

Supreme Court, U.S.
FILED

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No. 21-1597

IN THE SUPREME COURT OF THE UNITED
STATES

Seyed Mohsen Sharifi Takieh,

Plaintiff Appellant,

v.

Banner Health, Janice Dinner, Michael
O'Connor, M.D., Peter Fine, Christopher Volk,
Michael O'Meara, M.D., Steven Maxfield, M.D.

Defendant Appellees.

On Appeal from the United States District
Court for the District of Arizona
No. 2:19-cv-05878-MTL
Hon. Michael T. Liburdi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in determining that the District Court properly incorporated the Ruling in the State Court Injunction Action on a 12(b)(6) Motion to Dismiss when the only purpose for doing so was to controvert Dr. Sharifi's allegations and resolve disputed material facts in favor of defendants?
2. *Comcast* held that the §1981 Plaintiff must initially plead, and ultimately prove that Defendant's intentional discrimination on account of race was a "but-for" cause of Plaintiff's injury. Considering the additional pleading requirements announced in *Iqbal* and *Twombly* in order to state a plausible claim for relief, are a plaintiff's well-pled allegations still taken as true, including all reasonable inferences, even when Defendant offers competing explanations?
3. Did the district court (and Ninth Circuit) err in dismissing – at the pleading stage – Dr. Sharifi's examples of non-Arab physicians who were disparately treated when exhibiting the same or similar conduct of which Dr. Sharifi is accused?
4. The Arizona Medical Board (AMB) is an impartial Agency and the ultimate adjudicator of all Arizona physicians' ethical and professional conduct. It has the legal duty to regulate, and if necessary, penalize physicians for patient care issues, alteration of medical records and disruptive behavior; all considered very serious violations under the Medical

Practice Act of the State of Arizona. These alleged transgressions were the race- neutral bases and the competing reasons cited by Banner in terminating Dr. Sharifi. The AMB repeatedly dismissed all such allegations. After several prolonged and comprehensive investigations, the AMB considered them to be “without merit”. Did both the District Court, and the Ninth Circuit err by not taking into account any of the AMB's numerous determinations that these race neutral causes were “without merit” thereby reducing the strength of the “so convincing” status of the competing causes which had led to the implausibility of Sharifi’s allegations at the pleading stage?

Statement of Related Proceedings

Petitioner is not aware of any directly related proceedings in this or any other Court within the meaning of Rule 14.1(b)

Parties to the Proceeding

Petitioner believes that the Parties to the Proceeding
are all identified in the Caption

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Lower courts struggle with the application of the “but for” causation standard in the context of discrimination claims, especially where, as is the case here, the Court required to interpret and give the proper weight to completing explanations for conduct in determining whether plaintiffs have pled plausible claims.

Plaintiffs are required, under the pleading standards announced in *Iqbal* and *Twombly*, to offer allegations that plausibly suggest entitlement to relief. Where defendants offer competing explanations for their conduct, plaintiff's allegations that are equally plausible are insufficient without additional allegations tending to disprove defendant's alternative explanation. This case highlights the potential for these pleading standards and the causation standard announced in *Comcast* to make it nearly impossible for plaintiffs to plead a plausible claim for relief.

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Supreme Court Rule 13.1

Supreme Court is invoked under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

This case was brought under 42 U.S.C. § 1981, alleging that Defendants engaged in intentional discrimination on account of his race which impaired Dr. Sharifi's contractual rights under the Bylaws at Banner Baywood Medical Center (BBMC), and the various other Banner hospitals where he was credentialed. The text of the statute is contained in Appendix 5.

Dr. Sharifi further claimed that Defendants' intentional discrimination on account of his race had caused impairment of the Physician Services Agreements (PSAs) at the hospitals where he was credentialed, as well as interfered with future contracts and referrals through networks outside of the Banner health systems.

V. STATEMENT OF THE CASE

For over five years and counting, Dr. Sharifi has fought tirelessly for one thing: the opportunity to present the facts surrounding Banner's termination of his privileges at the various Banner hospitals where he was credentialed to a neutral and disinterested fact finder. Dr. Sharifi is confident that if given the opportunity to tell his side of the story, the jury will have no trouble identifying the excuses offered by Defendants for what they really are – pretexts for racial discrimination. This petition is the result of his efforts thus far.

The FAC details a complex series of incidents, committed by a number of individuals with varying degrees of involvement, over an approximate 13-year period at four different hospitals. Most of the discriminatory acts occurred at Banner Baywood Medical Center (BBMC), but the termination of Dr. Sharifi's privileges at BBMC automatically caused the loss of privileges at the other Banner hospitals. From approximately March of 2001 until sometime in December of 2014, Larry Spratling, M.D. was Chief Medical Officer (CMO) at BBMC. Spratling knew that Dr. Sharifi faced obstacles given the medical profession's resistance to change as well as his racial heritage. While Spratling was CMO at

BBMC, he mentored Dr. Sharifi, and perhaps insulated him to some extent since Spratling's support was obvious.

Dr. Sharifi is of Arab ancestry of Iranian origin and his place of birth was Iran. He is also one of a handful of physicians pioneering advances in the field of venous thromboembolic disease through research, some of which has collided with long-held medical assumptions regarding blood thinners and other clot-busting drugs particularly with regards to when, or under what circumstances, the use of low dose blood thinners is appropriate (in medical parlance "indicated" as opposed to when it is not, or "contraindicated").

Dr. Sharifi is one of the foremost experts and researchers in this field with nearly 200 publications, book chapters, and presentations to his credit. Dr. Sharifi has been licensed to practice medicine for twenty-eight years, and is Board Certified in Vascular Medicine, Interventional Cardiology, Cardiovascular Medicine, and Nuclear Cardiology. For approximately 13 years, he was credentialed at four Banner-run hospitals. Besides some initial resistance from Defendant Maxfield – who was in charge of Interventional Radiology (IR) at Banner – Dr. Sharifi's time in the Banner system was largely without incident,

especially considering that his patients are typically high risk, with life threatening health issues that conventional medicine has been unable to resolve. Maxfield initially directed that all of Dr. Sharifi's cases be peer reviewed until Spratling suggested a letter to Maxwell explaining how this constituted improper use of peer review.

Dr. Sharifi's letter had the desired effect because Maxfield ended the unwarranted peer review shortly thereafter which both Dr. Sharifi and Spratling suspected was on account of Dr. Sharifi's race. Thereafter, Dr. Sharifi's cases were peer reviewed like any other physician. He never resisted the process or threatened any participants, and there were never any issues with his care in any peer reviewed cases. Because of the almost miraculous results Dr. Sharifi obtained with the cutting edge treatments he, and other specialists in the field have developed, he received the bulk of the patient referrals from a variety of sources – especially for the most difficult cases where conventional treatments had failed.

Sometime in 2012, at Banner Gateway Medical Center (BGMC), Dr. Sharifi was prevented from administering low-dose thrombolytics to a patient who had developed

a life threatening blood clot after surgery performed by another Banner physician. The patient died of a large pulmonary embolism within hours of the refusal to permit Dr. Sharifi's treatment by the BGMC CMO, and the surgeon, but Dr. Sharifi was cleared of any wrongdoing. When he was named as a non-party at fault in a wrongful death action brought by the patient's family against Banner, Dr. Sharifi was deposed and testified truthfully. His deposition testimony occurred sometime in November of 2014, and was likely instrumental in facilitating the settlement of the suit shortly thereafter.

When Defendants initiated a sexual harassment investigation less than a year after Dr. Sharifi's deposition in the wrongful death action, the timing seemed suspicious. Shortly thereafter, physicians in the Banner system began reporting that Banner corporate instructed them not to refer patients to Dr. Sharifi because he was medically incompetent, had killed many patients through thrombolytic therapy, would soon lose his license to practice by the Arizona Medical Board (AMB), and would be terminated at Banner.

Off the record, many of these physicians attributed the statements directly to Banner Chief Corporate Counsel Defendant Dinner,

however, they were unwilling to state this under oath. Some eventually signed Declarations attesting to the defamatory statements which were attributed to Banner corporate, without identifying Dinner as the source. Dr. Sharifi believed Dinner was disseminating other defamatory statements like that he was luring women to his clinic with promises of drugs or alcohol in exchange for sexual favors. Dinner was overheard admitting as much, but lamenting that she was unable to accomplish Dr. Sharifi's termination on these bogus grounds. Sometime in October or November of 2018, sonographer Leslie Wilson heard Dinner make these, and other comments regarding Dr. Sharifi while talking on the telephone in a public location at BBMC.

Defendant Dinner was intimately involved in the entire process to terminate Dr. Sharifi. Dr. Sharifi obtained Ms. Wilson's Declaration in late August of 2019 – approximately ten months after the incident she describes – because she was initially reluctant to sign any sworn statement while employed in the Banner system. In late summer of 2019, she decided to retire, and executed the Declaration when she returned from a family vacation.

Ms. Wilson witnessed Dinner, along with another individual she did not recognize,

leaving BBMC sometime in the fall of 2018 (just about a month after the Fair Hearing). Dinner was on a cellphone, but it appeared as though she was addressing the individual accompanying her as well. As Dinner paused in the atrium, Ms. Wilson heard her say, among other things: (1) that Dr. Sharifi is a terrible doctor who “kills patients” and is otherwise “a danger to patients” in Arizona; (2) that the “idiot Muslim Iranian” dared to sue her and she “will make his life a living hell”; (3) that Dr. Sharifi is “a danger to the system” and Peter [Defendant Fine] and Chris [Defendant Volk] want him “fired at all costs”; (4) that Peter wants Dr. Sharifi – in addition to everything else done to him – to be made “an example so nobody dares testify against” Banner; (5) that it is “too bad we couldn’t get rid of him [Dr. Sharifi] on drug and alcohol use,” which were lies devised by Dinner in connection with the bogus sexual harassment charges, but “we tried”; (6) that even if “this [the fair hearing pretext] doesn’t work, we will come up with another excuse” – not cause – to eliminate him; (7) that Dr. Sharifi knows full “well that I [Dinner] pull[s] the strings ..., [but] he can never prove it”; (7) that she will personally ensure all his “calls and contracts” are “canceled,” so that he could not “fund his attorney’s fees with our [Banner’s] patients”; (8) and, that her buddy Randy (the hearing

officer Yavitz) did a “great job” on Dr. Sharifi’s Fair Hearing where he [Yavitz] “[o]f course, ... swayed the hearing panel.”

The FAC contains allegations that further detail Dinner’s involvement in the discriminatory acts, including: (i) orchestrating changes to Bylaw’s that specifically targeted Dr. Sharifi to eliminate his contractual rights; (ii) re-writing witness reports to support accusations against Dr. Sharifi; (iii) using the peer review privilege to facilitate discrimination; (iv) framing Dr. Sharifi for sexual harassment, drug, and alcohol use by manufacturing allegations against him. The acts included spreading the false and defamatory statements about Dr. Sharifi described above along with others. In Maricopa County Cause No. CV2018-001473 (the Defamation Action), Dr. Sharifi brought claims for defamation against Dinner, but this case ultimately did not decide much largely because Dr. Sharifi was denied access to any discovery including thousands of documents Dinner claimed were peer review privileged based on her participation in Dr. Sharifi’s peer review.

Other Declarants describe conduct that occurred around the time of the Fair Hearing, and conversations between Banner physicians either involved in the Fair Hearing, or who occupied positions of authority – like Defendants Hu, Maxfield, and Lyon – that

corroborate Dinner's involvement, as well as other details of the plot to destroy Dr. Sharifi and his career. An incident witnessed by Dr. Ava Rose involved Defendant Michael O'Meara who was the President of the Medical Staff and the Chairman of the Medical Executive Committee (MEC) at BBMC. O'Meara led the investigation of Dr. Sharifi outside the normal channels of peer review, and pursued it with an unusual degree of control over everything from the level of secrecy, to the extent the target – Dr. Sharifi – was prevented from understanding or defending the charges at most stages of the investigation.

Under the 2015 BBMC Bylaws in effect at the time, anyone involved in the investigation of charges resulting in a Fair Hearing was prohibited from selecting the panel who would decide the facts. At Dr. Sharifi's Fair Hearing, O'Meara was one of Banner's primary witnesses, along with O'Connor, and Banner's medical expert, Kevin Hirsch, M.D., whose report was rewritten by Dinner when the MEC realized that it failed to address any of the pretexts used to justify the investigation. Since he was employed by Banner, Hirsch did not qualify as "disinterested" under the 2015 Bylaws either.

There was a flurry of Bylaws changes before the Fair Hearing, all of which were directed at Dr. Sharifi, which included permitting O'Meara to appoint the three panel members, and allowing Dinner to select a non-neutral hearing officer, Randy Yavitz, who additionally was granted the ability to participate in the panel's deliberations. Mr. Yavitz ruled on the validity of the rushed changes, and determined that the amendments would apply to Dr. Sharifi's upcoming Fair Hearing, as well as retroactively cure some of the past violations that had occurred during the investigation. Defendant Hu was on Banner's witness list, but did not testify. He did stand outside the Fair Hearing trashing Dr. Sharifi, and intimidating his witnesses, which was later confirmed in the sworn Declaration of Ann Baker.

Defendant O'Connor was the Chief Medical Officer at BBMC. In 2015, he was involved in the sexual harassment investigation. In 2017, O'Connor was instrumental in initiating the investigation of Dr. Sharifi under the guise of patient care concerns. Although O'Connor and O'Meara initially lied about his involvement, it eventually surfaced that a case O'Connor had prevented Dr. Sharifi from performing at BBMC (involving a wheelchair bound patient and ultimately relieving his condition and

restoring complete ambulation within days) was used as a pretext to initiate O'Meara's clandestine investigation. Peer review cleared Dr. Sharifi on this case as well, after the surgery was performed at another hospital.

Sonographer Yvonne Atencio witnessed a conversation involving O'Connor and O'Meara only six or seven months before the sexual harassment investigation was initiated. During that conversation, O'Connor characterized Dr. Sharifi as a "Muslim Iranian terrorist who kills patients with tPA and has to be punished first and then removed from Banner." O'Meara, smiling, nodded in agreement and stated that "he will pull the trigger" and "Osamas have no place at Banner." O'Meara did not stop there. He went on to say that Dinner "would set him [Dr. Sharifi] up for AMB."

AMB did not cooperate, despite multiple attempts by O'Meara and Dinner to get an AMB ruling in Banner's favor – on the same issues and evidence that were used for his termination – Dr. Sharifi was cleared each time.

Another witness who testified against Dr. Sharifi at his Fair Hearing was Banner's Chief Clinical Officer Marjorie Bessel. On the eve of the Fair Hearing, after multiple physicians and experts had poured over the same medical records for years, Banner (and Bessel)

suddenly claimed to have discovered a new pretext for terminating Dr. Sharifi – improper alteration of medical records. These same accusations and evidence that were offered at the Fair Hearing were raised in complaints by Banner to – the agency charged with regulating physicians and the practice of medicine in Arizona – and every time Dr. Sharifi was completely exonerated, including once on appeal¹.

During the BBMC investigation, Dr. Sharifi was forced to file an injunctive action in Maricopa County Superior Court Cause No. CV2017-055848 (the Injunction Action) to prevent BBMC from prematurely reporting him to the National Practitioner's Database (NPDB) prior to rendering any final decision on his privileges. Upon the conclusion of the Fair Hearing, on September 13, 2019, the trial court in the Injunction Action entered a Minute Entry ruling affirming BBMC's decision. On November 11, 2019, Dr. Sharifi timely filed a Motion for New Trial based on

¹ Ironically, had AMB found that Dr. Sharifi committed some violation of professional standards, on judicial review of that finding the superior court would have had to apply the same deferential standard of review she used in the Injunction Action, but since he was completely cleared by AMB (three separate times), those decisions carry no weight.

the Declarations of Wilson and Rose which had only recently been obtained, but the

superior court held that it did not have the authority to even consider such evidence since it was not included in the record of the Fair Hearing.

Eventually, on December 5, 2018, a three-member subcommittee of the Banner Board of Directors (BOD), including Defendants Peter Fine and Christopher Volk comprising Banner's Appellate Review Committee (BARC) terminated Dr. Sharifi's medical staff privileges.

On December 20, 2020, Dr. Sharifi filed a complaint (Original Complaint) in Arizona district court bringing a claim pursuant to 42 U.S.C. § 1981 alleging that Defendants' actions impaired his contractual rights under the Bylaws at BBMC (and the various other Banner hospitals where he was credentialed), the Physician Services Agreements (PSAs) at these facilities, as well as future contracts and referrals through networks outside of the Banner health systems. On February 14, 2020, Defendants moved to dismiss the Original Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. On June 9, 2020, the district court dismissed the Original Complaint against all

Defendants on the basis of this Court's ruling in *Comcast v. Nat'l Ass'n of African Am.-Owned Media, Inc.*, but gave Dr. Sharifi leave to file an amended complaint that complied with the causation requirement announced. --- U.S. ---, 140 S. Ct. 1009 (2020). Dr. Sharifi timely filed his FAC. Defendants again moved to dismiss and the district court granted the motions on January 27, 2021, entering a final judgment of dismissal on January 28, 2021. Dr. Sharifi timely filed his appeal.

How the Questions Presented were Raised and Decided Below

The District Court based dismissal of the FAC on its determination that Dr. Sharifi had failed to plead a plausible §1981 claim considering the causation requirement announced in *Comcast*. To reach this conclusion, however, the District Court had to abandon the traditional rules applicable when testing the sufficiency of a complaint. The district court had to go even further and accept defendant's pretexts as true even where these allegations were directly contradicted or otherwise disputed.

According to the District Court's reasoning, the Superior Court's ruling in the Injunction Action could be considered on Defendant's 12(b)(6) motion to dismiss through judicial notice, incorporation, or even principles of preclusion. None of these

doctrines can be used in the manner the District Court applied them in this case.

Judicial notice is governed by Federal Rule of Evidence 201(b). Courts “may judicially notice a fact that is not subject to reasonable dispute”: if the fact is (1) “generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Id.*

Although courts may take judicial notice of matters of public record, or another court’s opinion, they may not do so for establishing the truth of the facts or underlying findings.

Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court’s opinion, it may do so for the existence of the opinion, which is not subject to reasonable dispute over its authenticity, but not of the underlying “factual findings of proceedings or records... so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.” *Wyatt v. Terhune*, 315 F.3d 1108, 1114 n.5 (9th Cir. 2003) (“Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice”), overruled on other

grounds, *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014); see also *Lee*, 250 F.3d at 690 (although the court can take judicial notice of undisputed matters of public record, the court cannot take judicial notice of disputed facts stated in public records).

The District Court never explicitly admitted it, but the Court clearly incorporated the Ruling and accepted its contents as true, depriving Dr. Sharifi of the presumptions and inferences to which he is entitled at the pleading stage. In the instant case, the District Court's incorporation of the Ruling in the Injunction Action had the practical effect of establishing Defendant's affirmative defense – which it is their burden to plead and prove by a preponderance of the evidence – using a Ruling that applied a much less rigorous standard of review.²

Throughout the proceedings below, defendants had argued – as their primary argument – principles of *res judicata* prevented the re-

² The Ninth Circuit's contention that Dr. Sharifi incorporated the Ruling in the FAC is meritless. Incorporation requires more than simply mentioning a document, but rather the document must be referred to extensively, and form the basis for the plaintiff's claim. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir.1994), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002); *U.S. v. Ritchie*, 342 F.3d 903 (9th Cir. 2003).

litigation of Banner's reasons for terminating Dr. Sharifi's privileges. The District Court's analysis drew the same erroneous conclusion according to the Ninth Circuit who agreed with Dr. Sharifi that Arizona Courts would not afford any preclusive effect to either the hospital peer review results, or the Ruling in the Injunction Action.

Both the District and Appellate Courts did not take any notice of the multiple dismissals of the AMB in not only rejecting the entire competing causes for terminating Dr. Sharifi but considered them as "without merit". The Courts did not even make reference to them. The AMB is an impartial Agency and the ultimate adjudicator of all Arizona physicians' ethical and professional conduct. It has the legal duty to regulate, and if necessary penalize physicians for patient care issues, alteration of medical records and disruptive behavior; all considered very serious violations under the Medical Practice Act of the State of Arizona. These alleged transgressions were the race- neutral basis and the competing reasons cited by Banner in terminating Sharifi. Consequently to a reasonable fact finder the dismissal of these competing causes by the AMB should at least reduce the strength of the competing arguments to be less than "so convincing" as to allow the plausibility of Sharifi's allegations to stand at least at the pleading stage.

Even without AMB's decisions and quoting from the dissenting Judge, under Rule 12(b)(6), the district court must accept the facts alleged in the complaint as true and determine whether those allegations "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The district court erred by failing to accept Dr. Sharifi's factual allegations as true and instead finding Defendants' competing explanation "so convincing" as to render Dr. Sharifi's allegations of racial discrimination implausible.

Furthermore, Dr. Sharifi alleged that five other non-Arab physicians at Banner committed similar patient care errors but were not reported to any medical boards or disciplined to the same degree. These allegations establish intentional discrimination based on disparate treatment, as Dr. Sharifi plausibly claimed that other similarly situated physicians not of Arab descent were treated more favorably. See *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008). The district court's holding that the non-Arab physicians needed to have committed the same three transgressions as Dr. Sharifi improperly required that the physicians be identically situated, rather than similarly situated. This is an overly

burdensome standard to impose at the pleading stage. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding that a plaintiff need only plead “enough facts to raise a reasonable expectation that discovery will reveal evidence” of the alleged wrongdoing). Moreover, Defendants’ claim at oral argument that the non-Arab doctors engaged in different or less culpable conduct than Dr. Sharifi is an assertion of fact outside the complaint and cannot be considered at this stage. Furthermore, had the Courts even considered AMB’s decisions in rendering the competing causes of termination of Sharifi by Banner “without merit”, the non-Arab physicians were situated “far worse”, let alone not being “similarly situated”.

By considering the decision of the AMB the Courts should have cast doubt (or at least reduced their strength as competing causes) on the veracity of Banner’s allegations of “patient care issues, altered medical records, and exhibited disruptive behavior”. Had these allegations been true, undoubtedly the AMB would have taken actions against Dr. Sharifi, rather than dismissing numerous and calling them “without merit”. Therefore, the reliance of the Courts on *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641–42 (9th Cir. 2004), as amended (concluding that the

plaintiff's colleagues were not similarly situated to him because one was not "involved in the same type of offense" and the other did not "engage in problematic conduct of comparable seriousness" would not be applicable as the true adjudicator of physicians' professional conduct namely the AMB had dismissed them.

VI. REASONS FOR GRANTING THE WRIT

Lower courts struggle with the application of the but for causation standard in this context – especially where the court is called upon to juggle competing explanations and determine the proper weight to give the various versions in the analysis whether plaintiff has plead a plausible claim.

Uniformity in both the standards and their application is of paramount significance in such an important area of the law. Plaintiffs and Defendants alike should have no doubts about what is required to plead and prove discrimination claims, as well as the effect of competing explanations for a particular defendant's conduct at the pleading stage. This Court's intervention is necessary to offer guidance to lower courts on these important issues.

VII. CONCLUSION AND PRAYER FOR RELIEF

The lower courts need guidance on how to apply the pleading standards in the face of competing alternative explanations for conduct.

This Court should grant certiorari to review the Ninth Circuit's opinion or grant such other relief as justice requires.

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