

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

SASCHA LYNCH,
Petitioner,

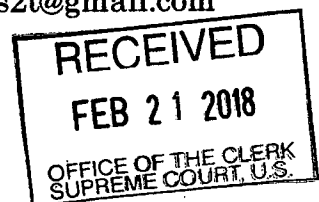
v.

PFIZER, INC., G.D. SEARLE & CO.
Respondents.

PETITION FOR A WRIT OF CERTIORARI

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

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QUESTIONS PRESENTED

The United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal pursuant to Federal Rules of Civil Procedure 12(b)(6) under a statute of limitations bar for an alleged hypothetical injury the courts deemed to have taken place in 2008. The plaintiff suffered a latent cancer diagnosis injury in fact in 2014.

This is a second separate disease caused by the same exposure to an intrauterine device, surgically implanted between March 1984 and February 1985, which became embedded and remained in plaintiff for 17+ years (its normal use cycle was three years). Plaintiff's first injury in 2005 was for infertility and now cancer, a clear worsening of earlier the conditions. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). Defendants' knew through the testing methodology of an outside laboratory that the toxic substance of the Cu-7 created malignancy cells, but failed to inform doctors or warn the public. Judge Real presided over both cases and identified a hypothetical injury as an injury in fact (which it cannot be), but dismissed the present claim for the 2014 cancer latent injury in fact and refuses to apply the "most appropriate" statute of limitations § 340.8 to it. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)

(characterizing all actions under 42 U.S.C. § 1983 as analogous to a state-law personal injury action).

The hypothetical injury of 2008 deemed a “second” injury by the courts, is an acknowledgment of the strong link between the effect of the toxic substance of the Cu-7 to plaintiff and the creation of a latent concrete injury in fact --- namely the cancer diagnosis in 2014.

The question presented is whether the United States Court of Appeals for the Ninth Circuit erred in finding that the district court did not abuse its discretion by holding that the statute of limitations dismissal was proper in conflict with the Supreme Courts’ *Twombly* / *Iqbal* plausibility standard outlined in Justice Kennedy’s Federal Rules of Civil Procedure 12(b)(6) calculus.

Secondly, the question is whether the United States Court of Appeals for the Ninth Circuit erred barring plaintiff’s as applied challenge to a state statute causing an economic and private right **injury in fact** in violation of her Fourteenth Amendment rights, is consistent with 42 U.S.C. § 1988 and this Court’s Prior Precedent in *Lujan* and more recently *Spokeo*. An injury in fact is a violation of a statutory right, a latent injury is concrete and particularized and these elements presented before federal courts are bound to follow the precedent of this Court. The U.S. Court of Appeals for the 9th Circuit and other circuits are divided on this issue.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Subsidiary

G. D. Searle & Co.

Successor-in-interest

Pfizer, Inc.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit in this case, is found at *Lynch v. Pfizer, Inc.*, No. 16-55494 (9th Cir. 2017). The opinion is reproduced in Appendix “A”.

The unpublished opinion of the United States District Court for the Central District of California, the Honorable Manuel L. Real. The Order is reproduced in Appendix “B”.

The Memorandum of the denial of rehearing and rehearing en banc is unpublished. The opinion is reproduced in Appendix “C”.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court’s judgment was entered on April 21, 2017. On May 5, 2017 the panel extended the time for filing a petition to and including June 2, 2017. A timely petition for rehearing and rehearing en banc was entered on the record June 1, 2017. The United States Court of Appeals for the Ninth Circuit denied the petition for rehearing and rehearing en banc, on December 7, 2017. The time for filing a petition to the Supreme Court is 90 days so the deadline is March 7, 2018.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

No person shall be . . . deprived of life, liberty, or property,
without due process of law. . . .

42 U.S.C. § 1983 provides in material part:

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. . . .

42 U.S.C. § 1988(a) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

§ 335.1, California Statutes, provides in material part:

Actions other than for recovery of real property shall be commenced as follows:

* * *

WITHIN TWO YEARS

* * *

An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

§ 340.8, California Statutes, provides in material part:

Actions other than for recovery of real property shall be commenced as follows:

* * *

WITHIN TWO YEARS

* * *

(a) In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance...from the date of injury, or two years **after** the plaintiff becomes aware of, or reasonably should be become aware of, (1) **an injury**, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later.

California Code of Civil Procedure § 335.1 and § 340.8 (the "Statutes") are reproduced in Appendix "D".

STATEMENT OF THE CASE

1. Background

In January 2014, Sascha Lynch was diagnosed with endometrial cancer. A radical hysterectomy was performed March of that year and she suffered economic injury for the inability to work during recovery and ongoing emotional distress. There is no history of cancer whatsoever in Lynch's family. Searching the internet, in 2015, Lynch became aware of an article published in Business Week Magazine dated October 14, 1985, which reported respondents knew, but failed to report the scientific evidence that its product tested on rhesus monkeys by Litton Bionetics, a United States Military testing laboratory, concluded the product was known to cause "pre-malignant transformations," and "badly bent out of shape cells," indications of cancer development from the copper implant. See Appendix "E". The copper implant is an intrauterine device ("IUD") called the Cu-7.

Sometime between March 1984 and February 1985 (exact date unknown), the IUD was implanted and Lynch was told the absence of the string would indicate it had dislodged. Over time, the string was no longer accessible and Lynch believed it had in fact dislodged. Subsequent PAP smears and pelvic examinations seemed to support her understanding. The IUD had embedded and remained undetected from health care professionals for approximately 17+ years, ultimately being surgically removed in 2002. The normal use cycle is only three years.

The material referred to in the Business Week article stemmed from internal Searle documents obtained by various plaintiffs' lawyers' in litigation with G.D. Searle & Co., over the Cu-7's connection to pelvic inflammatory disease ("PID"). The article points to respondents' knowledge that the scientific evidence of the Litton test results showed a sign of malignancy associated with the toxic substance of the Cu-7, but there was no warning to learned intermediaries (See Appendix "E: p.2") since they were responsible for administering the implant. They could not warn patients regarding an association to the Cu-7 and cancer without being warned.

Confirmation of this knowledge points to a statement made by then Searle expert, Gerald Oster, a biophysics professor who testified in a pretrial hearing, ". . . **nobody I know** suffers from any copper toxic effects by virtue of wearing a copper IUD. No **cancer** is reported." See Appendix "E: p.3". Is someone **he** knows... the criteria? It is being reported now...does he know plaintiff? "No cancer reported," is a side step of the issue. What is conspicuous in its absence is an affirmation by Prof. Oster then that exposure to the toxic substance of the Cu-7 does not create a latency period leading to a manifestation diagnosis of cancer. It cannot and has not been said. To date, respondents' have not refuted the report or its results. The Cu-7 was removed from the United States market in 1986 within 22 months of being implanted in Lynch, with no warning before or after its removal.

2. Facts of the Case

On December 9, 2015, prior to the expiration of the applicable statute of limitations of § 340.8, Lynch filed a copy of the Business Week article along with her Complaint against respondents alleging a product liability injury cause of action and emotional distress regarding its prescription drug device the Cu-7-- a copper-containing intrauterine contraceptive. See Appendix "E". The district court cited claim preclusion as a bar, based on the prior filing, *Henderson v. Pfizer, Inc.*, 285 Fed.Appx. 370 (9th Cir. 2008),¹ (the "2005 Action"), where Lynch alleged the device caused infertility preventing her and her then husband from conceiving. The 2005 Action reached the United States Court of Appeals for the Ninth Circuit and a mandate was issued July 29, 2008 citing a statute of limitations bar to which the Court of Appeals opined, "Pfizer argues the period began at the latest in January 2002, when the 'ultrasound discovered the IUD' and Henderson expressed concern that the device was causing her pain and may have affected her fertility. We agree with Pfizer."

In the present case, Lynch's argued in her complaint that her injury in fact claim for relief, should have survived a motion to dismiss under the Federal Rule of Civil Procedure 12(b)(6) plausibility standard. The judge concluded the claim was barred by "applicable statute of limitations" under

¹ *Henderson v. Pfizer, Inc.*, 285 Fed.Appx. 370 (9th Cir. 2008), the Court determining claim as time-barred. (Meeks-Henderson is a combination of former maiden and married names.)

California Code of Civil Procedure § 335.1 in reference to an injury the court determined was evident in 2008 (hereinafter “hypothetical” injury). *See* Appendix “B”. The court reasoned, “While discovery of new injuries can potentially lead to a new cause of action free from the limitations of res judicata...[here] the harms are the same.” *See* Appendix “B”. The nucleus of the facts presented here could not have been brought in the 2005 Action; *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F. 3d 1064, 1077 (9th Cir. 2003) (“If the harm arose from different facts at a different time, however, then the plaintiff could not have brought the claim in the first action”).

In reading Lynch’s complaint it shows the harms and facts are [not] the same. And most importantly, respondents are equitably estopped from relying on a statute of limitations defense because they knew the scientific evidence of the Litton Bionetics Cu-7 test results, concluded the product was known to cause “pre-malignant transformations,” and “badly bent out of shape cells,” indications of cancer development from the copper Cu-7 implant and because it fraudulently concealed the causal connection between its chemical exposure and Lynch’s cancer diagnosis injury in fact. *See* Appendix “E”.

Pursuant to United States Supreme Court Rule 14.1(i)(vi), for clarity in this Petition, the hypothetical injury relates to a pathology report attached here as Appendix “F”. Upon review, the evidence is clear the conclusion is – “negative for malignancy,” and therefore the theory of the courts are flawed. It not only improperly applied § 335.1 to the hypothetical injury, which

adversely affects Lynch's as applied challenge to it, but in the alternative, it affirms the validity of Lynch's cause of action for the actual injury she suffered in 2014. See Appendix "G".

Without granting leave to amend as requested pursuant to Federal Rule of Civil Procedure 15(a), the district court issued its Order on March 28, 2016 as a dismissal on the merits, which by definition is an abuse of discretion (see Appendix "B"), given that the plausibility standard was not only met but supported by the district court's own acknowledgement of a hypothetical injury that a second injury stemming from the same contact with the toxic substance of the Cu-7 was and is plausible. Filing a notice of appeal was met with resistance from Judge Real, who stated the appeal "was not taken in good faith and is frivolous." Circuit Court Judges O'Scannlain and Watford reviewed the records and determined Lynch was "entitled to continue her in forma pauperis status for this appeal."

3. Proceeding Below

On appeal, Lynch argued the discrepancy of the Ninth Circuit (hereinafter referred to as "Circuit Court" or "the Court"), recognizing two alleged and separate wrongs against her primary right is erroneously placed on the hypothetical injury, and not rightfully placed on the actual injury in fact she suffered in 2014. Further, considering the weight given the hypothetical injury is proof text that not only is it plausible for such injury to occur, but that it has in fact done so, given Lynch's 17+ year contact with the

Cu-7 and the latent cancer diagnosis she received in 2014. This Court's held in *Lujan v. Defenders of Wildlife*, 504 U.S. 560 (1992) in order to defeat a claim preclusive effect plaintiff [Lynch], must suffer a concrete injury...which is not hypothetical, and the concrete 2014 injury she suffered is the basis upon which her cause of action rests.

Petitioner noting that although the claim presented before the court stems from the same intrauterine device to which respondents failed to warn Lynch of its association with cancer, her new facts of the case precludes a res judicata bar. Lynch referred the Court of Appeals to *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), where res judicata does not bar a suit, involving the same wrongful conduct as alleged earlier, when "new facts or a worsening of the earlier conditions" are alleged. With alleged separate wrongs, her first being infertility and the second cancer, is indicative of the second injury being a "worsening" of conditions and the facts of that injury are different. In the 2005 Action, a cancer diagnosis could not have been presented because the facts surrounding the cause of action had yet to materialize. *See Lawlor*, 349 U.S. at 328 (holding that res judicata cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case).

In its Memorandum decision, the Court of Appeals remained silent on res judicata and failure to state a claim, but erroneously gave credence to a hypothetical injury barring the claim on statute of limitations grounds (*see* Appendix "A"), when it should have exercised judicial discretion and reversed

the district court's decision because respondents were equitably estopped from relying on a statute of limitations defense because they knew the scientific evidence of the Litton Bionetics Cu-7 test results and how it connected to Lynch's injuries. See Appendix "E". Instead it ruled in conflict with this Court's concrete injury clarification given in *Lujan*. The Court of Appeal's ruling in the present case is also in direct conflict with its own circuit members as outlined in the statement made in the 2005 Action:

"Under California law, "[a] cause of action accrues when the claim is complete with all of its elements. Although this ordinarily occurs on the date of the plaintiff's injury, accrual is postponed until the plaintiff either discovers or has reason to discover the existence of a claim" *Platt Elec. Supply, Inc. v. EOF Elec., Inc.*, 522 F.3d 1049, 1054 (9th Cir. 2008 (emphasis added, citations omitted))."

The 2005 Action opinion is in essence the claim as presented here. Continuing, the 2005 Action circuit court found when an "ultrasound discovered the IUD," was the completion of all the elements to start the limitations period. The equivalent is when Lynch "discovered" she had endometrial cancer in January 2014." The correlation between the two is notification outside of herself from a learned intermediary starting the clock. When the Court of Appeals concurred with the district court's decision, Lynch filed a timely petition for rehearing and rehearing en banc arguing she met the requirements of "particularity and concreteness" for Article III standing. On December 7, 2017, her petition for rehearing and rehearing en banc was denied. *Lynch v. Pfizer, Inc.*, No. 16-55494 (9th Cir. 2017). See Appendix "C."

The invocation of the prudential standing doctrine to avoid the merits was particularly problematic in the circumstances of this lawsuit. The petition for a writ of certiorari now follows.

REASONS WHY THIS WRIT SHOULD ISSUE

I. THE DECISION OF THE COURT CONFLICTS WITH 42 U.S.C. § 1988.

The Circuit Court determined plaintiff's Fourteenth Amendment Equal Protection and Due Process rights were not violated when it barred her claim on statute of limitations grounds based on a speculative and let's be clear, hypothetical injury. Plaintiff argued in order for her civil rights to be vindicated, it would require the Court to find the state statute it applied as a statute of limitations bar unconstitutionally applied to the particular set of circumstances in this case, which infringes on her due process (*United States v. Christian Echoes Nat. Ministry, Inc.*, 404 U.S. 561, 565 (1972) the elements of an as applied challenge was explained to be a claim that a statute, "by its own terms, infringes constitutional freedoms in the circumstances of a particular case.")

Under 42 U.S.C. § 1988, a state court interprets its own statute of limitations. The personal injury statute applied is not the most appropriate and Lynch's challenge does not relate to a latent injury in which the statute interprets how the issues of this case would carry in state court commencing the action, but instead to the one that unconstitutionally bars her claim. The Supreme Court held that the as applied challenge could be resolved only by

considering how the statute was being administered (*Bowen v. Kendrick* (1988) 487 U.S. 589 [101 L.Ed.2d 520, 108 S. Ct. 2562]). In California the requirement upon which decisions are made “shall identify the ‘gravamen’ of the cause of action” sued upon and whether in those particular circumstances the application would deprive her of a protected right. The protected right at issue here is her due process private right and a constitutional violation.

The question brought to this Court is whether the U.S. Court of Appeals for the 9th Circuit erred barring plaintiffs as applied challenge to a state statute causing an economic and private right **injury in fact** in violation of her Fourteenth Amendment rights, is consistent with 42 U.S.C. § 1988 or this Court’s Prior Precedent.

Congress elected not to provide a specific statute of limitations to govern § 1983 actions. However, relying on § 1988, this Court has urged lower courts to “ordinarily” borrow the most “analogous” and “appropriate” state statute of limitations but only “if consistent with federal law and policy.” See *Owens v. Okure*, 488 U.S. 235 (1989). The Court of Appeal chose not to “administer” the “most appropriate” statute on the claim presented before it, as one not encompassing an as applied challenge. The decision of the Court in doing so is an erroneous [one] and does not comport to protecting a legal right from being invaded. Chief Justice Marshall noted in *Marbury v. Madison*, 5 U.S. 137, 170 (1803), stating that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” The **most appropriate and**

analogous meaning is the most comparable, and in this case that statute is § 340.8 enacted to address a latent injury and its cause; see *Buttram v. Owen-Corning Fiberglas Corp.*, 16 Cal.4th 520 (1997).

Subdivision (a) of § 340.8² provides two alternative accrual dates based on exposure to a hazardous material or toxic substance:

“Either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed by the wrongful act of another, whichever occurs later.”

Thus, subdivision (a) of § 340.8 expressly provides that injury claims based upon toxic exposure are subject to the discovery rule.

The Fourteenth Amendment to the United States Constitution provides that “No person shall be . . . deprived of life, liberty, or property without due process of law.” The “liberty” in due process is plaintiff’s legal remedy by suit whenever that right is invaded, the right given to every individual to claim the protection when receiving an injury. *Marbury*, 5 U.S. at 163. The basic contours of this right are well established. A plaintiff’s liberty also encumbers courts to “furnish suitable remedies” germane to the “statutes of the State wherein the court having jurisdiction of such civil cause is held.” See *Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1925), found standing based on infringement of Fourteenth Amendment rights. The

² Section 340.8 signed into law on October 12, 2003, became effective January 1, 2004. (Stats.2003, ch. 873, p. 6398; Cal. Const., art. IV, § 8, subd. (c).)

Circuit Court's judicial decision should have lined up with what the State Legislature intended and apply the most appropriate § 340.8 statute of limitations to this present claim for a latent injury. The right to due process by the courts is a balance of plaintiff's interest against the risk of error and the cost of additional procedures. *Matthews v. Eldridge*, 424 U.S. 319, 341-47 (1976). As demonstrated here, the Circuit Court is in error.

When a court looks to applicable state statute of limitations for a federal action it "borrows the local time limitation most analogous to the case at hand." *Burnett v. Grattan*, 468 U.S. 42 (1984). The applicable statute here is § 340.8. The California Supreme Court held in an injury likely to develop into cancer in the future, has an expected lengthy period before manifestation can be medically diagnosed, the very issue presented here before both federal courts. The "most analogous" statute as it relates to the present case is found in *Buttram*, *supra*, 16 Cal.4th at p. 529:

"...although early formation of undetected cellular changes ultimately lead to contraction of the disease, it may be 30 to 40 years before the cancerous cells will result in a tumor large enough to be detected, be medically diagnosed, or cause symptomatology of the disease. The combination of lengthy latency periods and diagnostic difficulties is a unique feature of toxic substances cases for purposes of statutes of limitations analysis or related legal issues."

Both the plain language of § 1988 and the Court's jurisprudence make clear that the borrowing of a state statute of limitations under §1988 in §1983

cases must not be inconsistent with the Constitution and laws of the United States.”

To this end, plaintiff challenged the methodology used by the Circuit Court in determining what an injury-in-fact is and when the cause of action accrues. An actual injury requirement also has been embedded in most statute of limitations, which generally do not begin until there is a concrete injury. In short, the district court’s dismissal and the Circuit Court opinion holding that the plausibility injury standard had been met, but yet barred this claim on statute of limitations grounds is a due process violation and a deprivation of Lynch’s equal protection rights. Due process is the opportunity to be heard at a meaningful time and in a meaningful manner. An as-applied challenge to state statute § 335.1 is valid based on the particular facts presented here because such application adversely affects Lynch’s claim. Lynch clearly alleged such a challenge and sought relief from the erroneous application of the statute, which the Circuit Court ignored.

II. THE DECISION OF THE DISTRICT COURT AND COURT OF APPEALS CONFLICTS WITH THIS COURT’S PRIOR PRECEDENT.

Turning to the facts of the case, the Circuit Court determined the injury was traceable to the challenged action of the respondent taken as true and ultimately demonstrated causation. An injury in fact was established, but an erroneous application of a state statute was applied, which necessitated an as applied challenge to the constitutionally of the applied

personal injury statute by the Circuit Court. *Lynch* (9th Cir. 2017). The Supreme Court outlined the elements of the ‘injury in fact’ test requirement in two cases, *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (1992) and *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016).

In *Lujan*, Justice Scalia, who delivered the opinion, stated the test requires that a “plaintiff must have suffered an invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical,” a requirement it would seem the lower courts are not aware of or just chose not to follow. Further, Justice Kennedy with Justice Souter concurring in part, outlines a component of standing, which a “plaintiff must show that [s]he ‘has sustained or is immediately in danger of sustaining some direct injury’ as a result of the challenged official conduct.”

An application of § 335.1 affected petitioner’s claim in a personal and individual way in that the claim was not appropriately resolved through the judicial process. The Court’s inaction to the as applied challenge has caused plaintiff injury and a reversal in its decision would produce “a likelihood that a court ruling in [her] favor would remedy [her] injury.” *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75, and n.20 (1978).

In *Spokeo*, this Court once again was asked to expound on *Lujan* in that an injury affording a person standing must be “particularized” without overlooking “concreteness.” It is these two essential elements which best

describes what is absent in the hypothetical injury theorized by the lower courts in the present case. Since such an hypothetical injury has been proven nothing more than what it is called “hypothetical” by supporting documentation, yet it opened the door to the plausibility of such an injury occurring, which has in fact occurred in the present case.

The Circuit Court’s misinterpreted analysis that an injury in fact is one without injury, is the correction and guidance this Court provided in *Spokeo* clarifying that a plaintiff must show she suffered an invasion of a legally protected interest that is not hypothetical. This bears repeating, the Circuit Court’s erroneous application of a state statute is not a hypothetical injury. An economic injury is not hypothetical and an endometrial cancer diagnosis in 2014 is surely not a hypothetical injury.

As this case presents, cancer can only be discovered and diagnosed when it manifests and this Court addressed the dictates of discovery of an injury in *Urie v. Thompson*, 337 U.S. 163 (1948), writing, “a plaintiff could only be injured when the accumulated effects of the deleterious substance manifested themselves.” *Id.* at 170-71. Product liability law determines who is responsible for defective or dangerous products and *Urie* gave jurisdictions an incentive to enact a discovery exception in cases when the plaintiff’s injury did not manifest itself as actionable harm for a considerable amount of time. In reading the decisions of the lower courts in this case, their decisions are at odds with the longstanding 26-year precedent of *Lujan* and its companion case, *Spokeo*.

There can be no doubt that plaintiff had the right to challenge the Circuit Court's interpretation of the statute applied to her injury in fact claim. What the courts have presented is the statute must be construed as not intended to start to run until a plaintiff has, in fact, discovered the fact that she has suffered an injury, or by the exercise of reasonable diligence, should have discovered it. (A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008))³ In the pursuit of due diligence or obtaining facts constituting the violation, presupposes that access to information would be available in order to support a claim. Would a negative pathology report put a plaintiff on inquiry notice when no injury is present, which is what the trial court and Circuit Court are suggesting is the case here? The answer is no and should not have been a determining factor in either decision.

III. THE DECISION TO GRANT A STATUTE OF LIMITATIONS DISMISSAL CONFLICTS WITH THE TWOMBLY / IQBAL⁴ PLAUSIBILITY STANDARD UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6).

Since this Court's ruling on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 622 (2009) these cases have papered federal courts by defense counsel on the "Twiqbal" plausibility pleading standard used to dismiss cases under Federal Rule of Civil Procedure 12(b)(6). Most notably are the over utilized excerpts "threadbare

³ See, e.g., Spencer, *supra* note 6, at 481 ("Under plausibility pleading, one has no confidence that a plaintiff's dismissed claim was frivolous or nonmeritorious because it permits the dismissal of complaints that assert wrongdoing.... Indeed, it is a greater shame that discovery is foreclosed . . . in circumstances where the needed supporting facts lie in the exclusive possession of the defendants . . .')

⁴ *Twombly* cited in over 106,000 cases and *Iqbal* over 83,000 cases, have become the citation du jour in Rule 12(b)(6) cases.

recitals” and “mere conclusory statements.” Although the Circuit Court did not include this wording in its sparse statute of limitation decision, in concurring with the lower court, it failed to exercise judicial discretion because respondents are equitably estopped from relying on a statute of limitations defense because it knew the scientific evidence of the Litton Bionetics Cu-7 test results, concluded the product was known to cause “pre-malignant transformations,” and “badly bent out of shape cells,” indications of cancer development from the copper implant and because they fraudulently concealed the causal connection between the chemical exposure and Lynch’s cancer diagnosis injury in fact.

The threadbare recital referred to in the lower court’s decision brought about an admission that the complaint presented enough facts to cause it to reach a decision albeit for a hypothetical injury (instead of the 2014 concrete one) that there was enough meat on plaintiff’s cause of action that the plausibility of her sustaining such an injury was reached. A complaint with its companion exhibit (here, the three-page Business Week article), requires a court pursuant to Federal Rule of Evidence 201 to take judicial notice of the plausibility of the claim and the documents in support of it, which neither the district court or the Circuit Court has done.

The only “threadbare recitals” and “mere conclusory statements” to be found are in the Circuit Court’s decision in the present case, and its’ citing of *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 398 n3 (1999) and *Fox v. Ethicon Endo-Surgery, Inc.* 35 Cal. 4th 797, 805 (2005). In *Fox*, emphasis is placed on

when a cause of action accrues, meaning when it is “complete with all of the its elements.” The last element is damage or harm, whichever definition relied upon in this case, has been quantified by the Circuit Court’s acknowledgement of a nonexistent hypothetical injury; therefore, acknowledging that the actual 2014 cancer injury exists and is the damage or harm, establishing the last element and is the factual basis for the cause of action. *Norgart*, supra, 21 Cal.4th at pp. 397, 398.

The Circuit Court’s ruling throws a monkey wrench in this case with its application of limitations defense that over time has evolved by the courts and the Legislature governing limitations periods. The accrual doctrine, but the most important element the “discovery rule,” postpones accrual until a plaintiff discovers, or has reason to discover the cause of action. (*Norgart v. Upjohn Co.*, supra, 21 Cal.4th at p. 397), typically include a “wrongful act, causation, and injury.” How then could the Court not see the applicability of the cause of action in this case as it applies to the state law – unless it did not want to see it? (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99-100.)

When respondents withheld vital information not affording Lynch the option to ‘opt out’ of an IUD that causes cancer, the concealment of their fraud or “fraudulent scheme,” *Chiarella v. United States*, 445 U.S. 222 (1980) and the federal court becoming complicit in their wrongdoing by allowing respondent’s to not be held accountable by their rulings for an injury which passes the plausibility standard, but not allowed to go forward on the merits,

is judicial misconduct. What is at issue here is the definition of the injury...a hypothetical one ruled on and agreed to by the Circuit Court, or the legally protected economic and physical injury Lynch suffered in 2014 and the emotional distress suffered as a result of her injury. *Lujan*, 504 U.S. at 560. Physical harm is proof text that the distress is genuine. See Restatement (Second) § 7 cmt. b and §§ 436-436A.

The question brought to this Court is whether the United States Court of Appeals for the Ninth Circuit erred in finding that the district court did not abuse its discretion by holding that the statute of limitations dismissal for an injury in fact was proper under Federal Rules of Civil Procedure 12(b)(6) relying on *Twombly* and *Iqbal*.

When the factual content of a complaint is enough for the Circuit Court to draw the inference that, respondent is liable for Lynch's [second] injury in fact by its reference to an albeit erroneous "hypothetical" injury, holding that such injury is separate from the first and the catalyst between the two is a violation of a private right of the plaintiff, the Court has determined that Lynch presented "enough facts to state a claim to relief...plausible on its face" in her Lynch's complaint to defeat a motion to dismiss.

The Court did not ruled Lynch's claim was absent "facial plausibility," because the facts presented were successful enough to get them across the line from conceivable to plausible, supported by the court's drawing the inference of respondents' liability. *Id.* at 556, 570. In determining

when facts are sufficient for that transition, Justice Souter introduced a two-step method. He wrote:

“Rather than merely taking a quick look at the complaint, district courts should first carefully examine the complaint to smoke out any “merely legal conclusions resting on the prior [factual] allegations. *Twombly*, 550 U.S. at 564. Once that step is complete, district courts should weigh the remaining facts and determine if they are sufficient to “nudge [the] claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

Legal conclusions are determined by a judge or ruling authority and this Court has indicated that “a party cannot aver[t]” that it suffered an injury in fact until it reaches “the summary judgment stage”; and “cannot prove standing elements until it reached the trial stage.” See *Lujan*, 504 U.S. at 561, 112 S. Ct. 2130.

In the instant case, the latent 2014 cancer claim is based on a different “nucleus of facts” and could not have been tried in the 2005 Action. The facial plausibility found in this claim led the court to draw a reasonable inference that respondents are liable for the alleged misconduct. *Id.* at 556. The district court with the Circuit Court concurring drew inference that the factual allegations put forth in the Lynch complaint should have survived a motion to dismiss under *Twombly* and *Iqbal* by acknowledgment of their hypothetical second cause of action. This Court has not been without its own reservations and conflicts when applying *Iqbal* to lower court cases deemed 12(b)(6) proper to grant a motion to dismiss. Justice Kennedy describes when

bare assertions are in a complaint, it “is entitled no weight in the 12(b)(6) calculus,”⁵ but with factual allegations... dismissal is not proper.

Justice Kennedy writes, “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” This is the foundation upon which Lynch challenges the ruling of the district and Circuit courts. Her factual allegations state for 17+ years the Cu-7 remained embedded and undetected, to which the district court presiding over this and the prior action points back to it and writes: “The same Plaintiff in this case brought the same causes of action against the same defendant in her previous 2004 case.” The district court reached back in an effort to tie the two causes of action together as being only one private right does not match with precedent.

Lawlor gives the foundation to two cases stemming from the same contact with the Cu-7 for 17+ years, factoring in respondents being equitably estopped from relying on a statute of limitations defense because it knew the scientific evidence of the Litton Bionetics Cu-7 test results and its concluded indications of cancer development from the copper implant and because they fraudulently concealed the causal connection between the chemical exposure

⁵ *Id.* at 1950 (Iqbal) (Kennedy, J., Opinion for the Court) (“In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”); *id.* at 1959 (Souter, J., dissenting) (“Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible.”). This universal approach stands in contract to lower court’s sliding-scale approach. See *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007).

and the cancer diagnosis injury in fact. Continuing with Justice Kennedy's position he writes, "a court should assume their veracity." The decision from both courts' demonstrates assumption in the accuracy of the claim, as noted by the excerpt of the court's statement noted above. In short, by the Courts' own ruling, the "factual allegations" rose above the "speculative level" by attributing an injury in fact to Lynch's claim. Next, the plausibility factor is nexus of the present case.

With the Circuit Court concurring to the existence of a hypothetical injury relating to the usage of respondents' Cu-7, gives plausibility to such injury being attributed to its' use, and makes the actual 2014 injury in fact plausible and concrete meeting the Justice Kennedy 12(b)(6) calculus entitling her to relief and the motion to dismiss should have been denied. *Iqbal*, 129 S. Ct. at 1951 (Kennedy, J., Opinion for the Court). A court may not dismiss a complaint that presents "enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697 (quoting *Twombly*, 550 U.S. at 570).

The heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), require detailed factual allegations to raise above the speculative level. One need only look at the record, which reveals neither the district court nor the Circuit Court asserts Lynch failed at any time to meet this standard. Their decision however, is in violation of her Fourteenth Amendment right to equal protection of the law and due process. The only fatality they saw and ruled on, (which has been presented here to be an

erroneous one), is that the complaint should have been filed within a two year time period of their hypothetical 2008 injury analysis, while ignoring the actual concrete and particularized 2014 injury in fact claim brought in Lynch's complaint.

IV. THE DECISION CONFLICTS WITHIN THE NINTH CIRCUIT AND DECISIONS OF THE SECOND, THIRD, FIFTH, SIXTH AND DC CIRCUITS ON A FUNDAMENTAL ISSUE OF FEDERAL LAW.

The Circuit Court's decision in this case created a conflict with five other circuits in holding that the district court's granting dismissal for a latent injury pursuant to Federal Rules of Civil Procedure 12(b)(6) is appropriate when a claim shows that the cause of action was brought within the statute of limitations. *Giordano v. The Chemins Company, Inc.*, 599 F.3d 87 (2nd Cir. 2009); *Lake v. Arnold*, 232 F.3d 360 (3rd Cir. 2000); *Barnes v. Koppers, Inc.*, 534 F.3d 357 (5th Cir. 2008) (a jury finds for plaintiffs', circuit court reverse); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1559 (6th Cir. 1997) (affirmed in part reversed in part); *Gregg v. State of Hawaii*, 14-16785 (9th Cir. 2017) (vacated and remanded); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982).

V. THIS CASE PRESENTS THE RECURRING QUESTIONS OF EXCEPTIONAL IMPORTANCE WARRANTING THIS COURT'S IMMEDIATE RESOLUTION.

This case raises questions of vital importance to people: whether there should be a universal guidepost for navigating the uncertainties throughout the federal district and circuit court systems when determining the

requirement for sufficient factual matters in injury in fact cases as they pertain to federal courts applying state law statute of limitations under Rule 12(b)(6). Concrete injury appears to have a different meaning regarding the phrase “sufficient facts” (to an adequate degree), and what are the requirements to ascertain that “adequate degree” under Rule 12(b)(6).

As this Court evolved in its’ direction in *Burnett v. Grattan*, *supra* at 48, citing “a three-step process” to determine the “most appropriate” *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 462 (1975), or “the most analogous” *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980), providing guidance for applying the statute of limitations under 42 U.S.C. § 1988 and 42 U.S.C. § 1983 by federal courts based on state law was appropriate. The ramifications of courts arriving at differing outcomes when citing *Iqbal* and *Twombly*, and continued contextual misfires with injury in fact claims and meaning outlined by this Court needs clarity with the full intention for lower courts to follow it.

THIS COURT SHOULD REVERSE THE NINTH CIRCUIT’S DECISION

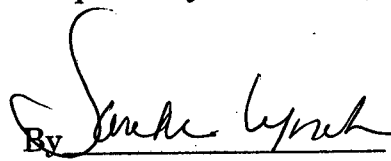
The decision in this present matter conflicts with Federal Rule of Civil Procedure 12(b)(6), conflicts with other circuit decisions and Supreme Court decisions. The district court and Circuit Court’s decisions are an abuse of discretion. For the reasons stated above, this Court should grant this writ to correct these errors made by the Ninth Circuit Court.

CONCLUSION

The petition for writ of certiorari should be granted.

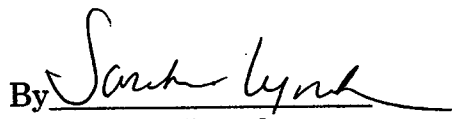
DATED: February 14, 2018

Respectfully submitted,

By 
Sascha Lynch

CERTIFICATION OF SERVICE

I hereby certify that, a copy of the foregoing PETITION FOR A WRIT OF CERTIORARI was served on respondent's counsel, Patrick J. Gregory, Esq., Shook, Hardy & Bacon, L.L.P., One Montgomery, Suite 2700, San Francisco, CA 94104-4505 via first class mail, postage prepaid, on the 14th day of February, 2018.

By 
Sascha Lynch