No. 18-___

In the Supreme Court of the United States

MADELEINE CONNOR,

Petitioner,

–v–

ERIC CASTRO, GARY SERTICH, NANCY NAVE, LEAH STEWART, and CHARLES "CHUCK" MCCORMICK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court announced a test permitting a plaintiff to show "state action" under 42 U.S.C. § 1983 when that element is challenged. In the present case, the Western District of Texas denied Petitioner's request to supplement her complaint after she learned of an email from a state actor to her employer, which negatively referenced Petitioner's protected activity in this case and suggested her removal from her job. The district court held that supplementation under Fed. R. Civ. P. 15(d) would be futile, as Petitioner could not show "state action" under *Lugar*. The Fifth Circuit Court of Appeals affirmed.

THE QUESTIONS PRESENTED ARE

1. Whether the Court of Appeals erred in affirming the district court's denial of Petitioner's request as futile to supplement her pleading under Fed. R. Civ. P. 15(d), where the email at issue evidences government retaliation as a matter of law and satisfies this Court's *Lugar* test to demonstrate "state action" under 42 U.S.C. § 1983.

2. Whether the Court of Appeals misapplied this Court's precedent in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

3. Whether the Court of Appeals erred by requiring Petitioner to provide actual proof of "state action" under 42 U.S.C. § 1983 by issuing what in effect is a fact finding—that the email was a "purely private act"—and in so finding, improperly raised Petitioner's burden to allege a plausible claim under this Court's precedence in *Twombly* and *Iqbal*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Madeleine Connor requests that the Court issue a writ of certiorari to reverse and remand the decisions below.

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals dated February 23, 2018 appears at *Madeleine Connor v. Eric Castro, Nancy Naeve, Gary Sertich, Leah Stewart, and Chuck "Charles" McCormick*, No. 17-50462, 719 Fed. Appx. 376 (5th Cir. 2018) and is reproduced in the appendix at App.1a.

District Court of Texas entered an order on April 25, 2015 and is reproduced in the Appendix to this petition at App.10a.

JURISDICTION

Motions for Rehearing and Rehearing En Banc were denied on April 24, 2018 (App.26a); Petitioner filed a timely application to extend time to file a writ of certiorari, and the application was granted on July 10, 2018, extending the Petitioner's time to file a writ of certiorari to August 22, 2018.

This Court has Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

- U.S. Const. amend. XIV, § 1

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- 42 U.S.C. § 1983

  Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

- Fed. R. Civ. P. 15(d)

  Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

STATEMENT OF THE CASE

A. Introduction

This an ordinary-citizen speech case wherein Petitioner sued the government—a local special taxing district—on behalf of her *pro bono* client and neighbor (David McIntyre), to enjoin the construction of sidewalks in the district. Petitioner alleged that the government subsequently retaliated against her in various ways. Petitioner contends that the denial of her request to supplement under Fed. R. Civ. P. 15(d) as "futile" was error, as the Court of Appeals misapplied substantive law from this Court to reach that finding. Further, the Court of Appeals impermissibly increased Petitioner's burden by requiring her to prove, rather than allege, a plausible claim of state action. Petitioner asks the Court to reverse and the holding of the Fifth

Circuit affirming the denial of the request to supplement, and remand the cause to the district court for further proceedings.

B. Statement of Facts and Procedural History

The allegation at the heart of this proceeding involves an email to Petitioner's employer, which specifically complains of the protected activity (litigation against the state), falsely disparages Petitioner, and suggests unfitness for her job or a promotion on account of the litigation. App.3a-68a.

The Western District denied Petitioner's request to supplement the complaint under Fed. R. Civ. P. 15(d), and Petitioner appealed. The Fifth Circuit Court of Appeals affirmed the district court's denial of the request to supplement, holding, as the district court had, that the amendment would be futile. App.21a-23a. Connor timely requests review of the Fifth Circuit's holding.

As further background, Petitioner sets forth the factual and procedural history here, and notes that the Fifth Circuit's factual and procedural histories are, in relevant part, correctly chronicled. App.2a-6a.

After the case to enjoin the sidewalk project was initially filed in state district court, Respondents, the special district's board of directors, subsequently engaged in a series of retaliatory conduct against Petitioner by threatening to report Petitioner to the Texas State Bar, Chief Disciplinary Counsel, for speaking about the case during citizen comment before the government Board; causing her to be twice banned by the neighborhood social media platform—NextDoor—for speaking out against the Board; and in trans-

mitting incomplete information about the case to the residents of the district in several "litigation status updates," which generally painted Petitioner and her client in a negative light to all of their neighbors of the District. App.2a-3a, App.12a.

After removal,[1] the Western District of Texas dismissed Petitioner's First Amendment retaliation claims under Fed. R. Civ. P. 12(b)(6) and remanded the state claims to the state district court. App.3a. Petitioner appealed the dismissal to the Fifth Circuit Court of Appeals, and while the appeal was pending, Petitioner added a First Amendment abridgement claim in state district court, which the federal district court had held was not pleaded. *See McIntyre v. Castro*, No. 1-15-CV-1100 RP, 2016 WL 1714919, at fn. 1 (W.D. Tex. 2016), *aff'd*, 670 F. App'x 250 (5th Cir. 2016), *reh'g denied* (Dec. 9, 2016). In response to the amendment in state court, Respondents removed the case for a second time, and the district court stayed the proceeding pending a decision from the Fifth Circuit. App.2a.

While the case was stayed in federal district court, Petitioner learned that one of the government officials had transmitted an email to her employer, which referenced the litigation against the District, and suggested that Petitioner be terminated from her position as Interim General Counsel for the Texas Veterans Commission due to the litigation (or passed over for promotion to the General Counsel's position), citing various falsehoods about Petitioner, *inter alia*, that she had loathsome mental disorders and that

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[1] 28 U.S.C. § 1331 is the basis for federal jurisdiction in the court of first instance.

she had been terminated from her previous position as assistant attorney general in the General Litigation Division of the Texas Attorney General's Office, (where she had been employed for eight years). App.5a.

The Director also indicated in the email that Petitioner was "devious attorney with no morals, no integrity, no credibility" whose goal in the litigation was to "cripple veterans and other disabled people," due to her opposition to the Directors' plan to install sidewalks in the district. App.5a.

The email is set forth in full as follows in the Fifth Circuit's February 23, 2018, opinion. App.3a-6a.

> You and I knew each other at Camp Mabry from 2004-2010 when I was the Provost Marshal and ATFP Officer. As a retired FBI executive the TAG felt very comfortable having me as a civilian sitting in an O-6 slot, given my extensive Counterterrorism experience. I had the utmost respect for you sir, you are a true patriot and a man of unparalleled professional credibility and personal integrity. That is why I'm writing you now.
>
> I recently learned that you appointed Madeleine Connors [sic] as the Interim General Consul [sic] for your agency. I'm sure you had no knowledge that Ms. Connors [sic] is making it her mission to bring frivolous law suits against veterans in the Lost Creek community over the issue of sidewalks being built in the neighborhood which are intended to meet ADA requirements for the disabled. Ms[.] Connors [sic] has made it her mission to drain the budget of

the Lost Creek Limited District, a governmental entity engaged in facilitating the transition of Lost Creek recently annexed by the City of Austin. This is a very complex process as you may know, but our community is vigorously supporting the federal mandate for sidewalks to improve safety for children getting on school buses, as well as disabled veterans and others protected by ADA. There can be nothing more common sense than this issue. Ms[.] Connors [sic] has brought seven law suits, all of which have failed to be accepted in state and federal court, and most recently her appeal was denied by the 5th Federal Circuit Court of Appeals as having no basis in fact. So much for [M]s[.] Connor's pedigree. This is all verifiable in open court records.

I tell you this sir, for one reason and one reason only—your mission is to help veterans rise above their challenges and reach their full potential in life for themselves and their families after serving and sacrificing for their country and the State of Texas. I can't believe you would intentionally undermine your sacred mission by hiring a devious attorney with no morals, no credibility, and no integrity, who's [sic] goal to further cripple veterans and other disabled citizens as a manifestation of her Borderline Personality Disorder with histrionic features, and a vendetta against men as her former husband learned the hard way. That's why she was fired from the Texas Attorney General's

> Office, who settled her law suit just to get rid of her, and why the Lost Creek Neighborhood Association voted her off the Board by a resounding 90% against her.
>
> I don't want to see you embarrassed Colonel Paladino, by acting in good faith on behalf of someone who has no faith, credibility, or integrity. I would strongly recommend you consider LTC Doug O'Connell, former TXMF JAG, Assistant DA prosecutor, Green Beret, and a man of honor for the Interim position, and possibly the formal General Consul [sic] role. Please sir, don't ignore this issue. I guarantee it will bite you when you least expect it, and the true victims will be disabled Americans and veterans.
>
> Sir, I wish you God speed and all God's blessings in your current calling. As a veteran I thank you and say, "Vaya con Dios."
>
> Respectfully,
> Chuck
> Sent from my iPad
>
> CHUCK McCORMICK, (FBI-Ret)
> The Austin Institute, LLC
> Strategic Consultants for
> Risk, Vulnerability, Security
> Assessment, Analysis, Mitigation

Due to the email, Petitioner sought to supplement her complaint under Fed. R. Civ. P. 15(d) when the district court lifted its stay. App.6a. The district court denied the request, citing futility of the proposed sup-

plement, as the email would be subject to the same plausibility defects as a series of other pre-discovery futility holdings of the court. App.22a.

On appeal of that ruling, the Fifth Court affirmed, holding that the futility finding was not an abuse of discretion. App.8a-9a; *Connor v. Castro*, 719 F. App'x 376, 380 fn.2 (5th Cir. 2018) ("Although Connor's appeal is without merit, we cannot say that it is frivolous.").

In response to Petitioner's point of error that the email fell squarely within this Court's test in *Lugar*, the Fifth Circuit concluded that "the email fails to support any allegation that McCormick acted under color of state law, rather than as a private individual, when he sent it to Connor's employer" because the Director used a private email server, signed his name as "Chuck," and used a signature block of a private organization. App.8a-9a.

REASONS FOR GRANTING THE PETITION

Petitioner seeks reversal of the Fifth Circuit's holding on three grounds.

First, allowing the holding to stand would provide an unreasonable shield of governmental liability to a virtually limitless pool of government officials, as long as the government actor utilizes a private platform (such as gmail, here) to carry out any number of constitutional and statutory violations against citizens, licensees, or government employees. Failing to correct this decision would be exponentially problematic with respect to relations between government actors and

the public in the Fifth Circuit. Petitioner has found no similar opinions in any other circuit, but would argue that a judicial opinion sanctioning such a shield of government liability—simply by use of a private email platform, using a nickname and/or a private signature block—would contravene public policy and the growing public concern over government officials who have attempted to evade transparency and accountability by utilizing private email servers and the like.[2] Thus, the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

Second, the Petition presents an issue important to federal jurisprudence because the Court of Appeals holding misapplies this Court's ruling in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931-932 (1982), as the conduct of the governmental actor here falls squarely within this Court's test to demonstrate governmental liability under the "fairly attributable to state action" prong of 42 U.S.C. § 1983. The now familiar test in *Lugar*, which is available when state action is not obvious (or carried out by a private person), is as follows:

> A plaintiff may satisfy the "under color of state law" requirement of § 1983 by proving that the conduct causing the deprivation is "fairly attributable to the State." "Fair attribution" requires (1) that the deprivation is caused by the exercise of a state-created

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[2] *See, e.g., City of El Paso v. Abbott*, 444 S.W.3d 315, 318-19 (Tex. App.—Austin 2014, pet. denied) (private email containing public business presumed open and subsequently codified in the Public Information Act.)

> right or privilege, by a state-imposed rule of conduct, or by a person for whom the state is responsible, and (2) that the party charged with the deprivation may be fairly described as a state actor. *Lugar*, 457 U.S. at 937. The three no-state-action findings of the courts below (gmail platform instead of government issue email, etc., signing by first name only and using a private signature block) cannot overcome the overwhelming tenor and references that are tied to the litigation against the government.

The email references the sidewalk litigation in multiple places. App.3a-5a. In it, the government actor, Director Charles McCormick, repeatedly references Petitioner as a lawyer who has brought "seven suits" against the government and "is making it her mission to bring frivolous law suits against veterans in the Lost Creek community over the issue of sidewalks being built in the neighborhood." Director McCormick refers to Petitioner (a citizen of the district) in an indisputably horrible light (immoral, lacking in integrity, and mentally ill), precisely because of the litigation. The email was written and transmitted by a government actor—a director of the district—in response to the protected activities of petition. *See* U.S. Const. amend. I.

The email reflects the director's displeasure with the litigation, and suggests, therefore, that Petitioner is not competent to serve the Texas Veterans Commission in her capacity as interim general counsel, and regardless, should not be promoted to General Counsel of the agency. It is further apparent that the motiva-

tion for the email is primarily on account of the litigation, second only to Director McCormick's suggestion that Petitioner's supervisor award her job to another person. Virtually every comment or suggestion leads back to the sidewalk litigation, including McCormick's allegation that Petitioner's "mission [is] to drain the budget of the Lost Creek Limited District," which of course represents another direct connection to the government and the lawsuit against it. App.4a.

The courts below rejected Petitioner's argument that these elements in the email itself, and its undisputed author—a state actor—satisfied the "state action" test under *Lugar*.[3] App.8a-9a, 21a-23a. This Court should grant the petition and correct this holding, which is directly contrary to the test in *Lugar*. Accordingly, the petition should be granted because the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court.

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[3] Neither the Fifth Circuit nor the district court opined on Petitioner's additional argument that the email, when considered in conjunction with the other governmental acts—such as threatening to file a complaint with the State Bar of Texas for speaking at a Board meeting as a citizen about the suit—bolstered the request to supplement the complaint. Petitioner argued that the email constituted conduct that had become a clear and irrefutable pattern of retaliation against her. However, both courts have consistently addressed all the actions against Connor—which were not disputed—singly, in a vacuum, as if each were the only actions against Connor ever taken on account of the litigation or representation of McIntyre.

Third, the holding misapplies the plausibility standards of *Twombly* and *Iqbal*,[4] and in effect, makes an affirmative fact finding that counters the well-settled principle that allegations in the complaint must be taken as true.

That is, in an additional way, the Fifth Circuit holding further conflicts with this Court's opinion in *Lugar*, which allows a factual inference to be drawn that conduct is "fairly attributable to the state" under 42 U.S.C. § 1983, as the Court of Appeals' holding required Petitioner to show actual state action. That is, the lower courts here issued a factual finding that Director McCormick's email was "purely a private act," which raised Petitioner's plausibility standard in *Twombly* and *Iqbal* to an actual proof standard—without the benefit of discovery. In failing to accept Petitioner's allegations as true, and instead finding facts that Director McCormick's email was a "purely private act," the court of appeals erred. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Petitioner did not make "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"; rather, she produced actual evidence of state action—an email from a government actor referencing the litigation, with which he was clearly displeased and requested the recipient to terminate Petitioner's employ. In this regard, the Court of Appeals misapplied *Iqbal*, by requiring more

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[4] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

than an inference of actual state action—even where Petitioner produced a retaliatory email from a sitting government actor—and instead issued a fact-finding of the opposite. App.9a. This Court should grant review of this holding, as it shifts the burden from a plaintiff to only allege a plausible claim—but to prove a plausible claim, as well as defeat the *Lugar* inference applied in favor of the wrong party—the state. Therefore, this Court should grant the petition because, by making an explicit negative fact-finding of 'no state action' instead of taking Appellant's allegations as true, with the *Lugar* inferences drawn in Petitioner's favor, the courts below decided an important federal question in a way that conflicts with relevant decisions of this Court. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.").

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Court grant her petition for writ of certiorari to the Fifth Circuit Court of Appeals at New Orleans, Louisiana; order briefing on the merits; reverse the affirmance of the Court of Appeals; and remand the cause to the district court for supplementation of the complaint.

Respectfully submitted,

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