No. 21-2702

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Michael Avenatti,

Plaintiff-Appellant,

v.

Fox News Network, LLC; Sean Hannity; Laura Ingraham; Maria Bartiromo; Howard Kurtz; Shannon Bream; Bret Baier; Trish Regan; Raymond Arroyo; Jon Scott; Leland Vittert; and Jonathan Hunt,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Delaware
The Honorable Stephanos Bibas, Circuit Judge, sitting by designation
Case No. 20-cv-01541-SB

Brief of Institute for Free Speech as *Amicus Curiae* in Support of Defendants-Appellees

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* Counsel would like to thank Michael Burnett, Simon Ruhland, and Jason Lundry, UCLA School of Law students who worked on the brief.

Rule 26.1 Disclosure Statement

Amicus Curiae Institute for Free Speech has no parent companies, subsidiaries, or affiliates and does not issue shares to the public.

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Interest of *Amicus Curiae*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. Along with scholarly and educational work, the Institute represents individuals and civil-society organizations in litigation securing their First Amendment liberties.

Summary of Argument

Whether this Court follows Judge Bibas in applying Federal Rule of Civil Procedure 21 and the factors from *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987), or applies the fraudulent joinder test as urged by Avenatti, the conclusion should be the same: Judge Bibas properly dismissed Jonathan Hunt and denied Avenatti's motion for remand.

Avenatti is a public figure, and the statements of which he complains are on a matter of public concern. Thus, to prevail on the fraudulent joinder inquiry, he must plead a "reasonable basis in fact" for the

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. The Defendants-Appellees have consented to the filing of this brief, but the Plaintiff-Appellant has not.

conclusion that Hunt acted with actual malice. *In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006) (quotation marks omitted).

A complaint lacking "factual allegations that suggest" knowledge of falsity or reckless disregard for the truth "has failed to plead actual malice." *Pace v. Baker-White*, 432 F. Supp. 3d 495, 513-14 (E.D. Pa. 2020) (cleaned up), *aff'd*, 850 F. App'x 827 (3d Cir. 2021). As to Hunt, the complaint is devoid of any such allegations—Avenatti merely alleges that Hunt "knew [his] statements to be false when they were made." (A. 134-35 ¶¶ 86-87, 138 ¶ 96.) Thus, Avenatti has failed to plead any "reasonable basis in fact" for the conclusion that Hunt acted with actual malice.

Avenatti likewise fails to plead a "reasonable basis in fact" supporting the claim that Hunt made a defamatory statement. His principal allegation is that Hunt defamed him by saying that Avenatti was "charged" with domestic violence when, in fact, he was "arrested" for domestic violence. (A. 134 ¶ 86, 138 ¶ 96.) Avenatti believes that there is a "marked, material difference" between saying a person was arrested and charged. (*Id.* at 130-31 ¶ 79.) Yet this argument fails as a matter of law.

Hunt's statements were substantially true because the average viewer would know that police needed probable cause to arrest Avenatti. (Avenatti does not allege that he was arrested without probable cause.) Thus, had Hunt said that Avenatti was "arrested" for domestic violence, viewers would have understood that the arresting officer had "a reasonable ground for supposing that a charge [of domestic violence] is well-founded."[2] Likewise, by saying that Avenatti was "charged," Hunt conveyed that an "assertion . . . ascribing guilt"[3] had been made. To the average viewer, the "gist" or "sting" would be the same. *Masson v. N.Y. Magazine, Inc.*, 501 U.S. 496, 517 (1991) (citation and quotation marks omitted).

And on the day of Avenatti's arrest, the Los Angeles Police Department issued two public statements: one announcing that Avenatti was arrested "on suspicion of domestic violence," the other that Avenatti "was booked . . . on a felony domestic violence charge (273.5 PC)." (Def.

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[2] *Probable Cause*, Merriam-Webster (last visited Nov. 11, 2021), https://www.merriam-webster.com/dictionary/probable%20cause.

[3] *Charge* (def. 4a), Merriam-Webster (last visited Nov. 11, 2021), https://www.merriam-webster.com/dictionary/charge.

Br. ISO Mot. to Dismiss 4 (Dkt. No. 12) (cleaned up).) Accordingly, Hunt's statements were literally true.

Thus, even under the fraudulent joinder test, it is clear that Hunt was not properly joined, and Judge Bibas therefore properly rejected Avenatti's thirteenth-hour attempt to destroy diversity jurisdiction. Accordingly, this Court should affirm both Hunt's dismissal and the denial of Avenatti's motion for remand.

Argument

a. Avenatti fails to plead that Hunt made any statement with actual malice

Avenatti concedes that, to avoid a finding of fraudulent joinder, he must plead "a reasonable basis in fact" for his defamation claim against Hunt. App. Br. 35; *see also In re Briscoe*, 448 F.3d at 218-19. "If a district court can discern, as a matter of law, that a cause of action is time-barred under state law, it follows that the cause fails to present even a colorable claim against the non-diverse defendant," *In re Briscoe*, 448 F.3d at 219; and the same logic applies to other legal barriers to recovery, such as absence of actual malice. Thus, Avenatti must plead facts sufficient to show that Hunt had "knowledge" that his allegedly defamatory

statements were false or had "reckless disregard" as to their falsity. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

To be legally sufficient, a public figure's libel complaint must "plead facts that suggest actual malice." *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 360 (3d Cir. 2020). "In the wake of *Iqbal* and *Twombly*, adequately pleading actual malice is an onerous task." *Pace*, 432 F. Supp. 3d at 513-14.[4] "[N]either negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, are sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used." *Id.* at 513 (cleaned

[4] Avenatti claims that "the *Iqbal* and *Twonbly* [sic] pleading standards are irrelevant in a fraudulent joinder analysis." (App. Br. 37.) As authority, he cites a district court case (*McDermott v. CareAllies, Inc.*, 503 F. Supp. 3d 225, 229 & n.14 (D.N.J. 2020)) and a pre-*Twombly* appellate case (*Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 853-54 (3d Cir. 1992)). Thus, it is not clear that his proposition is good law.

But this Court need not reach that question because the more forgiving pleading standard discussed in *Batoff* applies only to complex state law questions: "A claim which can be dismissed only after an intricate analysis *of state law* is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction." 977 F.2d at 953 (emphasis added). Whether Avenatti adequately pleaded actual malice is a First Amendment question, and thus a matter of federal law. And whether he adequately pleaded that Hunt's statements were defamatory does not require an intricate analysis of state law because California law is clear as to when language is defamatory.

up). And of course, a complaint lacking "factual allegations that suggest" knowledge of falsity or reckless disregard for the truth "has failed to plead actual malice." *Id.* at 514.

Pace dismissed a defamation complaint because it "merely recite[d] that Defendants acted in a 'malicious, intentional and reckless' manner." *Id.* Likewise, Avenatti pleaded that Hunt "w[as] fully aware that [his] statements in the articles were false." (A. 138 ¶ 96, 134-35 ¶¶ 86-87.) But he fails to "plead facts that suggest" Hunt possessed such awareness. *McCafferty*, 955 F.3d at 360. Thus, Avenatti's "threadbare recitals of the elements" of defamation, "supported by mere conclusory statements, do not suffice, and the Court must disregard them." *Pace*, 432 F. Supp. 3d at 514 (cleaned up).

b. Hunt's statements are not libelous because they are substantially true

Likewise, this is a case where "a district court can discern, as a matter of law, that a cause of action is [barred] under state law" because Hunt's statements were true. *In re Briscoe*, 448 F.3d at 219. Thus, it again "follows that the cause fails to present even a colorable claim against the non-diverse defendant." *Id.*

Avenatti claims that Hunt made the following defamatory statements:

On November 15, 2018, that Avenatti was "charged with domestic violence" and "left court last night." (A. 134 ¶ 86 (cleaned up).)

On November 20, 2018, that Avenatti "was 'out on bail after domestic violence charge'" and "'was formally charged last week with felony domestic violence.'" (*Id.* at 138 ¶ 96.)

But, as a matter of law, these statements cannot be defamatory: each is substantially true.

i. It is substantially true that Avenatti was charged with felony domestic violence

Truth "is an absolute defense to any libel action." *Campanelli v. Regents of Univ. of Cal.*, 44 Cal. App. 4th 572, 581 (1996) (citation omitted). "In order to establish the defense, the defendant need not prove the literal truth of the allegedly libelous accusation, so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark." *Id.* at 581-82 (citation omitted). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson*, 501 U.S. at 517 (citation and quotation marks omitted).

"In determining whether statements are of a defamatory nature, and therefore actionable, a court is to place itself in the situation of the hearer

or reader, and determine the sense or meaning of the language . . . according to its natural and popular construction." *Balzaga v. Fox News Network, LLC*, 173 Cal. App. 4th 1325, 1338 (2009) (citation and quotation marks omitted).

1. It is substantially true that Avenatti was "charged"

Avenatti claims that "there [i]s a marked, material difference—factually, legally, reputationally and culturally—between" "charge" and "arrest." (A. 130-31 ¶ 79.) But "minor inaccuracies of terminology or detail do not prevent the story from being substantially true as long as the 'gist' or 'sting' of the defamation is true." Rodney A. Smolla, 1 Law of Defamation § 5:17 (2d ed. Nov. 2021 update) (footnote omitted). Likewise for "[e]rrors of a technical nature . . . particularly errors in the use of legal terminology." *Id.* § 3:84 (discussing actual malice standard) (footnote omitted).

Rouch v. Enquirer & News of Battle Creek, for example, rejected the plaintiff's claim that it was libelous to say he was "charged with sexual assault" when he was arrested but not formally arraigned. 487 N.W.2d 205, 215-16 (Mich. 1992). The court overturned a lower court's "formalistic interpretation of the word 'charge,'" and instead stressed the

need "to ascertain the 'gist' or 'sting' of the article to the lay reader." *Id.* at 263. "Technical inaccuracies in legal terminology employed by nonlawyers such as those at issue here fall within this category" of minor errors that do not affect the gist or sting. *Id.* at 264. Though "plaintiff asserts that 'charge' should be limited to circumstances in which a formal arraignment has been held," "the word at issue in this case encompasses the formal legal sense as well as a broader lay sense." *Id.* " [U]se of 'charge' absent formal arraignment cannot be deemed materially false." *Id. See also Rosales v. City of Eloy*, 593 P.2d 688, 690 (Ariz. Ct. App. 1979) ("The word 'charges' also denotes 'accusations' or 'allegations' and does not necessarily mean the filing of criminal charges.").

Avenatti's claims fare no better. In the "natural and popular construction," *Balzaga*, 173 Cal. App. 4th at 1338, of the terms "charge" and "arrest," both would be understood as implying probable cause, and thus as having the same gist and sting, *Masson*, 501 U.S. at 517. *Compare Probable Cause*, Merriam-Webster (last visited Nov. 11, 2021), https://www.merriam-webster.com/dictionary/probable%20cause ("reasonable ground for supposing that a charge is well-founded"), *and Probable Cause*, Dictionary.com (last visited Nov. 11, 2021), https://

www.dictionary.com/browse/probable-cause ("reasonable ground for a belief, as, in a criminal case, that the accused was guilty of the crime"),[5] *with Charge* (def. 4a), Merriam-Webster (last visited Nov. 11, 2021), https://www.merriam-webster.com/dictionary/charge ("to make an assertion against especially by ascribing guilt or blame"), *and Charge* (def. 19), Dictionary.com (last visited Nov. 11, 2021), https:// www.dictionary.com/browse/probable-cause ("an accusation or allegation, such as a formal accusation of a crime in law"). Indeed, even some legal definitions of "arrest" imply an underlying charge. *See Arrest* (def. 2), Black's Law Dictionary (11th ed. 2019) ("The taking or keeping of a person in custody by legal authority, *esp. in response to a criminal*

[5] The average reader would be familiar with the concept of probable cause, which is often discussed in popular police procedurals. *See*, *e.g.*, Susan A. Bandes, *And All the Pieces Matter: Thoughts on The Wire and the Criminal Justice System*, 8 Ohio State J. Crim. L. 435, 441 (2011) (noting that, in *The Wire*, "[p]olice and Assistant State's Attorney Rhonda Pearlman and Judge Phelan spend substantial time discussing the threshold for probable cause and drafting warrant applications and reviewing arguments for extensions on wiretaps"); Susan A. Bandes, *Video, Popular Culture, and Police Excessive Force: The Elusive Narrative of Over-Policing*, U. Chi. Legal Forum 1, 8-9 (2018) ("Cop shows have played an influential role in shaping our national consciousness about police and policing. . . . Tropes about cops and perps and the nature of crime permeate popular discourse, including discourse about law." (footnote omitted)).

charge; specif., the apprehension of someone for the purpose of securing the administration of the law, esp. of bringing that person before a court." (emphasis added)).

Thus, had Hunt stated that Avenatti was "[arrested for] domestic violence" (A. 134 ¶ 86), the average reader or viewer would have presumed that the arresting officer had "a reasonable ground for supposing that a charge [of domestic violence] is well-founded," because arrests require probable cause. (*See* A. 20 ("Police are supposed to [have] good reason to arrest people").) That is at least as damning as an "assertion . . . ascribing guilt," to quote one of the definitions of "charge" given above.

Further, on the date of Avenatti's arrest, the LAPD stated both that "[its] Detectives *arrested*" him, and that its officers "'booked [him] . . . on a felony domestic violence *charge*.'" (Def. Br. ISO Mot. to Dismiss 4 (Dkt. No. 12) (citation omitted) (emphasis added).) These statements can only be reconciled in two ways, each fatal to Avenatti's claim that "arrest" and "charge" are markedly different.

1. Perhaps the LAPD used "arrest" and "charge" interchangeably. Such usage would vitiate Avenatti's claim of a "marked, material

difference" between the two terms. Indeed, if the cognoscenti in law enforcement understand those terms as being interchangeable, it is implausible that "the average reader" would understand them as having distinct meanings. Thus, Hunt's statements about Avenatti being charged would be substantially true.

2. Alternatively, perhaps the LAPD used "arrest" and "charge" according to their legal definitions. *E.g.*, *Arrest* (def. 1), Black's Law Dictionary (11th ed. 2019) ("A seizure or forcible restraint, esp. by legal authority."); *Charge* (def. 1), Black's Law Dictionary (11th ed. 2019) ("A formal accusation of an offense as a preliminary step to prosecution."). But such usage would vitiate Avenatti's claim to have "NEVER been charged with any crime relating to his arrest." (A. 130 ¶ 78; *see also id.* at 129-31 ¶¶ 74, 76, 80; *id.* at 139 ¶ 102; *id.* at 141 ¶ 107.) More importantly, such usage would render Hunt's statements about Avenatti being charged literally true.

Because the average viewer would understand "charge" and "arrest" as having the same gist, and because Avenatti fails to plead facts to the contrary, Hunt's statement that Avenatti was "charged" is substantially

true. Accordingly, Avenatti has failed to plead a "reasonable basis in fact" that the statement is actionable. *In re Briscoe*, 448 F.3d at 216.

2. It is true, or at least privileged, that Avenatti was charged with felony domestic violence

On November 14, 2018, the LAPD publicly announced that "'its Detectives arrested Michael Avenatti on suspicion of domestic violence,' that he 'was booked . . . on a felony domestic violence charge (273.5 PC).'" (Def. Br. ISO Mot. to Dismiss 4 (Dkt. No. 12) (brackets omitted).) Hunt's reporting of those statements is privileged, as "a fair and true report in . . . a public journal, of [a] public official proceeding . . . or . . . anything said in the course thereof." Cal. Civ. Code § 47(d)(1) (West 2021):

> A "public official proceeding" includes a police investigation. Thus, an article or broadcast about statements made in the context of a police investigation is privileged and cannot support a defamation claim. The privilege applies if the substance of the publication or broadcast captures the gist or sting of the statements made in the official proceedings.

Balzaga, 173 Cal. App. 4th at 1337 (citations omitted).

3. Hunt's statement that Avenatti was released on bail is privileged

On the day of his arrest, the LAPD announced that "[h]is bail [wa]s set at $50,000." (Def. Br. ISO Mot. to Dismiss 4 (Dkt. No. 12).) For the

same reason discussed above, even if the LAPD's statement was false, Hunt's would be privileged.

ii. Hunt's statement that Avenatti "left court last night" is not defamatory

In context, viewers would understand that Avenatti "left court" in relation to his domestic violence charge. As discussed above, it is substantially true that Avenatti was charged with domestic violence.

* * *

Because Avenatti has failed to plead any "reasonable basis in fact" that Hunt made a defamatory statement, his joinder is fraudulent. *In re Briscoe*, 448 F.3d at 216.

c. California law applies to Avenatti's claims

"The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Because "Delaware state courts follow the conflicts of law provisions in the Restatement (Second) of Conflicts," *Callaway Golf Co. v. Dunlop Slazenger Grp. Americas, Inc.*, 295 F. Supp. 2d 430, 434 (D. Del. 2003), federal courts must do so as well.

Section 150 of the Restatement directly addresses scenarios where defamation by way of an "aggregate communication" is alleged. Restatement (Second) of Conflict of Laws § 150. Aggregate communications are those "published simultaneously in two or more states." *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1138 (3d Cir. 1977) (footnote omitted). Such defamation claims are governed by "the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and parties" under the Restatement's general choice-of-law principles. Restatement § 150(1).

And for individual plaintiffs, this is presumed to be "the state where the person was domiciled at the time." *Id.* § 150(2). "The state where the injured party is domiciled (for natural persons) . . . will usually be the state of most significant relationship for claims of defamation by an aggregate communication that was published in that state." *Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, No. 10046-VCP, 2015 WL 5724838, at *11 (Del. Ch. Sept. 30, 2015).

Avenatti was domiciled in California at all relevant times. (A. 109; Def. Br. ISO Mot. to Dismiss 10 (Dkt. No. 12).) On appeal, he suggests

otherwise. (App. Br. 39 n.5.) But in the court below, the Defendants argued for application of California law (Def. Br. ISO Mot. to Dismiss 10 (Dkt. No. 12)), and Avenatti made no contrary argument. Thus, he failed to preserve the issue. Because there are no "sufficiently significant considerations" to overcome the presumption that California law applies, *Aoki v. Benihana, Inc.*, 839 F. Supp. 2d 759, 765 (D. Del. 2012), California law governs this suit.

Conclusion

Federal courts should not allow "devices"—such as Hunt's belated joinder—"intended to prevent a removal to a Federal court." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). This Court has "adhered to this principle in the context of fraudulent joinder used to defeat diversity jurisdiction." *Brown v. Jevic*, 575 F.3d 322, 326 (3d Cir. 2009). The District Court found "that Avenatti's purpose in" adding Hunt "was to defeat diversity jurisdiction." (A. 10.) Thus, in keeping with the principle against fraudulent joinders, the court analyzed the propriety of Hunt's joinder using the *Hensgens* factors (A. 9-12), dismissed him under Rule 21 (*id.* at 12), and denied Avenatti's motion for remand (*id.*).

Even under the fraudulent joinder test, Avenatti's attempt to join Hunt fails. Avenatti failed to plead any fact suggesting that Hunt acted with actual malice; instead, he merely alleged that Hunt "w[as] fully aware that [his] statements in the articles were false." (A. 138 ¶ 96; *see also id.* at 134-35 ¶¶ 86, 87 (same).) Such conclusory allegations do not constitute a "reasonable basis in fact." *In re Briscoe*, 448 F.3d at 216.

Likewise, Avenatti has failed to allege a "reasonable basis in fact" for his claim that Hunt made a defamatory statement. And because Avenatti was positioning himself for running for the nation's highest office at the time the statements were made, Hunt's speech is entitled to the strongest protection afforded by the First Amendment.

For all of the foregoing reasons, *amicus* respectfully asks that the judgment of the District Court be affirmed.

Date: December 23, 2021

s/ Eugene Volokh
Attorney for *Amicus Curiae*
Institute for Free Speech

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,451 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Date: December 23, 2021

s/ Eugene Volokh
Attorney for *Amicus Curiae*
Institute for Free Speech

Certificate of Service

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on December 23, 2021.

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Date: December 23, 2021

s/ Eugene Volokh
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