No.

In the Supreme Court of the United States

PETER PAUL BIRO,

Petitioner,

v.

CONDÉ NAST, A DIVISION OF ADVANCE MAGAZINE PUBLISHERS INC., DAVID GRANN, LOUISE BLOUIN MEDIA INC., GLOBAL FINE ART REGISTRY LLC, THERESA FRANKS, PADDY JOHNSON and YALE UNIVERSITY PRESS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), a public figure defamation plaintiff must prove malice by clear and convincing evidence in order to prevail. Under New York State law, the ultimate burden of proof of malice is the same. However, a defamation complaint in New York State Courts is sufficient if it alleges malice generally, and it need not allege specific evidentiary facts suggestive or probative of malice.

The questions presented are:

1. Do *Twombly* and *Iqbal*[*] require heightened factual pleading allegations of malice in a common-law defamation complaint, beyond the requirement of F.R.Civ.P. 9(b) that "[m]alice...may be alleged generally"?

2. If so, is the less strict New York standard substantive or procedural, and does a more strict federal pleading requirement which determines the outcome violate the Rules Enabling Act and principles of *Erie* federalism?

3. Once there is a judicial determination that complained-of language is susceptible of a defamatory connotation, is a public figure entitled to discovery to adduce evidence of malice?

4. Where a plaintiff is a limited-purpose public figure because of involvement in a public controversy, should First Amendment protections be limited to statements which are germane to the controversy and matters of public concern ?

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[*] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

PARTIES TO THE PROCEEDING

Petitioner Peter Paul Biro is a Canadian citizen.

Respondent David Grann is a citizen of New York.

Respondent Condé Nast, a Division of Advance Magazine Publishers Inc., is a corporation with its principal place of business in New York, and is the publisher of the *New Yorker* magazine.

Respondent Louise Blouin Media Inc. is a Delaware corporation authorized to do business in New York.

Respondent Global Fine Art Registry LLC is an Arizona limited liability company.

Respondent Theresa Franks is a citizen of Arizona.

Respondent Paddy Johnson is a citizen of New York.

Respondent Yale University Press is a department of Yale University, in New Haven, Connecticut.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Peter Paul Biro respectfully petitions this Court for a writ of certiorari to review two judgments of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The two opinions of the Court of Appeals for the Second Circuit are reported at 807 F.3d 541 and 622 Fed. Appx. 67, and are reproduced in the Appendix at 1a and 13a.

The U.S. District Court for the Southern District of New York issued six opinions. Two are reported at 883 F.Supp.2d 441 and 963 F.Supp.2d 255. Four are unreported, but three of the four are cited as 2011 U.S. Dist. LEXIS 125099 (S.D.N.Y. Oct. 27, 2011), 2012 U.S. Dist. LEXIS 113188 (S.D.N.Y. Aug. 10, 2012) and 2014 U.S. Dist. LEXIS 139065 (S.D.N.Y. Sep. 29, 2014). All six are reproduced in date order in the Appendix at 19a, 24a, 160a, 195a, 209a and 276a respectively.

JURISDICTION

The two judgments of the U.S. Court of Appeals for the Second Circuit were entered on December 8, 2015. Petitioner did not seek rehearing or *en banc* review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition is timely, being filed within 90 days of entry of the judgments, S.Ct.Rule 13 subd. 1.

Federal jurisdiction below was based upon diversity of citizenship, 28 U.S.C. § 1332(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fed. R. Civ. P. 9. Pleading Special Matters

...

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Rules Enabling Act, 28 U.S.C. § 2072:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

STATEMENT OF THE CASE

In July 2010, the New Yorker magazine published a 16,000 word article ("the Article") entitled "The Mark of a Masterpiece: The man who keeps finding famous fingerprints on uncelebrated works of art." The writer was respondent David Grann, and petitioner Peter Paul Biro, a forensic scientist, is the man referred to in the

headline. The Article purported to be an in-depth study of the processes of authentication of works of art, and specifically by means of forensic scientific analysis and examination of physical evidence, possibly connected to the artist who may have created a work. A complete copy is in Appendix D at 102a-159a.

Mr. Biro initially cooperated with Mr. Grann in preparation of the Article. However, he soon realized that the Article was not intended to be an objective examination of the issues, but rather an attack on his reputation and character, and he refused to participate any longer. As it turned out, he was correct. What was supposed to be an article about the science of art authentication turned out to be a vicious and unwarranted personal attack upon Mr. Biro's reputation, professionalism and career, for reasons known only to Mr. Grann, his sources, and the editors and publisher of the New Yorker.

In the Article, Mr. Grann describes extensively in highly personal terms his process of writing it. He traveled to Montreal, where Mr. Biro resided. Mr. Biro welcomed him to his home, shared meals with him and discussed his forensic work extensively.

Mr. Grann then went to the local courthouse and examined records of some court matters from the 1980's involving Mr. Biro, all of which were long terminated. Mr. Grann then sought out and interviewed some of the parties who had been opposed to Mr. Biro in those court cases, and quoted extensively what those persons said about Mr. Biro, much of which was defamatory.

Mr. Grann also worked on the Article in New York with respondents Theresa Franks and Global, who

published their own defamatory and venomous words about Mr. Biro on their own websites, boasting about their assistance to him and the New Yorker in the preparation of the Article.

The Article contains many passages which either state outright or strongly imply that Mr. Biro:

- was involved in forgery of fingerprints by somehow creating them and placing them on works of art;
- had concocted a fraudulent investment scheme to falsely authenticate works of art and sell them to investors;
- had knowingly sold a painting falsely claiming it to be by Renoir;
- had planted or fabricated evidence during an investigation.

Under New York law, all of these statements are false and libelous *per se*, being accusations of criminal acts and attacks on his professional reputation.

The Article had an immediate and devastating impact on him, and that impact has lasted to the present day. Within weeks, he was dismissed as a director of a public company in London, told that it was because of the Article. He was sued by that company, and eventually had to pay court costs and legal fees there, amounting to tens of thousands of pounds. His many clients disappeared and he had to sell his home of many years. His health and well-being have been seriously adversely affected.

Because of the prominence of the New Yorker in the media world, the Article was picked up by other publications, some of whom repeated the accusations against him in the weeks and months afterward (and

after this action was commenced as well), often adding their own embellishments and additional defamatory language, some of which are available on the internet to this day.

THE PRESENT ACTION

1. Proceedings in the District Court

Mr. Biro determined to seek redress, and on June 29, 2011, he filed an action in the U.S. District Court for the Southern District of New York. Mr. Biro was the plaintiff, and the main defendants were Condé Nast, a division of Advance (the owner and publisher of the New Yorker), and David Grann, the author ("the New Yorker respondents"). Jurisdiction was based upon diversity, Mr. Biro being a citizen of Canada, and the defendants at that time being citizens of New York.

The original complaint contained a single claim for libel against the New Yorker respondents, a single claim for libel against three other defendants, and a third claim against all of them, that being one for false statements causing special damages. Numerous passages alleged to be defamatory from the Article were set out i*n haec verba* in the complaint.[1] The Court is respectfully directed to the entire Article (Appendix D at 102a-159a), the enormous defamatory impact of which can only truly be understood when it is read as a whole, the proper legal standard under New York law.

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[1] The original complaint was amended and supplemented three times. The last operative complaint is the Third Amended and Supplemental Complaint, which is in the Appendix at 293a-354a.

The Article, and the filing of the complaint, attracted significant media attention, and other organizations and individuals later published their own accounts of the allegations in the Article on the internet and in print. Several of these parties were later made defendants, eventually settled with Mr. Biro, and have been dismissed; several were later joined.

When the case was commenced, the District Judge to whom it was assigned directed discovery to proceed during the pendency of the New Yorker defendants' motion to dismiss. However, shortly thereafter, the case was reassigned to Hon. J. Paul Oetken, who immediately stayed discovery. Petitioner has never had any discovery in this case whatsoever.[2]

Mr. Biro then requested that Judge Oetken recuse himself, because of certain dealings which he had with defendants' counsel prior to ascending to the bench. Judge Oetken denied the request (Appendix C at 19a).

The New Yorker respondents then moved to dismiss under Rule 12(b)(6), arguing that the complained-of language was either not defamatory, or was protected opinion. Other respondents moved to dismiss as well. The District Court granted the motions in part and denied them in part in two extensive and detailed opinions, specifically holding that four passages in the Article were susceptible of a defamatory connotation (Appendices D at 24a and E at 160a). Petitioner and the

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[2] There was some limited jurisdictional discovery, solely concerning two respondents' amenability to suit in New York. All references herein to discovery should be understood as merits discovery only.

New Yorker respondents moved for reconsideration, which was denied (Appendix F at 194a).

Following the determination that portions of the Article were arguably defamatory, petitioner sought to conduct discovery, but the District Court continued to stay it, and permitted the New Yorker respondents to file an answer and a second motion to dismiss, this time under Rule 12(c). In that motion, they also argued that Mr. Biro was a public figure and was therefore required to plead malice, but that he had not done so and that the complaint should be dismissed.

The District Court's decision on the motion (Appendix G at 208a) held that (1) petitioner was a public figure, and (2) was therefore obliged to plead malice, but that (3) despite the extensive facts indicative of malice set out in the complaint, and (4) despite its earlier ruling that four passages in the Article were potentially defamatory, and (5) despite that petitioner had been denied any discovery, (6) the complaint was nonetheless insufficient, pursuant to *Twombly* and *Iqbal*. Petitioner argued that he should be entitled to discovery to develop evidence of malice, and that there were in any event sufficient facts already in the complaint to indicate malice, but was denied. The claims against the New Yorker respondents were dismissed in their entirety.

The other respondents then filed their own 12(b)(6) and 12(c) motions, which were granted (Appendix H at 275a) on similar grounds as the dismissal of the New Yorker respondents, and also on the grounds that the complained-of language was not defamatory and that there was no personal jurisdiction over two of them.

The operative complaint is in Appendix I at 293a. The entire New Yorker Article was an exhibit to that complaint, but was also an appendix to the District Court's decision on the first motion to dismiss, and is set out in full there (Appendix D at 102a).

2. The appeal to the Second Circuit

On appeal to the Second Circuit Court of Appeals, petitioner argued that (1) he was not a public figure, (2) even if he were, there were sufficient factual and non-conclusory allegations of malice in the complaint, and (3) he was entitled to limited discovery on the issue of malice in any event, immediately after the District Court's initial determination that the Article contained potentially defamatory language.

He also argued that even if he were a limited-purpose public figure, the complained-of language must bear some reasonable relation to the underlying controversy. He said that large portions of the Article had nothing to do with any controversy surrounding his work and the authentication of art, but were in the nature of false and defamatory attacks on his character and personal life, largely based upon decades-old events.

Finally, he argued that, under well-established New York State defamation law and the plain language of Rule 9(b), malice could be pleaded generally in a complaint, with proof of it reserved for trial. Therefore, he argued, had the action been brought in New York State court, it would have been allowed to proceed. This difference in outcome between Federal and State Court was substantive, not procedural, and thus violated

principles of *Erie*[3] federalism and the Rules Enabling Act. He argued that this Court's landmark *Shady Grove*[4] case compelled a reversal.

The Second Circuit affirmed the District Court's holding that Mr. Biro was a public figure, and affirmed the dismissal of the complaint, primarily on the ground that *Twombly* and *Iqbal* required pleading of facts indicative of malice, and that the complaint failed to do so. The Circuit Court ignored petitioner's federalism arguments, and specifically rejected his argument about the germaneness of the complained-of language to the controversy (1a-12a). The Court also issued a second unpublished opinion, dismissing the remaining claims against the other respondents (13a-19a).

The Second Circuit said that "[t]o say the least, we agree with the District Court's observation that '[t]here is little question that a reader may walk away from the Article with a negative impression of Biro.'" (4a). But it denied him the right to do anything about it, despite the impression being based on deliberate falsehoods.

REASONS FOR GRANTING THE PETITION

1. There are irreconcilable conflicts in Federal and State case law over the definition of "public figure."

In the landmark cases of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Curtis Publishing Co.*

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[3] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[4] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

v. Butts, 388 U.S. 130 (1967), this Court created significant First Amendment protections for criticism of public officials and public figures respectively, by holding that they could only prevail on a defamation claim if they could prove constitutional malice by clear and convincing evidence.

In the 1970's this Court decided four public figure defamation cases, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979); and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). In each case, this Court examined the standards for determining whether a defamation plaintiff was a public figure. And in each case this Court determined that the plaintiff was not one, and therefore did not have to plead or prove malice in order to proceed with a defamation claim. Despite each plaintiff's extensive involvement in a controversy which had attracted significant public attention, this Court held in each case that the standard had not been met.[5] Had those four cases been followed, it is unlikely that petitioner here would be deemed a public figure.

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[5] As one District Court observed about *Gertz*, "[i]n addition to injecting himself voluntarily into this area of public controversy, Gertz had achieved some public prominence in his own right. He had served as an officer of the National Lawyers Guild, and had considerable stature as a lawyer, author, lecturer, and participant in matters of public import. Perhaps if attorney Gertz was not a public figure, nobody is." *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041, 1044 (S.D.N.Y.1975), *rev'd on other grds.*, 551 F.2d 910 (2d Cir.1977), *cert.den.* 434 U.S. 834 (1977)(citation and quotation marks omitted).

Moreover, *Gertz* did not actually define the term. "It is unclear whether the *Gertz* Court purported to define the term 'public figure' or was only explaining why public figures are treated differently from others. A careful reading of the majority opinion strongly suggests the latter." 1 Sack, Sack on Defamation, § 5:3.1 at 5-19 to 20 (4th ed. 2010, Rel. #4, 4/14)(footnotes omitted) (hereinafter "Sack").

"The Supreme Court issued those opinions [*Wolston* and *Hutchinson*] in 1979. In other words, the Supreme Court has not elaborated further on the public-figure question in nearly thirty years." *Anaya v. CBS Broadcasting Inc.*, 626 F. Supp. 2d 1158, 1191 (D.N.M. 2008). And this Court has not done so in the seven years since *Anaya*.[6]

This lack of elaboration since 1979 has led to irreconcilable conflicts among the cases in both Circuit and State Courts. This Court should take the opportunity presented by this case to set out a national and uniform definition of "public figure," one which considers not only the original purpose of the term, but also the last two decade's dramatically changed media landscape, including the internet, social media and the escalating threats to an individual's reputation posed by these developments. This Court should examine what it means to be a public figure in the new world of blogs, tweets and viral internet postings, and to strike an

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[6] In *Air Wis. Airlines Corp. v. Hoeper*, ___U.S.___, 134 S. Ct. 852 (2014), the issue was whether material falsity was an element of malice, but the respondent in that case was not a public figure, and his defamation claim was in any event barred by a statutory immunity from suit.

appropriate balance between the First Amendment and a person's right to recover for unjustified reputational damage. *See, e.g*, Sanders & Miller, *Revitalizing Rosenbloom: the Matter of Public Concern Standard in the Age of the Internet*, 12 First Amend. L. Rev. 529 (2014); Kelley, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 La.L.Rev. 559 (2013); Lat & Shemtob, *Information Privacy: Public Figurehood in the Digital Age*, 9 J. of Telecomm. & High Tech. L. 403 (2011).

The First Amendment right to criticize public officials without fear of libel suits, established in *New York Times,* the extension of that right to attacks on public figures in *Butts*, and the responses of Courts since then, have practically eliminated the right of such persons to recover for damage to their reputations. In the four decades since *Gertz*, lower courts have often found that defamation plaintiffs were public figures, on facts far less compelling than in those four cases. The present case is only the most recent example.

New York Times and *Butts* erected substantial barriers to a successful defamation claim by a public figure. But those barriers, when combined with the overly expansive interpretations of *Twombly* and *Iqbal* which lower Courts have adopted in the recent past, have made it nearly impossible for a common-law defamation claim even to proceed, let alone succeed. This expansive interpretation was not warranted by this Court's precedents, and should also be re-examined.

In sum, as Judge Sack noted, "[t]he lack of a comprehensive definition or description of the term 'public figure' in the Supreme Court and the divergent case law in state and lower federal courts make the

determination of a defamation plaintiff's status an uncertain process, differing from state to state and court to court." Sack, *supra*, § 5:3.6 at 5-45. Petitioner respectfully submits that the writ should be granted to reduce these conflicts and divergent outcomes.

The cases are in hopeless disarray and cannot be reconciled. In *Anaya*, *supra*, the New Mexico District Court set out in detail the varying views of some Circuit Courts regarding the definition of public figures. For example, in the Second Circuit, to obtain a ruling that a plaintiff is a public figure:

> A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence other prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.

Lerman v. Flynt Distributing Co., 745 F.2d 123, 136-137 (2d Cir.1984).

In the D.C. Circuit, the analysis is much more complex and vague. In *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir.1980), *cert. den.* 449 U.S. 898, the Court addressed the point at considerable length:

> As the first step in its inquiry, the court must isolate the public controversy...To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some

> specific question... If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.
>
> Once the court has defined the controversy, it must analyze the plaintiff's role in it...
>
> Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy. His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him. Misstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection.

627 F.2d at 1296-98 (citations and quotation marks omitted). *See also Tavoulareas v. Piro*, 817 F.2d 762 (D.C.Cir.1987).

The *Waldbaum* analysis has been adopted in the Fifth and Eleventh Circuits. *See Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1492-93 (11th Cir. 1988)("The proper standards for determining whether plaintiffs are limited public figures are best set forth in *Waldbaum v. Fairchild Publications, Inc.*"); *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 432 (5th Cir.1987)("In an effort to give shape to what might be a formless inquiry into limited-purpose-public-figure status, the District of Columbia Circuit has developed a three-step test...This test appears to be sensible, and we adopt it.").

In the First Circuit, the careful and thorough historical analysis of the issue in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir.1980),

does not lend itself to a short summary. In that case, the Court found that a corporation was not a public figure, but did not set out a particular multi-factor test.

By contrast, the Fourth Circuit has a five-factor test:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

Fitzgerald v. Penthouse Int'l, 691 F.2d 666, 668 (4th Cir.1982).

In the Seventh Circuit, the leading case is *Harris v. Quadracci*, 48 F.3d 247 (7th Cir.1995):

> Although the Supreme Court has not set forth the pertinent criteria for determining who is a limited purpose public figure, Wisconsin courts have...Under the "federal analysis," denominated as such because of its reliance on *Waldbaum*...the court applies a three-part inquiry: (1) isolating the controversy at issue [and determining whether it was a controversy of substantial statewide public interest affecting persons beyond the immediate participants in dispute]; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential; and (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy.

48 F.3d at 250-251 (citations omitted; brackets in original).

In the Ninth Circuit, the California Supreme Court has said:

> [W]hen called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported "public figures" have thrust themselves into the forefront of particular public controversies. As is reflected in the evolution of the public figure doctrine, from *Butts* through *Gertz*, *Firestone* and *Wolston*, such a determination is often a close question which can only be resolved by considering the totality of the circumstances which comprise each individual controversy.

Reader's Digest Assn. v. Superior Court, 37 Cal.3d 244, 254-255 (Cal.1984).

See also Makaeff v. Trump Univ., LLC, 715 F.3d 254, 266 (9th Cir.2013): "[W]e consider whether (i) a public controversy existed when the statements were made, (ii) whether the alleged defamation is related to the plaintiff's participation in the controversy, and (iii) whether the plaintiff voluntarily injected itself into the controversy for the purpose of influencing the controversy's ultimate resolution."

Another significant difference between these standards for determining public figure status– relevant in the present case–is whether the complained-of language is germane to the public controversy. This requirement exists in the D.C. and Seventh Circuits, but not in the Second Circuit. On the other hand, the

Second Circuit requires that a public figure have regular access to the media, which is not a factor elsewhere.

So we thus have a three-part, four-part or five-part test, depending on the Circuit. And that does not even address the variations among the State Courts. Given the vagueness of the test in the first place–a test of constitutional dimension–and the profound consequences for a defamation plaintiff's burden of proof and likelihood of success, these disparities are not acceptable. *See Gertz, supra*, 418 U.S. at 342 ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test."). Given those consequences, it is unacceptable for a plaintiff–particularly one like petitioner here, who has already been found to have been potentially libeled–to be stopped from even trying to surmount that barrier.

Even when a plaintiff is a limited-purpose public figure because of involvement in a public controversy, the First Amendment protections afforded a publisher should not extend to statements which are not germane to the controversy. Were it otherwise, a public figure would be essentially libel-proof. Involvement in a public controversy is not tantamount to an open license to defame, by publishing false statements about a public figure's personal life or history.

In the present case, the Second Circuit declined to consider the point of germaneness, on the plainly erroneous ground that "[i[n the District Court, Biro did no more than mention this argument in passing; therefore, we deem it forfeited and decline to consider it." (17a). But in fact it was briefed in both Courts, and should be part of any definition of a public figure.

2. The potentially defamatory language in the Article is not a matter of public concern, and in such a case, the First Amendment interest is less important.

Closely related to the idea that protected statements must be germane to the controversy is that statements must also relate to a matter of public concern. In *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 757-758 (1985), this Court said:

> We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was strong and legitimate. A State should not lightly be required to abandon it, for, as Mr. Justice Stewart has reminded us, the individual's right to 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. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments.

> The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance....In contrast, speech on matters of purely private concern is of less First Amendment concern. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent...we hold that the state interest adequately supports awards of presumed and punitive damages - even absent a showing of "actual malice."

572 U.S. at 757-60 (citations and quotation marks omitted).

A fair reading of the New Yorker Article raises the question of what issues of public concern could have possibly justified this wholesale attack on the personal reputation of one scientist, previously known to few outside of the art world, based upon unrelated personal matters which occurred decades before the ostensible subject of the Article, the forensic analysis of works of art. There are none. What possible connection could there be between minor civil disputes from the 1980's over a few thousands of dollars–and interviews with angry litigants who were invited to air their old grievances in the New Yorker–and whether Mr. Biro actually found fingerprints on a Leonardo or Jackson Pollock painting, or whether his scientific methods are legitimate or not? They do not challenge Mr. Biro's expertise or methods or his work. Rather, they falsely

imply that he is a criminal, and the District Court agreed that this was a reasonable interpretation. Is every limited-purpose public figure now open to having her entire private life revealed without recourse, regardless of any connection to the controversy which made her one?

Petitioner respectfully submits that this petition should be granted, and this Court should re-examine what it means to be a limited-purpose public figure, in the context of matters not of public concern.

3. It is practically impossible for a public figure to plead malice successfully against a media defendant in Federal Courts, but it is easily done in New York State Courts. The conflict is irreconcilable.

Prior to this case, the Second Circuit had not addressed the issue of pleading malice in a public figure defamation case.[7] Rather, the existing rule in the Second Circuit was that "resolution of the...actual malice inquir[y] typically requires discovery," *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir.2001). And in *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406 (2d Cir.2000), the Second Circuit said that

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[7] *See Kerik v. Tacopina*, 2014 U.S.Dist.Lexis 167446 (S.D.N.Y. Dec. 2, 2014) at *57 n. 9 ("Whether a plaintiff is ordinarily required plausibly to allege actual malice at the pleading stage appears to be an open question."); *Biro v. Condé Nast*, 963 F. Supp.2d 255 at 279 n. 16 (S.D.N.Y.2013)(252a): "Biro's complaint about requiring plausibility before discovery undoubtedly gets to the very heart of the controversy surrounding the modern interpretation of Rule 12(b)(6)."

"Rule 9(b) of the Federal Rules of Civil Procedure only requires a plaintiff to generally aver malice as to a defendant's state of mind...it is important to recognize the difference between disposing of a case on a 12(b)(6) motion and resolving the case later in the proceedings, for example by summary judgment. Moreover, a plaintiff may allege facts suggestive enough to warrant discovery, *even where those facts alone would not establish a cause of action for defamation.*" 208 F3d at 410 (quotation marks and citations omitted; emphasis added).

In adopting for the first time in the present case a heightened pleading requirement (and implicitly overruling *Behar* and *Boyd, supra*), the Second Circuit said (7a):

> In urging us to hold that he did not have to allege facts sufficient to render his allegations of actual malice plausible, Biro notes that Rule 9(b) allows malice to "be alleged generally," Fed. R. Civ. P. 9(b), and points to the District Court's observation that "neither the Supreme Court nor the Second Circuit has precisely articulated the effect of Iqbal and Twombly on defamation cases," Biro II, 963 F. Supp. 2d at 278. Both observations may be true, but Iqbal makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent. 556 U.S. at 686-87. There, the Supreme Court held that "Rule 9(b) requires particularity when pleading fraud or mistake, while allowing malice, intent, knowledge, and other conditions of a person's mind to be alleged generally," but "does not give [a plaintiff] license to evade the

> less rigid—though still operative—strictures of Rule 8." Id. (quotation marks omitted). It follows that malice must be alleged plausibly in accordance with Rule 8.

The Second Circuit then cited three cases to that effect, *Pippen v. NBC Universal Media, LLC*, 734 F.3d 610 (7th Cir. 2013), *cert.den.* 134 S.Ct. 2829; *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir.2012); and *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir.2012). But in none of these cases, unlike the present one, were there prior holdings that the complained-of language was potentially defamatory. If a complaint does not set forth language which is susceptible of a defamatory meaning in the first place, then the sufficiency of pleading malice need not be reached, and any ruling on it is essentially dictum. A statement published with knowledge that it is false is still not actionable if it cannot be defamatory in the first place. Words must be both false *and* defamatory to be actionable.

In *Pippen,* the alleged defamation was based upon erroneous news reports that the plaintiff, a retired professional basketball player, had filed for bankruptcy. The Seventh Circuit held that the report was not defamatory as a matter of law. Thus the sufficient pleading of malice was beside the point.

In *Mayfield*, a report that a race car driver had taken performance-enhancing drugs was true, and thus not defamatory. Yet the Fourth Circuit dismissed the claim on the basis that malice was insufficiently pleaded.

In *Schatz*, both the District Court and the First Circuit had refused to resolve the threshold issue of

whether the language complained of was defamatory, but merely concluded that malice had not been pleaded sufficiently. The Court said:

> In the defamation context, malice is not a matter that requires particularity in pleading — like other states of mind, it may be alleged generally. Fed. R. Civ. P. 9(b). But, to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred — even in a world with *Twombly* and *Iqbal*. Rule 9 merely excuses a party from pleading states of mind under an elevated pleading standard — it does not give him carte blanche to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss. *Schatz, supra,* 669 F.3d at 52.

But this is essentially no rule at all, and is self-contradictory. Either malice can be pleaded generally, *i.e.*, it suffices merely to state that it exists, as Rule 9(b)'s plain language states, or else *Twombly* and *Iqbal* have imposed an additional requirement not in its text. Under the Second Circuit's interpretation (and those of the other Circuits it cited), *Twombly* and *Iqbal* have amended Rule 9(b) with respect to pleading malice, without going through the procedure required under the Rules Enabling Act.

With a media defendant, evidence of malice is by definition usually deeply embedded in the editorial process and is almost always unknown *a priori*. Moreover, an allegation of malice is not a bare legal conclusion as to an element of a cause of action, of the kind which were condemned in *Twombly* and *Iqbal*. To

say that someone acted with malice is not a legal conclusion at all; it is rather a *purely factual assertion about that person's subjective state of mind, i.e.* that someone uttered a statement with knowledge that it was false. Whether that allegation is correct, that is, whether the speaker actually knew or believed it to be false (or had serious doubts), and the legal implications of that state of mind, if proven, are matters to be determined at trial or on summary judgment, after discovery. But where it is an element of a state cause of action, it is incorrect to characterize it as a legal conclusion.

Moreover, the Second Circuit ignored or rejected the many allegations in the complaint suggestive of malice, including the facts that (1) one of the principal sources for the Article had posted her own viciously defamatory language about Mr. Biro on her own websites; (2) the author of the Article had been previously sued in the D.C. Circuit for libel, and that Court had refused to dismiss the action; (3) some interviewees quoted in the Article had known biases against Mr. Biro; and (4) some of the respondents had been informed of their errors of fact but refused to retract. This is not the place to argue these and other factual issues in detail, but they are present throughout the complaint. Thus, had everything alleged been taken as true, as required on a Rule 12 motion, the complaint would not have been dismissed.

New York State courts have approached this problem very differently from the Federal courts. New York cases are uniform and long-standing in requiring that a public figure must *prove* actual malice in order to prevail at trial (or defeat summary judgment). But the

cases also recognize that a public figure's ability to *plead* facts demonstrating malice in a sworn complaint is limited, and can seldom be determined in the pre-discovery context of a motion to dismiss. In New York, once a plaintiff can allege the publication of statements which are susceptible of a defamatory connotation, she is entitled to proceed to discovery.

Among the many cases are *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508-09, 534 N.Y.S.2d 656 (1988) ("allegations of plaintiff's complaint sufficiently state a cause of action for defamation...plaintiff's allegations that the statements were maliciously made, if proven, would overcome that defense [of qualified privilege]"); *People v. Grasso*, 21 A.D.3d 851, 853, 801 N.Y.S.2d 584 (1st Dept.2005), *dism. on other grds.* 11 N.Y.3d 64 (2008)("Whether Grasso (who concedes that he is a public figure) will be able to sustain his burden of proving actual malice at trial cannot be determined at this pre-discovery stage of the litigation"); *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 (2d Dept. 2010); *Kotowski v. Hadley*, 38 A.D.3d 499, 500, 833 N.Y.S.2d 103 (2d Dept.2007)("plaintiff had no obligation to show evidentiary facts to support these allegations of malice on a motion to dismiss"); *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 109, 773 N.Y.S.2d 348 (1st Dept.2004); *Terry v. County of Orleans*, 72 A.D.2d 925 (1st Dept.1979)(same); *Mellen v. Athens Hotel Co.*, 153 A.D. 891 (1st Dept.1912)("An inference of malicious intent may arise from the writer's inclusion of expressions beyond such as are necessary for the purpose of the privileged communication, but, whatever the proof available, the plaintiff need not allege his evidence."); *Martin v. Daily News, L.P.*, 2009 N.Y. Misc.

LEXIS 3858 (Sup.N.Y.Co. July 20, 2009); *Trump Village Section 4, Inc. v. Bezvoleva*, 2015 N.Y. Misc. LEXIS 4848 (N.Y. Sup. Ct. Aug. 10, 2015)(citing cases); *Kamchi v. Weissman*, 125 A.D.3d 142, 1 N.Y.S.3d 169 (2d Dept.2014); *Colantonio v. Mercy Med. Ctr.*, 115 A.D.3d 902, 982 N.Y.S.2d 563 (2d Dept.2014); *Weiss v. Lowenberg*, 95 AD3d 405, 406, 944 N.Y.S.2d 27 (1st Dept.2012); *Shaw v. Club Mgrs. Assn. of Am., Inc.*, 84 A.D.3d 928, 923 N.Y.S.2d 127 (2d Dept.2011); *Pezhman v. City of New York*, 29 A.D.3d 164, 812 N.Y.S.2d 14 (1st Dept.2006); *Terry v. County of Orleans*, 72 AD2d 925, 422 N.Y.S.2d 826 (4th Dept 1979); *Dougherty v. Andrews*, 65 A.D.2d 929, 410 N.Y.S.2d 446 (4th Dept.1978); *Cabin v. Community Newspapers, Inc.*, 50 Misc. 2d 574, 270 N.Y.S.2d 913 (Sup 1966), *aff'd*, 27 A.D.2d 543, 275 N.Y.S.2d 396 (2d Dept.1966); *Bruno v. New York News, Inc.*, 68 A.D.2d 987, 414 N.Y.S.2d 813 (3d Dept.1979).

It is thus long-established law in New York defamation cases that malice need only be alleged generally in a complaint, with evidence of it available through discovery.

It is also significant that New York, with its own rich history of protecting freedom of expression (the 1735 trial of John Peter Zenger, for example), considers its constitutional protection of freedom of press and speech to exceed that provided by the First Amendment, and thus greater than that required by *New York Times v. Sullivan, supra*. *See O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n. 3 (1988)("protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment"); *and see Immuno*

AG v. Moor-Jankowski, 77 N.Y.2d 235, 249-50 (1991), containing an extensive analysis of the contrast between New York State and Federal defamation law.

Yet, despite this greater protection for publishers in the media center of New York, State Courts here still give public figures the opportunity to discover evidence to support their claims of malice, and do not dismiss those claims at the outset. As long as the plaintiff meets the threshold requirement to show the publication of potentially defamatory language, he is entitled to proceed to discovery.

Both *Twombly* and *Iqbal* were cases from the Second Circuit, which had originally upheld the validity of the complaints. But those cases involved federal antitrust claims and *Bivens* claims. By contrast, in this diversity case, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and the Rules Enabling Act impose federalism considerations. It is not at all clear why *Twombly* and *Iqbal* should be extended to state law claims which are only brought in Federal Courts under diversity jurisdiction, and there are sound policy reasons that they should not.

Moreover, public figure libel claims are unique, in that they necessarily implicate a defendant's state of mind, private information which is unknowable without discovery. "[W]hen the defendant controls critical private information, *Iqbal* creates an apparent catch-22 for plaintiffs, requiring them to plead information they do not know but denying them a means of discovering that information." Noll, *The Indeterminacy of Iqbal*, 99 Geo. L.J. 117, 120 (2010).

In this case, the District Court had found that the Article contained statements which were susceptible of

a defamatory connotation, and were not protected opinion. Once that threshold determination had been made, petitioner should have been afforded discovery rights. The application of *Twombly* and *Iqbal* to bar discovery into the editorial process is in direct conflict with *Herbert v. Lando*, 441 U.S. 153 (1979), which permitted it. No other case has been found in which a Court found complained-of language to be potentially defamatory, but then refused to allow a plaintiff to proceed to discovery.

4. The difference between the Federal and State approaches is substantive, not procedural, and thus violates the Rules Enabling Act and principles of *Erie* federalism.

"Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action." *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1077 (3d Cir.1985). In this diversity case the Court of Appeals and the District Court were obliged to follow the law of New York State. But under that law, the complaint in this case is sufficient and would not have been dismissed.

The Federal Rules of Civil Procedure are to be construed so that the outcome of a diversity case, governed by state common law principles, is the same in either court. The point is to avoid "substantial variations [in outcomes] between state and federal litigation" which would "likely...influence the choice of a forum," *Hanna v. Plumer*, 380 U.S. 460, 467-468 (1965). *See also Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

Had this case been brought in New York State court, it would almost surely not have been dismissed prior to discovery. Whether characterized as substantive or procedural, this is surely a "substantial variation in outcomes." If the interpretation of a Federal Rule in a Federal Court bars a case which would not be barred in State Court, the difference is substantive, not procedural. While the usual case involves Federal rights which are greater than State rights, the converse is equally true.

The Rules Enabling Act, 28 U.S.C. § 2072(b) provides that the federal "rules shall not abridge, enlarge or modify any substantive right." An interpretation of a rule of procedure which bars a claim in Federal Court at the pleading stage, but would permit it to proceed in State Court amounts to the abridgement of a substantive right. It violates "the *Erie* prohibition of court-created rules that displace state law." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 412 n. 9 (2010), and "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer, supra,* 380 U.S. at 468 (footnote omitted).

In *Shady Grove, supra*, this Court held that Rule 23's class action provisions prevailed over New York CPLR 910(b), which would have barred the action. Justice Stevens's concurrence[8] addressed the conflict

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[8] Given this Court's 4-1-4 split in *Shady Grove*, Justice Stevens's views should be deemed the holding of the Court. *Marks v. United States*, 430 U. S. 188, 193 (1977)("When a fragmented Court decides a case and no single rationale explaining the result enjoys the (continued...)

between Federal and State substance and procedure rules at length, and makes many points which are relevant here:

> [F]ederal rules must be interpreted with some degree of sensitivity to important state interests and regulatory policies, and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state court....
>
> In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies. *When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice...*
>
> When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be

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[8](...continued)
assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.")(internal quotation marks and citation omitted).

> interpreted to avoid that impermissible result...A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.
>
> 559 U.S. at 418-23. (quotation marks and citations omitted; emphasis added).

In this case, the long-standing rule permitting defamation plaintiffs in New York State Courts to plead malice generally, without factual detail, defines the scope of their right to proceed to adjudicate their claims. Thus it "is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id*. Therefore, Rule 9(b) cannot be interpreted so as to displace that state rule.

The conflict only arises because of the Second Circuit's overly expansive view of the plain language of Rule 9(b). Had that plain language been applied to this case, the complaint would have been sufficient, such a conclusion would comport with New York law, and there would be no conflict. But because the Second Circuit erroneously imposed a heightened pleading requirement as to malice in a state common-law defamation claim, it created an unnecessary conflict with New York law.[9]

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[9] In a related context, there is a Circuit conflict regarding whether state anti-SLAPP statutes are properly applied in Federal diversity cases, or whether doing so violates the *Erie* doctrine. That conflict

(continued...)

The Second Circuit sought to minimize the near-insurmountable barrier imposed by its interpretation of *Twombly* and *Iqbal* by noting in passing three District Court cases (none from New York) in which malice had supposedly been sufficiently pleaded to avoid dismissal (10a). But the cases do not support the point; they contradict it.

The cases are *Tiversa Holding Corp. v. LabMD, Inc.*, 2014 U.S. Dist. LEXIS 54632, 2014 WL 1584211 (W.D. Pa. Apr. 21, 2014); *Lynch v. Ackley*, 2012 U.S. Dist. LEXIS 177118, 2012 WL 6553649 (D.Conn. Dec. 14, 2012); *Ciemniecki v. Parker McCay P.A.*, 2010 U.S. Dist. LEXIS 55661, 2010 WL 2326209 (D.N.J. June 7, 2010).

In *Tiversa*, the Court said that it was not deciding whether the plaintiff was a public figure. Therefore, its conclusion that malice was sufficiently pleaded was dictum. Moreover, the complaint in this action pleaded many more facts suggestive of malice than the few alleged in *Tiversa,* as pointed out *supra* at 24.

In the *Lynch* case, the District Court stated only that the plaintiff had pleaded malice sufficiently, without setting out any facts in the complaint to support that conclusion. Moreover, the Second Circuit recently disposed of the entire case on the ground of qualified immunity. *Lynch v. Ackley*, 2016 U.S. App. LEXIS 1378 (2d.Cir.Jan. 28, 2016).

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[9](...continued)
is presently before this Court, *see Mebo International, Inc. v. Yamanaka*, 607 Fed. Appx. 768 (9th Cir.2015), *pet. for cert.filed*, Oct. 21, 2015.

In the *Ciemniecki case*, the Court found sufficient a fact-free allegation that "[t]he...Defendants published false and defamatory statements...with knowledge of their falsity and/or with reckless disregard as to their truth or falsity." 2010 U.S. Dist. LEXIS 55661 at *40. This is precisely the sort of conclusory allegation which the Second Circuit rejected in this case.

Therefore, the Second Circuit's refusal to follow New York law, and its unwarranted expansion of the minimal pleading requirement of Rule 9(b) so as to dismiss a state common-law defamation claim violated the Rules Enabling Act and principles of *Erie* federalism. The conflict is one of the considerations for granting certiorari set forth in S.Ct. Rule 10(a): "a United States court of appeals has... decided an important federal question in a way that conflicts with a decision by a state court of last resort." In this case, the Second Circuit's decisions conflict with more than a century of uniform holdings by all levels of New York State Courts. The difference is substantive, not procedural, and the issue merits this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 3, 2016

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