of HILES as the person in the images and videos described above and posted on January 6, 2021. First, as noted above, W-1, who personally knows HILES, positively identified him in two of the videos from the Facebook account. The images and videos display unique attire and, in some instances, a clear view of the individual’s face. Your affiant has also reviewed HILES’ Virginia driver’s license photograph and profile picture for the Facebook account in the name of “Jake Hiles” and they appear to be the same individual in the pictures at the U.S. Capitol on January 6, 2021. Your affiant also viewed multiple open source videos on the website [www.youtube.com](http://www.youtube.com), in which an individual identifies himself as “Jake Hiles.” In one of the videos, the individual who identified himself as “Jake Hiles” appears to be wearing the same hat as pictured in Figure 1 above. The person in those videos appears to be the same individual in the pictures at the U.S. Capitol on January 6, 2021.

Following January 6, 2021, a post to HILES’ Facebook account included lengthy first-person commentary on what was seen and experienced at the U.S. Capitol on January 6, 2021. The post included the statement, “While under the rotunda, I never saw anyone touch or vandalize

anything and I distinctly heard several people saying ‘look but don’t touch.’” You affiant believes the “rotunda” referenced in HILES’ post is the rotunda located inside the U.S. Capitol Building. HILES also included in his Facebook post “I was walking past offices, and one office clearly above the door said “Office of Majority Leader Steny Hoyer.”” The post also indicated that the writer was in the front row of individuals outside the Capitol, “the crowd pushed [him] to the top of the steps” and once he had entered the Capitol, he just wanted to leave.

Based on the foregoing, your affiant submits that there is probable cause to believe that JACOB G. HILES violated 18 U.S.C. §§ 1752(a)(1) and (2), which makes it a crime to (1) knowingly enter or remain in any restricted building or grounds without lawful authority to do; and (2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engage in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions; or attempts or conspires to do so. For purposes of Section 1752 of Title 18, a “restricted building” includes a posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service, including the Vice President, is or will be temporarily visiting; or any building or grounds so restricted in conjunction with an event designated as a special event of national significance.



Your affiant submits there is also probable cause to believe that HILES violated 40 U.S.C. § 5104(e)(2)(G), which makes it a crime to willfully and knowingly parade, demonstrate, or picket in any of the Capitol Buildings.



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Brandon C. Merriman  
Special Agent  
Federal Bureau of Investigation

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by telephone, this 15<sup>th</sup> day of January 2021.



Zia M. Faruqui  
2021.01.15  
16:10:15 -05'00'

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Zia M. Faruqui  
U.S. MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

**JACOB GAVIN HILES,**

**Plaintiff,**

**v.**

**CABLE NEWS NETWORK, INC.,**

**Defendant.**

**Case No. 2:23-cv-351-AWA-LRL**

**[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

Upon consideration of the Motion by Defendant Cable News Network, Inc. to Dismiss Plaintiff's Amended Complaint (the "Motion"), any opposition and/or reply filed in connection therewith, and the argument of counsel, it is hereby

**ORDERED** that the Motion is **GRANTED**. It is hereby further

**ORDERED** that this action is dismissed with prejudice. It is hereby further

**ORDERED** that Plaintiff is liable to Defendant for its reasonable attorneys' fees and costs incurred in this matter, in an amount to be determined after briefing by the parties.

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE