

No. _____

In the
Supreme Court of the United States

GO NEW YORK TOURS INC.,

Petitioner,

v.

GRAY LINE NEW YORK TOURS, INC., ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

Maurice Ross
Counsel of Record
BARTON LLP
711 Third Avenue, 14th Floor
New York, NY 10017
(212) 687-6262
mross@bartonesq.com

June 25, 2025

Counsel for Petitioner

SUPREME COURT PRESS



(888) 958-5705



BOSTON, MASSACHUSETTS

QUESTION PRESENTED

There is substantial confusion and inconsistency among the lower courts concerning how to interpret and apply the “plausibility” pleading standard, leading courts to prematurely adjudicate claims that are not only “plausible,” but that rest on a firm factual basis. This Court should clarify that the “plausibility” standard was intended to give district courts a mechanism for weeding out clearly meritless claims, but was not intended to empower district courts to adjudicate material disputed factual issues at the pleading stage without permitting at least limited and focused discovery concerning such disputed issues of fact. This case is a paradigmatic example of how the lower courts have erred in applying the “plausibility” standard, and thus, is an ideal vehicle for this Court to clarify the confusion and inconsistencies among the lower courts.

The Question Presented Is:

Should this Court reconsider or clarify the pleading standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) because lower courts nationwide, including the lower courts in this case, have converted this Court’s “plausibility” standard for pleadings into an overly restrictive “more probable than not” standard, and in so doing (a) routinely fail to provide all reasonable inferences in favor of the plaintiff, and (b) often adjudicate material disputed factual issues at the pleading stage?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Go New York Tours Inc.

Respondents and Defendants-Appellees below

- Gray Line New York Tours, Inc.
- Twin America, LLC
- Sightseeing Pass LLC
- Big Bus Tours Group Limited
- Big Bus Tours Limited
- Open Top Sightseeing USA, Inc.
- Taxi Tours, Inc.
- Leisure Pass Group Holdings Limited
- Leisure Pass Group Limited
- Leisure Pass Group, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Go New York Tours Inc. states that it has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Second Circuit
No. 24-2392-cv

Go New York Tours Inc., *Plaintiff-Appellant* v.
Gray Line New York Tours, Inc., Twin America LLC,
Sightseeing Pass LLC, Big Bus Tours Group Limited,
Open Top Sightseeing USA, Inc., Taxi Tours, Inc.,
Leisure Pass Group Holdings Limited, Leisure Pass
Group Limited, Leisure Pass Group Inc., Big Bus
Tours Limited, *Defendants-Appellees*.

Final Opinion: March 27, 2025

U.S. District Court, Southern District of New York
No. 23-cv-4256 (ER)

Go New York Tours Inc., *Plaintiff* v.
Gray Line New York Tours, Inc., Twin America LLC,
Sightseeing Pass LLC, Big Bus Tours Group
Limited, Open Top Sightseeing USA, Inc., Taxi
Tours, Inc., Leisure Pass Group Holdings Limited,
Leisure Pass Group Limited, Leisure Pass Group
Inc., Big Bus Tours Limited, *Defendants*.

Final Opinion: August 27, 2024

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
LIST OF PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
JUDICIAL RULES AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
A. Preliminary Statement	3
B. Statement of Facts	8
1. Relevant Terminology.....	8
2. Relevant Parties	8
3. Previous Legal Proceedings.....	10
4. The Present Case.....	11
REASONS FOR GRANTING THE PETITION.....	19
CONCLUSION.....	22

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS**OPINIONS AND ORDERS**

Opinion, U.S. Court of Appeals for the Second Circuit (March 27, 2025).....	1a
Opinion and Order, U.S. District Court for the Southern District of New York (August 27, 2024)	9a

CASE DOCUMENTS

Brief and Special Appendix for Plaintiff-Appellant (November 11, 2024)	36a
Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (December 13, 2023)	73a
Declaration of Julia Conway (November 13, 2023)	105a
Amended Verified Complaint (October 10, 2023)	112a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	i, 3, 4, 7, 19
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	i, 3, 7, 19
<i>Braden v. Wal-Mart Stores, Inc.</i> , 588 F.3d 585 (8th Cir. 2009)	20
<i>Go New York Tours, Inc. v. Gray Line New York Tours, Inc.</i> , 831 F. App'x 584 (2d Cir. 2020), <i>cert. denied</i> 141 S. Ct. 2571 (2021)	11, 15
<i>Go New York Tours, Inc. v. Gray Line New York Tours, Inc.</i> , No. 19-CV-02832 (LAK), 2019 WL 8435369 (S.D.N.Y. Nov. 7, 2019).....	10
<i>Jones v. United States</i> , 137 U.S. 202 (1890)	17
<i>Levitt v. Yelp! Inc.</i> , 765 F.3d 1123 (9th Cir. 2014)	20
<i>Massachusetts v. Westcott</i> , 431 U.S. 322 (1977)	17
<i>United States of America and State of New York v. Twin America, LLC, et al.</i> , S.D.N.Y. Case No. 1:12-cv-08989 (November 17, 2015)	10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

15 U.S.C. § 1.....	1, 2, 4, 11, 16, 17
15 U.S.C. § 2	1, 3, 4, 11, 16
28 U.S.C. § 1254(1)	2
N.Y. Gen. Bus. Law § 340, <i>et seq.</i>	2, 11, 17

JUDICIAL RULES

Fed. R. Civ. P. 12(b)(6)	4
Fed. R. Civ. P. 8(a)(2),.....	2
Fed. R. Civ. P. 9	20

OTHER AUTHORITIES

Kelsey Finn, <i>The Harsh Reality of Rule 8(a)(2): Keeping the Twiqbal Pleading Standard Plausible, not Pliable</i> , Vol. 49, SOUTHWESTERN LAW REVIEW (April 2020)	3, 19
Matthew Cook, et al. <i>The Real World: Iqbal/Twombly The Plausibility Pleading Standard's Effect on Federal Court Civil Practice</i> , Vol. 75:3, MERCER LAW REVIEW (2024).....	3, 20

TABLE OF AUTHORITIES – Continued

	Page
Office of the N.Y. State Attorney General, <i>Assurance of Discontinuance</i> , No. 24-070 (Sep. 9, 2024), (The “Big Bus AOD”) available at https://ag.ny.gov/sites/default/files/settlements-agreements/big-bus-tours-limited-et-al-assurance-of-discontinuance-2025.pdf (last accessed June 21, 2025)	7
Office of the N.Y. State Attorney General, <i>Assurance of Discontinuance</i> , No. 25-015, (April 10, 2025) (the “Gray Line AOD”) available at https://ag.ny.gov/sites/default/files/settlements-agreements/twin-america-llc-et-al-assurance-of-discontinuance-2025_0.pdf (last accessed June 21, 2025)	7
Office of the N.Y. State Attorney General, <i>Press Release</i> (April 16, 2025), available at https://ag.ny.gov/press-release/2025/attorney-general-james-secures-over-25-million-new-york-city-bus-tour-companies (last accessed June 20, 2025)	7, 17



PETITION FOR A WRIT OF CERTIORARI

Go New York Tours Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.



OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit appears at 2025 WL 947083 (Mar. 27, 2025) and is included in the Appendix (“App.”) at 1a. The Memorandum and Order of the District Court for the Southern District of New York dated August 27, 2024, granting Respondents’ motion to dismiss the Federal claims in the first amended complaint, appears at 2024 WL 3952190 (Aug. 27, 2024) and is included at App.9a.



JURISDICTION

On October 11, 2023, Petitioner filed the operative complaint in this action, asserting claims for monopolization, attempted monopolization, and conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, unreasonable restraint of trade in violation of the Sherman Act, 15 U.S.C. § 2 and unfair competition (the “Federal Claims”), as well as claims for unreasonable restraint of trade under the New York corollary to

Sherman Act, the Donnelly Act, N.Y. Gen. Bus. L. § 340 (the “State Law Claims”). On August 27, 2024, the United States District Court for the Southern District of New York granted Respondents’ motion to dismiss the first amended complaint to the extent of dismissing the Federal Claims with prejudice and declining to exercise supplementary jurisdiction over the State Law Claims. Petitioner filed a timely appeal to the United States Court of Appeals for the Second Circuit, which affirmed the dismissal on March 27, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).



JUDICIAL RULES AND STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 8(a)(2), in relevant part

A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]

Sherman Anti-Trust Act, 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Sherman Anti-Trust Act, 15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

**STATEMENT OF THE CASE****A. Preliminary Statement**

This case presents an appropriate vehicle to allow this Court to address and clarify widespread confusion and inconsistencies among the lower courts concerning application of the “plausibility” pleading standard articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Numerous legal commentators have noted that this Court’s pleading standards first enumerated in *Twombly* and later refined in *Iqbal* have been applied inconsistently depending on the circuit, as well as within circuits themselves, depending on the posture of the case and even individual judges. See Matthew Cook, et al., *The Real World: Iqbal/Twombly The Plausibility Pleading Standard’s Effect on Federal Court Civil Practice*, Vol. 75:3, MERCER LAW REVIEW, 864, 891 (2024); Kelsey Finn, *The Harsh Reality of*

Rule 8(a)(2): Keeping the Twiqbal Pleading Standard Plausible, not Pliable, Vol. 49, SOUTHWESTERN LAW REVIEW, 409 (April 2020). This case is the paradigmatic example of how lower courts have misapplied *Iqbal* and *Twombly* by applying an overly restrictive version of the “plausibility” pleading standard.

As demonstrated below, the lower courts erred in this case when they determined that Petitioner Go New York Tours, Inc. (“Go New York” or “Petitioner”) failed to allege sufficient facts in its operative Complaint to support plausible antitrust claims under Section 2 of the Sherman Act, 15 U.S.C. § 2 or, Section 1 of the Sherman Act, 15 U.S.C. § 1. This case arises from a clear combination of operations by the two formerly dominant operators in the New York City hop-on, hop-off sightseeing tour bus market (the “NYC Market”), operating under their brand names “Gray Line” and “Big Bus.” The lower courts erred by concluding at the pleading stage that this clear combination of operations did not result in violations of antitrust law. *See* App.8a, 35a.

At the pleading stage, without the benefit of discovery, Go New York supported its allegations of anticompetitive behavior with observations of Respondents’ public facing conduct in the relevant market. *See* App.131a-135a. However, the district court erroneously resolved inferences which could be gleaned from market conditions in favor of Respondents, not Go New York, essentially requiring a “smoking gun” to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss an antitrust case. Go New York adequately alleged that Respondents combined their operations to obtain monopoly power, or, at the very least a combination in restraint of trade, which harmed competition in the

NYC Market in the following ways: *First*, Respondents used their anticompetitive combination to deprive their competitors, including Go New York, of access to valuable bus stops, which are a critical source of customers and revenues. *See App.134a.* *Second*, Respondents materially misled consumers, by failing to disclose that they had combined operations and thereby deprived consumers of competitive options within the relevant market. *See App.131a-134a, 144a-148a.* *Third*, Respondents used their monopoly power to fix prices in a manner that harmed both consumers and suppliers of hop-on, hop-off tour bus operations. *See App.145a.* *Fourth*, Respondents continued their preexisting anticompetitive conspiracy to deprive Go New York of access to various tourist attractions for use in multi-attraction passes, a critical segment of the NYC Market. *See App.135a-136a.* Essentially ignoring these allegations, both the district court and the Second Circuit focused on a factual dispute raised by Respondents concerning whether they had, in fact, merged operations. The lower courts then erroneously resolved this material factual dispute at the pleading stage in favor of Respondents, without affording Petitioner the opportunity to conduct any discovery. *See App.27a-28a, 35a.* Instead of drawing inferences at the pleading stage in favor of Petitioner, the district court improperly resolved the issue of whether Respondents merged or combined their operations or otherwise engaged in coordinated anticompetitive activity by adopting Respondents' interpretation of a written agreement among Gray Line and Big Bus. *See App.27a.* This was clear legal error and represents a fundamental misapplication of this Court's plausibility standard.

The lower courts' error arose because at the pleading stage, Respondents submitted an agreement dated August 27, 2020 (more specifically, a memorandum of understanding) between Big Bus and Gray Line (the "MOU"). *See App.107a-111a.* Respondents alleged that according to their interpretation, the MOU demonstrated that Respondents had not merged or combined their operations in a manner designed to acquire market power or engage in anticompetitive conduct. Although Go New York contested this interpretation, based on observations of Respondents' conduct on-the-ground, and supported by photographic evidence, the lower courts accepted the interpretation advanced by Respondents. *See App.7a-8a, 35a-36a.* The lower courts also rejected as "speculative" Go New York's contention that given the realities on-the-ground as observed by Go New York, the MOU could not possibly have been the only operational agreement among Respondents. *See App.6a, 36a.* In so doing, the lower courts adopted Respondents' interpretation of the MOU to reject all of the contentions made by Go New York concerning how Respondents had combined their operations to acquire and exercise anticompetitive monopoly power in the relevant market or effectuated a combination in restraint of trade. This is a clear example of courts failing to draw reasonable inferences in favor of the plaintiff at the pleading stage, and instead, adjudicating material disputed issues of fact.

In dismissing Go New York's claims, the lower courts essentially closed their eyes to reality by adopting Respondents' interpretation of the working relationships among Respondents, rather than Go New York's allegations of anticompetitive conduct, based

on observations on-the-ground. The lower courts error was exposed recently, when the Office of the Attorney General of the state of New York (the “NYAG”) entered into settlements with Respondents arising from an investigation by the NYAG into anticompetitive practices surrounding a series of agreements to restrain trade in the NYC Market.¹ The findings of the NYAG in its investigation were substantially similar to, and indeed closely mirrored, Go New York’s allegations in its pleadings in the operative Complaint, which the lower courts found to be implausible.² The fact that the NYAG caused Respondents to enter into substantial monetary settlements resolving allegations substantially similar to the ones in Go New York’s pleadings, should give this Court pause as to how district courts are misapplying *Twombly* and *Iqbal* to reject valid claims at the pleading stage.

¹ See Office of the New York State Attorney General, *Press Release* (April 16, 2025), available at <https://ag.ny.gov/press-release/2025/attorney-general-james-secures-over-25-million-new-york-city-bus-tour-companies> (last accessed June 20, 2025).

² Office of the New York State Attorney General, *Assurance of Discontinuance*, No. 24-070 (Sep. 9, 2024), (The “Big Bus AOD”) available at <https://ag.ny.gov/sites/default/files/settlements-agreements/big-bus-tours-limited-et-al-assurance-of-discontinuance-2025.pdf> (last accessed June 21, 2025); Office of the New York State Attorney General, *Assurance of Discontinuance*, No. 25-015 (April 10, 2025) (the “Gray Line AOD”) available at https://ag.ny.gov/sites/default/files/settlements-agreements/twin-america-llc-et-al-assurance-of-discontinuance-2025_0.pdf (last accessed June 21, 2025).

B. Statement of Facts

1. Relevant Terminology

Hop-on, hop-off sightseeing tours are open-top, double-decker buses which travel on predetermined routes through areas of New York City, and other cities that are of general interest to tourists. These tours allow tourists and other customers to “hop off” a tour bus at attractions that are of particular interest to them, and then to “hop on” another tour bus operated by the same company when they are ready to resume their tour. *See App.125a.*

Multi attraction passes are bundles of admission tickets to various attractions throughout New York City, such as the Empire State Building or the Intrepid Air and Space Museum. Multi-attraction passes are a natural fit for hop-on, hop-off sightseeing tour bus operators, whose business model relies on transporting tourists around fixed loops. They are also convenient for tourists, as multi attraction passes are generally priced lower than the sum of individual tickets for each of the attractions they offer admission to. In order to offer multi attraction passes, in addition to offering a hop-on, hop-off bus tour to transport tourists, interested companies must enter into “trade partner agreements” with attractions. *See App.127a.*

2. Relevant Parties

There are four relevant groups of corporate entities among the parties (1), Petitioner Go New York Tours Inc., (2) corporate entities in the “Gray Line” group of companies, (3) corporate entities in the “Big Bus” group of companies, and (4), corporate entities in the

“Leisure Pass/Go City” group of companies, each of which is defined further below.

Petitioner Go New York Tours Inc. was founded in New York City in 2012 by its current principal, Asen Kostadinov, with just four buses, and has since expanded its fleet to more than 40 buses, becoming a significant competitor in the NYC Market. *See App.122a.*

Respondents Gray Line New York Tours, Inc., Twin America, LLC (“Twin America”) and Sightseeing Pass, LLC (collectively, “Gray Line”) share common ownership and previously operated the trademarked “Gray Line” branded hop-on, hop-off tours in New York City and currently sell bundled “attraction passes” under the brand name “New York Sightseeing Pass.” *See App.115a.* Prior to the COVID-19 pandemic, Gray Line was the largest operator of hop on-hop off sightseeing tours in the NYC market. *See App.122a-132a.*

Respondents Big Bus Tours Group Limited, Big Bus Tours Limited, Open Top Sightseeing, USA, Inc. and Taxi Tours, Inc. (“Taxi Tours” and collectively with the three aforementioned Respondents, “Big Bus”), share common ownership and are part of the Big Bus group of companies, owned and operated by a United Kingdom based private equity firm. *See App.116a-118a.* The Big Bus group operates hop-on, hop-off sightseeing buses around the world under the trademarked “Big Bus” brand name, and Taxi Tours, Inc. is its New York City-based operator. *See App.117a-118a.* Prior to the COVID-19 pandemic, Taxi Tours, on behalf of the Big Bus group, was the second largest operator of hop-on, hop-off tours in the NYC Market. *See App.124a.*

Respondents Leisure Pass Group Holdings Limited a/k/a Go City Holdings Limited, Leisure Pass Group Limited a/k/a Go City Limited, and Leisure Pass Group, Inc. a/k/a Go City (collectively, “Go City”), Inc. are corporate affiliates of Big Bus, and upon information and belief, owned by the same private equity firm. *See* App.118a-119a. Go City’s primary business is to sell multi attraction passes which incorporate Big Bus’ hop-on, hop-off bus tour. *See* App.130a.

3. Previous Legal Proceedings

Gray Line, Big Bus, and Go City are no strangers to anticompetitive conduct. In fact, Twin America itself was the result of a merger that was later prosecuted by the Department of Justice for antitrust violations, which Twin America settled.³ However, the most relevant proceeding for the purposes of this appeal was a previous antitrust case brought by Go New York against Gray Line, Big Bus, and Go City in 2019.

In that case, Go New York alleged that Gray Line conspired with Big Bus and Go City to restrain trade in the market for multi attraction passes in New York City. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, No. 19-CV-02832 (LAK), 2019 WL 8435369, at *2 (S.D.N.Y. Nov. 7, 2019). Specifically, Go New York alleged that Gray Line and Big Bus/Go City entered into “exclusive” agreements with partner attractions, which they then waived only for each other. *Id.* Go New York further alleged that Gray Line and

³ *See United States of America and State of New York v. Twin America, LLC, et al.*, S.D.N.Y. Case No. 1:12-cv-08989, “Final Judgment,” Dkt No. 175 (November 17, 2015), available at: <https://www.justice.gov/atr/case-document/file/794441/dl?inline> (last accessed June 19, 2025)

Big Bus/Go City intimidated and coerced partner attractions not to work with Go New York, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On November 7, 2019, the honorable Lewis D. Kaplan of the Southern District of New York dismissed Go New York’s complaint with prejudice for failure to state a claim. *Id.* The Second Circuit later affirmed his dismissal. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, 831 F. App’x 584 (2d Cir. 2020), *cert. denied* 141 S. Ct. 2571 (2021). While this Court denied the petition for certiorari in that case, this petition presents a more compelling set of circumstances as to why this Court should grant certiorari for the reasons described herein.

4. The Present Case

Go New York brought the present suit on May 22, 2023, alleging violations of Section 2 of the Sherman Act, or, in the alternative, violations of Section 1 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as violations of the Sherman Act’s state law corollary, the Donnelly Act, New York Gen. Bus. L. § 340 and common law unfair competition.

In the operative complaint (the “Complaint”) Go New York alleged that through a written series of agreements, beginning in or about July 2020, Big Bus and Gray Line combined their New York hop-on, hop-off operations into a single operating entity. *See* App.132a. Go New York alleged that Gray Line and Big Bus agreed that (a) Big Bus would operate its hop-on, hop-off tour buses within New York City, (b) Gray Line would cease operating its fleet of hop-on, hop-off tour buses within New York City, certain buses owned by Gray Line would be operated by Big Bus, (c) Gray

Line would continue to sell tickets on its website and otherwise under its “Gray Line” and “City Sightseeing” brand names for hop-on, hop-off tour buses, with Gray Line’s ticket holders being directed to use their tickets to ride only buses operated by Big Bus, (d) Big Bus would continue to sell tickets to consumers for its hop-on, hop-off tour buses, (e) Gray Line, Big Bus and Go City would continue to sell their respective multi attraction passes and in so doing, would cooperate with each other in providing access to trade partner attractions, while excluding Go New York from access to such attractions, and (f) Gray Line, Big Bus and Go City would not undercut each other on prices for hop-on hop-off tour buses and multi attraction passes, essentially conspiring to fix the prices of such services. *Id.*

In the Complaint, Go New York included numerous observations of market conditions to bolster its allegations that Big Bus and Gray Line’s combination of operations caused substantial harm to the NYC Market, including pictorial evidence. For instance, Go New York alleged that although Gray Line ceased operating its buses, Gray Line misrepresented its operating status to the New York City Department of Transportation (the “DOT”) in order to permit the combined operation, run by Big Bus to stop at Gray Line’s assigned bus stops. App.134a. Access to these bus stops is an extremely valuable source of revenue for hop-on, hop-off bus operators, and the DOT reassigns bus stops not in use. *Id.* Gray Line’s misrepresentation of its operating status to the DOT deprived Go New York and its other competitors of access to these valuable bus stops, thus harming the market by restricting competition. *Id.* Further, Go New York included multiple pictures of

a Big Bus prominently featuring the “Gray Line” logo, demonstrating that even though Big Bus and Gray Line were advertising themselves to consumers as two distinct competitors of each other, they were in fact operating as a single entity. This misled consumers, who may have preferred either Big Bus or Gray Line based on their respective brand reputations and advertised services. In fact, consumers were all directed to the same operating entity providing the same services, at the same price, fixed by Respondents in a manner designed to reduce price competition in the NYC Market. *See* App.133a-134a. As alleged by Go New York, Respondents’ anticompetitive combination also had the impact of preventing competition in the market for suppliers and services to hop-on, hop-off tour operators, thereby increasing Go New York’s costs. *See* App.145a.

Go New York also alleged that through a series of agreements, Gray Line and Big Bus/Go City expanded and intensified their preexisting conspiracy to deprive Go New York of access to partner attractions. App.135a. Specifically, Go New York alleged that Gray Line and Big Bus/Go City “have conspired to leverage their substantial market power to require and/or to persuade major New York City attractions to refuse to enter into trade partner agreements with Go New York, and have regularly falsely disparaged TopView as an ‘inferior, low cost, low quality’ service such that the attractions would risk harming their own reputations by entering into trade partner agreements with Go New York.” App.136a.

Respondents moved to dismiss the Complaint, submitting the declaration of a Big Bus executive, Julia Conway (the “Conway Declaration”), which furnished

the district court with a copy of an agreement dated August 27, 2020, entered into by Gray Line and Big Bus Tours Limited, on behalf of the other Big Bus entities, termed a “Memorandum of Understanding”. *See* App. 107a-111a.⁴ Conway attested that “This is the ‘written agreement’—referenced although mischaracterized—in Paragraph 44 and 55 of the Amended Verified Complaint.” *See* App.105a-106a. The Conway Declaration did not mention any other agreements, and described the relationship between Big Bus and Gray Line as a “mere ticket reseller agreement.” *Id.* Citing to the MOU and the Conway Declaration, Respondents argued they had entered into a mere “ticket selling” agreement, and that the MOU proved that they had not merged or combined their operations.

Go New York disputed Respondents’ interpretation of the MOU and their assertion that the MOU proved that Respondents had not combined their operations or otherwise engaged in anticompetitive conduct. Go New York argued that properly interpreted, the MOU was wholly consistent with Go New York’s allegations that Respondents had merged or combined their operations and engaged in anticompetitive conduct. *See* App.86a. In fact, Go New York highlighted that although the MOU contemplated Gray Line using Big Bus’ intellectual property “solely to the extent necessary for the resale of tickets,” the evidence based on on-the-ground observations, supported by photographs, demonstrated that the sharing of intellectual property between Big Bus and Gray Line had gone far beyond these provisions of the MOU. *Id.* In fact, photographs contained in Go New York’s pleadings displayed the

⁴ This agreement was previously defined as the MOU.

placement of *Gray Line*'s trademark on buses operated by Big Bus. *See App.133a-134a*. However, the MOU did not contemplate any use by Big Bus of Gray Line's trademarks. *See App.107a-111a*.

Likewise, the MOU had no provisions regarding the sharing of bus stops among Respondents. However, Go New York's Complaint alleged that in combining their operations, Respondents had agreed to share with each other bus stops that previously had been assigned by the DOT to one Respondent or the other. *See App. 134a*. Further, Go New York's pleading also alleged that in order to share these bus stops with each other and prevent them from being reassigned to competitors such as Go New York, Gray Line falsely represented to the DOT that Gray Line intended to resume operations once the disruption from the pandemic subsided. *See App.134a*. These false representations to the DOT were in furtherance of Respondents' anticompetitive conspiracy, as alleged in Go New York's pleadings, and were designed to exclude Go New York and other competitors from access to these valuable bus stops. While the district court found Go New York's allegations to be implausible, these same allegations regarding bus stops were at the heart of the findings of the NYAG that led to recent settlements by Respondents wherein they agreed to cease operating as a combined entity and otherwise cease their joint anticompetitive activities.⁵

Adopting Respondents' interpretation of the MOU while giving short shrift to most of Go New York's allegations, the lower courts dismissed Go New York's Sherman Act and unfair competition claims with

⁵ *See* Big Bus AOD, at ¶ 5, Gray Line AOD at ¶ 5.

prejudice on *res judicata* grounds. *See App.35a*. As described Go New York had previously brought Sherman Act claims against Big Bus and Gray Line, however, because the combination of operations and MOU postdated Go New York's previous complaint, the threshold question then became whether, on their own, these allegations were enough to state a *new* claim for either monopolization or restraint on trade in violation of 15 U.S.C. §§ 1 and 2. The district court candidly admitted that if Go New York's claims based on the combination of operations were sufficient to state a new claim, then *res judicata* would not apply. *See App.26a*. The district court held that Go New York's new allegations did not state a claim under the Sherman Act, stating that "the text of the MOU fails to support [Go New York's] allegations [of a merger of operations], as it only describes an agreement for Gray Line to resell tickets for Big Bus tour bus services and to license intellectual property 'solely' to the extent necessary for such resale." *See App.28a*. It was clear error for the district court to focus solely on the question of whether or not there had been a merger of operations, rather than Go New York's numerous other allegations concerning Respondents combination of operations in restraint of trade to cause anticompetitive harm.

The Second Circuit affirmed. Again, focusing solely on the text of the MOU, it found that Go New York's new claims could not sustain an allegation of monopoly, because "Go New York does not plausibly allege that Big Bus and Gray Line merged into a single entity." *See App.7a*. It also found, similar to the district court, that the text of the MOU did not support Go New York's new allegations of a restraint of trade in viola-

tion of 15 U.S.C. § 1. *Id.* In so doing, the Second Circuit ignored Go New York’s allegations, based on public market conditions, of a much more fulsome and deeper relationship than that memorialized in the text of the MOU, which caused substantial harm to the market. The Second Circuit did not address Go New York’s allegations regarding Respondents’ behavior that deprived Go New York bus stops, nor how Respondents misled consumers. *See App.6a-8a.* Moreover, even though Go New York had shown how the public facing relationship between Big Bus and Gray Line necessitated further agreements than just the MOU, the Second Circuit found Go New York’s allegations of subsequent operating agreements to be “conclusory.”

On April 16, 2025, the NYAG announced that it had conducted an investigation pursuant to the Donnelly Act, N.Y. Gen. Bus. Law § 340, *et seq.*, and Section 1 of the Sherman Act, 15 U.S.C. § 1, “into the use of reseller and operation management agreements for the provision of” hop-on, hop-off tour buses in New York City, and identified eight agreements in addition to the MOU as part of the collusion between Twin America and Big Bus to reduce competition in the NYC Market.⁶ ⁷ As part of the settlement, the NYAG released two “assurances of discontinuances” (the

⁶ It is well settled that this Court may take judicial notice of agency records and proclamations. *See Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977); *Jones v. United States*, 137 U.S. 202, 214 (1890) (holding that Federal Courts, including the Supreme Court, may take notice of “public acts . . . of the executive . . . ”).

⁷ *See* Office of the New York State Attorney General, *Press Release* (April 16, 2025), available at <https://ag.ny.gov/press-release/2025/attorney-general-james-secures-over-25-million-new-york-city-bus-tour-companies> (last accessed June 20, 2025).

“AODs”) detailing its findings against each of Gray Line and Big Bus. The AODs identified eight written agreements entered into among Twin America and Big Bus subsequent to the MOU in furtherance of their anticompetitive collusion and arrangements. This is exactly what Go New York alleged in its Complaint.⁸ The AODs further stated that Big Bus and Gray Line had entered into a scheme to defraud the New York City Department of Transportation into believing Gray Line was still operating its hop-on, hop-off bus tours so it would not reassign bus stops, again, exactly what Go New York alleged. *Id.* In other words, the AODs were predicated on allegations substantially similar to those that the lower courts rejected as implausible.

⁸ See Big Bus AOD at ¶¶ 4-5, Gray Line AOD at ¶¶ 4-5.



REASONS FOR GRANTING THE PETITION

This Court has previously cautioned lower courts that the “plausibility” standard should not be confused with standards applied in adjudicating summary judgment motions, and should not be construed by lower courts as permission to adjudicate material disputed issues of fact at the pleading stage. In *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009), this Court specifically cautioned that “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) Further, this Court expressly rejected different pleading standards for different postures of civil cases, holding that “Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.” *Id.* at 684 (internal citations omitted).

Numerous commentators have noted that the pleading standards elucidated in *Twombly* and clarified in *Iqbal* have not been applied consistently depending on the cause of action, circuit, and even individual judge within circuits. For instance, one law review article posits that “courts have accepted less factual specificity for claims involving statutory and constitutional violations of discrimination.” See Kelsey Finn, *The Harsh Reality of Rule 8(a)(2): Keeping the Twiqbal Pleading Standard Plausible, not Pliable*, Vol. 49, SOUTHWESTERN LAW REVIEW, 409 (April 2020). Another law review note stated that “the standard for ‘plausible’ pleadings has been far from a bright-line test. On the contrary, both the district and the circuit courts have

struggled to consistently apply this test,” and noted that the First Circuit applies a much more lenient standard to pleadings where the facts to be proven were likely in the hands of the defendants than the Third and Fourth. *See* Matthew Cook, et al., *The Real World: Iqbal/Twombly The Plausibility Pleading Standard’s Effect on Federal Court Civil Practice*, Vol. 75:3, MERCER LAW REVIEW, 864, 891 (2024). As to the Second Circuit, the circuit court this petition derives from, the note found that it “commingled” the standards for pleading malice and fraud under Fed. R. Civ. P. 9, making successfully pleading malice to be a nigh impossibility, as it would require particular allegations regarding the mental state of defendants. *Id.* at 893-4. It further found that the Eighth Circuit “give[s] greater deference and more lenience to the inferences that a court will make than the other circuits have shown in the cases cited herein.” *Id.* at 901 (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595-6 (8th Cir. 2009)). Indeed, the Ninth Circuit itself has admitted that “There is some tension among the Court’s pleading-standards cases.” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014).

This case represents the paradigmatic opportunity for this Court to clarify and harmonize the pleading standards among the various circuit courts of the United States by setting minimum standards as to what courts *may not* do at the pleading stage. Specifically, this Court should clarify that on a motion to dismiss, courts may not resolve competing factual predicates in favor of the defendant, nor may they resolve competing inferences in favor of a defendant.

Both the district court and the Second Circuit erred by resolving disputed material issues of fact con-

cerning the proper interpretation and antitrust implications of the MOU at the pleading stage, while failing to draw reasonable inferences from Go New York's other allegations concerning Respondent's collusive anticompetitive conduct in favor of Go New York. The lower courts failed to appreciate the significance of Go New York's allegations of anticompetitive conduct that were based on its "on-the-ground" observations concerning the nature and extent of Respondents' combined operations, which reflected a far deeper relationship than the "mere ticket reselling agreement" posited by Respondents. These allegations were supported by photographic evidence included in the body of Go New York's pleadings, which the lower courts essentially ignored. *See* App.133a-134a. The lower courts ignored that this photographic evidence indicated sharing of intellectual property between Big Bus and Gray Line outside the scope of any term of the MOU. Further, the lower courts essentially ignored Go New York's allegations concerning Respondents' misrepresentations to the DOT regarding the sharing of bus stops, which were designed to assure that their competitors such as Go New York would not have access to them. *See* App.134a-135a. Respondents never addressed Go New York's claims regarding the bus stops, instead casting doubt on them by citing the fact that the MOU did not address them, but Go New York specifically alleged subsequent operating agreements. *See* App.132a.

However, the lower courts incorrectly asserted that Go New York's allegation that there must be other operating agreements among respondents was "speculative" (App.6a), when in fact, Go New York's allegation was based on its experience concerning the

coordination that would be necessary among Respondents to implement their joint operations based on Go New York’s on-the-ground observations. The NYAG’s investigation established that Go New York’s “speculation” was exactly right—there were, in fact, at least eight subsequent operating agreements among Respondents.⁹ In these circumstances, this case has become the paradigmatic example of how lower courts err in applying the “plausibility” pleading standard by failing to draw all reasonable inferences in favor of the plaintiff.



CONCLUSION

This Court should use this case as a vehicle for clarifying the appropriate application of this Court’s “plausibility” pleading standard. It should find, moreover, that the lower courts in this case incorrectly resolved material disputed issues of fact at the pleading stage, and failed to give Petitioner the benefit of all reasonable inferences from the factual allegations in the pleadings. Perhaps most importantly, this Court should make clear that the “plausibility” standard should not be deemed to require that plaintiffs provide “smoking gun” evidence at the pleading stage, but only that the pleadings must contain sufficient factual detail as to provide defendants and the Court reasonable notice of the existence of plausible claims. This Court should, further, encourage lower courts to permit the parties to proceed to conduct discovery where the pleadings result in disputed issues of material facts,

⁹ See Big Bus AOD at ¶ 4, Gray Line AOD at ¶ 4.

such as those that were presented in the present case when Respondents asserted falsely that the MOU established only a mere “ticket selling” arrangement rather than an anticompetitive combination or conspiracy in restraint of trade, while neglecting to mention the eight agreements subsequent to the MOU.

Respectfully submitted,

Maurice Ross
Counsel of Record
BARTON LLP
711 Third Avenue, 14th Floor
New York, NY 10017
(212) 687-6262
mross@bartonesq.com

Counsel for Petitioner

June 25, 2025