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

BRIEF IN OPPOSITION

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September 27, 2021

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QUESTION PRESENTED

Petitioners are former senior Liberian public officials who received five-figure bonus payments from the Liberian government after negotiating a deal to transfer oil rights to a multinational company, and who now seek to assert defamation and false light claims arising from a factually accurate report by a non-profit organization about that transaction. To do so, they ask this Court to excuse public official defamation plaintiffs like themselves from the pleading standard this Court articulated in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The question presented is:

Whether this Court should create an exception to federal pleading standards for public official defamation plaintiffs, in the absence of any Circuit split on this issue, where district courts have not "effectively shut" the "door to defamation recovery" as Petitioners claim, and where this Court has already considered and rejected the rationale urged by Petitioners.

PARTIES TO THE PROCEEDING

Petitioners Christiana Tah and Randolph McClain are citizens of Maryland and North Carolina, respectively.

Respondent Global Witness is a nonprofit, non-governmental organization registered under Section 501(c)(3) of the Internal Revenue Code. Global Witness has no corporate parent and no publicly held corporation owns 10 percent or more of its stock. Global Witness undertakes its activities in the United States through Respondent Global Witness Publishing, Inc. No publicly held corporation owns 10 percent or more of Global Witness Publishing, Inc.'s stock.

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INTRODUCTION

This Petition presents a challenge to the pleading standards adopted in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), dressed up as a dispute over the practicability of the "actual malice" fault standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It should be denied.

Petitioners Christiana Tah and Randolph McClain seek review of the D.C. Circuit's decision affirming the dismissal of claims for defamation and false light invasion of privacy they had brought against Respondents Global Witness and Global Witness Publishing, Inc. (together, "Global Witness"). Their complaint alleged that an entirely truthful report by Global Witness conveyed an allegedly false implication, namely that they had accepted bribes. The District Court concluded, and the D.C. Circuit agreed, that the public official Petitioners failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure because they did not plead facts that, if proven, could plausibly establish that Global Witness published the allegedly false implication with knowledge of its falsity or serious doubt about its truth, the constitutionally required "actual malice" fault standard.

The Petition asks this Court to "instruct lower courts on how to apply *Twombly* and *Iqbal* in First Amendment actual malice cases," Pet. at 4, but the lower courts need no such instruction. There is no Circuit split to resolve. Nor does experience in the lower courts support Petitioners' claim that imposing

the *Twombly* and *Iqbal* plausibility requirement on pleading actual malice "effectively creates absolute immunity from defamation liability in all actual malice cases." *Id.* at 3. And this Court in *Iqbal* expressly rejected Petitioners' argument that it is somehow unfair to require plausibility pleading when "the subjective state of mind" of the defendant is an element of the claim. *Id.* at 16.

Even if this Court were inclined to articulate an "adjustment to the application of the First Amendment in defamation suits" as Petitioners request, *id.* at 2, this case presents a poor vehicle for doing so. First, Petitioners are not just public figures but public *officials*, whose "actions involved the administration of public affairs." *See Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (GORSUCH, J., dissenting). Second, the speech challenged in this case, a 35-page investigative report with extensive endnotes providing sources for each fact presented, was published by a non-profit organization that does not share "the business incentives fostered by our new media world." *Id.* Third, the challenged report is *true*—Petitioners do not allege that it presented any false fact, but rather claim the accurate facts conveyed an allegedly false *implication*, which raises distinct pleading obligations. Fourth, the First Amendment protects the expression of conclusions drawn from such fully disclosed true facts, and neither the District Court nor the D.C. Circuit reached this additional and independent basis for dismissing Petitioners' claims.

This case presents no important, unresolved federal question and no departure from accepted practice. Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

Because the Petition misstates the record in material respects, Global Witness provides a brief summary of the undisputed facts and relevant portions of the Global Witness report.

A. The Global Witness Report

Global Witness is an international non-profit organization working to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system. As part of those worldwide efforts, Global Witness undertakes in-depth investigations and publishes long-form reports. For nearly two decades, it has reported extensively on governance issues in the West African country of Liberia and advocated for transparency in, among other things, natural resources contracts.

On March 29, 2018, Global Witness published an investigative report titled "Catch me if you can: Exxon's complicity in Liberian oil sector corruption and how its Washington lobbyists fight to keep oil deals secret." JA53-91.[1] The culmination of months of research and investigation, the report is 35 pages long and contains 125 endnotes detailing its sources

[1] Citations to "JA_" are to the Joint Appendix filed in *Tah v. Global Witness Publ'g Inc.*, No. 19-7132 (D.C. Cir. Feb. 10, 2020).

for the facts presented. Those sources include U.S. judicial records, Liberian government documents, and other original and authoritative materials. JA88-90. The report explores issues relating to oil development and transparency by focusing on the history of deal-making between the Liberian government and international and national companies seeking to drill in an area off the Liberian coast known as Block 13.

(i) Transparency laws and corruption surrounding the initial sale of Liberia's "Block 13" rights

The Global Witness report begins by discussing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), in order to highlight the critical role of transparency laws in natural resource development and governance. Introduced with bipartisan support, Section 1504 requires oil, gas, and mining companies listed on U.S. stock exchanges to report payments made to foreign governments, as well as payments related to natural resource extraction on public lands in the United States. *Id.* Other western nations followed the lead of the United States and enacted similar transparency laws.

Liberia was among the countries outside the West that did the same. Its commitment to transparency enabled Global Witness to obtain much of the data on which the report relied from a semi-autonomous government agency charged with overseeing financial disclosures for Liberia's natural resources

contracts. JA61. That data led Global Witness to examine transactions involving Liberia's two sales of licenses for Block 13. The first deal, in 2004, involved a license sold to a company with possible ties to persons inside government and was marred by findings of bribery by a Liberian government auditor; the second deal, struck years later, involved the sale of a license to Exxon and was negotiated by a government committee that included Petitioners. JA58-61.

The Global Witness report discusses these deals in the context of the history of oil development in Liberia, which was "essentially dormant" until the government's oil agency NOCAL "decided to auction some of Liberia's 17 offshore oil blocks" in 2004. JA63-64. As the report explains, oil company Broadway Consolidated PLC ("Broadway") bid in 2004 on a license to drill in Block 13. While Liberia's "official account is that [Broadway] was the only applicant for Block 13," Global Witness identified "grounds to suspect that [Broadway] obtained Block 13 because the company was likely part-owned by government officials with the power to influence the award of oil licenses," which would constitute a violation of Liberian law. JA63-64.

Broadway's license for Block 13 won approval in the Liberian legislature in 2007. Yet the report explains that The Liberian Government's General Auditing Commission subsequently investigated the deal and determined that NOCAL spent more than $100,000 "to bribe members of the Liberian legislature so that they would approve the award of

Block 13 to [Broadway], alongside three oil blocks for [another] company." JA68. The Global Witness report notes that the Auditing Commission found that the payments "were paid directly to state officials, not to lobbyists, and were determined . . . to be bribes," even though NOCAL had characterized the payments as "compensation" or "lobbying fees." *Id.* The report also presents the Auditing Commission's disclosure that NOCAL board minutes reflected a payment from Broadway of $75,000, *id.*, six days before NOCAL paid the first of its bribes to Liberian legislators, JA66.

The Global Witness report refers to bribes made to public officials only in relation to the Broadway license deal and government findings of wrongdoing surrounding that transaction.

(ii) Exxon's acquisition of the Block 13 rights

In January 2011, after Broadway had failed to drill and fell behind on its payments, the Liberian government ordered the company to sell its license for Block 13. JA67; JA69. In November 2011, Exxon struck a tentative agreement with a Canadian oil company Canadian Overseas Petroleum Ltd. ("Canadian Overseas") to buy the majority of Block 13, contingent on NOCAL's approval.

In negotiating that transaction, Exxon sought assurance from Liberia that what it called "past irregularities"—namely, the bribes from Broadway identified by the Liberia Auditing Commission and an earlier September 2011 report by Global Witness—would not affect the proposed deal or Block

13's new owners. JA69-70. Exxon ultimately proposed a complex deal split across two contracts "due to [its] concern" about U.S. anti-corruption laws, as Exxon itself described it in a PowerPoint presentation delivered to Liberian officials. JA72. Exxon could "use [Canadian Overseas] as a go-between that would, Exxon appears to have thought, shield it from any US legal risks posed by Block 13." *Id.*

After describing the transaction, the Global Witness report asks: "[I]f Exxon was satisfied that buying Block 13 was legal, why did the company still feel the need to use [Canadian Overseas] as a go-between and negotiate so hard for Liberian legal guarantees in its final contract?" JA79. The report considers two possibilities. On one hand, Exxon may have been "simply exercising an over-abundance of caution, perhaps even attempting to create legal safeguards against new, unforeseen legal risks." *Id.* On the other hand, Exxon may have "continued to be concerned about US anti-corruption laws," both because Liberian officials may have been among the Broadway owners selling the lease and because "the bribes paid so [Broadway] could originally obtain Block 13 were still bribes, were still publicly reported, and Exxon was aware of them when it bought the license from [Broadway]." *Id.* The report then calls for an investigation to determine whether U.S. money-laundering laws were broken or the U.S. Foreign Corrupt Practices Act violated over the course of these 2011 transactions. JA79-82.

Neither the Complaint nor the Petition alleges that the report's presentation of any of the foregoing facts is in any way incorrect.

(iii) The payments to Petitioners

In a separate section of the report, Global Witness discusses the 2013 award of Block 13 and the "unusual, large payments [that] were made by NOCAL to Liberian Government officials in connection with" that award. JA82. The payments, as data showed, were equal to 160% of Liberia's most highly paid minister's salary. The Global Witness report states, in pertinent part:

> In the month following the award of Block 13 to Exxon, NOCAL paid $210,000 to six key Liberian Government officials who signed the Exxon deal – $35,000 per official. These officials were National Investment Commission Chairman Natty Davis, Finance Minister Amara Konneh, NOCAL CEO Randolph McClain, Mining Minister Patrick Sendolo, NOCAL Board Chairman Robert Sirleaf, and Justice Minister Christiana Tah.
>
> Global Witness believes these payments to be unusual. According to NOCAL bank records covering several years surrounding this date, except for smaller yearly bonuses paid

> shortly before Christmas, there is no sign of equivalent bonuses during this time. Block 13 was the only oil license awarded during the period.
>
> These payments were called "bonuses" by NOCAL and were made to the officials because they were members of Liberia's Hydrocarbon Technical Committee . . . , the inter-ministerial body responsible for signing Liberia's oil licenses. They appear also to be linked to [the Hydrocarbon Technical Committee's] signing of Block 13.
>
> Global Witness calculates that the payments represented a 160 percent increase on the reported highest salary paid to a Liberian minister. Robert Sirleaf, however, was working for free according to newspaper reports. Yet he also received a $35,000 payment.

Id.

Petitioners do not dispute the truth of any of these statements. They admit the payments and defend them as made at the direction of Liberian President Ellen Johnson Sirleaf because of the "magnitude" of the payment Liberia had received for the extraction rights. Pet. at 7; JA14 ¶ 25. They further allege that NOCAL passed a resolution—

signed by McClain and President Sirleaf's son Robert—authorizing the disbursement of payments to, among others, the Hydrocarbon Technical Committee (of which Tah and McClain were members) and the NOCAL Board of Directors (on which McClain and Robert Sirleaf sat). JA14-15 ¶ 26.

McClain asserts that he sought counsel on whether receipt of the payments would be legal, Pet. at 7-8, but the Petition elides from whom he sought that "legal advice on the propriety" of the payments. *Id.* The Complaint, however, acknowledges that it was Petitioner Tah and her colleague who "conduct[ed] a legal analysis" and concluded that the bonuses—that is, the payments *they themselves stood to receive*—"would be legal." JA16 ¶¶ 27-28; *see also* JA15-16 ¶ 26 (McClain "convened [a Hydrocarbon Technical Committee] meeting and asked two of [its] members"—one of whom was Tah—"if payment of such bonuses would be legally permissible").

Global Witness sought comment as part of its investigation. As the Petition concedes, Pet. at 6, the report presented at length Petitioners explanations for the payments, including the reasons Petitioners assert the payments were legitimately earned bonuses. *See* JA82-83. The report includes both Tah's and McClain's points that all NOCAL staff, not just signatories to the contract, received a payment (of some amount). The report is also clear that "Global Witness has no evidence that Exxon directed NOCAL to pay Liberian officials, nor that Exxon knew such payments were occurring." JA83.

In a later subsection titled "Exxon Should Have Known Better," the Global Witness report nonetheless fairly criticizes Exxon because it "knew the *risk posed* by giving NOCAL a large signature bonus: the agency had previously acted on behalf of [another oil company] by bribing officials so that oil blocks would be approved." JA84 (emphasis added). It was, after all, a risk that Exxon itself discussed in its own presentation to the Liberian government. The report then offers Global Witness's opinion "that Exxon should have considered it *possible* that money the company provided to NOCAL *could have* been used as bribes in connection with Exxon's Block 13 deal," and notes that "Global Witness has written to Exxon requesting information about those safeguards the company may have put in place to prevent the *possible misuse* of its funds by NOCAL." *Id.* (emphases added).

The report suggests Liberia should investigate the payments to the Hydrocarbon Technical Committee and to legislators "to determine whether any Liberian laws may have been broken," and that "[w]ere it to be determined that there has been any illegality, the US Department of Justice should investigate Exxon to determine if the company violated the FCPA." *Id.*

Despite the Petition's claims, Global Witness nowhere calls these payments bribes—in contrast to payments made and received by others in the prior Liberian oil deal that the Global Witness report explicitly labels as bribes, based on official findings. Moreover, the Global Witness report states that it

"cannot prove that these payments were improper," and presents only its belief that "they warrant investigation to determine whether they broke Liberian or US law." JA85.

The Global Witness report finally offers a series of recommendations to make future deals between extractive companies and foreign governments more transparent, key among them asking Congress to "support the implementation of Section 1504 by urging the SEC to ensure a strong new rule is published and by voting no on any efforts to weaken or repeal the statute." JA86. The report then calls for several investigations to determine *whether* the Block 13 transaction violated any laws in the United States, Liberia, or other nations, including "an investigation into whether NOCAL violated any Liberian law when it distributed payments in 2013 to officials who signed the Block 13 license." JA87. The Global Witness report adds that Liberia's government "should also review its policies on bonuses paid to staff." *Id.*

B. Liberia's Response To The Global Witness Report

Following publication of the Global Witness report, President Sirleaf's successor formed a Special Presidential Committee to investigate the Block 13 deal. JA35 ¶ 74; Pet. at 9. The investigation led to a "Report of the Special Presidential Committee Appointed to Examine the March 2018 Global Witness Report of the National Oil Company of Liberia (NOCAL)" released in May 2018 (the "Presidential Committee Report"), which made

findings concerning the payments. *Id.* It determined that "the payment may have been a promise made prior to the conclusion of the ExxonMobil deal," but that it had not found evidence that those payments were bribes "within the context of [Liberian] law." JA38 ¶¶ 81-82 (quoting Presidential Committee Report). The Petition's claim that the Committee "unequivocally renounced" the supposed bribery allegations in the Global Witness report "as false" is incorrect and misleading. Pet. at 9.

The Petition omits altogether the Committee's *other* finding, which is that the payments were "demanded by the HTC," "without any legal basis," and constituted a "misuse of public money." These official findings mirror Global Witness's assessment of the payments as "large" and "unusual." The Committee indicated that the payments should be returned, JA38, and recommended various potential sanctions for those who refused to comply. Petitioners admit they have refused to return the money.

C. The Proceedings Below

Petitioners filed this lawsuit against Global Witness in September 2018, asserting claims for defamation and false light invasion of privacy. Global Witness moved to dismiss the Complaint under Rule 12(b)(6). The District Court granted the motion after finding that the Complaint failed to allege facts that could plausibly support a claim that the report was

published with actual malice. Pet. App. at 66a-72a.[2] After noting that "Plaintiffs contest none of the facts in the Report, even if they disagree with the inference that may be drawn therefrom," and accepting their allegation that the report could be read to convey a defamatory inference, the District Court found that none of the facts alleged could plausibly support the conclusion that Global Witness "was aware that its story was fabricated or too improbable to circulate." *Id.* at 69a. Moreover, the generic "interlocking" theories offered in the Complaint—such as an allegedly preconceived storyline and adversarial stance against Exxon—failed plausibly to allege that Global Witness knew its report was false or had serious doubts about its truth before publication.. *Id.* at 67a.

On appeal, the D.C. Circuit similarly examined Petitioners' allegations supporting actual malice—a supposed preconceived storyline and ill-will toward Exxon, and a claimed failure to credit Petitioners'

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[2] Petitioners have sought a writ of certiorari only on the question of whether an exception should be made under the *Iqbal/Twombly* pleading standard for public officials and figure plaintiffs in defamation cases. Global Witness therefore does not summarize other procedural history not relevant to the Petition, except to correct the Petition's misstatement that the Court of Appeals found that readers would have understood the Global Witness report as asserting Petitioners had accepted bribes. Pet. at 11. The majority opinion did not address the alleged defamatory meaning at all and resolved the appeal on actual malice grounds alone. Additionally, while the courts below accepted as true the factual allegations in the Complaint in considering Global Witness's motion to dismiss, no court has found anything stated in the report to be false.

denials and to name *all* of the payment recipients—and likewise found them insufficient to plausibly demonstrate publication with actual malice. *Id.* at 8a. For example, the D.C. Circuit considered whether the content of the report, or the requests for comment that Global Witness sent to Liberian officials toward the end of the reporting process, could plausibly give rise to an inference of actual malice and held that they could not. *Id.* at 15a-16a. Similarly, the Court examined the denials of the Liberian officials (published in the report itself) and found nothing in them to suggest knowledge of falsity or a high degree of awareness of probable falsity on the part of Global Witness. *Id.* at 18a.[3]

The D.C. Circuit also rejected the sufficiency of allegations of Global Witness's supposed ill will against Exxon and its CEO. It noted the well settled principle that hostility toward a subject does *not* constitute actual malice and further concluded that facts pleaded in the Complaint did not demonstrate ill will in any event. *Id.* at 19a. Nor did the assertion of a preconceived storyline, for which Petitioners offered no plausible factual support, or their complaint that the report names only the signatories to the deal, not *every* recipient of bonus payments,

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[3] Petitioners emphasize that all Hydrocarbon Technical Committee staff received the bonus. The D.C. Circuit correctly noted that Global Witness disclosed that fact to readers in the report and that Petitioners failed to dispute that the payments to themselves were anything other than "large" and "unusual"—much less that Global Witness considered them otherwise.

plausibly allege knowing falsity or reckless disregard of the truth.

The Court of Appeals emphasized the facial inadequacy of the Complaint: "The implications of Tah and McClain's theory are breathtaking: they would find support for an inference of actual malice in a wide swath of investigative journalism that turns out to be critical of its subject." *Id.* at 19a.

The dissent below framed the question before the D.C. Circuit as whether "Global Witness's accusation that *Exxon* bribed [Petitioners] . . . is facially plausible," and deemed it implausible because Global Witness "lacked any support for insinuating that the payments to Tah and McClain were bribes." Pet. App. at 26a. The dissent thus concluded that a plausible allegation of actual malice emerged from the text of the report, in which Global Witness wrote that it had "'no evidence that Exxon directed [NOCAL] to pay Liberian officials, nor that Exxon knew such payments were occurring.'" *Id.* at 26a (quoting Global Witness report).

The majority countered that the Global Witness report did *not* accuse Exxon of bribing Petitioners. The report revealed large, unusual payments by *NOCAL*. This fact "[a]t most … implies that NOCAL, not Exxon, was the briber, thus rendering any lack of evidence as to Exxon's direction or knowledge"—the thing that preoccupied the dissent—"irrelevant." *Id.* at 14a. The majority also rejected the dissent's premise that raising questions in the absence of a definitive answer—here, Tah and McClain's claim that "Global Witness subjectively *knew* that it had

not been able to determine whether the payments . . . were corrupt bribery payments'"—sufficiently pleads fault and can "shoehorn in every conceivable actual malice theory." *Id.* at 15a.

Petitioners did not seek rehearing or rehearing en banc in the D.C. Circuit. They filed a petition for a writ of certiorari in July 2021.

REASONS FOR DENYING THE PETITION

I. There Is No Need For This Court To "Instruct Lower Courts On How To Apply *Twombly* And *Iqbal* In First Amendment Actual Malice Cases"

The central premise advanced by Petitioners is that this case provides an opportunity for the Court "to instruct lower courts on how to apply *Twombly* and *Iqbal* in First Amendment actual malice cases." Pet. at 4. This urges a solution to a non-existent problem. The Circuits have uniformly recognized that public official and public figure defamation plaintiffs must plead facts that plausibly allege publication with actual malice fault to state a claim for defamation. District courts have had no difficulty applying that rule and their application of this now-familiar pleading standard has not created any "absolute immunity" for defamation defendants, as the reported decisions confirm.

Moreover, the Petition's reasoning that pleading standards must be relaxed in libel cases against public officials and public figures because "details concerning the defendant's conduct and state of mind

are largely outside a plaintiff's grasp" at the pleading stage, *id.* at 14, was weighed and rejected by this Court in *Twombly* and *Iqbal*.

A. There Is No Circuit Split To Resolve

It is a bedrock principle of American libel law that public officials cannot prevail in a defamation action unless they can prove, by clear and convincing evidence, that the allegedly defamatory statements were published with "actual malice" fault, *i.e.*, with knowledge of their falsity, or despite a "high degree of awareness" of their "probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 67, 74-75 (1964). This is an intentionally heavy burden, intended to serve a "profound national commitment" to promoting "debate on public issues," even though that such debate "may well include vehement, caustic, and sometimes unpleasantly sharp" statements about public officials. *Sullivan*, 376 U.S. at 270-72.

Following *Twombly* and *Iqbal*, the Circuits—including the D.C. Circuit—have uniformly recognized that the actual malice standard plays an important role in assessing the facial validity of a defamation claim brought by a public official or public figure. Such plaintiffs "must plead 'plausible grounds' to infer actual malice by alleging 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" actual malice.'" *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (quoting *Twombly*, 550 U.S. at 556); *accord Tah*, App. 15-20; *McCafferty v. Newsweek Media Grp.*, 955 F.3d 352, 360 (3d Cir. 2020); *Nelson Auto Ctr. v. Multimedia Holdings Corp.*, 951 F.3d 952, 958 (8th

Cir. 2020); *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 745 (5th Cir. 2019); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016); *Pippen v. NBCUniversal Media*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. NASCAR*, 674 F.3d 369, 377-78 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Ryniewicz v. Clarivate Analytics*, 803 F. App'x 858, 868 (6th Cir. 2020) (defamation plaintiff failed to make plausible allegation of actual malice necessary to overcome state-law qualified privilege).

Faced with this unbroken line of Circuit-level precedent, Petitioners attempt to manufacture a split arising from the Second Circuit's decision in *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019). But *Palin* did not reject the principle that a public official plaintiff must plead facts that give rise to a plausible allegation of actual malice, a principle the Second Circuit expressly embraced just a few years earlier in *Biro*. Rather, the Second Circuit in *Palin* concluded that the complaint's allegations in that case "paint[ed] a plausible picture of [an] actual-malice scenario." *Id.* at 813. Applying that same standard, the District Court in this case concluded, and the Court of Appeals agreed, that Petitioners' "theories *fail* to support a plausible claim that Global Witness acted with actual malice." Pet. App. 15a (emphasis added). Put differently, the courts below did not "dismiss a plausible complaint because it is not as plausible as the defendant's theory," as had the district court in *Palin*, 940 F.3d at 815, but rather they dismissed *implausible* theories of actual malice—exactly as *Twombly* and *Iqbal* require.

That different cases with different facts produce different results does not evidence a "split" in authority, only application of a legal rule in different circumstances. Petitioners' claimed Circuit split is entirely illusory.

B. The "Door To Defamation Recovery" Is Not "Effectively Shut" For Public Officials Or Public Figures

Petitioners are equally mistaken in urging that *Twombly* and *Iqbal* have "effectively create[d] absolute immunity from defamation liability in *all* actual malice cases," Pet. at 3 (emphasis added), and "effectively end[ed] public plaintiff defamation cases in the federal system," *id.* at 4. These extraordinary claims, however, are unsupported by actual evidence.[4]

Petitioners do not identify any case—other than their own—where they believe a defamation claim was wrongly dismissed because the plaintiff was required to plausibly allege actual malice and failed to do so. Instead, Petitioners quote a 2014 law review article questioning whether "'it is ever possible to survive a 12(b)(6) motion on the element of actual malice after *Iqbal* and *Twombly*.'" Pet. at 13 (quoting Clay Calvert et al., *Plausible Pleading & Media Defendant Status*, 49 Wake Forest L. Rev. 47, 69 (2014)). But they omit the very next sentence of that

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[4] *See, e.g.*, Carl Sagan, *Broca's Brain: Reflections on the Romance of Science* (1979) ("I believe that the extraordinary should certainly be pursued. But extraordinary claims require extraordinary evidence.").

article, declaring that *"[t]he answer is 'yes,' . . .* and the opinions finding sufficient pleading of actual malice may illustrate the type of facts that help plaintiffs when pleading it." 49 Wake Forest L. Rev. at 69-70 (emphasis added).

Indeed, decisions published just during the pendency of this case reveal that federal courts applying *Twombly* and *Iqbal* in libel cases with public official or public figure plaintiffs can and do deny motions to dismiss when those plaintiffs plead facts establishing plausible claims. *E.g.*, *Nunes v. Lizza*, No. 20-2710, 2021 U.S. App. LEXIS 27630 (8th Cir. Sept. 15, 2021); *Blankenship v. Trump*, No. 19-cv-549, 2021 U.S. Dist. LEXIS 165989 (S.D. W. Va. Sept. 1, 2021); *US Dominion, Inc. v. Powell*, No. 21-cv-40, 2021 U.S. Dist. LEXIS 150495 (D.D.C. Aug. 11, 2021); *Nunes v. WP Co.*, No. 21-cv-506, 2021 U.S. Dist. LEXIS 150498 (D.D.C. Aug. 11, 2021); *Colborn v. Netflix*, No. 19-cv-484, 2021 U.S. Dist. LEXIS 99478 (E.D. Wis. May 26, 2021); *Dershowitz v. CNN, Inc.*, No. 20-cv-61872, 2021 U.S. Dist. LEXIS 120809 (S.D. Fla. May 24, 2021); *Moore v. Cecil*, 488 F. Supp. 3d 1144 (N.D. Ala. 2021); *Am. Addiction Cntrs. v. Nat'l Ass'n of Addiction Treatment Providers*, 515 F. Supp. 3d 820 (M.D. Tenn. 2021); *Blankenship v. Napolitano*, 451 F. Supp. 3d 596 (S.D. W.Va. 2020); *Williams v. Roc Nation*, No. 20-cv-3387, 2020 U.S. Dist. LEXIS 195173 (E.D. Pa. Oct. 21, 2020); *FinancialApps v. Envestnet*, No. 19-cv-1337, 2020 U.S. Dist. LEXIS 139090 (D. Del. July 30, 2020), *rep. and recomm. adopted*, 2020 U.S. Dist. LEXIS 168562 (D. Del. Sept. 15, 2020); *Watson v. NY Doe 1*, 439 F. Supp. 3d 152 (S.D.N.Y. 2020); *Gilmore v. Jones*, 370

F. Supp. 3d 630 (W.D. Va. 2019); *Butowsky v. Folkenflik*, No. 18-cv-442, 2019 U.S. Dist. LEXIS 104297 (E.D. Tex. Apr. 17, 2019); *Wigington v. Metro. Nashville Airport Auth.*, 374 F. Supp. 3d 681 (M.D. Tenn. 2019); *Resolute Forest Prods. v. Greenpeace Int'l*, No. 17-cv-2824, 2019 U.S. Dist. LEXIS 10263 (N.D. Cal. Jan. 22, 2019); *Steele v. Goodman*, 382 F. Supp. 3d 403 (E.D. Va. 2019); *Spirito v. Peninsula Airport Comm'n*, 350 F. Supp. 3d 471 (E.D. Va. 2018).[5]

Two of these decisions, in particular, put the lie to the premise of this Petition because they expressly acknowledge *Tah* and still come to the conclusion that those plaintiffs plausibly alleged actual malice. *US Dominion*, 2021 U.S. Dist. LEXIS 150495, at *35-36 (quoting *Tah*); *Nunes*, 2021 U.S. Dist. LEXIS 150498, at *16 (same).

Petitioners' claim that an "absolute immunity" against libel claims effectively exists for public officials and public figures is also entirely illusory.

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[5] This list does not include defamation cases in which plaintiffs needed to plead actual malice for other reasons—for instance, to overcome a qualified privilege arising under state law—and federal courts denied motions to dismiss on the grounds that actual malice was plausibly alleged. *E.g.*, *Belya v. Metro. Hilarion*, No. 20-cv-6597, 2021 U.S. Dist. LEXIS 95259 (S.D.N.Y. May 19, 2021); *Mitchell v. Fujitec Am.*, No. 20-cv-363, 2021 U.S. Dist. LEXIS 23212 (S.D. Ohio Feb. 8, 2021); *Chatterjee v. CBS Corp.*, No. 19-cv-212, 2020 U.S. Dist. LEXIS 20346 (E.D. Ky. Feb. 6, 2020).

C. The Court Has Already Considered and Rejected the Special "State of Mind" Pleading Rules that Petitioners Seek

Building on their erroneous claim that public plaintiffs currently have no meaningful chance to survive a motion to dismiss due to their "lack of access to evidence of a defendant's state of mind," Pet. at 15-16, Petitioners ask the Court to consider changing the pleading rules so that public official and public figure defamation plaintiffs can receive "the benefit of discovery" to obtain "evidence of the subjective state of mind of the publisher." *Id.* at 16.

This argument is no different than the one respondents made in both *Twombly* and *Iqbal*. In *Twombly*, respondents insisted that "pleading requirements must be *more* relaxed – not less – with regard to matters peculiarly within the opposing party's knowledge." Br. for Respondents, *Twombly*, 2006 U.S. S. Ct. Briefs LEXIS 1697, at *46. And in *Iqbal*, respondent argued that the Court should not "alter the liberal pleading requirements of Rule 8" in part because of the "profound informational asymmetry" between the parties – *i.e.*, because relevant records "would presumably have been unavailable to [respondent] prior to filing his complaint" and because "interrogatories or depositions" were "the only means of discovering" certain evidence. Br. for Respondent, *Iqbal*, 2008 WL 4734962, at *43.

This Court rejected those arguments and held that, regardless of such concerns, *every* plaintiff must "allege [enough] by way of factual content to nudge

his claim . . . across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 683 (quoting *Twombly*, 550 U.S. at 570) (alteration and internal marks omitted); *see also id.* at 678-79 (instructing that the Federal Rules "do[] not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). As this Court explained, "Rule 9 merely excuses a party from pleading [malice] under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8." *Id.* at 686-87.

Petitioners make no effort to distinguish *Twombly* and *Iqbal* in this regard. Nor do they explain how the Court could rewrite this pleading standard for allegations of actual malice in defamation cases without calling into question the multitude of rulings from lower courts that have followed "these two landmark decisions" and "imposed the heightened plausibility requirement to allegations of malice, intent, knowledge, and other conditions of mind." 5A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1301 (4th ed.) (collecting cases addressing claims of, *inter alia*, malicious prosecution, common law fraud, violation of the False Claims Act, and breach of the implied duty of good faith and fair dealing).

In short, Petitioners ask the Court for special treatment for public official and public figure libel plaintiffs, in the form of an easier path to discovery, even though this Court has already rejected Petitioners' rationale and the impact of such a change to federal pleading standards would extend

far beyond libel law. There is no reason, let alone a compelling reason, to effect such a sweeping change.

II. This Case Is A Poor Vehicle For Revisiting The Actual Malice Standard

Even if the Court were inclined to articulate an "adjustment to the application of the First Amendment in defamation suits" as Petitioners request, Pet. at 2, this case would offer a poor vehicle for doing so, for at least four independent reasons.

First, because Petitioners are public *officials*, not public *figures*, this case would not help the Court reassess the boundaries of public figure status—let alone "limited-purpose" or "involuntary" public figure status—even if the Court were inclined to do so. *Cf. Berisha*, 141 S. Ct. at 2429 (GORSUCH, J., dissenting) (observing that "private citizens can become 'public figures' on social media overnight," that "[i]ndividuals can be deemed 'famous' because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most," and that "an individual can become a limited purpose public figure simply by *defending* himself from a defamatory statement").

Second, because Global Witness is a non-profit organization with no business incentives, and the challenged report itself is concededly the product of a traditional investigative reporting process, granting certiorari would not provide an opportunity for the Court to address the impact (if any) on *Sullivan* of how "our Nation's media landscape has shifted" since this Court issued that landmark decision. *Cf. id.* at

2427-28 (discussing "the rise of 24-hour cable news and online media platforms" and "the business incentives fostered by our new media world").

Third, because Petitioners concede that the report at issue does not contain even a single false statement of fact, and instead allege only that the concededly true facts conveyed a false implication, this case does not provide an opportunity to address the actual malice standard—at the pleading stage or otherwise—without the additional complications inherent in a libel-by-implication claim. *See, e.g.*, *Kendall v. Daily News Publ'g Co.*, 716 F.3d 82, 90 (3d Cir. 2013) ("The need to show intent necessarily means that the actual-malice standard will have different elements of proof in ordinary defamation cases than in defamation-by-implication cases."); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993) ("[B]ecause the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true.").

Fourth, Petitioners' claim would fail on alternate grounds even if the Court were to revise the fault pleading standard for public official and public figure libel plaintiffs. The allegedly false and defamatory implication at issue in this case—that the bonuses Petitioners received were *quid pro quo* bribes—cannot ultimately be actionable because it is a conclusion based on fully disclosed true facts, namely that Petitioners received the payments after they signed the oil deal; that the payments were larger than the annual salary at the time of Liberia's

highest-paid ministers; and that NOCAL euphemistically described bribes it had paid years earlier as "compensation" or "lobbying fees."

Thus, even if a reader of the challenged report could conclude, based on those disclosed and undisputed facts, that the payments were improper, that would remain a nonactionable conclusion regardless of whether Petitioners actually participated in any *quid pro quo* transaction. *See, e.g., Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."); *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 468 (S.D.N.Y. 2012) ("If the Constitution protects an author's right to draw an explicit conclusion from fully disclosed facts, then an unstated inference that may arise in a reader's mind after reading such facts is also protected as an implicit expression of the author's opinion."), *aff'd on other grounds*, 807 F.3d 541 (2d Cir. 2015).

CONCLUSION

For the reasons discussed above, the Petition should be denied.

Respectfully submitted,

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September 27, 2021