

No. ____

In the Supreme Court of the United States

Elisabeth Hendrika Sophia Maria Smit, widow of M.G.H. Craenmehr and mother of Steven Craenmehr, Individually; Lizzy Jane Francis Plug, Individually, as Next Friend of M.C., a minor, and on behalf of the Estate of Steven Craenmehr, deceased,

Petitioners,

V.

SXSW Holdings, Incorporated, formerly known as SXSW, Incorporated; SXSW, L.L.C. formerly known as SXSW Transition, L.L.C.; Patrick Lowe; Transportation Design Consultants, L.L.C.; City of Austin,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Scott M. Hendler
1301 West 25th Street, Suite 400
Austin, Texas 78705
512-439-3202
shendler@hendlerlaw.com
Counsel of Record for Petitioners

Peter D. Kennedy
Graves, Dougherty,
Hearon & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480-5674
pkennedy@gdhm.com
Counsel of Record for Respondents
SXSW Holdings, Inc. and
SXSW, L.L.C.

Brantley Ross Pringle, Jr.
900 Congress Avenue, Suite 500
Austin, Texas 78701
512/476-4600
rpringle@w-g.com
Counsel of Record for Respondents
Patrick Lowe and
Transportation Design Consultants,
L.L.C.

Chris Edwards, Assistant City
Attorney
City of Austin Law Department
P. O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-2419
Chris.Edwards@austintexas.gov
Counsel of Record for Respondent City
of Austin

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and of the United States Court of Appeals for the Fifth Circuit.

Statement Requesting Extension

Petitioners Elisabeth Smit and Lizzy Plug respectfully request a 60 day extension of time to file their Petition for Writ of Certiorari. The Fifth Circuit affirmed the dismissal of Petitioners' case and entered a denial of the petition for rehearing on November 6, 2018. The deadline to file a Petition for Writ of Certiorari will expire on February 4, 2019. Petitioners attach copies of the majority and dissenting opinions and the Order denying rehearing. Petitioners are filing this application for extension of time more than 10 days prior to that due date.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the courts below was invoked under 28 U.S.C. § 1332. Petitioners are citizens of The Netherlands and Respondents are citizens of the State of Texas.

Description of the Nature of the Case and the Rulings Below

Petitioners sued the City of Austin and festival operators who owned and occupied, respectively, the premises where together they held a large music festival in the streets of the Central Business District of Austin, Texas. An errant vehicle fleeing police drove into an inadequately barricaded section of roadway where festivalgoers had been invited to congregate, running down numerous individuals and killing four, including Steven Craenmehr, Petitioners' son and husband. Texas law recognizes that liability can attach to premises owners and occupiers where their

invitees are injured or killed due to criminal activity that occurs on premises under their control. The district court granted a motion filed under FRCP 12(b)(6) dismissing the Complaint. The Fifth Circuit affirmed.

The court below incorrectly applied this Court's reasonable plausibility standard as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) to affirm the dismissal of the Complaint. This raises important questions of federal procedural law and Texas Supreme Court decisional authority that were determined adversely by the court below. The Complaint pled Texas premises liability and public nuisance causes of action and was crafted to address each element of each cause of action in detail to comply with the reasonable plausibility standard. The decision of the court below adopted a new legal standard in Texas that requires a showing of *actual control* rather than the *right of control* that can be demonstrated by contract as the Texas Supreme Court has held. *See Shell Oil v. Khan*, 138 S.W.3d 288, 292 (Tex. 2004). The Fifth Circuit's holding adopts a rule that contradicts established precedent of the Texas Supreme Court on this point.

The court below also imposed upon a plaintiff at the pleading stage a requirement to meet a standard of proof akin to a motion brought under FRCP 56 regarding prior similar criminal acts that exceeds what this Court required under the *Iqbal/Twombly* reasonable plausibility doctrine in the context of Texas jurisprudence. *See Timberwalk Apts., Partners v. Cain*, 972, S.W.2d 749 (Tex. 1998). Judge Graves's dissent addresses the incorrect standard imposed on Petitioners

requiring them to demonstrate, at the pleading stage, that there was a sufficient number of prior criminal acts to overcome a motion for summary judgment. The lower court's holding imposes upon a plaintiff a standard required to defeat a motion brought under FRCP 56 to overcome a motion to dismiss under FRCP 12(b)(6) at the pleading stage.

Since the *Iqbal* and *Twombly* decisions, defendants have relied on an increasingly subjective interpretation of the decisions to justify challenging even the most reasonably plausible complaint. The Complaint at issue in this matter offers the Court a unique example of a carefully crafted pleading that complied with the reasonable plausibility standard, yet fell victim to an increasingly liberal application of that standard by the lower courts that conflicts with the standard as articulated by this Court. This case presents the Court with an opportunity to flesh out the parameters of the reasonable plausibility pleading doctrine into sharper relief and further define the contours the Court articulated over a decade ago.

Statement Justifying Good Cause for the Extension

Petitioners request additional time to file their Petition for Writ of Certiorari on several grounds: A legal question similar to one presented here is currently pending before the Texas Court of Appeals based on the same facts arising from the same multiple injury event that occurred at the SXSW Music Festival in Austin, Texas on March 13, 2014. *Nguyen et al. v. SXSW Holdings, Inc., et al.* 14-17-00575-CV, in the Fourteenth Court of Appeals of Texas. That question is: What constitutes sufficient evidence of prior criminal activity to give rise to premises liability? The

Nguyen appeal was submitted for decision to the Fourteenth Court following oral argument on June 26, 2018. While no firm date exists for the Court of Appeals to issue its decision, given the time it has been pending, a decision is expected in the near future and resolution of the appeal could provide guidance to determine whether Petitioner in this matter sufficiently stated a claim for relief based on the criminal activity exception to premises liability recognized by Texas law.

In addition, Petitioners respectfully request an extension of time to attempt to associate experienced Supreme Court co-counsel to present the case to this Court. Petitioners' counsel is a four lawyer firm with only two experienced litigation lawyers (the third' practice area is limited to legislative advocacy and public policy and the fourth was licensed in November 2018). Petitioners' counsel is not experienced in preparing a Petition for Writ of Certiorari and are attempting to associate a more experienced Supreme Court practitioner. Petitioners gave careful consideration as to whether to pursue a Petition for Certiorari and following the conclusion to do so, have been unable to locate or associate an experienced member of the Supreme Court Bar to assist in the matter. Petitioners' counsel is in need of additional time to ensure a properly prepared Petition for Certiorari is submitted to this Court for consideration and the association of more experienced member of this Bar will assist to that end. SXSU Holdings, Inc., SXSU, LLC, Patrick Lowe, Transportation Design Consultants, and the City of Austin do not oppose this application for extension of time.

Prayer

Petitioners respectfully request an extension of time to file their Petition for Writ of Certiorari to April 5, 2019.

Respectfully submitted,

Scott M. Hendler
1301 West 25th Street, Suite 400
Austin, Texas 78705
512-439-3202
Counsel for Petitioners

January 23, 2019