No. 21-121

In The Supreme Court of the United States

CHRISTIANA TAH; RANDOLPH MCCLAIN,

Petitioners,

v.

GLOBAL WITNESS PUBLISHING, INC., GLOBAL WITNESS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

AMICI CURIAE BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION, LITIGATION SECTION AND THE CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Litigation Section of the Beverly Hills Bar Association ("BHBA") and California Society of Entertainment Lawyers ("CSEL") respectfully submit this brief as *amici curiae* in support of Petitioners CHRISTIANA TAH and RANDOLPH MCCLAIN's Petition for Writ of Certiorari.[1] In accordance with Supreme Court Rule 37.2(a), *amici* timely sought and obtained the consent of all parties to file this brief.

BHBA is a voluntary bar association with more than 2,000 members, who live or work primarily on the west side of Los Angeles. Founded in 1931, BHBA is dedicated to improving the administration of justice, meeting the professional needs of Los Angeles lawyers, and serving the public. BHBA founded the first and largest pro bono public interest law firm in the United States, which now assists nearly 10,000 indigent and unrepresented clients annually. BHBA has long been an active participant in the American Bar Association House of Delegates and the California Conference of Bar Associations. The Litigation Section is one of BHBA's largest and most active sections, covering the

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

traditional substantive and procedural law governing adversarial judicial dispute resolution.

CSEL is an association of attorneys (and, to a certain extent, creative professionals) representing artists in the entertainment industry. Founded in 2013 in response to the lack of artist-friendly professional societies in the Los Angeles entertainment law community, CSEL seeks to balance the influence of powerful conglomerates which dominate the entertainment industry with the rights of creative professionals. Since submitting its first *amicus curiae* brief in support of the Petitioner in *Petrella v. Metro-Goldwyn-Mayer, Inc.*,[2] CSEL has endeavored to identify lines of reasoning that lack integrity and/or violate longstanding precedent before those in a position to correct them, where those decisions erode the rights of creative professionals. Such an opportunity is presented here.

BHBA and CSEL members represent numerous public figures, including some of the world's most-widely known celebrities. Additionally, BHBA and CSEL members practice in a jurisdiction with a strong statute regarding strategic lawsuits against public participation ("SLAPP"), in which an award of attorney's fees is mandatory if a plaintiff fails to demonstrate a "probability" that he will prevail on the claim. As such, *amici's* members' experience the effect of *Iqbal* and *Towmbly* on public figure defamation claims in their day-to-day practice.

[2] 572 U.S. 663 (2014).

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals below applied *Iqbal* and *Twombly* differently from the Second Circuit, creating a conflict which this Court should resolve. Specifically, while the Second Circuit analyzes whether the complaint provides a plausible claim, the court below weighed the evidence to divine which of several plausible explanations was *most* persuasive. Alternatively, the court below incorrectly applied this Court's standards for a 12(b)(6) motion in a public figure defamation case.

This case involves extremely important issues regarding the balancing of the right to defend one's reputation, the right to free speech, and the right to curtail expensive discovery and the waste of time of high-level public officials. These issues are even more urgent in the Ninth Circuit and the other circuits which allow anti-SLAPP motions in federal diversity cases, since public figure defamation plaintiffs in those circuits would have virtually no chance of surviving an attack at the pleading stage if the interpretation of the court below were adopted. And not only are plaintiffs in those circuits almost certain to have their cases dismissed before they can conduct any discovery, but they are then forced to pay attorney's fees and costs under their state's anti-SLAPP statutes.

That result is contrary to this Court's intention as announced in *Iqbal* and *Twombly*.

ARGUMENT

I. THE COURT BELOW APPLIED THE WRONG STANDARD; OR ALTERNATIVELY, THERE IS A SPLIT AMONG THE CIRCUIT COURTS

In *Iqbal*, the Court held that a complaint will not fail on a 12(b)(6) motion if the allegations are "unrealistic," "nonsensical," "chimerical" or "extravagantly fanciful." Rather, a complaint will fail if the allegations are so "conclusory" as to amount to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). As the Court noted, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. *Amici* agree that a bare allegation such as "the defendant acted with actual malice," without any supporting facts, would be inadequate to satisfy that element of a defamation claim by a public figure.

In his dissent in the case below, Judge Silberman noted that the correct test – which was applied by the Second Circuit in *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019) – is "whether the complaint is plausible," i.e., whether the complaint alleges *one* of *several* plausible explanations of the facts regarding defendant's state of mind. *Tah v. Global Witness*, 991 F.3d 231, 251 (D.C. Cir. 2021); *Palin*, 940 F.3d at 815. Judge Silberman noted that the majority in his circuit prematurely decided whether the allegations in plaintiff's complaint have *greater or lesser* plausibility than alternative explanations:

> The Majority discounts these facts by weighing the evidence and drawing inferences against [Petitioners]. . . . Such weighing of the evidence is, of course, impermissible at the 12(b)(6) stage. As the Second Circuit recently reiterated in another defamation case, "[I]t is not the [ ] court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory." *Palin*, 940 F.3d at 815.

Tah, 991 F.3d at 250-251.

In other words, the court below did not follow the standard announced in *Iqbal* and *Twombly*[3] of determining whether the complaint's allegations are so "conclusory" as to amount to legal conclusions. Instead, the majority in the court below acted as if it was ruling on a motion for summary judgment after the evidence had been fully developed through the discovery process, and decided whether it thought Petitioner's factual allegations were ultimately convincing by weighing competing plausible explanations for defendant's actions.

Judge Silberman argued in his dissent that there is a conflict between the circuit courts regarding the application of *Iqbal* and *Twombly* in public figure defamation claims: "But perhaps most troublesome is the **conflict** [the majority's opinion] creates with the Second Circuit (not to mention the Supreme Court) concerning the role of a court when applying Rule 12(b)(6) in the libel context." *Tah*, 991 F.3d at 251 (emphasis

[3] *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

added). The majority below did not note any conflict with the Second Circuit's application of *Iqbal* and *Twombly*. So it is possible that the District of Columbia simply applied the *wrong standard* to a 12(b)(6) motion in a public figure defamation case.

Whether there is a conflict in the circuits' application of *Iqbal* and *Twombly*, as Judge Silberman believes, or the majority below simply incorrectly applied the Court's standards for 12(b)(6) motions, it would be helpful for this Court to clarify the standards that the circuit courts should use in this context.[4]

II. THIS CASE INVOLVES EXTREMELY IMPORTANT ISSUES

The right to protect one's good name is an important one. As Justice Stewart wrote: "The right of a man to the protection of his own reputation from . . . wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).

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[4] The Court also instructed the court of appeals in *Iqbal* to decide whether to remand to the district court so that respondent can seek leave to amend his deficient complaint. *Amici* believes this is another basis for granting certiorari, i.e. the court below should have considered a remand to allow Petitioners to amend their complaint.

First Amendment rights are also crucial.[5]

On the other hand, the right to curtail expensive discovery[6] and the distraction and waste of time of high-level public officials[7] when the plaintiff in a defamation case has not alleged a plausible claim is also beneficial.

Striking the correct balance in a public figure defamation cases is thus important for the country.

This balance is even more important in circuits that allow state anti-SLAPP motions[8] in federal diversity cases, such as the Ninth Circuit. *See, e.g.*, *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999).[9] For example, a motion brought under California's anti-SLAPP act requires plaintiff to show a ***probability*** that he will prevail on the claim based on admissible evidence without, in most cases, having been allowed to engage in even limited discovery. Cal. Civ. Proc. Code § 425.16(b)(1). If the court grants the motion to strike, it *must* impose *attorney's fees* and costs against the

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[5] This includes reporting on corruption and bribery of public figures.

[6] As in *Twombly*.

[7] As in *Iqbal*.

[8] Currently, the states are split: 28 states have anti-SLAPP laws. *See* Harvard University's Berkman Klein Center's Digital Media Law Project, https://www.dmlp.org/legal-guide/state-law-slapps.

[9] In contrast, the District of Columbia's Anti-SLAPP Act law does *not* apply in federal court. *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1334-1337 (D.C. Cir. 2015).

plaintiff. Cal. Civ. Proc. Code § 425.16(c)(1)-(2).[10] Moreover, the Ninth Circuit has held that the § 425.16(g) "discovery freeze" applies when an anti-SLAPP motion to strike is based on the legal deficiencies of a claim, because the motion must be treated as though it were a motion filed under Rule 12(b)(6). *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

Therefore, if the reasoning of the court below were adopted by the Ninth Circuit, a public figure plaintiff facing an anti-SLAPP motion in a diversity case would have to convince the judge before any discovery is commenced that he will *probably* prevail in convincing the judge that his allegations were *more plausible* than *alternative* interpretations of the facts. This would, *de facto*, be impossible without a direct admission of malice by the defendant.

And so public plaintiffs in the Ninth Circuit routinely lose anti-SLAPP motions, and are hit with an attorney's fees and costs award before they have the chance to conduct any discovery. The same is true in many jurisdictions with similar anti-SLAPP statutes. This makes clear articulation of the pleading standard for actual malice all the more important.

[10] There are exceptions, but they are not applicable to this case.

CONCLUSION

For the reasons set forth above, *Amici Curiae* joins Petitioners in requesting that this Court grant the petition for the writ of certiorari.

Respectfully submitted,

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