No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), be overturned?

PARTIES TO THE PROCEEDING

Petitioner Joe D'Ambrosio was the plaintiff in the district court. Respondent Carmen Marino was sued in his official capacity as a county prosecutor, thus making Cuyahoga County, Ohio, a defendant. Respondent Cleveland police officer Leo Allen was sued in his individual capacity and was also a defendant in the district court. Respondent City of Cleveland was also a defendant in the district court. In the court of appeals, Petitioner was the appellant, and Respondents were appellees.

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PETITION FOR A WRIT OF CERTIORARI

Joe D'Ambrosio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals is available at 747 F.3d 378 and reproduced in the Appendix. (Pet. App. 1–22.) The decision of the U.S. District Court for the Northern District of Ohio is available at 2013 U.S. Dist. LEXIS 10100 and reproduced in the Appendix. (Pet. App. 23–56.)

JURISDICTION

The court of appeals issued its judgment on March 27, 2014. (Pet. App. 1.) The court denied Petitioner's timely petition for rehearing en banc on May 8, 2014. (Pet. App. 57.) Justice Kagan granted an extension of time to file this Petition to and including October 5, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

Federal Rule of Civil Procedure 8(a) provides in part as follows: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

STATEMENT OF THE CASE

Petitioner Joe D'Ambrosio was sent to death row in 1989 and was there for more than a decade when federal courts required that Cuyahoga County prosecutors and Cleveland police turn over all of their files, finally revealing the evidence of his innocence that had been concealed all along. (This included evidence that another suspect had a motive to kill the victim, that the suspect knew details about the victim's injuries that were not publicly known, and that—contrary to what the jury heard—the murder likely took place in the suspect's building where people heard someone say "let's dump the body.") After 20 years on death row and even further misconduct by the County, D'Ambrosio was finally freed in 2010.

Time further revealed additional misconduct that occurred in the County Prosecutor's office in other cases. The same high-level and long-serving lead prosecutor on D'Ambrosio's case, Carmen Marino, also withheld exculpatory evidence in the murder case against a man named Ronald Larkins. Larkins was also tried in the 1980s, just before D'Ambrosio, and it wasn't until 2003 that this misconduct surfaced. *See State v. Larkins*, 2006 Ohio 90, 2006 Ohio App. LEXIS 80 (Ohio Ct. App. Jan. 12, 2006). Larkins was also freed. In 2004, the Sixth Circuit noted what was called the "shameful" record of Marino, citing more than ten cases involving "similar misconduct" to *Brady* violations. (Second Am. Compl. ¶ 28; R. 20 at 25 (citing *Lott v. Coyle*, 366 F.3d 431, 433 n.1 (6th Cir. 2004)).) After many years, the world started to learn that Marino and the County cheated to obtain convictions. Scholars began taking note as well: "One of the most

notorious perpetrators of this type of misconduct is the former chief prosecutor in Cuyahoga County, Ohio, Carmen Marino." Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 Case W. Res. L. Rev. 547 (2007).

This all sets up a disturbing question: What is the true extent of this misconduct, and—if Marino could commit it so egregiously and remain at such a high-level in that office for decades—did such misconduct amount to a custom of that office? *See id.* at 548 ("[O]ne can only wonder how many other 'Marino prosecutions' included exculpatory evidence that Marino concealed from the defense."). The civil justice system has, of course, a longstanding mechanism to find out the truth in these situations: The discovery stage.

Thus, D'Ambrosio filed this suit under 42 U.S.C. § 1983 seeking compensation for his wrongful imprisonment. The operative Complaint recounted in detail the wrongful conduct related to the withholding of evidence, and the Complaint even incorporated by reference more than one hundred pages of federal court habeas opinions in D'Ambrosio's case concluding that this wrongful conduct had occurred. (Second Am. Compl. ¶ 16.) The Complaint included a *Monell* claim against the County, alleging both that Marino—as a high-level lead prosecutor for so many years—was a "policymaker," and that the County itself had a policy or custom of misconduct in seeking to obtain convictions. (*Id.* ¶¶ 75–89.) The Complaint included a section entitled "The pattern and policy of violations by the Prosecutor's Office," describing Marino's misconduct here and in *Larkins*, and citing more than

ten other court decisions finding that he had committed misconduct. (*Id*. ¶¶ 75–79). The Complaint also included an alternative claim against lead Cleveland Police detective Leo Allen, alleging that he had concealed evidence "from the defense," and that he qualified as a policymaker, such that the City of Cleveland was also liable. (*Id*. ¶¶ 62–68, 90–92.)

The Defendants moved for judgment on the pleadings under this Court's decisions in *Iqbal* and *Twombly,* contending that no discovery was permitted. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The district court agreed, dismissing all claims. (Pet. App. 56.) D'Ambrosio appealed to the Sixth Circuit.

On appeal, the County argued that Marino's documented misconduct did not allow for the inference that he had committed any *more* misconduct. At oral argument, Judge Kethledge challenged that view, noting that Marino would likely be making efforts to conceal any such misconduct:

> That all sounds highly speculative, really. I mean I don't know if they would have—you know, if Marino did this in 20 other cases that we'd already know about it. I have no idea. I really don't. I mean *I'm sure Marino is doing everything he can to make sure that doesn't get known by everybody*.

(Kethledge, J., Oral Arg., Jan. 23, 2014, 20:36–20:53 (emphasis added).)[1] Judge Kethledge further

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[1] Audio of this oral argument, under case number 13-3118, is available on the Sixth Circuit's website at this address:

questioned the County regarding how, absent discovery, such a plaintiff could adequately allege even further (yet-to-be-proven) misconduct to evince a pattern or custom:

> It's hard not to have some sympathy for the Plaintiff in that respect. I mean, absent discovery, how the heck are they supposed to solve this quantitative problem? Just sit around and hope someone else has a successful habeas petition?

(*Id.* 19:03–19:18.)

For his part, Detective Allen argued that the Complaint should be dismissed against him on the basis that it phrased his wrongful conduct as concealing evidence "from the defense" instead of "from the defense by withholding it from the prosecutor." At oral argument, Judge Kethledge countered that this was a "highly technical" argument, and further elicited agreement from Allen's counsel that the claim was otherwise meritorious because the evidence concealed was "obviously exculpatory." (*Id.* 27:05–28:15; 31:25–31:43.)

Nevertheless, in an opinion by Judge Griffin (joined by Judge Suhrheinrich and Judge Kethledge), the Sixth Circuit affirmed dismissal of the Complaint. (Pet. App. 1.) The court concluded that, despite the known and undisputed misconduct at such high levels of the prosecutor's office, no discovery was permitted under *Iqbal* to ascertain the extent of that misconduct. The court also adopted Detective Allen's "highly technical"

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http://www.ca6.uscourts.gov/internet/court_audio/audSearch.htm

argument. The court then denied en banc review. After 20 years wrongfully on death row, D'Ambrosio's effort to seek redress in the federal courts has been shut down without so much as even a deposition of Carmen Marino or any other discovery.

D'Ambrosio now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Federal courts across the country are conflicted on the fundamental threshold issue for every civil action: How do we know if a complaint is sufficient for the case to proceed? This disarray is rooted in this Court's *Iqbal* decision, which purports to adopt *Twombly*'s plausibility analysis, but also conflicts with—and does not mention—the Court's unanimous decision just seven years earlier in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). *See, e.g.*, *Washington v. Certainteed Gympsum, Inc.*, No. 10-204, 2011 U.S. Dist. LEXIS 94920, at *11 (D. Nev. Aug. 24, 2011) ("Courts across the country have disagreed as to whether *Swierkiewicz* is still good law under *Twombly* and *Iqbal*'s more rigorous 'plausibility' pleading standard.") (discussing various cases).

The circuits need this Court's guidance. *See, e.g.*, *Sablan v. A.B. Won Pat Int'l Airport Auth.*, No. 10-013, 2010 U.S. Dist. LEXIS 130692, at *9–10 (D. Guam Dec. 9, 2010) (noting that the Third Circuit has held that *Swierkiewicz* was overruled, that many scholars have agreed, but that "[m]ost courts have not gone so far, because lower-court judges are not to deem a Supreme Court decision overruled *sub silentio*, even if it is plainly inconsistent with a later one," and that they "have instead struggled to reconcile *Swierkiewicz* with plausibility pleading").

There is a clear solution. As one scholar has persuasively explained, *Twombly*'s plausibility analysis is consistent with this Court's precedent, but *Iqbal* misinterpreted *Twombly* and should be overturned. Luke Meier, *Why* Twombly *Is Good Law (But Poorly*

Drafted) and Iqbal *Will Be Overturned*, 87 Ind. L.J. 709 (2012).

This case is the ideal vehicle to address this question. The proper reading of *Twombly* recognizes there are complaints that will naturally lack some factual specificity (say, about the true extent of a defendant's secretive misconduct), yet present plausible claims that are entitled to discovery. D'Ambrosio's allegations regarding the extent of misconduct here are exactly that type. Certiorari should be granted.

I. The Circuits Are Divided On The Basic Pleading Standards And Whether *Iqbal* Has Overturned *Swierkiewicz*.

A clear sense of how the basic pleading standard has developed over time is necessary to understand the severity of the current circuit split that *Iqbal* has wrought. This section provides a brief overview of that chronology and then shows how pervasive the split and confusion is among the lower courts.

A. The development of pleading standards.

The Federal Rules of Civil Procedure were implemented in 1938, with the clear objective that less factual specificity be required for pleading claims than had existed under the previous code-pleading regime. Meier, *supra*, at 718 & n.43 (citing Charles Alan Wright & Arthur R. Miller, 5 Federal Practice and Procedure § 1202, at 93 (3d ed. 2004)). This was evident from the text of Rule 8, which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (citing Fed. R. Civ. P. 8(a)(2).) Additionally, the rules provided generous discovery provisions enabling the parties to obtain

relevant information regarding the facts of the case. *Id.* at 719. The drafters of the rules also made clear that "[t]he intent and effect of the rules is to permit the claim to be stated in general terms." *Id.* & n.56 (quoting 1955 Advisory Committee Notes).

At issue are four famous decisions of this Court that have interpreted Rule 8. The first (*Conley*) was decided in 1957. The other three (*Swierkiewicz*, *Twombly*, and *Iqbal*) were all decided after the year 2000. These decisions are briefly described below.

1. 1957—Conley

In *Conley v. Gibson*, this Court issued its first interpretation of what Rule 8 requires a plaintiff to present in the initial complaint. 355 U.S. 41 (1957); Meier, *supra* at 720. The plaintiffs brought a discrimination suit under a federal statute. In this Court, the defendant raised two independent arguments to dismiss complaint. First, the defendant raised a factual-specificity challenge, contending that the factual story of discrimination in the complaint lacked sufficient specificity. Meier, *supra* at 720–22. The Court rejected this argument, explaining that the Federal Rules do not require the facts of the claim to be "set out in detail," and that "all the Rules require is a 'short and plain statement of the claim' that will give the defendant *fair notice* of what the plaintiff's claim is and the grounds on which it rests." *Conley*, 355 U.S. at 47 (quoting Fed. R. Civ. P. 8) (emphasis added). Second, the defendant raised a legal-theory challenge, contending that—regardless of the factual specificity—the legal theory of the claim was not cognizable (i.e., that the federal statute sued under did not apply). Meier, *supra* at 720–22.

It was when rejecting this legal-theory challenge that the Court issued its famous "no set of facts" phrasing for assessing whether such a legal challenge should prevail: "[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45–46. In other words, the legal theory is legitimate if there is some conceivable set of facts the plaintiff could show (even if those facts have not been alleged or shown yet) that would entitle the plaintiff relief. Thus, if a complaint sought relief under a legal theory that did not exist or did not apply to the situation, that complaint would be dismissed because there is "no set of facts" that a plaintiff could prove that would entitle the plaintiff to relief.

In the end, factual specificity under *Conley* is governed by the notice standard—the facts simply must give the defendant fair notice of what the claim is and the grounds on which it rests. Meier, *supra* at 721, 727. The *Conley* complaint satisfied Rule 8 because it provided sufficient factual specificity regarding the underlying event.

2. 2002—Swierkiewicz

For the next 45 years, Rule 8 and *Conley's* notice standard governed complaints in federal court. Yet some courts began imposing heightened pleading standards in certain types of cases.

In *Swierkiewicz v. Sorema N.A.*, the Court unanimously rejected that approach, reaffirming that the longstanding notice standard announced in *Conley*

continued to govern whether a complaint was sufficient. 534 U.S. 506 (2002); Meier, *supra* at 757. The plaintiff had filed a discrimination suit under the Civil Rights Act of 1964, alleging that he had been fired on account of his national origin. *Swierkiewicz*, 534 U.S. at 508–09. This Court explained that the plaintiff's complaint satisfied *Conley*'s notice standard by detailing "the events leading to [the plaintiff's] termination." *Id.* at 514. The Court also noted that the complaint contained "conclusory allegations of discrimination." *Id.* But because the complaint had provided specific facts regarding the termination, the complaint was sufficient. The Court further noted that it need not be plausible that the plaintiff would actually prevail: "Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Id.* at 515; Meier, *supra* at 757. Like the complaint in *Conley*, the complaint in *Swierkiewicz* had sufficient factual specificity, and it satisfied Rule 8 for that reason.

3. 2007—Twombly

Five years after *Swierkiewicz*, the Court decided *Twombly*. 550 U.S. 544. *Twombly* presented the first time this Court had ever concluded that a complaint was lacking in factual specificity regarding the underlying event alleged. Meier, *supra* at 739. It thus presented the question of whether such a complaint could *still* satisfy Rule 8 and the notice standard—and how courts should make that determination.

Twombly involved a class action alleging Sherman Act antitrust violations against major telecommunications providers. 550 U.S. at 550. The complaint included a generic allegation (without

factual specificity) of an illegal conspiracy among the defendants, and the complaint also recounted in detail the parallel business conduct of the defendants. *Id.* at 551; Meier, *supra* at 729. Though such parallel conduct is not itself illegal, the plaintiff contended that it was probative of whether an illegal conspiracy had occurred. *Id.*

This Court concluded that the complaint lacked sufficient factual specificity regarding the conspiracy itself, as the "bare assertion of conspiracy" had no mention of the "specific time, place, or person involved in the alleged conspiracies." 550 U.S. at 555 n.10 & 556; Meier, *supra* at 730. A "conclusory" allegation of an agreement at some unidentified time, the Court explained, "does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. Thus, as far as factual specificity of the underlying event, the complaint could not satisfy Rule 8.

But the Court also concluded, even in light of the more-specific allegations of parallel conduct, that the conspiracy claim also was not plausible. Writing for the Court, Justice Souter noted that such conduct was lawful and quite expected in that industry—this "was not suggestive of conspiracy, not if history teaches anything." *Id.* at 567. That lawful conduct was an "obvious alternative explanation." *Id.* Thus, not only was the complaint lacking factual specificity regarding the conspiracy, the complaint's additional allegations did not make that alleged conspiracy a plausible event. The complaint therefore still did not satisfy Rule 8.

The Court also famously retired *Conley*'s "no set of facts" language, which the *Conley* Court employed to assess a legal-theory challenge. Over time, many had

erroneously read this phrase to apply to all challenges to a complaint—including factual-specificity challenges. In this way, the standard appeared absurd, as a complaint would seemingly pass muster with nothing more than the name of the plaintiff and defendant and a request for judgment (because there would be a conceivable "set of facts" that could be legally cognizable). Meier, *supra* at 724 (citing this erroneous view). In truth, *Conley* had developed the phrase as an accurate way to dispose of *legal-theory challenges*. Meier, *supra* at 723 (noting that it is "abundantly clear that this ['no set of facts'] phrase was intended to guide a court in considering a legal theory challenge"). Indeed, because the critical question in *Twombly* was one of factual specificity, *Conley*'s "no set of facts" language was not relevant to the analysis. *Id.* at 731. In any event, *Conley*'s "famous observation . . . earned its retirement." *Twombly*, 550 U.S. at 563.

In sum, the *Twombly* Court expressly relied on both *Conley* and *Swierkiewicz* and concluded that (1) the complaint *lacked factual specificity* about the alleged conspiracy (and the conclusory phrases regarding such a conspiracy could not provide factual specificity); and (2) the alleged conspiracy was *not plausible* in light of the other allegations of lawful conduct (even though those were specifically described). Thus, on neither of these grounds did the complaint satisfy Rule 8.

4. 2009—Iqbal

Two years later, and seven years after *Swierkiewicz*, the Court decided *Iqbal*. The plaintiffs were individuals who had been arrested and detained in the wake of the September 11, 2001 terrorist attacks. Meier, *supra* at 743; *Ashcroft v. Iqbal*, 129 S. Ct. 1937

(2009). They alleged claims of purposeful discrimination against John Ashcroft and Robert Mueller.

A review of the complaint shows that these allegations *were* factually specific, describing the "who, what, when, and where" of the plaintiffs' detainment and the policies driving it. Meier, *supra* at 755–56. The allegations were much like those in *Swierkiewicz*, where the plaintiff had alleged the specific facts regarding his termination along with the expected conclusory statement that this conduct was discriminatory.

Yet the *Iqbal* Court held that the complaint did not satisfy Rule 8. The Court reached this conclusion by purporting to apply *Twombly*. As discussed, *Twombly* (and *Conley* and *Swierkiewicz*) begin by looking to whether there are specific factual allegations adequately describing the underlying transaction or event at issue (even if some allegations are conclusory). If so, the complaint is sufficient (*Conley* and *Swierkiewicz*); if not (*Twombly*), the court proceeds to assess whether the claims are nonetheless plausible. But *Iqbal* interpreted the first step as an inquiry into merely whether the factual allegations were "conclusory." If so, the complaint was not sufficient unless, at the second step of *Twombly*, the claims were still plausible. Meier, *supra* at 756.

Because the complaint in *Iqbal* was conclusory, the Court believed the complaint failed the first method of satisfying Rule 8 for that reason alone. The Court thus proceeded to assess plausibility as it had done in *Twombly*, concluding that the discrimination claim was not "plausible," as there were many legitimate reasons

the individuals might have been detained (just as there were legitimate reasons for the *Twombly* defendants to have engaged in parallel business conduct). Meier, *supra* at 755. The Court therefore held that the complaint, failing the second method as well, did not satisfy Rule 8.

The Court did not explain how a plaintiff could provide greater factual specificity regarding a defendant's state of mind to allege discriminatory intent. The Court also never mentioned *Swierkiewicz*, even though it similarly involved a conclusory allegation regarding discriminatory intent—and that complaint was deemed sufficient even if it was "unlikely" to succeed. Meier, *supra* at 757.

Had the Court just overturned a unanimous decision from only seven years earlier, without mentioning it? The lower courts were left to grapple with that question.

B. The courts are fully divided and conflicted in light of *Iqbal*.

Since *Iqbal*, courts across the country are conflicted on perhaps the most fundamental, threshold issue in every civil suit filed in federal court: What exactly is the pleading standard under Rule 8? In particular, is *Swierkiewicz*—a unanimous decision of this Court from 2002 that applied the pleading principles of *Conley*—even good law anymore? Some courts have said no.[2] Others have said yes.[3] And still others go

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[2] *See, e.g.*, *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009) ("*Swierkiewicz* has been repudiated by both *Twombly* and *Iqbal* . . . at least insofar as [*Swierkiewicz*] concerns pleading

back and forth.[4]

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requirements and relies on *Conley*."); *Sparks v. South Kitsap Sch. Dist.*, No. 13-5682, 2014 U.S. Dist. LEXIS 38653, at *10 (W.D. Wash. March 18, 2014) (rejecting as "simply wrong" plaintiff's argument that *Swierkiewicz* "was not overruled by *Iqbal*/*Twombly*"); *United States v. Maricopa Cnty*., 915 F. Supp. 2d 1073, 1078 (D. Ariz. 2012) ("*Swierkiewicz* was overruled by *Twombly* and *Iqbal* . . . ."); *see also, e.g.*, Joseph A. Seiner, *After* Iqbal, 45 Wake Forest L. Rev. 179, 193 (2010) (concluding that there is "serious concern following *Iqbal* as to the validity of the *Swierkiewicz* decision"); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 Lewis & Clark L. Rev. 15, 18 (2010) (stating that *Swierkiewicz* "effectively may be dead").

[3] *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) ("Neither *Iqbal* nor *Twombly* overrule *Swierkiewicz*, and it is our duty to apply the Supreme Court's precedents unless and until the Supreme Court itself overrules them."); *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012); *Starr v. Baca*, 652 F.3d 1202, 1213–16 (9th Cir. 2011); *Lowe v. Hous. Works, Inc.*, No. 11-9233, 2013 U.S. Dist. LEXIS 70813, at *23 (S.D.N.Y. May 15, 2013) ("[T]he bulk of case law in this Circuit holds that *Swierkiewicz* remains good law."); *Carter v. The Hartford Fire Ins. Co.*, No. 11-4008, 2012 U.S. Dist. LEXIS 148630, at *12 (N.D. Ga. Sept. 17, 2012) ("*Swierkiewicz* remains good law even after the Supreme Court's decisions in *Twombly* and *Iqbal*."); *Blanc v. City of Miami Beach*, 965 F. Supp. 2d 1350, 1354 (S.D. Fla. 2012); *cf. Miller v. Wal-Mart*, No. 13-46, 2013 U.S. Dist. LEXIS 184231, at *15 (W.D.N.C. Nov. 8, 2013) ("*Swierkiewicz* was only overruled to the extent it applied the pre-*Twombly* pleading standard where a federal court could grant a motion to dismiss only where it was clear that no relief could be granted under any set of facts.").

[4] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 n.17 (3d Cir. 2010) ("Although [our decision in *Fowler*] stated that *Twombly* and *Iqbal* had 'repudiated' the Supreme Court's earlier decision in *Swierkiewicz* . . . we are not so sure . . . . In any event, *Fowler*'s

This conflict is so well developed that courts have discussed it explicitly on many occasions in the few years since *Iqbal* has been issued. *See, e.g.*, *Washington v. Certainteed Gympsum, Inc.*, No. 10-204, 2011 U.S. Dist. LEXIS 94920, at *11 (D. Nev. Aug. 24, 2011) ("Courts across the country have disagreed as to whether *Swierkiewicz* is still good law under *Twombly* and *Iqbal*'s more rigorous 'plausibility' pleading standard.") (discussing various cases); *Lowe v. Hous. Works, Inc.*, No. 11-9233, 2013 U.S. Dist. LEXIS 70813, at *23 (S.D.N.Y. May 15, 2013) (discussing a decision indicating "that a split exists among the Circuits" regarding whether "*Swierkiewicz* remains good law"); *Moody v. Ark. State Highway & Transp. Dep't*, No. 12-312, 2013 U.S. Dist. LEXIS 48807, at *9 n.3 (E.D. Ark. Apr. 4, 2013) ("Whether *Twombly* and *Iqbal* overturned or significantly altered *Swierkiewicz* appears to be a somewhat open question in the Eighth Circuit and at least two other circuits."); *Secka v. Dentserv Mgmt.*, No. 12-2560, 2013 U.S. Dist. LEXIS 21195, at *8 n.2 (S.D.N.Y. Feb. 11, 2013) ("The Second Circuit has recognized the circuits are split on whether *Swierkiewicz* remains good law after *Iqbal*, but has thus far declined to weigh in on the issue."); *Vahid v. Farmers Ins. Exch.*, 985 F. Supp. 2d 1002, 1006 n.3 (S.D. Iowa 2013) ("[A] group of four dissenters on the Eighth Circuit regarded *Swierkiewicz* as good law for discrimination cases *after Twombly* . . . .") (citing

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reference to *Swierkiewicz* appears to be dicta, as *Fowler* found the complaint before it to be adequate.").

Gregory v. Dillard's, Inc., 565 F.3d 464, 495 (8th Cir. 2009) (en banc)).[5]

In light of this conflict and confusion, the courts have also repeatedly stated that they are struggling to articulate and apply the pleading standards—indicating that further action is needed from the Supreme Court. *See, e.g.*, *Sablan v. A.B. Won Pat Int'l Airport Auth.*, No. 10-013, 2010 U.S. Dist. LEXIS 130692, at *9–10 (D. Guam Dec. 9, 2010) (noting that the Third Circuit has held that *Swierkiewicz* was overruled, that many scholars have agreed, but that "[m]ost courts have not gone so far, because lower-court judges are not to deem a Supreme Court decision overruled *sub silentio*, even if it is plainly inconsistent with a later one," and that they

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[5] *See also Schwab v. Smalls*, 435 F. App'x 37, 40 (2d Cir. 2011) ("Questions have been raised, however, as to *Swierkiewicz*'s continued viability in light of *Twombly* and *Iqbal*"); *Brown v. Castleton State Coll.*, 663 F. Supp. 2d 392, 403 (D. Vt. 2009) ("*Swierkiewicz* itself has a questionable status after *Twombly* . . . and especially after *Iqbal*."); *Smith v. City of New York*, No. 12-3250, 2013 U.S. Dist. LEXIS 65798, at *8 n.2 (S.D.N.Y. May 8, 2013) ("Whether *Swierkiewicz* remains good law in light of *Twombly* and *Iqbal* is 'somewhat of an open question' in this Circuit."); *Baiyasi v. Delta Coll.*, No. 11-13094, 2012 U.S. Dist. LEXIS 65715, at *30 (E.D. Mich. May 10, 2012) (recognizing "the tension between *Swierkiewicz* and the subsequent decisions in *Twombly* and *Iqbal*"); *Trevino v. Austin Peay State Univ.*, No. 11-1139, 2012 U.S. Dist. LEXIS 37300, at *9 n.5 (M.D. Tenn. March 19, 2012) ("Some district courts within the Sixth Circuit and some courts outside of this circuit have questioned whether *Swierkiewicz* remains good law following *Twombly* and *Iqbal*."); *Ashmore v. FAA*, No. 11-60272, 2011 U.S. Dist. LEXIS 103623, at *8 (S.D. Fla. Sept. 2, 2011) ("In light of *Twombly* and *Iqbal*, however, the approach in *Swierkiewicz* has been questioned.").

"have instead struggled to reconcile *Swierkiewicz* with plausibility pleading"); *Washington*, 2011 U.S. Dist. LEXIS 94920, at *11–12 (noting that the Ninth Circuit "provided a framework to navigate the Supreme Court's myriad of pleading standards . . . ."); *Andrews v. Mass. Bay Transit Auth.*, 872 F. Supp. 2d 108, 115 (D. Mass. 2012) ("Neither the First Circuit nor the Supreme Court has discussed to what extent *Swierkiewicz* remains good law after *Twombly* and *Iqbal*, but the District of Rhode Island has attempted to reconcile the cases.") (citing *Mayale-Eke v. Merrill Lynch*, 754 F. Supp. 2d 372, 377 (D.R.I. 2010)); *Franks v. Vill. of Bolivar*, No. 11-701, 2011 U.S. Dist. LEXIS 133740, at *10 n.2 (N.D. Ohio Nov. 18, 2011) ("The lower courts in this circuit have grappled with whether the holding of *Swierkiewicz* remains good law in light of *Twombly* and *Iqbal*"); *Jianjun Xie v. Oakland Unified Sch. Dist.*, No. 12-2950, 2013 U.S. Dist. LEXIS 29898, at *11 n.3 (N.D. Cal. March 5, 2013) ("The effect of *Twombly* and *Iqbal* on *Swierkiewicz* is complex and controversial . . . .").

Simply put, the courts are divided and unclear on how to assess every federal civil complaint filed in the country. This Court can and should clarify this state of affairs.

II. This Court Should Overturn *Iqbal* And Re-establish *Conley*, *Swierkiewicz*, And *Twombly* As A Consistent Line Of Cases True To Rule 8.

A. The proper reading of *Twombly* and the pleading standards.

As noted, *Twombly* should be read to describe a two-method process for assessing complaints that adheres to Rule 8 and this Court's decisions in *Conley* and *Swierkiewicz*. A court first assesses whether the complaint has appropriately specific, non-conclusory factual allegations explaining the underlying transaction or event (recognizing that "conclusory" allegations are necessary to all complaints and will surely be contained in the claims). If such factual specificity is there, this is one means to satisfy Rule 8. If not, the complaint may still satisfy Rule 8 so long as the allegations give rise to a plausible claim (perhaps through specific circumstantial allegations and facts). And plausibility turns on whether actionable misconduct can be inferred from the allegations. This means that allegations of otherwise *lawful* conduct—even if they might conceivably be consistent with unlawful conduct—will likely fall short of establishing a plausible claim of such unlawful conduct.

This approach to *Twombly* is consistent with the history and logic of Rule 8, and with *Conley* and *Swierkiewicz*. The *Conley* Court understood that, even when the factual specificity of a complaint is challenged, "a plaintiff is not always required to plead all of the facts that will ultimately need to be proven in order to recover from the defendant." Meier, *supra* at

725. This is confirmed by the *Conley* Court's citation to a decision by Judge Charles Clark—the principal architect of the Federal Rules of Civil Procedure—in which he emphasized that a plaintiff need not plead every fact ultimately necessary for recovery. *Id.* at 725–26 (discussing *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)). Judge Clark had also made the same point in his non-judicial writings, remarking on facts such as those within the defendant's knowledge: "[C]ertain matters of the kind which the law will conclude from the other facts pleaded . . . or *which lie in the knowledge more of the defendant than the plaintiff*, need not be set forth even though they are material operative facts." *Id.* at 726 & n.104) (emphasis added). Moreover, *Swierkiewicz* made clear that a "conclusory allegation of discrimination" did not make the complaint insufficient so long as there was factual specificity *even if* the allegation was implausible: "Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Id.* at 515; Meier*, supra* at 757.

B. *Iqbal* should be overturned.

The fundamental mistake in *Iqbal* is that the complaint *did* satisfy the first, primary inquiry: It *did* sufficiently describe with factual specificity the event at issue that was the basis for liability. Of course, the allegation of "discriminatory purpose" is conclusory, but there is no way to provide any further facts about a person's purpose or mindset. Thus, "[a]lthough the allegation of conspiracy in *Twombly* could have been drafted with more factual specificity, the allegation of discriminatory intent in *Iqbal* could not have been

drafted with any more precision" (because it is not an "event or transaction"). Meier, *supra* at 756.

As noted, *Iqbal* mistakenly broke from all previous precedent by first assessing whether the allegations were "conclusory," even if there were sufficient factual allegations regarding the underlying event. Using this as the first step, the Court then improperly proceeded to the plausibility analysis.

This explains why the *Iqbal* Court never mentioned *Swierkiewicz*, even though it was discussed extensively in the briefs to this Court by both sides. Meier, *supra* at 757 n.258 (noting that both sides' merits briefs in *Iqbal* cited *Swierkiewicz* multiple times); *see also Bryant v. Pepco*, 730 F. Supp. 2d 25, 28 n.2 (D.D.C. 2010) ("Significantly, *Twombly* relied explicitly on *Swierkiewicz* and *Iqbal* failed to mention *Swierkiewicz* or expressly overturn it."). In short, *Iqbal* cannot be reconciled with *Swierkiewicz*—both complaints were sufficiently factually specific and both also involved conclusory allegations as well. Meier, *supra* at 757. And this is why the federal courts are in disarray regarding whether *Swierkiewicz* remains good law. *Id.* at 757 ("Many courts and commentators have determined that *Iqbal* overruled the *Swierkiewicz* case. This is a fair conclusion; the cases cannot be reconciled."). "The best interpretation of the *Iqbal* opinion is not that the Court intended to overrule cases such as *Swierkiewicz*, but rather that the Court was bewildered by the nebulous *Twombly* opinion." *Id.* at 752.

"The best, and easiest, fix to this problem is for the *Iqbal* case to be overruled" and for *Twombly* to be read as endorsing the two-step process discussed above. *Id.*

at 759. This solution is "both historically and analytically sound." *Id.* Additionally, in light of this Court's precedent, "it is a much easier task to overrule the *Iqbal* decision than it would be to overrule the *Swierkiewicz* decision." *Id.* Ultimately, "there is no convincing argument that the *Iqbal* Court's interpretation of Rule 8 is superior to that represented in previous Supreme Court case law." *Id.* at 760.

III. D'Ambrosio's Case Is An Ideal Vehicle To Clarify *Twombly*'s Plausibility Standard Because The Complaint Here Satisfies That Standard.

This case is the ideal next stage in this Court's Rule 8 line of cases from *Conley* to *Swierkiewicz* to *Twombly*. Recall that *Conley* and *Swierkiewicz* involved complaints that satisfied Rule 8 through the first method: sufficiently specific facts regarding the underlying event or transaction that the plaintiffs claimed entitled them to relief. And recall that *Twombly* involved a complaint that failed that method and further failed the plausibility method of satisfying Rule 8 because of the *lawfulness* of the circumstantial conduct alleged. A case that would provide the greatest clarity in this Court's pleading jurisprudence would be one in which, even assuming that the complaint was lacking factual specificity about the underlying transaction at issue, nonetheless raised plausible claims of misconduct in light of the related allegations of *known misconduct* it presents, thus satisfying Rule 8. This is that case.

D'Ambrosio's case is essentially the converse of *Twombly*. In *Twombly*, the plaintiff presented a specific pattern of known *lawful* conduct (parallel

conduct by the companies), and asked the court to infer from that pattern an unlawful event (a conspiracy) consistent with that lawful pattern. Here, by contrast, D'Ambrosio presents specific incidents of known and proven—and undisputed—*severe misconduct*, and asks the court to infer from that severe misconduct that there simply could be *more of that* same misconduct amounting to a pattern or custom. In *Twombly*, the question was whether lawful conduct plausibly suggested unlawful conduct. Here, the question is whether unlawful conduct plausibly suggests there is more of it.

In particular, the Complaint here alleges a *Monell* claim against the County, contending that the County has a custom or pattern of essentially cheating to obtain convictions with various due-process violations like those that occurred here, and in *Larkins*, and in the ten other cases cited in the Complaint.[6] The Complaint also explains Marino's high-level, longstanding, and influential role in the office. What is lacking, of course, is the precise extent of this known and proven misconduct. As Judge Kethledge recognized at oral argument, that shouldn't be surprising—Marino would very likely be "doing everything he can to make sure that it doesn't get known by everybody." (Oral Arg., 20:36–20:53.) "Rational people, after all, do not conspire out in the open, and a plaintiff is very unlikely to have factual

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[6] The County has argued that the Eleventh Amendment, which insulates *state* treasuries from suit, extends to insulate the County from all claims here. That view is incorrect. *Northern Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 193 (2006) (the Court "has repeatedly refused to extend sovereign immunity to counties").

information that would exclude the possibility of non-conspiratorial explanations before discovery." *Erie Cnty. v. Morton Salt, Inc.*, 702 F.3d 860 (6th Cir. 2012).[7]

Assume then, that D'Ambrosio's Complaint indeed lacks this factual specificity regarding the true *extent* of the misconduct. Further assume that this means D'Ambrosio cannot satisfy Rule 8 through the first method—that is, by presenting factual specificity regarding the full extent of the pattern or custom of misconduct by the County. Under *Twombly*, the question then becomes whether this claim is nonetheless plausible in light of the allegations and other conduct alleged.

And this is where D'Ambrosio's Complaint is fundamentally strong where the complaint in *Twombly* is weak: As noted, the allegations in *Twombly* were of known *lawful* conduct, and the court was asked to make the analytical leap of inferring unlawful conduct from it. Here, the allegations are of known, proven,

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[7] As D'Ambrosio argued extensively below, the Complaint satisfies *Iqbal* for these reasons, and justifies this Court's reversal even under *Iqbal*. *See Mendard v. CSX Transp. Inc.*, 698 F.3d 40, 45–46 (1st Cir. 2012) (Boudin, J.) (discussing *Iqbal* and explaining that discovery is warranted where a plausible claim may be indicated "'based on what is known,' at least where, as here, "some of the information needed may be in the control of the defendants'"); *Bertuglia v. City of New York*, 839 F. Supp. 2d 703, 740 (S.D.N.Y. 2012) (denying motion to dismiss *Monell* claims against prosecutor's office where plaintiff cited to various cases where prosecutors from that office committed misconduct—the complaint alleged sufficient facts under *Iqbal* to allow the court "to draw the inference that there is a history of mishandling grand jury presentations," including problems with *Brady* material).

undisputed and severe *unlawful* conduct, and the court is asked to simply infer that there could be more of it. This sort of claim is exactly why the plausibility standard exists for such plaintiffs. In Judge Kethledge's words, "absent discovery, how the heck are they supposed to solve this quantitative problem?" (Oral Arg., 19:03–19:18.) By definition, the plaintiff cannot know of the extent of the defendants' secretive, conspiratorial misconduct (those facts are lacking), yet the plaintiff has proven *misconduct of the same kind, in multiple instances, by the same high-level official*. The proper reading of *Twombly* ensures that such a complaint proceeds to discovery, even if the specific facts regarding the extent of misconduct are not yet known. To borrow Justice Souter's words in *Twombly*, Marino's repeated misconduct *is* "suggestive of conspiracy, []if history teaches anything." *Id.* at 567. Indeed, were it otherwise, there would be effectively no way for a plaintiff to ever bring a *Monell* claim unless the plaintiff already knew the full extent of the misconduct *before discovery*—but that's exactly what the discovery process is designed to provide. *See, e.g.*, *Edwards v. City of Goldsboro*, 178 F.3d 231, 245 (4th Cir. 1999) (holding that Rule 8 requires nothing more than a short and plain statement of a plaintiff's *Monell* claims, giving the entity fair notice of what the claims are and the grounds upon which they rest—a plaintiff is not required to plead "multiple incidents of constitutional violations that may be necessary *at later stages* to establish the existence of a an official policy or custom and causation") (emphasis added); *Vector Research v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 697 (6th Cir. 1996) (recognizing this standard).

Thus, the Complaint here demonstrates how the proper plausibility analysis should proceed under *Twombly* where there are certain material facts not yet known. It is the ideal next chapter in this Court's Rule 8 precedent.[8]

In sum, granting review here will enable the Court to resolve the division and confusion in courts across the country on the fundamental question of how to assess whether a complaint is sufficient to proceed to the discovery stage. It will also ensure that a man who spent 20 years wrongfully on death row will not have his attempt at redress cut short in violation of the Federal Rules of Civil Procedure.

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[8] This case also enables the Court to reinforce the elementary principle that Rule 8 will not bar a meritorious claim phrased in a way that might be considered technically inaccurate. Detective Allen conceded that the claim against him for concealing exculpatory evidence had merit to proceed to discovery, agreeing with Judge Kethledge's statement that this withheld evidence was "obviously exculpatory." (Oral Arg., 31:25–31:43). Yet Allen persuaded the Sixth Circuit to dismiss the claim on the grounds that it was phrased improperly as concealment "from the defense" instead of "from the defense through the prosecutor." That ruling also violates Rule 8. *See Conley*, 355 U.S. at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); *Swierkiewicz*, 534 U.S. at 514 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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