17-3801-cv

United States Court of Appeals

for the

Second Circuit

SARAH PALIN, an individual,

Plaintiff-Appellant,

– v. –

THE NEW YORK TIMES COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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STATEMENT PURSUANT TO
FED. R. APP. P. 35(B) AND 40(A)(2)

Appellee ("The Times") respectfully submits this petition for rehearing by the Panel or the Court *en banc* with respect to two substantive aspects of the Panel's ruling that conflict with long-settled precedent establishing the governing standards for adjudicating the sufficiency of defamation claims.[1] The Panel proceeded from the premise that its opinion resolves only questions about "rules of procedure and pleading standards." Op. 2. But beyond reproving the district court's procedure, the Panel misapprehended two bedrock First Amendment protections: the legal standards governing what constitutes (1) plausible allegations of "actual malice" and (2) protected statements of "opinion."

First, in concluding that Palin adequately alleged actual malice, the Panel premised its analysis on allegations of "recklessness" as that term is traditionally used in tort law, as well as on allegations of political animus. But both the Supreme Court and this Circuit have rejected the former as legally irrelevant and the latter as insufficient as proof of actual malice. *E.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015).

[1] The Times does *not* seek rehearing with respect to the Panel's conclusions that the district court erred when it held an evidentiary hearing, Op. 8-13, or that Appellant ("Palin") plausibly alleged the challenged statements are "of and concerning" her, *id.* 20.

The "reckless disregard" prong of the actual malice standard focuses squarely on the defendant's state of mind and requires, at a minimum, facts demonstrating that the defendant published despite a "high degree of awareness" of the challenged statements' "probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). And lower courts expressly have been instructed not "to place too much reliance" on allegations of politically-motivated "ill will" as evidence of the required subjective awareness. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989). Contrary to these well-established legal standards, the Panel premised its analysis on allegations that the author's purported political differences with Palin led him to engage in objectively "reckless" conduct such as failing to "reacquaint" himself with previously published articles or to read a news report to which his Editorial hyperlinked. Op. 17.

Second, in rejecting the argument that Palin failed adequately to plead defamation because the challenged statements constitute non-actionable expressions of opinion, the Panel failed to apply the controlling constitutional standard—instead finding it sufficient that a "reasonable reader" could "view the challenged statements as factual." Op. 21. Both the Supreme Court and this Circuit have definitively held that, to be actionable, an allegedly defamatory statement must be the type that is "provably false." *Milkovich v. Lorain Journal*,

497 U.S. 1, 19-20 (1990); *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976); *see also Moldea v. New York Times*, 22 F.3d 310, 313 (D.C. Cir. 1994) (on rehearing).

The Panel's opinion conflicts with the Supreme Court's and this Circuit's prior decisions, materially altering both the actual malice standard and the constitutional protections afforded expressions of opinion. If not corrected, it will inevitably "dampen[] the vigor and limit[] the variety of public debate" in a manner directly "inconsistent with the First and Fourteenth Amendments." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). The Times respectfully submits that this Petition raises issues of exceptional importance that warrant rehearing.

STATEMENT OF FACTS

A. The Map, The Shootings, And The Editorial

In 2010, SarahPAC, a political action committee named for Palin, published online a map with crosshairs positioned over the congressional districts of several Democrats, and a list of their names (the "Map"), including Rep. Gabrielle Giffords. A15, A202-09. Shortly after its publication, attacks on the offices of several Representatives identified on the Map (including Giffords) engendered a national debate about the potential of inflammatory rhetoric to incite those "on the fringe" to violence. A202-03.

On January 8, 2011, Jared Loughner opened fire at a political event in Tucson, killing six and wounding thirteen, including Giffords. The shooting

renewed the public debate regarding the Map and the extent to which it contributed to an atmosphere that led to such violence. During the ensuing criminal proceedings, which were aborted following Loughner's guilty plea, no evidence was publicly disclosed indicating he had seen the Map. A18-21, A60-99.

On June 14, 2017, James Hodgkinson shot several people at a congressional baseball practice in Virginia, including Rep. Steve Scalise. A11. That evening, The Times published on its website the Editorial at issue. A36-39.

The Editorial described Hodgkinson's attack and then remarked that "[a]n American today would be right to be horrified – and not very surprised" by the shooting. A36. The Editorial bemoaned "a sickeningly familiar pattern," noting that Hodgkinson was "virulently opposed to President Trump" and espoused harsh views on social media. *Id*. The passages at issue followed:

> Was this attack evidence of how vicious American politics has become? Probably. In 2011, when Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl, the link to political incitement was clear. Before the shooting, Sarah Palin's political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.
>
> Conservatives and right-wing media were quick on Wednesday to demand forceful condemnation of hate speech and crimes by anti-Trump liberals. They're right. Though there's no sign of incitement as direct as in the

> Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right.

A37. The Editorial contained a hyperlink (underlined above) to prior articles, one of which included the observation that no direct connection had been made between the Loughner shooting and the Map. A642-43. The Editorial then offered its thesis: The attack was "evidence of how readily available guns and ammunition are in the United States." A37-38.

Immediately following the Editorial's publication online, some readers challenged its assertions that the Map constituted "political incitement" or that there was any "link" between it and the Loughner shooting. A62-63. The following morning, The Times removed those references from the online Editorial, and published corrections and an apology. A23.

B. The District Court Proceedings

Although Palin never contacted The Times to complain about the Editorial, twelve days after its publication, she filed this lawsuit. Shortly thereafter, she served discovery on The Times demanding it disclose every internal communication it has had about her since 2011, along with every document in its files concerning some 30 other articles. She also sought to subpoena 23 Times employees, most of whom had nothing to do with the Editorial.

The Times moved to dismiss on three grounds, two of which are relevant here: (i) that Palin had failed plausibly to allege that the challenged statements

were published with actual malice and (ii) that the statements constitute non-actionable opinion. The district court *sua sponte* ordered an evidentiary hearing to assist it in addressing the "plausibility issue." A319-20. James Bennet, who authored the challenged statements, testified. A321-400.

On August 29, 2017, the district court dismissed the Complaint. While it rejected The Times's other arguments, A448-53, the court concluded that Palin could not plausibly allege actual malice, even when considering the evidence adduced at the hearing cited by Palin in supplemental briefs, A453-63. Palin moved for reconsideration, filing a Proposed First Amended Complaint ("PAC") that incorporated facts adduced at the hearing. The district court denied that motion, holding that amendment would be futile because it had already addressed the purportedly "new" factual allegations in its original decision. A746-52.

C. The Panel's Decision

Palin appealed. On August 6, 2019, the Panel reversed the district court's judgment, reaching two main conclusions. First, it held that the evidentiary hearing violated the Federal Rules of Civil Procedure. Op. 9-13. Second, the Panel held that the PAC plausibly alleged a claim for defamation. *Id.* 15-21. In reaching the second conclusion, as relevant to this Petition, the Panel determined that (1) the PAC set out a plausible "theory of actual malice" based on Bennet's alleged political views and potential "personal hostil[ity]" toward Palin, which

manifested itself in his "reckless" failure to "reacquaint" himself with prior news coverage of the Arizona shooting, *id.* 14-17; and (2) the challenged statements were not protected expressions of opinion because "a reasonable reader could view [them] as factual," *id.* 21.

ARGUMENT

I.
THE PANEL DECISION MATERIALLY MISAPPREHENDS THE ACTUAL MALICE STANDARD

According to the Panel, "[t]he PAC contains allegations that paint a plausible picture of . . . actual malice . . . in three respects: (1) Bennet's background as an editor and political advocate provided sufficient evidence to permit a jury to find that he published the editorial with deliberate or reckless disregard for its truth, (2) the drafting and editorial process also permitted an inference of deliberate or reckless falsification, and (3) the Times' subsequent correction to the editorial did not undermine the plausibility of that inference." Op. 14. The Panel's analysis misapprehends controlling constitutional law in two fundamental ways: (1) its confusion of "reckless" conduct with the distinct concept of "reckless disregard" in assessing actual malice and (2) its unprecedented reliance on an author's alleged political views and resulting ill will as the predicate for a finding of actual malice.

First, the Panel concluded that Palin had plausibly alleged actual malice on the basis of allegations that Bennet was "reckless" in his research. This fundamentally misconstrues the "reckless disregard" prong of the constitutional standard. The Supreme Court has repeatedly emphasized, as Judge Sack explains in his treatise, that "'[r]eckless disregard' as to falsity as that term is applied in the *New York Times [v. Sullivan]* test is virtually unrelated to 'recklessness' in the ordinary sense: gross negligence or wanton behavior." Robert D. Sack, *Sack On Defamation* § 5:5:1 (5th ed. 2018). Rather, the "reckless disregard" prong of the "actual malice" rule sets out a subjective standard, one that is satisfied *only* where there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. The requisite "reckless disregard" is present *only* when the defendant publishes despite "a high degree of awareness" that the challenged statements are "probably" false. *Garrison*, 379 U.S. at 74-75. As a result, "reckless disregard," in the actual malice context, "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (quoting *St. Amant*).

The Panel's conclusion that the PAC plausibly alleges that Bennet published the challenged statements in "reckless disregard" of their truth cannot be

reconciled with this precedent. In its opinion, the Panel makes no effort to apply the Supreme Court's definition of the term as set out in cases such as *Garrison* and *St. Amant*. Instead, it assesses whether Bennet's conduct could plausibly be viewed as "reckless" in the traditional sense, faulting him for, among other things, publishing "the editorial without reacquainting himself with the contrary articles published in *The Atlantic* six years earlier," Op. 17, and "hyperlink[ing to] an article that he did not read," *id.* 18.

The Supreme Court and this Circuit repeatedly have held that such "failures to investigate" do not evidence a "high degree of awareness" of "probable" falsity. *Garrison*, 379 U.S. at 74-75. In *Sullivan* itself, the editorial advertisement at issue contained facts allegedly contradicted by earlier news stories published by the same newspaper. 376 U.S. at 287. As the Supreme Court emphasized, such an allegation "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id*. at 286-88; *accord Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 126 (2d Cir. 2013) ("the failure to review one's own files is inadequate to demonstrate malice by the party responsible for publishing a statement"). The Panel failed to adjudicate the plausibility of the PAC's allegations under the *constitutionally* required standard.

Second, it is settled law that neither bias nor ill will is sufficient to constitute actual malice. "[T]he mere presence of some ulterior motive," including even "a personal desire to harm" the plaintiff, "is not enough to support a finding of actual malice," *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 596 (D.C. Cir. 2016), and, as a result, the Supreme Court has cautioned that courts should be careful not "to place too much reliance" on such allegations, *Connaughton*, 491 U.S. at 668. There is an important reason for this: "many publications set out to portray a particular viewpoint or even to advocate a partisan cause," *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir. 1991), and reliance on such advocacy as evidence of actual malice would inevitably inhibit public debate.

In this case, the Panel's analysis is *premised* on the PAC's allegation that Bennet "had a 'pre-determined' argument he wanted to make in the editorial," Op. 14, because "he had reason to be personally hostile toward Palin, her political party, and her pro-gun stance," *id.* 16. The remainder of its analysis—specifically, that such motives plausibly caused Bennet either deliberately to make statements he knew to be false or "recklessly" fail to consult prior publications concerning the Loughner shooting—is entirely dependent on this predicate allegation. All apart from the fact that such an allegation of ill will may not, as a matter of law, bear the weight the Panel places on it, the Panel's analysis cannot be reconciled with the

Supreme Court's controlling decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The Supreme Court has emphasized that a claim is "plausible" only "when the plaintiff pleads factual content that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (emphasis added). And, as this Court has recognized, the "hurdles to plausibly pleading actual malice" are especially "significant given the First Amendment interests at stake." *Biro*, 807 F.3d at 545. Those hurdles, the Supreme Court has explained, cannot be overcome where, as here, there is an "obvious alternative explanation" for the challenged conduct. *Iqbal*, 556 U.S. at 682.

As an initial matter, the allegation that Bennet was pursuing a "pre-determined" argument based on hostility to Palin and her views on guns cannot be reconciled with the Editorial itself, which argues that "liberals" should be held to the same standards as "[c]onservatives" when it comes to "political incitement." Moreover, there is no factual allegation to support the PAC's conclusory assertion, accepted by the Panel, that Bennet is an "outspoken advocate" of gun control. Op. 16. The PAC fails to allege even a single instance of such "advocacy" by Bennet prior to the Editorial.

The remaining alleged "facts" relied on by the Panel to support its theory of political animus are all derived from a familial relationship—*i.e.*, that Bennet's *brother* belongs to a different political party than Palin, that his *brother* and Palin each have endorsed political candidates opposed by the other, and that Bennet's *brother* was once threatened with violence. *Id.* Such allegations cannot *reasonably* support the chain of inferences the Panel draws from them within the meaning of *Iqbal* and *Twombly*. Rather, the PAC is premised on the following internally contradictory and inherently *im*plausible reasoning: Long before the Loughner shooting, Bennet hated Republicans generally, and Palin specifically; despite this animus, he oversaw multiple articles over many years stating that there was no link between Loughner and the Map; while overseeing publication of these articles during his brother's political rise, Bennet gave no public hint of his hatred for and did not defame Palin for many years; six years later, Bennet oversaw and approved publication of several columns in The Times that similarly reflected a "journalistic consensus" that the Map had no connection to Loughner;[2] but then, seizing his long-delayed moment, Bennet suddenly wrote an editorial and in its

[2] Op. 15-16. The Panel's reference to such a "journalistic consensus" cannot be reconciled with the articles attached to the PAC in support of that contention. As the district court noted, A461-62, many of those articles speculate that Loughner was politically motivated and that political rhetoric, including the Map, was at least in part to blame, *see* A482-84.

sixth paragraph embedded a defamatory falsehood about her to appease his longstanding animus. Under *Iqbal* and *Twombly*, this is the very definition of implausible.

Most significantly, the Panel's opinion fails to acknowledge the dispositive significance under *Iqbal* of the "obvious alternative explanation" presented by the facts alleged in the PAC and it therefore makes no attempt to assess whether, as in *Iqbal*, the invidious conduct alleged in the complaint must yield to the "obvious alternative" scenario presented by those same allegations—in this case, that Bennet made an honest mistake, which was swiftly corrected.[3] On this score, the district court's conclusion, which is neither dependent on facts adduced at the evidentiary hearing (beyond those incorporated in the PAC) nor assessments of witness credibility, is undoubtedly correct:

> What we have here is an editorial, written and rewritten rapidly in order to voice an opinion on an immediate event of importance, in which are included a few factual inaccuracies somewhat pertaining to Mrs. Palin that are

[3] Instead, the Panel invokes the correction as evidence of actual malice, positing that it was "issued after a calculus that standing by the editorial was not worth the cost of public backlash." Op. 18. As the Supreme Court's decision in *Iqbal* demonstrates, the "obvious alternative explanation" supported by The Times's prompt publication of a correction and apology cannot be overcome by such speculative stacking of inferences from the bare fact of their publication. *See Iqbal*, 556 U.S. at 682 ("As between th[e] 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondents ask us to infer, discrimination is not a plausible conclusion.").

> very rapidly corrected. Negligence this may be; but defamation of a public figure it plainly is not.

A463.

II.
THE PANEL DECISION MATERIALLY ALTERS CONSTITUTIONAL PROTECTION FOR OPINION

It is well settled that, under the First Amendment, a statement about a matter of public concern is not actionable in the first instance unless, as a matter of law, it is the kind of statement that is "provable as false." *Milkovich*, 497 U.S. at 19-20; *Buckley*, 539 F.2d at 894. This threshold requirement warrants dismissal of Palin's claim, but it was not applied by the Panel.

The Panel's adjudication of whether the challenged statements constitute non-actionable opinion is premised entirely on the notion that those statements – the Editorial's assertion that the Map constituted "political incitement" (whatever that might mean) and that it had a "direct" link to the Loughner shooting (*i.e.*, the Map referenced Giffords by name) – could be construed by readers as a factual assertion that the Map caused the shooting. Op. 21. The Panel arrives at this conclusion *not* by first determining whether the challenged statements are sufficiently precise to be susceptible of being proved false, but, instead, by considering only whether "a reasonable reader *could view* the challenged statements as factual." *Id.* (emphasis added). In so doing, the Panel

misapprehends the two-part constitutional standard for adjudicating whether a statement constitutes non-actionable opinion in two crucial respects.

First, the Panel abandons the threshold objective inquiry required by the First Amendment (whether a statement is of the type capable of being proven true or false) and relies exclusively on the second inquiry (whether a reasonable reader would "view" the statement "as factual"). This is contrary to *Milkovich* and its progeny, which require the court *first* to assess whether a challenged statement is "provable as false." 497 U.S. at 19-20; *Flamm v. AAUW*, 201 F.3d 144, 151 (2d Cir. 2000) (defendant conceded statement was capable of being proved false and court therefore considered only second inquiry).

Second, the Panel further departs from the governing legal standard by citing on-line comments by some readers (what the Panel calls "social media backlash") as evidence that the challenged statements were perceived as factual. Op. 21. But the threshold determination of whether a statement is of the kind that can be proved false is a legal question for the court, and courts have repeatedly recognized that how some readers may have construed a statement is not relevant even to the second prong of the analysis. *E.g.*, *Farah v. Esquire Magazine*, 736 F.3d 528, 537 (D.C. Cir. 2013) ("test . . . is not whether some actual readers were misled [into thinking statement was factual], but whether the hypothetical reader could be"); *see also Ollman v. Evans*, 750 F.2d 970, 997 (D.C. Cir. 1984) (Bork, J.,

concurring) (determining whether statement is factual requires "close judicial scrutiny" of "totality of the circumstances" surrounding publication "to ensure that cases about types of . . . writing essential to a vigorous first amendment do not reach the jury").

The Panel's standard inevitably will inhibit the type of core political speech that invariably follows mass shootings. Just three days before the Panel's decision, two horrific mass shootings occurred within hours of each other in El Paso and Dayton, sparking intense national debate and speculation over whether political rhetoric motivated the assailants. This type of debate ensues precisely because the motivations of a mass shooter cannot be fully discerned, let alone definitively proven.

Indeed, while the El Paso shooter wrote that his anti-immigrant views predated President Trump's political ascendancy, many have nonetheless expressed their belief that the President's rhetoric enabled and encouraged him. *See, e.g.*, Bethea, *"Trump The Accomplice": El Paso Residents Blame President For Hate-Fueled Mass Shooting*, New Yorker (Aug. 5, 2019). Similarly, some have linked the Dayton shooting to leftist politics, while others reject any such link. *See, e.g.*, Klepper & Biesecker, *Trump seeks to link Dayton shooter to liberal politics*, Wash. Post (Aug. 7, 2019). Whether that sort of speculation is misguided or cogent, it is not capable of being proved false, and precisely because such

speculation addresses a subject of profound national importance, it resides at the core of the First Amendment's protections.

The Panel decision renders this type of debate actionable and invites the subjects of such disputes to file defamation actions that would require the courts to adjudicate who is "right" about such matters of political debate. It also empowers public figures to invoke the litigation process as a vehicle to punish their perceived ideological opponents. As Judge Bork, himself no stranger to the sting of public debate, has explained:

> [L]ibel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion. Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments[,] . . . and the law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate.

Ollman, 750 F.2d at 993 (Bork, J., concurring). The Court should grant rehearing to ensure that the kind of debate about public affairs at issue in this case remains "uninhibited, robust and wide-open." *Sullivan*, 376 U.S. at 270.

CONCLUSION

For these reasons, The Times requests rehearing.

Dated: August 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 35(b)(2) and Fed. R. App. P. 40(b(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,900 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 pt. font.

Dated: August 20, 2019 /s/ Jay Ward Brown

OPINION

17-3801-cv
Palin v. The New York Times Company

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2018

ARGUED: SEPTEMBER 21, 2018
DECIDED: AUGUST 6, 2019

No. 17-3801-cv

SARAH PALIN, an individual,
Plaintiff-Appellant,

v.

THE NEW YORK TIMES COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York.
No. 17-cv-04853 – Jed S. Rakoff, *Judge*.

Before: WALKER and CHIN, *Circuit Judges*, and KEENAN.*

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* Judge John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation.

This case is ultimately about the First Amendment, but the subject matter implicated in this appeal is far less dramatic: rules of procedure and pleading standards. Sarah Palin appeals the dismissal of her defamation complaint against *The New York Times* ("the Times") for failure to state a claim. The district court (Rakoff, *J.*), uncertain as to whether Palin's complaint plausibly alleged all of the required elements of her defamation claim, held an evidentiary hearing to test the sufficiency of Palin's pleadings. Following the hearing, and without converting the proceeding to one for summary judgment, the district court relied on evidence adduced at that hearing to dismiss Palin's complaint under Federal Rule of Civil Procedure 12(b)(6). We find that the district court erred in relying on facts outside the pleadings to dismiss the complaint. We further conclude that Palin's Proposed Amended Complaint plausibly states a claim for defamation and may proceed to full discovery.

We therefore VACATE and REMAND for proceedings consistent with this opinion.

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Times, New York, NY, *on the brief*), *for Defendant-Appellee*.

———

JOHN M. WALKER, JR., *Circuit Judge*:

This case is ultimately about the First Amendment, but the subject matter implicated in this appeal is far less dramatic: rules of procedure and pleading standards. Sarah Palin appeals the dismissal of her defamation complaint against *The New York Times* ("the Times") for failure to state a claim. The district court (Rakoff, *J.*), uncertain as to whether Palin's complaint plausibly alleged all of the required elements of her defamation claim, held an evidentiary hearing to test the sufficiency of Palin's pleadings. Following the hearing, and without converting the proceeding to one for summary judgment, the district court relied on evidence adduced at that hearing to dismiss Palin's complaint under Federal Rule of Civil Procedure 12(b)(6). We find that the district court erred in relying on facts outside the pleadings to dismiss the complaint. We further conclude that Palin's Proposed Amended Complaint plausibly states a claim for defamation and may proceed to full discovery.

We therefore VACATE and REMAND for proceedings consistent with this opinion.

BACKGROUND

On January 8, 2011, Jared Loughner opened fire at a political rally for Democratic Congresswoman Gabrielle Giffords in Tucson, Arizona ("the Loughner shooting"), killing six people and injuring thirteen others. Representative Giffords was seriously wounded in the attack.

Shortly before the tragic attack, Sarah Palin's political action committee ("SarahPAC") had circulated a map that superimposed the image of a crosshairs target over certain Democratic congressional districts (evoking, in the view of many, images of violence). Giffords' district was among those targeted by the SarahPAC crosshairs map. The image had been publicized during the earlier political controversy surrounding the Affordable Care Act, but in the wake of the Loughner shooting, some speculated that the shooting was connected to the crosshairs map. No evidence ever emerged to establish that link; in fact, the criminal investigation of Loughner indicated that his animosity toward Representative Giffords had arisen before SarahPAC published the map.

Six years later, on June 14, 2017, another political shooting occurred when James Hodgkinson opened fire in Alexandria, Virginia at a practice for a congressional baseball game. He seriously injured four people, including Republican Congressman Steve Scalise ("the Hodgkinson shooting"). That same evening, the Times, under the Editorial Board's byline, published an editorial entitled "America's Lethal Politics" ("the editorial") in response to the shooting.

The editorial argued that these two political shootings evidenced the "vicious" nature of American politics.[1] Reflecting on the Loughner shooting and the SarahPAC crosshairs map, the editorial claimed that the "link to political incitement was clear," and noted that Palin's political action committee had "circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs," suggesting that the

[1] App'x 37.

congressmembers themselves had been pictured on the map.[2] In the next paragraph, the editorial referenced the Hodgkinson shooting that had happened that day: "Though there's no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right."[3]

The Times faced an immediate backlash for publishing the editorial. Within a day, it had changed the editorial and issued a correction. The Times removed the two phrases suggesting a link between Palin and the Loughner shooting. Added to the editorial was a correction that read: "An earlier version of this editorial incorrectly stated that a link existed between political incitement and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established."[4] The Times also clarified that the SarahPAC map had overlaid crosshairs on Democratic congressional districts, not the representatives themselves.

Twelve days after the editorial was published Palin sued the Times in federal court. She alleged one count of defamation under New York law. Thereafter, the Times moved to dismiss Palin's complaint for failure to state a claim.

After the motion to dismiss had been fully briefed, the case took an unusual procedural turn: the district judge held an evidentiary hearing on the motion to dismiss. The district judge stated that the

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[2] App'x 36–37. The crosshairs were put on a map over the locations of the congressional districts, and the names of the congressmembers in question—including Representative Giffords—were listed at the bottom of the page.

[3] App'x 41.

[4] App'x 22.

hearing was to assess the plausibility of the "[o]ne close question" presented by the Times' motion to dismiss: whether Palin had sufficiently pled the actual malice element of her defamation claim.[5]

The district judge ordered the Times to identify the author of the editorial and the Times produced James Bennet, the editorial page editor at the Times and the author of the editorial, to testify at the hearing. Bennet was the hearing's only witness. Bennet explained at the hearing that his reference to Palin in the editorial was intended to make a rhetorical point about the present atmosphere of political anger. He also recounted the editorial's research and publication process and answered inquiries about his prior knowledge of the Loughner shooting six years earlier and any connection to Palin. Bennet testified that he was unaware of any of the earlier articles published by the Times, or by *The Atlantic* (where he had previously been the editor-in-chief), that indicated that no connection between Palin or her political action committee and Loughner had ever been established. In addition to answering questions from the Times' counsel, Bennet responded to questions by Palin's counsel and the district judge. Neither party objected to the district judge's decision to hold the hearing.

On August 29, 2017, the district court, relying on evidence adduced at the hearing, granted the Times' motion to dismiss. The district court determined that any amendment would be futile and dismissed Palin's complaint with prejudice. Later, Palin asked the district court to reconsider its decision that the dismissal was with prejudice and included a Proposed Amended Complaint with her

[5] Order re: Motion to Dismiss, ECF No. 35.

motion. The district court denied the motion for reconsideration and leave to replead. She now appeals.

DISCUSSION

We review a district court's grant of a motion to dismiss the complaint on the pleadings de novo and "construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor."[6]

Under New York law a defamation plaintiff must establish five elements: (1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability.[7] In addition, "a public figure plaintiff must prove that an allegedly libelous statement was made with actual malice, that is, made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[8] It is undisputed that Palin, a former governor of Alaska and Republican candidate for Vice President in 2008, is a public figure.

When actual malice in making a defamatory statement is at issue, the critical question is the state of mind of those responsible for the publication.[9] Because the Times identified Bennet as the author of

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[6] *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017) (internal quotation marks omitted).

[7] *See Celle v. Filipino Reporter Enterps. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (citations omitted).

[8] *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173–74 (2d Cir. 2001) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

[9] *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013) ("[T]he plaintiff must identify the individual responsible for publication of a statement, and it is

the editorial, it was his state of mind that was relevant to the actual malice determination. We will first address the district court's use of the hearing in the process of deciding the motion to dismiss and then determine whether Palin's Proposed Amended Complaint plausibly states a claim for defamation.

I. The Hearing

The pleading standards articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) are well-known: in order to satisfy Federal Rule of Civil Procedure 8, a complaint must contain "enough facts to state a claim to relief that is plausible on its face."[10] A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[11] A well-pleaded complaint will include facts that "raise a right to relief above the speculative level."[12] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[13]

On appeal, Palin argues that the district court's reliance on the hearing to decide the motion to dismiss offends the Federal Rules of

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that individual the plaintiff must prove acted with actual malice." (citing *New York Times*, 376 U.S. at 287)).

[10] *Twombly*, 550 U.S. at 570.

[11] *Iqbal*, 556 U.S. at 678.

[12] *Twombly*, 550 U.S. at 555.

[13] *Iqbal*, 556 U.S. at 678.

Civil Procedure. We agree that the hearing runs headlong into the federal rules.

When presented with the Times' Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court relied on Rule 43(c) to convene the hearing at which Bennet testified. The district court's invocation of Rule 43(c), which addresses taking testimony at trial, was misplaced: that rule has nothing to do with the proceedings at the motion-to-dismiss stage. Following the hearing, the district court granted the Times' motion to dismiss, finding that Palin failed to plausibly allege actual malice. This conclusion rested on inferences drawn from Bennet's testimony at the plausibility hearing.

Rule 12(d) provides: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Rule 12(d), therefore, presents district courts with only two options: (1) "the court may exclude the additional material and decide the motion on the complaint alone" or (2) "it may convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material."[14]

The district judge took neither permissible route under Rule 12(d). The judge both relied on matters outside the pleadings to decide the motion to dismiss and did not convert the motion into one for summary judgment. To the contrary, his aim was explicit: to determine whether Palin's complaint stated a plausible claim for

[14] *Kopec v. Coughlin*, 922 F.2d 152, 154 (2d Cir. 1991) (quoting *Fonte v. Bd. of Managers of Continent Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988)).

relief under Rule 12(b)(6). The district judge explained that "[b]y requiring district courts to make plausibility determinations based on the pleadings, the Supreme Court has, in effect, made district courts gatekeepers."[15]

In an effort to salvage the propriety of the district court's decision, the Times argues that the district court complied with Rule 12(d) because it did not rely on matters outside the pleadings.[16] The Times argues that Bennet's testimony was not outside the pleadings because it presented material integral to the complaint by merely adding depth to what was apparent from the face of Palin's complaint. But the material that came to light at the hearing did considerably more than elaborate on the allegations in the complaint.

A matter is deemed "integral" to the complaint when the complaint "relies heavily upon its terms and effect."[17] Typically, an integral matter is a contract, agreement, or other document essential to the litigation.[18] Hearing testimony elicited by the trial judge after litigation has already begun is not the type of material that ordinarily has the potential to be a matter "integral" to a plaintiff's complaint.

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[15] *Palin v. New York Times Co.*, 264 F. Supp. 3d 527, 530 n.1 (S.D.N.Y. 2017) (citing *Iqbal*, 556 U.S. at 662; *Twombly*, 550 U.S. at 554) (internal citations omitted).

[16] *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153–54 (2d Cir. 2002) (holding that extraneous material is not "outside the pleadings" when the material is integral to complaint and relied upon by the plaintiff in framing the complaint).

[17] *Id.* at 153 (internal quotation marks omitted).

[18] *See Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) ("In most instances . . . the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls . . . ."); *see also Nicoisa v. Amazon.com, Inc.*, 834 F.3d 220, 234 (2d Cir. 2016) (an "order page" and "conditions of use" agreement were integral to the complaint when the complaint contained numerous references to them).

Regardless, Palin could not have "relie[d] heavily"[19] on Bennet's testimony when drafting her complaint because she had no idea what Bennet would say. Bennet's testimony revealed substantive information about his motivations and the editorial drafting process—none of which Palin could have known in advance of her pleadings, much less "relie[d] heavily" on.[20]

The Times falls back on the argument that, even if the district court relied on matters outside the pleadings, we may treat the motion *as if* it had been converted to a motion for summary judgment. We have held that the "conversion of a Rule 12(b)(6) motion into one for summary judgment is governed by principles of substance rather than form"[21] and that "[t]he essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment."[22]

We decline to treat the Rule 12(b)(6) motion here as having been converted to one for summary judgment. Apart from the fact that the able and highly experienced district judge did not purport to convert the motion, Palin had no prior notice that the district court might resolve the Times' Rule 12(b)(6) motion after the judge's sua sponte hearing, much less that he might treat the motion as one for summary judgment. Indeed, the district court was explicit about treating the motion only as a test of the sufficiency of the pleadings. The Times relies on cases where the plaintiff had adequate notice and the district

[19] *Chambers*, 282 F.3d at 153 (internal quotation marks omitted).

[20] *Id.*

[21] *In re G &A Books*, 770 F.2d 288, 295 (2d Cir. 1985).

[22] *Id.*; *see also Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 592 (2d Cir. 1993).

court simply neglected to properly convert the motion.[23] This is not a situation in which where the plaintiff ought to have seen a summary-judgment decision coming.[24]

Even if the plaintiff had been given notice and the court had explicitly converted the motion to one for summary judgment, we would still have to vacate because the district court's opinion relied on credibility determinations not permissible at any stage before trial.[25] As we will discuss in the next section, the district court's acceptance of Bennet's testimony as credible was what led it to grant the Times' motion to dismiss.

The Times also argues that Palin was not deprived of a meaningful opportunity to conduct discovery "pertinent to the motion."[26] Presumably, the Times is referring to "discovery" on the spot: Bennet's testimony and some related documents. Even assuming that the hearing afforded Palin all of the discovery to which

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[23] *See G & A Books*, 770 F.2d at 295; *Northville Downs v. Granholm*, 622 F.3d 579, 585–86 (6th Cir. 2010).

[24] In fact, the hearing transcript reflects the understandable confusion of Palin's counsel. App'x 395–97 (The Court: "Neither side raised any objection to my holding [the evidentiary] hearing . . . Counsel: . . . It wasn't a normal kind of hearing during a 12(b)(6) . . . . And to be honest, Judge, we really wouldn't have tendered an objection because we were trying to get a better understanding of kind of what the inquiry was . . . .").

[25] *See Soto v. Gaudett*, 862 F.3d 148, 157 (2d Cir. 2017) (noting that at the summary judgment stage "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))).

[26] Fed. R. Civ. P. 12(d); *see United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 88 n.13 (2d Cir. 2017) (noting the district court's "broad discretion to limit discovery in a prudential and proportionate way" (internal quotation marks omitted)).

she was entitled, this fact does not mitigate the errors committed by the district court.

It is clear to us that the district court viewed the hearing as a way to more expeditiously decide whether Palin had a viable way to establish actual malice. But, despite the flexibility that is accorded district courts to streamline proceedings and manage their calendars, district courts are not free to bypass rules of procedure that are carefully calibrated to ensure fair process to both sides. The procedural path followed by the district court conforms to neither of the two options permitted by Rule 12(d). While we are cognizant of the difficult determinations that *Twombly* and *Iqbal* often place on district courts, the district court's gatekeeping procedures must nevertheless comply with the Federal Rules of Civil Procedure.

II. Palin's Proposed Amended Complaint

Having determined that the district court erred in relying on evidence that came to light in the plausibility hearing when it granted the Times' motion to dismiss, we must ascertain what effect, if any, that error had on the dismissal of Palin's defamation complaint. To do so, we will review Palin's Proposed Amendment Complaint ("the PAC") to determine whether she stated a plausible claim for defamation. Because of the district court's decision to hold the plausibility hearing, this case comes to us in unique form. After the district court dismissed her claim with prejudice, Palin attached a PAC to her motion for reconsideration of the "with prejudice" part of the dismissal. The PAC included certain material added by the hearing and we discern no fault here because Bennet's testimony, reliable or not, was now part of the record. The district court denied the motion for reconsideration, finding that leave to replead would be futile and that the PAC suffered the same "fatal flaws" as the original

complaint.[27] Our review of the grant of a motion to dismiss is de novo;[28] therefore we now turn to whether the PAC states a plausible claim for relief. We conclude that it does.

In the Times' view, the district court correctly determined that Palin's original complaint and the PAC both gave rise to only one plausible conclusion: that Bennet made an unintended mistake by including the erroneous facts about Palin. We disagree.

In both the original complaint and the PAC, Palin's overarching theory of actual malice is that Bennet had a "pre-determined" argument he wanted to make in the editorial.[29] Bennet's fixation on this set goal, the claim goes, led him to publish a statement about Palin that he either knew to be false, or at least was reckless as to whether it was false. The PAC contains allegations that paint a plausible picture of this actual-malice scenario in three respects: (1) Bennet's background as an editor and political advocate provided sufficient evidence to permit a jury to find that he published the editorial with deliberate or reckless disregard for its truth, (2) the drafting and editorial process also permitted an inference of deliberate or reckless falsification, and (3) the Times' subsequent correction to the editorial did not undermine the plausibility of that inference.

First, Palin alleges that, because of the editorial positions Bennet held at *The Atlantic* and *The New York Times*, a jury could plausibly find that Bennet knew before publishing the editorial that it

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[27] Memorandum and Order denying Motion for Reconsideration, ECF No. 61.

[28] *Elias*, 872 F.3d at 104.

[29] App'x 472.

was false to claim that Palin or her political action committee were connected to the Loughner shooting.

The PAC alleges that, from 2006 to 2016, Bennet was the editor-in-chief of *The Atlantic*, where "he was responsible for the content of, reviewed, edited and approved the publication of numerous articles confirming there was no link between Mrs. Palin and Loughner's shooting."[30] The complaint references several articles about the Loughner shooting published by *The Atlantic* during Bennet's tenure, the most notable of which is entitled *"Ten Days That Defined 2011."* The part of that article discussing the Loughner shooting reads: ". . . the bad thing to come out of this already terrible story was a round of blame hurling, with people rushing to point at Sarah Palin's infamous target map . . . . In truth, Loughner is clinically insane and this was not really about politics at all."[31]

At the hearing, Bennet stated that he could not recall reading those articles, and even if he had read them, he did not have them in mind when he published the editorial. The district court, in rejecting Palin's theory as implausible, credited this testimony as truthful when it found that Bennet's failure to read the articles was simply a research failure that did not rise to the level of actual malice.

By crediting Bennet's testimony, the district court rejected a permissible inference from the articles: that one who had risen to editor-in-chief at *The Atlantic* knew their content and thus that there was no connection between Palin and the Loughner shooting. That Palin's complaint sufficiently alleges that Bennet's opportunity to

[30] App'x 481.

[31] Richard Lawson, *Ten Days That Defined 2011*, The Atlantic, Dec. 29, 2011.

know the journalistic consensus that the connection was lacking gives rise to the inference that he actually did know.

The PAC also includes allegations suggesting that Bennet in particular was more likely than the average editor-in-chief to know the truth about the Loughner shooting because he had reason to be personally hostile toward Palin, her political party, and her pro-gun stance. Bennet's brother, a Democrat, had served as a United States Senator for Colorado since 2009. In 2010, Senator Bennet was endorsed by two House members whose districts had been targeted by the SarahPAC map. Two days before the Loughner shooting, a man threatened to open fire on Senator Bennet's offices, and thereafter both Bennet brothers became "outspoken advocate[s] for gun control."[32] Also, during the 2016 election, Palin endorsed Senator Bennet's opponent and Representative Giffords endorsed Senator Bennet.

The district court gave no weight to these allegations, finding that political opposition did not rise to the level of actual malice. We agree with the district court that political opposition alone does not constitute actual malice, but we conclude that these allegations could indicate more than sheer political bias—they arguably show that Bennet had a personal connection to a potential shooting that animated his hostility to pro-gun positions at the time of the Loughner shooting in 2011.[33] Palin's allegations are relevant to the credibility of Bennet's testimony that he was unaware of facts

[32] App'x 480.

[33] *Cf. Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 590 (D.C. Cir. 2016) ("[A] newspaper's motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice." (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989))).

published on his watch relating to the Loughner shooting and that he made a mistake when he connected Palin to the that shooting. Palin's allegations present a plausible inference that Bennet's claim of memory loss is untrue.

At a minimum, these allegations give rise to a plausible inference that Bennet was reckless when he published the editorial without reacquainting himself with the contrary articles published in *The Atlantic* six years earlier.[34] And that plausible inference of recklessness is strengthened when added to Palin's allegations that Bennet had reason to be personally biased against Palin and pro-gun positions in general. When properly viewed in the plaintiff's favor, a reasonable factfinder could conclude this amounted to more than a mistake due to a research failure.

Second, the PAC also alleges that certain aspects of the drafting and publication process of the editorial at *The New York Times* permits an inference of actual malice. Elizabeth Williamson, the editorial writer who drafted the initial version of the editorial, had hyperlinked in her draft an article entitled "*Sarah Palin's 'Crosshairs' Ad Dominates Gabrielle Giffords Debate*." The article stated, contrary to the claim in the published editorial, that "[n]o connection" was made between the SarahPAC map and Loughner.[35] The link was also included in the final version of the editorial, a version that Bennet essentially rewrote. The Times argues that the hyperlink shows the absence of malice. But

[34] *See Behar*, 238 F.3d at 173–74 (actual malice satisfied upon a showing the statement was made "with reckless disregard of whether it was false or not" (internal quotation marks omitted)).

[35] App'x 642–43.

the PAC alleges that, by including a hyperlink that contradicted the argument of his editorial, Bennet "willfully disregarded the truth."[36]

The district court, siding with the Times, concluded that including the hyperlinked article was further evidence of simple mistake. After crediting Bennet's testimony that he did not read the hyperlinked article, the district judge concluded that a mistake was the only plausible explanation. But 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. In any event, under these circumstances, it was arguably reckless for Bennet to hyperlink an article that he did not read.

Third, the district court concluded that the correction swiftly issued by the Times again demonstrated that the only plausible explanation for the erroneous statements was a mistake. Yet, it is also plausible that the correction was issued after a calculus that standing by the editorial was not worth the cost of the public backlash. Bennet could have published the editorial knowing—or recklessly disregarding—the falsity of the claim, and then decided later that the false allegation was not worth defending.

At bottom, it is plain from the record that the district court found Bennet a credible witness, and that the district court's crediting his testimony impermissibly anchored the district court's own negative view of the plausibility of Palin's allegations.

The district court at one point stated that Bennet's "behavior is much *more plausibly* consistent with making an unintended mistake

[36] App'x 494.

and then correcting it than with acting with actual malice."[37] Perhaps so, but it is not the district court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory. The test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation.[38] The jury may ultimately agree with the district court's conclusion that Bennet was credible—but it is the jury that must decide. Therefore, at the pleading stage, we are satisfied that Palin has met her burden to plead facts giving rise to the plausible inference that Bennet published the allegedly defamatory editorial with actual malice. We emphasize that actual malice does not mean maliciousness or ill will; it simply means the statement was "made with knowledge that it was false or with reckless disregard of whether it was false or not."[39] Here, given the facts alleged, the assertion that Bennet knew the statement was false, or acted with reckless disregard as to whether the statement was false, is plausible.

The Times also argues that Palin failed to plausibly allege two other elements of a defamation claim: (1) that the editorial is not "of and concerning"[40] Palin and (2) the challenged statements cannot reasonably be understood as assertions of provably false fact. The

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[37] *Palin*, 264 F. Supp. 3d at 537 (emphasis added).

[38] *See Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a probability requirement . . . .") (internal quotation marks omitted).

[39] *Behar*, 238 F.3d at 174 (internal quotation marks omitted); *see id.* ("The reckless conduct needed to show actual malice is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing, but by whether there is sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." (internal quotation marks and citation omitted)).

[40] *See Elias*, 872 F.3d at 104.

district court considered and rejected both of these arguments, and we agree.

First, Palin has plausibly alleged that the challenged statements are "of and concerning" her.[41] The Times argues that SarahPAC, as a political action committee, is a creature of federal law and entirely distinct from Palin herself. At the pleading stage, however, the bar to satisfy this element is low. As we held in *Elias*, the plaintiff "need only plead sufficient facts to make it plausible—not probable or even reasonably likely—that a reader familiar with [the plaintiff] would identify [the plaintiff] as the subject of the statements at issue."[42]

Palin's allegations are more than sufficient to plausibly allege that the challenged statements were "of and concerning" her. The editorial refers to Palin specifically—"Sarah Palin's political action committee."[43] The legal designation of a political action committee under federal law notwithstanding, Palin has plausibly pleaded that a reader would identify her as the subject of the statements. The Times' arguments to the contrary are unpersuasive.

Second, the Times argues that we can also affirm the district court because the challenged statements are not reasonably capable of being proven false.[44] The Times claims that Loughner's motivations

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[41] *Id.* ("[A] defamation plaintiff must allege that the purportedly defamatory statement was of and concerning him or her . . . ." (internal quotation marks omitted)).

[42] *Id.* at 105 (citing *Iqbal*, 556 U.S. at 678).

[43] App'x 37.

[44] *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990); *see also Celle*, 209 F.3d at 178 (noting that under New York law differentiating opinion from actionable fact involves "a determination of whether the statement is capable of

are ultimately unknowable and speculative. This objection also goes nowhere. We agree with the district court that a reasonable reader could view the challenged statements as factual, namely that Palin, through her political action committee, was directly linked to the Loughner shooting. The social media backlash that precipitated the correction further suggests that the Times' readers perceived the false statements as fact-based.

We conclude by recognizing that First Amendment protections are essential to provide "breathing space" for freedom of expression.[45] But, at this stage, our concern is with how district courts evaluate pleadings. Nothing in this opinion should therefore be construed to cast doubt on the First Amendment's crucial constitutional protections. Indeed, this protection is precisely why Palin's evidentiary burden at trial—to show by clear and convincing evidence that Bennet acted with actual malice—is high. At the pleading stage, however, Palin's only obstacle is the plausibility standard of *Twombly* and *Iqbal*. She has cleared that hurdle.

Naturally, we take no position on the merits of Palin's claim.

CONCLUSION

For the reasons stated above, we VACATE and REMAND the judgment of the district court for further proceedings consistent with this opinion.

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being objectively characterized as true or false" (internal quotation marks omitted)).

[45] *New York Times*, 376 U.S. at 271–72.