No. 14-393

# In the Supreme Court of the United States

JOE D'AMBROSIO,

*Petitioner*,

v.

CARMEN MARINO, et al.,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITIONER'S REPLY BRIEF


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November 11, 2014


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## REPLY

Respondents' Opposition Briefs not only confirm that this Court's review of the Question Presented is warranted, they unwittingly illustrate precisely why this case is the ideal vehicle for the Question.

The County lodges three arguments: (1) the Petition never identified any conflict between the decision below and the decisions of any other court or this Court; (2) whether *Iqbal* is wrongly decided was not raised below; and (3) D'Ambrosio's *Monell* claims cannot proceed to discovery because they lack factual specificity to show a custom or pattern as only some County misconduct is known. Respondent Allen repeats these points and adds that he never conceded that the withheld evidence was "obviously exculpatory," as Judge Kethledge had stated.

These arguments are easily discarded: (1) the whole point of the Petition is that the decision below follows *Iqbal*'s approach, and that approach directly conflicts with Rule 8 and the decisions of this Court in *Conley*, *Swierkiewicz*, and *Twombly*; (2) of course D'Ambrosio never previously raised the argument that *Iqbal* was wrongly decided—no lower court has the authority to overrule decisions of this Court; and (3) under *Twombly*, D'Ambrosio's claims are entitled to discovery—*even if they lack factual specificity*—because they specify proven misconduct (unlike *Twombly*) and plausibly suggest *more of the same misconduct* that is not yet known. As to Allen's final point about not conceding that the evidence was obviously exculpatory: That claim is simply not true, but it is also irrelevant since the courts have universally concluded that the withheld evidence was exculpatory.

The Court should grant certiorari.

## I. The whole point of the Petition is that the decision below conflicts with decisions of this Court.

Respondents are missing the point of the Petition. A brief recap is in order:

The Petition explained that *Twombly*'s two-step approach to assessing complaints under Rule 8 is correct. First, the court determines whether the complaint is sufficiently factually specific. If so, the complaint satisfies Rule 8 (just as the complaints did in *Conley* and *Swierkewicz*). If not, then the court determines whether the complaint still gives rise to a plausible claim. This second inquiry turns on whether the specific facts alleged plausibly suggest actionable misconduct. In *Twombly*, the complaint failed this second step because the specific facts alleged lawful conduct that had an obvious lawful explanation (i.e., that parallel business conduct was expected in that industry and did not plausibly suggest a conspiracy). But *Iqbal* did not follow this proper approach. The *Iqbal* Court mistakenly held that once a complaint fails the first step (lacking factual specificity), the complaint is—by definition—lacking plausibility as well. Thus, *Iqbal* conflicts with *Twombly, Swierkiewicz*, and *Conley*. This is illustrated by the massive split in the Courts regarding whether *Iqbal* overturned *Swierkiewicz*, where this Court unanimously concluded that the same sort of allegations satisfied Rule 8.

The Petition further explained why D'Ambrosio's case is the ideal vehicle to address this question: Even assuming that the Complaint fails step one (sufficient

factual specificity), it satisfies step two and plausibly states a claim because—unlike *Twombly*—the specific facts alleged here involve *unlawful* (and proven) conduct. Employing *Iqbal*'s mistaken approach, the court below simply stopped at step one, concluding that a lack of factual specificity ended the analysis. Under the proper approach as stated in *Twombly* (and consistent with *Swierkiewicz* and *Conley*), D'Ambrosio easily satisfies Rule 8—the misconduct by Carmen Marino that has surfaced is severe, proven, and occurred at the highest levels of that office on multiple occasions, and is exactly the type that the County would attempt to ensure "doesn't get known by everybody." Pet. at 4 (quoting Kethledge, J.).

## II. All of Respondents' arguments are mistaken.

Respondents' three main points (and Allen's additional point) unravel quickly.

***First***, Respondents claim that the Petition fails to identify any conflict between the decision below and any decision of this Court. (County Opp. at 7; Allen Opp. at 6.) As shown, the whole point is that the decision below applies the *Iqbal* approach, which conflicts with *Twombly*, *Swierkiewicz*, *Conley*, and Rule 8 itself. Indeed, even the County acknowledges that just ten years ago the court below may have deemed the Complaint sufficient under various "cases from the nineties" (before *Iqbal*) interpreting Rule 8 for *Monell* claims. (County Opp. at 7.)

***Second***, Respondents note that D'Ambrosio did not argue to the court below that *Iqbal* was wrongly decided, and that D'Ambrosio even acknowledged that

*Iqbal*'s standard applied. (County Opp. at 5; Allen Opp. at 4.) This is an odd point to make. Of course D'Ambrosio did not argue to the Sixth Circuit that it should conclude *Iqbal* was wrong or that *Iqbal* did not govern—only this Court can overturn *Iqbal*. Not even the novice practitioner would make such a foolish argument below. Respondents are confusing this situation with one in which a petitioner seeks review of a *legal claim* that has not been presented below. Here, the legal claim D'Ambrosio presents is whether the Complaint satisfies Rule 8, and that was indisputably the entire focus of the decisions below. As to legal claims, this Court is indeed "one of final review, not of first view." (Allen Opp. at 4 (quoting *Ford Motor Co. v. United States*, 134 S. Ct. 510, 510–11 (2013).)

***Third***, the County contends that D'Ambrosio's *Monell* claim lacks factual specificity and therefore was properly dismissed on that basis alone. (*See, e.g.*, County Opp. at 4–5 (admitting that prosecutor Marino violated *Brady* in multiple cases but contending that D'Ambrosio failed to allege sufficient facts of a widespread practice).) This, of course, is exactly why this case is the perfect complement to *Twombly*. Even assuming Respondents and the court below were correct that D'Ambrosio failed to allege sufficient factual specificity (step one), the Complaint *does* allege a plausible claim (step two) of further widespread misconduct because—unlike *Twombly*—the court is simply asked to infer *further* misconduct from known, severe, repeated misconduct (not from lawful conduct). The County's entire argument here illustrates why this case is an ideal vehicle to address the Question Presented.

And in an effort to further buttress this idea that the Complaint here was factually insufficient, both Respondents cite to *Connick v. Thompson*, where John Thompson, like D'Ambrosio, was freed after years on death row and brought a § 1983 claim against the prosecutor's office for the *Brady* violations that caused his wrongful imprisonment. 131 S. Ct. 1350 (2011). This is a strange case for the Respondents to cite in their favor: *Thompson's claims were sufficient to proceed to discovery under Rule 8*. D'Ambrosio is making the same point. The problem for *Thompson* was that, *at trial*, the jury rejected his direct *Monell* claim that the prosecutor's office had a pattern of *Brady* violations. *Id.* at 1357 & 1364 n.10 ("The jury rejected this claim, and Thompson does not challenge that finding."). The sole issue for this Court in *Thompson*—not present here—was whether the jury had an adequate basis to conclude that he had proven liability for the more-nebulous claim that the office had also failed to adequately train its prosecutors. *Id.* at 1360 (concluding that Thompson had not presented sufficient facts—*after discovery*—to support this claim); *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 822–23 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*.").

***Finally,*** we come to Allen's argument that the court below was correct to dismiss the claim against him for concealing exculpatory evidence because the Complaint did not properly phrase the claim as stating that he was to turn over such evidence "to the prosecutor," and, further, that he never conceded this withheld evidence was "obviously exculpatory." (Allen Opp. at 6–8.)

These contentions are also readily refuted. First, Allen has no response to the Petition's fundamental point about all of this: Such highly technical readings of complaints simply contradict this Court's Rule 8 decisions, such as *Conley* and *Swierkiewicz*, which ensure that cases are decided "on the merits" and not on a "misstep by counsel." Pet. at 27 n.8 (quoting *Conley*, 355 U.S. at 48). Second, as if it were not clear that the withheld evidence here was indeed exculpatory (as all courts addressing this case have indisputably concluded), the exchange with Judge Kethledge speaks for itself:

> Judge Kethledge: If you're mistaken about this *technical barrier* to their claim going forward, would you concede that based on these *I would think highly exculpatory pieces of evidence* that Detective Allen . . . allegedly . . . concealed—would you agree that those allegations do make out a claim for officer liability under this Court's decision in *Moldowan* and the Supreme Court's decision in *Trombetta*?
>
> * * *
>
> Counsel for Allen: . . . . I would say that another element that they would have to allege is sufficient facts to show that . . . it was . . . readily

> apparent to him at the time that this was both material and exculpatory. . . .
>
> Judge Kethledge: *Some evidence is obviously exculpatory.*
>
> Counsel for Allen: *Right.*

(Sixth Circuit Oral Arg., 31:25-31:43 (emphasis added).)

In sum, all of Respondents' efforts to impugn the Petition fall short.

## III. Respondents do not contend that there are any flaws to the substantive approach to Rule 8 advocated in the Petition.

In addition to Respondents' flawed arguments above, their Opposition Briefs are also noteworthy for what they do not say. They do not dispute that there is a real and developed conflict among the circuits regarding the proper Rule 8 analysis—so much so that it is entirely unclear whether *Swierkiewicz* even remains good law in light of *Iqbal*. Moreover, Respondents do not contend that there are any analytical or historical flaws presented by the solution the Petition endorses to clarify this state of affairs: Adopt the proper interpretation of Rule 8 and *Twombly* noted above (consistent with *Conley* and *Swierkiewicz*), and overturn the flawed *Iqbal* decision.

Granting review here will enable this Court to clarify the fundamental threshold question clouding every lawsuit filed in this nation: Is the complaint sufficient to proceed under the Federal Rules of Civil

Procedure? This an important federal question of the highest degree. And it is one that can be resolved only by this Court.

## CONCLUSION

The Petition should be granted.

Respectfully submitted,

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