2021 WL 3209835 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Christiana TAH; Randolph Mcclain, Petitioners,
v.
GLOBAL WITNESS PUBLISHING, INC., Global Witness, Respondents.

No. 21-121.
July 26, 2021.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

Petition for Writ of Certiorari

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***i QUESTION PRESENTED**

Whether a complaint by a public plaintiff alleging defamation sufficiently pleads actual malice, in the absence of direct evidence, by presenting detailed factual allegations from which, when collectively considered, actual malice could plausibly be inferred.

***II LIST OF PARTIES**

The Petitioners Christiana Tah and Randolph McClain are individuals.

The Respondents are Global Witness Publishing Inc., incorporated in the District of Columbia, and Global Witness, incorporated in the United Kingdom.

STATEMENT OF RELATED CASES

There are no related cases.

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*1 OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 991 F.3d 231 (D.C. Cir. 2021). App. 1. The Opinion of the District Court is reported at 413 F. Supp. 3d 1 (D.D.C. 2019). App. 48.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 2021. This Petition is timely filed within 150 days of that decision, as required by this Court's March 19, 2020 Order concerning the extension of time to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL RULES PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Federal Rule of Civil Procedure 8(a)(2) provides that a Claim for Relief must contain: "a short and plain statement of the claim showing that the pleader is entitled to relief..."

*2 STATEMENT OF THE CASE

A. Introduction

This case presents the Court with an opportunity to make a long-overdue adjustment to the application of the First Amendment in defamation suits. This Court has not elaborated on the First Amendment "actual malice" defamation standard for thirty years. *See Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991). No current sitting Justice was on the Court when *Masson* was decided.

The actual malice standard created in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), has recently been called into question, including a dissenting opinion by Justice Gorsuch, *Berisha v. Lawson,* 141 S.Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from the denial of certiorari); two opinions by Justice Thomas, *Id.* at 2424 (Thomas, J., dissenting from the denial of certiorari), *McKee v. Cosby,* 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari); and the dissenting opinion from Judge Silberman below, *Tah v. Global Witness,* App. 21-47 (Silberman J., dissenting).

While some call for an outright rejection of *Sullivan* and the actual malice test, this Petition offers the Court the opportunity to make a critical and long-overdue adjustment to how the *Sullivan* standard is applied in the real world of federal defamation litigation *without* overruling *Sullivan* or entirely discarding the actual malice standard.

The actual malice standard is daunting enough on its own. The one fighting chance plaintiffs *do* have in actual malice cases, however, is to uncover evidence of knowledge of falsity or reckless disregard for truth or falsity through discovery. Given the subjective ***3** nature of actual malice, and the reality that evidence will almost always be within the exclusive possession of the defendant, plaintiffs rarely possess direct evidence of actual malice at the pleading stage.

What plaintiffs may possess, however, are detailed facts from which actual malice could plausibly be inferred. These facts seldom, in themselves, constitute direct "smoking gun" clear and convincing evidence of actual malice. Indeed, when such facts are available, cases typically settle without resort to litigation. But often, plaintiffs do possess and plead, as Tah and McClain in this case did possess and plead, facts that are both highly suspicious and give rise to a plausible inference of actual malice.

This pragmatic real-world litigation dynamic in turn places enormous stress on the proper interpretation of the federal "plausibility" pleading standard articulated in *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

The decision below is emblematic of similar decisions by other Courts of Appeal applying *Twombly* and *Iqbal* in federal diversity defamation cases in a manner that effectively creates absolute immunity from defamation liability in all actual malice cases. There is one conflicting counter-example, a recent decision by the Second Circuit in *Palin v. New York Times Co.,* 940 F.3d 804 (2d Cir. 2019). This Petition demonstrates the conflict between *Palin* and the decision below, and other Circuit decisions aligned with it.

In the words of Justice Gorsuch, "over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability." *Berisha,* 141 S.Ct. at 2428 (Gorsuch, J.) Yet surely ***4** this Court *never* envisioned the *Sullivan* standard as an absolute end to defamation law in public plaintiff cases. And surely this Court *never* anticipated that *Twombly* and *Iqbal* would effectively end public plaintiff defamation cases in the federal system. Yet this "combination of ingredients" has led to this outcome. Two medications prescribed by a physician may each, considered alone, promise positive results. The unintended consequence of prescribing those two medications in combination, however, may create severely injurious or even lethal consequences as the two medications interact.

The actual malice standard adopted in *Sullivan* and the plausibility standard adopted in *Twombly* and *Iqbal* are both judicially crafted doctrines of this Court's own invention. Each doctrine may continue to make sense considered on its own terms, and this

Petition does not invite the Court to invoke a nuclear option, abandoning either the actual malice or plausible pleading standards. This Petition does present, however, the ideal vehicle for the Court to instruct lower courts on how to apply *Twombly* and *Iqbal* in First Amendment actual malice cases. Quite simply, something must give. "Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation." *Berisha,* 141 S.Ct. at 2429 (Gorsuch, J.)

The dissenting opinion of Judge Silberman below demonstrated fact-by-fact and issue-by-issue how the Majority did exactly what federal courts should not do at the pleading stage. Courts should not pick apart in a "divide and conquer" tactic each discrete allegation, holding that standing alone the allegation does not in itself prove actual malice. Nor, once a ***5** court determines that a complaint states facts which give rise to a plausible inference of actual malice, should a complaint be dismissed because a court regards a defendant's alternative exculpatory theory more plausible.

This Court should announce this rule: A complaint by a public plaintiff alleging defamation sufficiently pleads actual malice, even in the absence of direct evidence, by presenting detailed factual allegations from which, when collectively considered, actual malice could plausibly be inferred.

This Court should proceed to apply the rule by following Judge Silberman's roadmap, demonstrating to lower courts what the rule means in practical application, by holding that when plaintiffs allege facts plausibly probative of the existence of actual malice, as Tah and McClain have, dismissal is not permitted.

B. Factual and Procedural Background

In a long and distinguished career as a public servant in Liberia, Petitioner Christiana Tah occupied many government positions. In 2009, Tah was appointed Attorney General and Minister of Justice for Liberia by Liberian President Ellen Johnson Sirleaf, the first female African head of state, winner of the Nobel Peace Prize, and awardee of the American Presidential Medal of Freedom. Complaint ¶ 2.

Petitioner Randolph McClain was born in Liberia. He was educated in the United States, and had a long and distinguished career with the DuPont Company and DAK Americas, occupying numerous positions of scientific and business leadership. Following his retirement from DuPont and DAK Americas, McClain ***6** returned to his native Liberia to offer leadership and public service. His service included the position of Chairman of the Board of the Liberia Telecommunications Corporation, and (of prime importance here) the position of President and Chief Executive Officer of the National Oil Company of Liberia ("NOCAL"), and Chairman of Liberia's Hydrocarbon Technical Committee. ("HTC") Complaint ¶ 3.

Global Witness is an international human rights watchdog organization. App. 2. This action arises from the publication of a report by Global Witness in March of 2018, entitled: *Catch me if you can* ("Report"). Tah and McClain alleged that the Report falsely accused them of accepting bribes and engaging in corruption in connection with an oil transaction between Liberia and Exxon Mobil Corporation ("Exxon").

The *Catch me if you can* Report chronicled the acquisition by Exxon of an offshore oil "production sharing contract" license in the waters off the coast of Liberia, known as "Block 13." Block 13 is a rectangular plot of territory in the ocean waters off the coast of Liberia owned by the nation of Liberia that potentially held valuable oil reserves. Ultimately, Block 13 failed to produce oil. App. 3.

NOCAL is a governmental corporation created pursuant to Liberia's Petroleum Law, responsible for the award of oil licenses. Its mission is to develop Liberia's hydrocarbon potentials for national self-sufficiency and sustainable development. In 2007, Liberia first licensed the production sharing contract rights to Block 13 to a company with both British and Liberian ties that was originally called Broadway Consolidated PLC, and later Peppercoast Petroleum ***7** PLC. In 2010, it was determined that Broadway Consolidated was in default of certain terms in the production sharing contract with Liberia. App. 3.

In the wake of Broadway Consolidated's default, Tah and other Liberian officials, following the advice of outside legal counsel, decided to seek an outside buyer to come in and purchase the production sharing contract rights of Block 13 from Broadway Consolidated, on terms that would also be more favorable to the government of Liberia.

This strategy was adopted, and Liberia, with the aid of expert consultants, began the process of seeking prospective purchasers for Block 13. Exxon emerged as the prospective purchaser, and negotiations commenced. The negotiations led to an historic agreement in which Exxon would pay a substantial sum for the purchase of the production sharing contract for Block 13, a total of $120 million, of which $50 million would go directly to Liberia itself. App 3.

In its entire history, Liberia had never received a payment of such magnitude for the rights to extract natural resources. President Sirleaf and others within the Liberian government saw the Exxon deal as an historic victory for the Liberian people, in which the government of Liberia would for the first time receive a substantial payment for the sale of extraction rights. The Exxon deal was to serve as a model for all future contracts of this nature.

Upon completion of the contract between Liberia and Exxon, Liberian President Sirleaf instructed the Board of NOCAL ("the Board"), to distribute bonuses to all who assisted in concluding the deal. App. 50. McClain, as Secretary of the Board sought legal advice on the propriety under Liberian law of paying ***8** bonuses as President Sirleaf had directed. The Board was advised that bonus payments were legally permissible. The Board then met to determine the recipients and amounts of the bonuses. The Board resolved to award bonuses to *all employees* of NOCAL, to all members of the Hydrocarbon Technical Committee, and to the five consultants who had assisted the Committee in the negotiation of the contract. The entire amount paid in bonuses totaled approximately $500,000. This was 1% of the $50 million premium that Exxon had paid to the Liberian goverment for the Block 13 rights. The seven negotiating team members of the Hydrocarbon Technical Committee, including Tah and McClain, received bonuses of $35,000 each. The five consultants were each sent bonuses of $15,000. The remaining balance of the $500,000, approximately $290,000, was distributed to all other NOCAL employees, numbering over 140 persons, including office staff, custodial workers, and drivers. App. 4.

In March 2018, Global Witness, on the verge of publication, sent letters to Tah, McClain, and others stating its conclusion that the payments were bribes, and demanding any reaction within seven days. Six individuals provided detailed responses. Four of those who responded were members of the Hydrocarbon Technical Committee and two were external consultants, including Jeff Wood, an American consultant hired by Liberia to assist in the negotiations with Exxon. While Tah, McClain, and others were outraged that Global Witness had already made up its mind that the payments were bribes, they nonetheless did reply, explaining in detail that the payments were bonuses entirely consistent with Liberian law, paid in appreciation for the historic success achieved through the Exxon ***9** contract. Jeff Wood's response was particularly important, in that it explained the inherent improbability of the Global Witness bribery accusation, noting that the distribution of bonus payments to all employees of NOCAL was entirely inconsistent with the notion that the payments were bribes, and explaining in addition that the reason no similar payments had ever been made before was that no such successful deal benefiting Liberia had ever been concluded before. App. 6, 30-31.

On March 29, 2018, Global Witness published its *Catch me if you can* Report. The Report exploded like a bomb within Liberia and among members of the Liberian community world-wide. The Report accused Tah, McClain, and others of bribery to facilitate the Exxon deal, wreaking havoc to their reputations.

George Manneh Weah succeeded Ellen Sirleaf as the President of Liberia in 2018. Following publication of the *Catch me if you can* Report, President Weah appointed a Special Presidential Committee to investigate the allegations of bribery against Tah, McClain, and others identified in the Global Witness Report. The Special Presidential Committee issued its findings on May 10, 2018. The Special Committee Report unequivocally renounced the bribery allegations contained in the Global Witness Report as false. App. 54.

Armed with a finding by the Liberian government that the accusations of bribery by Global Witness were false, Tah and McClain commenced this action for defamation and false light invasion of privacy. The overarching theory of the Complaint was that Global Witness was fixated on a pre-determined story-line to bring down Exxon and Rex Tillerson, then the new U.S. Secretary of State, by advancing ***10** the story that the Block 13 deal was corrupt and laced with bribery. That headlong fixation led to reckless disregard for the truth. Global Witness made a faint covering gesture to seek comment from those whom it was accusing at the eleventh hour, in emails that admitted that Global Witness had already made up its mind that Tah, McClain, and others had received bribes.

The Global Witness story was inherently improbable. The Global Witness Report itself admitted that it had no evidence that Exxon directed or knew about payments to government officials. Liberian officials, including all of the employees at NOCAL, had no reason to bribe themselves. The careful wordsmithing of the Global Witness Report, in which it studiously avoided ever actually asserting that bribery existed, while nonetheless making it clear to readers that it believed the payments were bribes, underscored the existence of actual malice, by communicating to readers the impression that it *knew* that bribes existed, when in fact *it knew that it did not know.*

Global Witness responded by filing an "anti-SLAPP" motion under the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a). The anti-SLAPP motion, which if granted would have saddled Tah and McClain with Global Witness's attorney's fees, was accompanied by a motion to dismiss. The substance of Global Witness's motion to dismiss was that the Report was not capable of conveying the defamatory meaning or the "false light" alleged, and secondarily, that even if capable of being construed as defamatory, the Complaint failed to plausibly allege actual malice.

***11** Tah and McClain prevailed on the anti-SLAPP issue. In *Abbas v. Foreign Policy Grp., LLC,* 783 F.3d 1328 (D.C. Cir. 2015), the D.C. Circuit, in an opinion written by now-Justice and then-Judge Kavanaugh, held that the District's anti-SLAPP law could not be applied to federal courts siting in diversity, because application of the anti-SLAPP law conflicted with the Federal Rules of Civil Procedure. The *Abbas* ruling created a federal circuit split, which this Court has yet to resolve. *See Godin v. Schencks,* 629 F.3d 79, 81, 92 (1st Cir.2010) (applying Maine's anti-SLAPP law in a federal diversity case); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.,* 190 F.3d 963, 973 (9th Cir. 1999) (holding that California's anti-SLAPP law applies in federal diversity cases). Global Witness argued that the *Abbas* decision had been rendered erroneous by a subsequent decision of the District of Columbia Court of Appeals, *Competitive Enterprise Institute v. Mann,* 150 A.3d 1213 (D.C. 2016), *cert. denied, National Review, Inc. v. Mann,* 1404 S.Ct. 344 (2019). The courts below rejected that assertion by Global Witness.

Turning to the merits, both courts below also rejected the first line of defense interposed by Global Witness, finding that average readers would have understood the Global Witness Report as asserting that Tah and McClain had accepted bribes. Both courts also accepted the allegations in the Complaint that the bribery allegations were false, a conclusion buttressed by the findings of the Special Commission appointed by the Liberian government. App. 22, 59-66.

Both courts below nonetheless held that dismissal was warranted because Tah and McClain had failed to plausibly plead actual malice. The Majority opinion for the Court of Appeals panel refused to find the ***12** Global Witness story inherently improbable. The Majority refused to credit the argument that actual malice could plausibly be inferred from allegations that Global Witness pursued a pre-conceived story line; that Global Witness turned a blind eye to the detailed refutations of its story presented by Tah, McClain, Jeff Woods, and others; that the failure of the Report to include in its narrative the fact that the legal advisor to President Sirleaf was among those paid a bonus; and that Global Witness published its sensational bombshell story because it was motivated by a subjective fixation on catching Exxon and its former CEO Rex Tillerson in scandal. App. 13-20; 66-72.

Judge Silberman dissented. Judge Silberman deemed the Global Witness story inherently improbable. He credited the claim by Tah and McClain that Global Witness subjectively knew that it had not been able to determine whether the payments were corrupt bribery payments, yet proceeded to present to readers the defamatory message that Tah and McClain had taken bribes. App. 26-37. Judge Silberman also took issue with the Majority's view that a publisher "need not accept denials." He argued that

the content of the denials are what matters, and that Global Witness had been provided with detailed explanations refuting its bribery accusations, with no evidence and no witnesses on the other side. Judge Silberman asserted that the cumulative balance of the evidence gave "Global Witness obvious reasons for doubt." App. 33-34.

This Petition ensued.

*13 REASONS FOR GRANTING THE WRIT

A. Public Plaintiffs Face an Almost Impossible Hurdle in Surviving a Rule (12)(b)(6) Motion on Actual Malice Under *Iqbal* and *Twombly*

As commentators have observed: "One might wonder whether it is ever possible to survive a 12(b)(6) motion on the element of actual malice after *Iqbal* and *Twombly."* Clay Calvert, Emma Morehart, Sarah Papadelias, *Plausible Pleading & Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel Law on the Golden Anniversary of Sullivan,* 49 Wake Forest L. Rev. 47, 69 (2014). While the answer may not be "never," it certainly is "hardly ever." *See, e.g., Michel v. NYP Holdings, Inc.,* 816 F.3d 686 (11th Cir. 2016) (sustaining motion to dismiss for failure to plausibly plead actual malice); *Biro v. Conde Nast,* 807 F.3d 541 (2d Cir. 2015) (same); *Pippen v. NBCUniversal Media, LLC,* 734 F.3d 610 (7th Cir. 2013) (same); *Mayfield v. National Association for Stock Car Auto Racing, Inc.,* 674 F.3d 369 (4th Cir. 2012) (same); *Schatz v. Republican State Leadership Committee,* 669 F.3d 50 (1st Cir. 2012) (same).

Justice Thomas has correctly characterized the current regime as imposing on public plaintiffs an "'almost impossible' standard." *McKee,* 139 S. Ct. 675, quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 771 (1985) (White, J., concurring in the judgment).

B. Discovery is Essential to a Fair Playing Field

"New York Times and its progeny made it essential to proving liability that the plaintiff focus on the ***14** conduct and state of mind of the defendant." *Herbert v. Lando,* 441 U.S. 153, 160 (1979). In *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), this Court recognized that "[t]he proof of 'actual malice' calls a defendant's state of mind into question ... and does not readily lend itself to summary disposition." *Id.* 120, n.9. To refit the famous sports adage, "Winning isn't everything; it's the only thing," in establishing actual malice, "Discovery isn't everything, it's the only thing."

"[D]iscovery ... is the *only way* to determine whether a defendant acted knowingly or recklessly." Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective,* 53 La. L. Rev. 1153, 1155 (1993) (emphasis added). Actual malice presents "a question of fact, which justifies exhaustive discovery into what information the defendant had and what she did with it." Leslie Kendrick, *Speech, Intent, and the Chilling Effect,* 54 Wm. & Mary L. Rev. 1633, 1668-69 (2013). Determining whether a defendant published with actual malice "is a complex factual issue that normally cannot be resolved without discovery." David Anderson, *Is Libel Law Worth Reforming?,* 140 U. Pa. L. Rev. 487, 511 (1991). As the Ninth Circuit observed in *Flowers v. Carville,* 310 F.3d 1118 (9th Cir. 2002), "the issue of 'actual malice' ... cannot be properly disposed of by a motion to dismiss in this case, where there has been no discovery." *Id.* at 1131. *See also Metabolife International, Inc. v. Wornick,* 264 F.3d 832, 848 (9th Cir. 2001) (same).

At the pleading stage, however, details concerning the defendant's conduct and state of mind are largely outside a plaintiffs grasp. "Actual malice makes it difficult to plead facts supporting a reasonable ***15** inference of a plausible claim because it is a demanding, subjective standard that does not readily lend itself to proof through direct evidence." Matthew Schafer, *Ten Years Later: Pleading Standards and Actual Malice,* Comm. Law, Winter 2020, at 1, 35. Under the current regime, public plaintiffs effectively have no chance. "Faced with a substantive standard that, for good reason, is higher than normal, they are also faced with a pleading standard that is virtually insurmountable, for reasons that are unclear at best." Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After Twiqbal: A Circuit Survey,* 17 Nev. L.J. 709, 727 (2017).

The challenge for plaintiffs is that *direct* evidence of actual malice virtually never exists in any serious and significant defamation case. (If it does exist, the case is typically not litigated, but settled.) Prior to *Twombly* and *Iqbal,* the reality that plaintiffs must always prove actual malice through indirect and circumstantial evidence was well-recognized. As Judge Kozinski wrote for the Ninth Circuit: "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Eastwood v. National Enquirer, Inc.,* 123 F.3d 1249, 1253 (9th Cir. 1997). "The fact that we can't look inside the editors' minds doesn't stop us from reaching conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof (as in most criminal prosecutions)." *Id.* at 1256. n. 20. The orthodoxy thus once was that plaintiffs were not punished at the pleading stage for the inevitable disadvantage they face in lack of access to evidence of a defendant's ***16** state of mind. "The First Amendment imposes substantive requirements on the state of mind a public figure must prove in order to recover for defamation, but it doesn't require him to prove that state of mind in the complaint." *Flowers,* 310 F.3d at 1130.

This is no longer true. Now, as *Twombly* and *Iqbal* are currently being applied, public plaintiffs effectively *are* saddled with proving state of mind in the complaint, rendering the vast majority of complaints dead on arrival. The door to defamation recovery is effectively shut by the combination of the pro-defendant gloss that has accreted to the actual malice standard, and the accelerating willingness of courts applying *Twombly* and *Iqbal* to demand of plaintiffs the one thing they will virtually never possess at the pleading stage without the benefit of discovery--evidence of the subjective state of mind of the publisher. "[T]he plaintiff may not know the subjective state of the defendant's mind at the time of publication." Cornett, *supra,* at 727. Whether a defendant acted with actual malice "is usually *solely within the exclusive knowledge* of the defendant." *Id.* (emphasis added).

C. The D.C. Circuit's Decision Conflicts with the Second Circuit's Decision in *Palin*

In *Palin v. New York Times Co.,* Sarah Palin, the former Governor of Alaska and Republican nominee for Vice President, brought a defamation action against the *New York Times.* The opening sentence of the Second Circuit's decision in *Palin* could well be the opening sentence for any description of the *Tah* case here: "This case is ultimately about the First Amendment, but the subject matter implicated in ***17** this appeal is far less dramatic: rules of procedure and pleading standards." *Palin,* 940 F.3d at 807.

Judge Silberman in his dissent below correctly observed that the Majority's decision distorted both the substantive meaning of the actual malice standard under *Sullivan* and the proper role of courts in ruling on Rule 12(b)(6) motions to dismiss in the libel context, creating a conflict with the Second Circuit's ruling in *Palin.* App. 37.

The Second Circuit's decision in *Palin* turned in part on the error committed by the District Court in holding an evidentiary hearing at the motion to dismiss stage, a procedural turn that the Second Circuit held ran "headlong into the federal rules." *Id.* at 810. "While we are cognizant of the difficult determinations that *Twombly* and *Iqbal* often place on district courts," the Second Circuit observed, "the district court's gatekeeping procedures must nevertheless comply with the Federal Rules of Civil Procedure." *Id.* at 812-13.

The Second Circuit also held that the district court's *substantive analysis* went beyond what was permissible at the pleading stage, even after *Twombly* and *Iqbal.* That is the portion of the Second Circuit's decision in *Palin* that cannot be reconciled with the approach taken by the D.C. Circuit below in *Tah.* Most critically for purposes of this Petition, the Second Circuit held that at the pleading stage, the defendant's mere *opportunity* to obtain facts that would have refuted the story was enough to give rise to a *permissible plausible inference* that the defendant did know those facts. It was thus error for the district court to choose between the two possible inferences, once innocent and one culpable. *Id.* at 814 (By crediting Bennet's testimony, the district court ***18** rejected a permissible inference ... That Palin's complaint sufficiently alleges that Bennet's opportunity to know the journalistic consensus that the connection was lacking gives rise to the inference that he actually did know.").

The Second Circuit similarly held that the district court failed to properly credit the probative value of allegations that political bias by the *Times* editor may have led to reckless disregard for the truth, holding that "[w]hen properly viewed in the plaintiffs

favor, a reasonable factfinder could conclude this amounted to more than a mistake due to a research failure." *Id.* at 815. So too, the Second Circuit held that the district court erred in adopting an innocent explanation for a hyperlink connected to the article during the editorial process, noting that the "inclusion of the hyperlinked article gives rise to more than one plausible inference, and any inference to be drawn from the inclusion of the hyperlinked article was for the jury--not the court." *Id.* Finally, the Second Circuit generally found the district court to have erred because it consistently adopted the *Times'* theories over Palin's theories. *Id.* As Judge Silberman correctly observed in his dissent, the Majority below simply substituted its theory of what Global Witness had done with the theory advanced in the Complaint, and decided that the Majority's version was more plausible than the theory advanced in the Complaint. App. 34-36.

D. The Decision Below is an Exemplar of Everything Federal Courts Should Not be Permitted to Do Under the First Amendment or Federal Pleading Standards.

Comparing *Tah* to *Palin,* it is plain that the Court of Appeals in *Tah* did exactly what *Palin* held federal ***19** courts may not do. The allegations in the Complaint supporting the existence of actual malice were factually detailed and dense, spanning some 19 paragraphs. They were far from formulaic recitations of the elements of actual malice, or mere conclusory and threadbare recitals.

The Petitioners understand that this Court does not sit to resolve fact-intensive disputes over the application of law to fact. That is not the purpose of the presentation here. The specificity presented in this Petition is rather offered to demonstrate the futility of the current regime. The Petitioners' Complaint provided an *abundance* of detail from which actual malice could plausibly be inferred but was still found wanting. The Complaint alleged:

> Global Witness deliberately and callously communicated to readers the defamatory accusation that Christiana Tah and Randolph McClain accepted a bribe even though at the time of its publication of *Catch me if you can* Global Witness was in possession of ample information discrediting the bribery allegation. Global Witness subjectively *knew* that it had not been able to determine whether or not the payments of $35,000 to Christiana Tah and Randolph McClain were corrupt bribery payments or innocent and deserved bonuses. Yet without resolving that subjective doubt, and notwithstanding the material in its possession that generated a high degree of subjective awareness that its story was false, Global Witness proceeded to present to readers the defamatory message that in fact Christiana Tah and Randolph McClain had taken bribes. This behavior went beyond ***20** ordinary negligence and escalated to publishing the defamatory bribery falsehood with knowledge of falsity or reckless disregard for truth or falsity. To advance its sensationalist agenda, Global Witness presented to readers a bribery charge *as if it knew the charge to be true* when in fact *it knew it did not know.* Complaint, ¶ 85.

The imputations of bribery published by Global Witness were inherently improbable. Moreover, prior to publication, the fundamental flaws in the Global Witness bribery thesis had been painstakingly *explained* to Global Witness.

Judge Silberman's dissent below persuasively demonstrated the underlying incoherence of the Global Witness Report. As the Complaint alleged, and as the Liberian Government's own investigation found, from the beginning the real target of the Global Witness Report was Exxon, and its former CEO, the then new U.S. Secretary of State, Rex Tillerson. The Complaint explained in elaborate detail why the desire of Global Witness to catch Exxon and Tillerson in scandal blinded Global Witness to the truth. Complaint, ¶¶, 87-90. For Exxon and Tillerson to be guilty of bribery, somebody had to be bribed. App. 30.

Yet as the Complaint pointed out, Global Witness had no evidence that Exxon itself directed or knew about payments to officials. This was stated in the Global Witness Report itself, and as pled in the Complaint, was emphasized by other reportage

summarizing the Global Witness Report. Complaint, ¶ 73 ("The *Newsweek* article then channeled the sinister suggestion of the Global Witness Report that the payments came from the same bank account in ***21** which Exxon had deposited its funds: 'The payments were probably made from the same bank account into which Exxon had just deposited $5 million for Block 13, although there is no evidence that Exxon itself directed or knew about payments to officials, according to the report.'").

Judge Silberman's dissent correctly honed in on this fundamental failing of the Global Witness Report, which *itself* acknowledged that Global Witness had no evidence that Exxon had paid any bribes. But despite its own confession that it had no evidence that Exxon had paid bribes, Global Witness did everything it could to convey to readers the impression that Exxon *had* paid bribes and that Tah and McClain were the recipients of those bribes.

As Judge Silberman pointed out, the admission in the Global Witness Report itself that it could not, despite its investigation, confirm that Exxon was guilty of bribery, should have led inexorably to the conclusion that the accusation that Tah and McClain had *accepted* bribes was inherently improbable:

Appellants claim that Global Witness knew it lacked any support for insinuating that the payments to Tah and McClain were bribes. Thus, a jury could infer that Global Witness subjectively doubted the truth of its Report.

I agree. In my view, because Global Witness's story is obviously missing (at least) one necessary component of bribery, it is inherently improbable. Although it accused Appellants of taking bribes from Exxon, Global Witness admits that it had "no evidence that Exxon directed the [National Oil Company] to pay Liberian officials, nor that Exxon knew such payments were ***22** occurring." J.A. 83 (emphasis added). In other words, despite all its investigating, Global Witness uncovered *nothing* to demonstrate that Exxon was the briber and *nothing* to even suggest there was an agreed upon exchange. *Accord Tah,* 413 F. Supp. 3d at 10 ("Global Witness's suspicions and calls for investigations of Exxon Mobil and [the National Oil Company] lacked *any* evidence that the former had involvement in monies paid to employees of the latter.") (emphasis in original). And with no privity between Exxon and the Technical Committee members, it is bizarre to accuse Appellants of taking a bribe. As *St. Amant* teaches, it is sufficient to infer--on this basis alone-- that Appellee acted with knowing disregard for the veracity of its publication.

App. 26-27. [1]

***23** The Majority dismissed this argument, reading the Global Witness Report as implying that NOCAL, not Exxon, was the briber. As Judge Silberman rejoined, this claim by the Majority is utterly illogical and incoherent. NOCAL, an arm of the government of Liberia, had no reason to bribe its own employees, but it had every reason to congratulate its own employees on a job well done-for what was for Liberia the deal of a lifetime. The Complaint drove this home, in paragraph after paragraph, setting forth in detail how the fundamental flaws in the Global Witness story had been presented to Global Witness prior to publication.

Specifically, Jeff Wood painstakingly explained that the payments made by Exxon, including the $50 million that went to NOCAL, was in no sense "voluntary," as Global Witness had asserted, but was a bargained-for payment successfully negotiated by Liberia as part of Exxon's purchase price. App. 41. Wood explained that he would testify as a witness in any defamation action brought against Global Witness regarding the false bribery allegations. Wood's statements made it clear that it was deliberately misleading for Global Witness to equate the bribery allegations surrounding the original purchase of Block 13 by Broadway Consolidated in 2006 and 2007 with the very different bonus payments awarded following the highly successful 2013 Exxon deal. App. 28. Woods' statements also explained how the bonus payments to all NOCAL employees, "all the way down to the drivers and housekeeping staff," was "hardly consistent with an intent to bribe, and completely consistent with the payment of a bonus." Complaint ¶ 97. Wood refuted the claim that the payments were corrupt because there had been no similar payments in recent years, ***24** explaining that the theory was entirely baseless, because there had *been no* successful Company deals consummated during those years. There had simply been no success to reward. App. 31. These communications to Global

Witness were not "mere denials." Rather, these were communications that led to a plausible inference that Global Witness was guilty of "purposeful avoidance of the truth." *Harte-Hanks Communications Inc. v. Connaughton,* 491 U.S. 657, 692 (1989).

The Complaint buttressed these allegations with numerous facts reinforcing the inference that Global Witness led readers to believe bribery had occurred when Global Witness itself knew it had not been able to confirm the bribery accusation. The Majority opinion below picked apart each of these factual allegations, offering an exculpatory reason for each. Judge Silberman, in turn, offered an inculpatory reason for each. Yet if the *Palin* holding that federal courts are not to weigh competing plausible explanations of the facts on a 12(b)(6) motion is sound, the Majority's methodology, picking apart the Complaint's allegations by offering counter-explanations, was error, a kind of "plausibility creep," that if allowed to go unchecked, will swamp the law of defamation in federal forums.

Tah and McClain alleged that Global Witness, in its zeal to write a sensational story bringing down Exxon and Secretary Tillerson, pursued a preconceived story line plausibly probative of actual malice. Tah and McClain argued that letters seeking comment sent by Global Witness to various participants in the Block 13 deal, including Tah and McClain, were cynically calculated to provide Global Witness with journalistic cover. In those letters Global Witness stated that it had already concluded ***25** that the payments to Tah and McClain and others were "most likely" bribes. Complaint ¶¶ 91-92, App. 62. The preconceived story blinded Global Witness to any evidence put before it that would contradict its sensationalist thesis. Tah and McClain did not assert that this was in itself dispositive of the existence of actual malice, but surely gave rise to a plausible inference probative of actual malice. The Majority opinion improperly rejected this thesis, asserting: "After all, virtually any work of investigative journalism begins with some measure of suspicion." App. 16. The Majority concluded that the fact that the letters came on the eve of publication provided "no support at all for the notion that Global Witness's conclusion was preconceived." App. 16. And turning the letters against Tah and McClain, the Majority noted that seeking such comment is standard journalistic practice. App. 16.

The Majority's labored effort to explain away the letters underscores that it was doing exactly what federal courts are not supposed to do, engaging in a weighing of the evidence at the pleading stage. This was symptomatic of the Majority's entire opinion, on issue after issue. As Judge Silberman observed, "[t]he Majority discounts these facts by weighing the evidence and drawing inferences against Tah and McClain." App. 34.

Given the detail of the refuations presented to it, it was certainly plausible that Global Witness had before it evidence that must have given it obvious reason to doubt the accuracy of the story. The Majority below acted as if Tah and McClain merely argued that actual malice inured in "Global Witness's failure to credit their denials." App. 17. But Tah and McClain did not argue anything so shallow as claiming that the *mere fact* of a denial is probative of ***26** actual malice. Rather, it is the *content* of the denial that matters. As Judge Silberman pointed out, "the specific content of a denial may well give the publisher obvious reasons to doubt the veracity of the publication." App 33. Judge Silberman explained:

Global Witness, however, did not have evidence on both sides of the issue. It had no evidence"--and no witnesses--to contradict the six denials. The cumulative balance of the evidence thus gives Global Witness obvious reasons for doubt.

I am dumbfounded by the Majority's assertion that the denials in our case contain "no readily verifiable information ... that would provide 'obvious reasons to doubt.'" ... The denials were specific, and it was within Global Witness's power to easily inquire into whether other employees received bonuses, the content of the Board's resolution approving the bonuses, and whether the $4 million to the National Oil Company was negotiated as part of the purchase price (etc.).

App. 34.

Similarly, the Majority flitted away the argument of Tah and McClain that the detailed allegations in the Complaint asserting ill-will and a subjective desire on the part of Global Witness to damage Exxon and Secretary Tillerson were probative of actual

malice, describing this argument as "breathtaking" and dismissing it with the truism that "evidence of ill will 'is insufficient by itself to support a finding of actual malice.'" App. 19, quoting *Tavoulareas v. Piro,* 817 F.2d 762, 795 (D.C. Cir. 1987) (en bane).

***27** The subjective "gotcha" motivation alleged in detail in the Complaint may not *in itself* constitute actual malice, but it is obviously *probative,* and could give rise to a plausible instance of actual malice given the sensationalist tenor of the Global Witness report, seeking to make headlines against Exxon and Secretary Tillerson, blinding Global Witness to the truth. Consider the cogent analysis of Judge McKinnon, joined by then-Judge Scalia, but then vacated by the full D.C. Circuit sitting en bane:

> The mere existence of a preconceived plan to "get" the subject of a defamatory story does not prove that the publisher acted knowingly or recklessly in publishing false information. But it is beyond question that one who is seeking to harm the subject of a story--whether motivated by simple ill will, or partisan political considerations, or otherwise laudable concern for the safety of the nation, or a mere desire to attract attention and boost circulation--is more likely to publish recklessly than one without such motive.

Tavoulareas v. Piro, 759 F.2d 90, 98 (D.C. Cir. 1985) (internal citations omitted), vacated and superseded on other grounds by *Tavoulareas v. Piro,* 817 F.2d 762, 772 (D.C. Cir. 1987) (en bane), *cert. denied,* 484 U.S. 870 (1987).

The opinion of the Majority below is also flatly inconsistent with this Court's statement in *Herbert v. Lando,* reciting that "'[t]he existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided ***28** they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiffs rights ...'" *Herbert,* 441 U.S at 164, n. 12, quoting 50 Am.Jur.2d § 455 (1970).

As the opinion of Judges McKinnon and Scalia explained, the "idea that motive can be evidence of actual malice when it is not an element of the tort" is sound, for the distinction "is akin to that between motive to kill *(e.g.,* greed or hatred) and *intent* to kill in a murder prosecution. They are not the same thing. The second is an element of the crime of murder; the first is evidence admissible to prove that element." *Tavoulareas,* 759 F.2d at 98 n.34 (emphasis in original). Thus "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks,* 491 U.S. at 668 (internal citations omitted).

Tah and McClain offered many other specific indicia of actual malice, none of them credited by the Majority. NOCAL paid bonuses to all those involved in the negotiations, including American consultants. App 31. It also paid bonuses to all employees of NOCAL, even the most low-ranking employees. As Judge Silberman put it, "for Global Witness's story to be true, Exxon was somehow spreading bribes left and right like Johnny Appleseed." App. 29. "The much more obvious explanation is that the 'bonuses' were in fact bonuses paid for outstanding performance." App. 29.

***29** The Complaint emphasized the stunning failure of Global Witness to include the name of the Legal Advisor to President Sirleaf, Seward Cooper, as among the Hydrocarbon Technical Committee members who received a $35,000 bonus. Indeed, while the Committee had six members, as Global Witness knew, the sinister chart it displayed to graphically communicate its point that bribe money had flowed from Exxon through Company to the Committee members contained only *five* of the six members, conspicuously leaving out Seward Cooper's name. Complaint ¶ 99. Why might this matter? A plausible inference is that Global Witness realized that including Seward's name as one of the recipients could have caused its entire thesis to unravel. President Sirleaf ordered the bonus payments *after* successful completion of the contract with Exxon as a deserved bonus for a job well done. The payments were made only after a careful legal opinion was rendered approving the legality of the payments by Tah and Cooper, President Sirleafs own legal advisor. That legal opinion was *grounded* in the supposition that there was

no quid pro quo, not even a *demand,* for payment by any Committee member, including Seward Cooper himself. *Id.* A jury could conclude that the conspicuous omission of Cooper's name and title from its *Catch me if you can* Report was a deliberate manipulation to mask from readers a glaring inconsistency in its narrative, a manipulation plausibly probative of actual malice. The Majority's answer to this was an unabashed substitution of the Majority's inference over the inference to which Tah and McClain were entitled. The Majority argued that "[i]f anything, that one of the lawyers responsible for conducting a legal analysis of the payments was himself in line to ***30** receive one makes the payments even more suspicious." App. 20. Yet Tah and McClain were entitled to the opposite inference--that it was Global Witness's omission of this detail that was suspicious. The Majority impermissibly weighed competing plausible inferences.

E. In Shutting Out the Vast Majority of Public Plaintiff Cases the Current Regime Undermines Both Society's Interest in Protecting Reputation and the Quality of Public Discourse

"The adverse consequences of the actual malice rule do not prove *Sullivan* itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far." Elena Kagan, *A Libel Story: Sullivan Then and Now,* 18 Law and Social Inquiry 197, 205 (1993). (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)).

There may be universal agreement that somehow the *outcome* in *Sullivan* was both inevitable and just. The Court was faced with a punishing libel judgment against the *New York Times* arising from a paid advertisement from the Committee to Defend Martin Luther King in which the plaintiff, an obscure Alabama public commissioner never mentioned in the ad, was plainly seeking to punish the *Times* for daring to publish the essential truths of the civil rights struggle. Somehow the pernicious decision of the Alabama Supreme Court, in a case rife with racist suppression of press coverage of the civil right movement could not be allowed to stand. The ensuing debate over the propriety of the *Sullivan* decision has not been over the outcome but the means the Court ***31** chose to get there, and costs those means have exacted on the protection of reputation and the quality of American public discourse. For "not all such suits look like *Sullivan,* and the use of the actual malice standard in even this limited category of cases often imposes serious costs: to reputation, of course, but also, at least potentially, to the nature and quality of public discourse." Kagan, *supra,* at 204-05.

The dual interests at stake are worth emphasis. "[T]he Court has reiterated its conviction--reflected in the laws of defamation of all of the States--that the individual's interest in his reputation is also a basic concern." *Herbert v. Lando,* 441 U.S. at 169. The protection of "his own good name '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.'" *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

For defamation plaintiffs, this is no theoretical abstraction. It is profoundly personal and destructive. Justice Thomas argued in *Berisha* that the lack of historical support for actual-malice requirement "is reason enough to take a second look at the Court's doctrine." *Berisha,* 141 S.Ct. at 2425. (Thomas, J.) History aside, Justice Thomas also noted the real-world damage caused by the current regime, observing: "Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm." *Id.* Christiana Tah and Randolph McClain were dedicated public servants who sacrificed greatly to combat corruption and promote progress and the rule of law for their native country, only to see their ***32** efforts cynically trashed as collateral damage in an effort to embarrass Exxon and Secretary of State Tillerson. The decision below, and others like it around the nation, leave them and others like them, without recourse to remedy. "The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury." *Gertz,* 418 U.S. at 390 (White, J., dissenting).

In the recent words of Justice Gorsuch, "Since 1964 ... our Nation's media landscape has shifted in ways few could have foreseen." *Berisha,* 141 S.Ct. at 2427 (Gorsuch, J.), citing David Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan,* 81 Ohio St. L. J. 759, 794 (2020). "Our marketplace of ideas is being battered by a perfect storm of technological, economic, and political changes." *Id.* at 800. "When a defamatory message is posted on the Internet, one can

view and track and permanently document the echo boom of comments, posts, tweets, and repetitions of the defamatory story as the falsehood spreads like a virulent virus across digital space." Rodney A. Smolla, *Law of Defamation* § 1:27.50 (2021 ed.).

The damage to public discourse exacted by a regime that effectively threatens to shut down a large swath of defamation actions should deeply concern the Court. This Court has recognized society's interest, expressed through the libel laws of the states, to both protect individual reputation and deter falsehoods in our public discourse, observing in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770 (1984), that "New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods." *Id.* at 777.

***33** "The level of discourse over public issues is not simply a function of the total amount of speech." Richard Epstein *Was New York Times v. Sullivan Wrong?,* 53 U. Chi. L. Rev. 782, 799-800 (1986). Today, with the proliferation of social media, internet, cable, satellite, broadcast, and print media, society is awash in the quantity of discourse. But the level of discourse "also depends on the *quality* of the speech." *Id.* at 800. (emphasis added). To the extent that no realistic roadblocks exist to the correction of error, the public is a loser. *Id.*

When the actual malice standard is combined with the *Twombly* and *Iqbal* standard, as interpreted by the D.C. Circuit and the other federal circuits that are aligned with it, there is effectively little or no law of defamation left. As Justice Thomas observed: "The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires." *Berisha,* 141 S.Ct. at 2425 (Thomas, J.).

F. The Perils of Double Counting

The opinion below is of a piece with other opinions wrongly dismissing complaints at the pleading stage in order to protect the publisher from the expense of discovery. *See Michel,* 816 F.3d at 702 (claiming that the "costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech."). This sort of reasoning is yet another powerful reason for the Court to grant this writ. To the extent that the opinion below or opinions such as *Michel* place a "thumb on the scale" at the pleading stage *against* public plaintiffs, they engage in a form of First Amendment "double counting" that this ***34** Court has previously rejected. Such "double counting" involves the piling on of onerous procedural barriers to recovery, in addition to the First Amendment standards the law already provides.

As the Court explained in *Calder v. Jones,* 465 U.S. 783 (1984), "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits." *Id.* at 790. Rejecting an attempt to place a thumb on the scale in procedural matters such as jurisdiction, the Court stated that "[t]o reintroduce those concerns at the jurisdictional stage would be a form of double counting." *Id.* The Court observed that it had "already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.* at 790-91.

"Many Members of this Court have raised questions about various aspects of *Sullivan." Berisha,* 141 S.Ct. at 2429 (Gorsuch, J.) (collecting statements). One critical "aspect of *Sullivan" is* procedural. The Court could and should harmonize the actual malice standard with *Twombly* and *Iqbal* by holding that a complaint by a public plaintiff alleging defamation sufficiently pleads actual malice, even in the absence of direct evidence, by presenting detailed factual allegations from which, when collectively viewed, actual malice could plausibly be inferred. At the very least, the time has come to once again engage these issues. "[T]he Court would profit from returning its attention ... to a field so vital to the 'safe deposit' of our liberties." *Id.*

*35 CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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Appendix not available.

Footnotes

1 Judge Silberman's incisive analysis on this point led to an ancillary exchange between the Majority and Judge Silberman, in which the Majority argued that Tah and McClain had not made this argument. This led to the caustic rejoinder by Judge Silberman that this "leads me to wonder whether we received the same briefs." App. 27. Suffice it to say, at minimum,

that Tah and McClain in their Complaint *did* recite that Global Witness and other media organizations picking up on its Report disclaimed any proof that Exxon had paid bribes. Complaint, ¶ 73. But more importantly, as emphasized in the Complaint, in the arguments proffered to both Courts below, and in this Petition, the entire theory of the case brought here by Tah and McClain against Global Witness was that despite knowing it did not know whether bribery had occurred, Global Witness deliberately conveyed to readers the impression that it had. As Judge Silberman put it bluntly: "That sounds to me a whole lot like accusing Global Witness of publishing its story with no evidence to back it up." App. 27.

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