No. 20-625

IN THE

Supreme Court of the United States

JOSEPH FINDLER IV,

Petitioner,

v.

CHRISTOPHER WRAY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

Do the lower federal courts have the authority to depart from the pleading standards required by the Federal Rules of Civil Procedure and this Court's relevant decisions, when a complaint alleges unlawful and unconstitutional conduct, which, if proven true, would entail an entitlement to relief?

Does a District Court have the discretion to deny any opportunity to amend a complaint at the same time it dismisses a complaint with prejudice, when there is any possibility that deficiencies may be cured through more specified pleading or without notice, a definitive ruling on the pleadings, or identification of deficiencies within the complaint prior?

Can a lower federal court determine it lacks subject matter jurisdiction over a plaintiff's claims and proceed to make a determination on the merits of a plaintiff's claims or "hypothetically" impose or bypass the question of subject matter jurisdiction to make a determination on the merits of a plaintiff's claims, and then subsequently dismiss those claims with prejudice?

Can a Circuit Court affirm, in whole, the holding of a District Court, which determined that it lacked subject matter jurisdiction over a plaintiff's claims, when the Circuit Court's determination that the District Court had subject matter jurisdiction over a plaintiff's claims, directly conflicts with that District Court's holding?

PARTIES TO THE PROCEEDING

Petitioner Joseph Findler IV was the Plaintiff-Appellant in the United States Court of Appeals for the Sixth Circuit. Respondents Christopher Wray and Timothy Slater were the Defendant-Appellees in the Sixth Circuit. DOE 1, Special Agent, Detroit Field Office of the Federal Bureau of Investigation, DOE 2 - 100 and DOE 101 - 500, were defendants in the District Court, but none of them participated in the appeals pertinent to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner Joseph Findler IV, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order (opinion) of the U. S. Court of Appeals for the Sixth Circuit (App. 1a-6a) is unreported at *Findler v. Wray*, No. 19-2487 (6th Cir. Aug 19, 2020). The order (opinion) of the U. S. District Court for the Eastern District of Michigan (App. 9a-15a) is unreported at *Findler v. Wray,* No. 19-cv-11498 (E.D. Mich. Dec. 20, 2019).

JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment on August 19, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Relevant constitutional provisions, statutes and rules involved are within the Appendix. App. 32a-35a.

STATEMENT OF THE CASE

"[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

Marbury v. Madison, 5 U.S. 137, 166 (1803)

Joseph Findler IV (hereinafter "Findler" or "Petitioner"), proceeding pro se, filed a complaint in the United States District Court for the Eastern District of Michigan, pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and 42 U.S.C § 1983, alleging that federal government officials and employees and those in concert and coordination with those officials, whether state officials or private individuals, violated his Fourth, Fifth and Fourteenth Amendment rights under the U. S. Constitution. [1]

In Findler's Complaint, he alleges that Defendant Does unlawfully intercepted, accessed and surveilled specific electronic devices of Findler's, explained how any information obtained was used, what was intercepted, accessed and surveilled, how Defendant Does prevented and impeded actions on Findler's electronic devices and that the coordination of these acts occurred with the knowledge and deliberate indifference of Respondents Christopher Wray and Timothy Slater. [1]

Findler alleges the unlawful interception, access and surveillance he was subjected to, was a consequence and byproduct of, a "widespread harassment...campaign" targeting Findler conducted through a Facebook Group, that employees of the Federal Bureau of Investigations ("FBI"), were participants in, whom communicated information regarding the Facebook Group and its operations to Findler, including the fact that it was illegal and constituted Public Corruption.[1] Details provided

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[1] *See* Complaint (ECF No. 1).

within the Complaint include names, dates, and circumstantial information.

The District Court referred this case to a Magistrate Judge.[2] Subsequently, Respondents Christopher Wray and Timothy Slater filed a Motion to Dismiss under Fed R. Civ. P. 12(b)(1) and Fed R. Civ. P. 12(b)(6).[3]

Findler filed a Motion for Leave to File First Amended Complaint on September 19, 2019.[4] In Findler's proposed, First Amended Complaint, he adds significantly more details on the unlawful interception, access and surveillance of Findler's electronic devices and of the widespread harassment and stalking campaign.[4]

The Magistrate Judge issued a Report and Recommendation ("R&R"), recommending denying Findler's Motion for Leave to File First Amended Complaint and granting Defendants' Motion to Dismiss with prejudice, on November 13, 2019. App. 16a–31a. In the R&R, it stated that "proof" of "assumptions" was needed to confer subject matter jurisdiction on the Court, and that "the Court lacks subject matter jurisdiction over Findler's claims, and his complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1)." App. 24a-25a.

The R&R then surmised "[e]ven if the Court has subject matter jurisdiction over Findler's claims, his complaint should still be dismissed", "for failure to

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[2] *See* Referral Order (ECF No. 5).

[3] *See* Mot. to Dismiss (ECF No. 13).

[4] *See* Mot. for Leave to File First Amended Compl. (ECF No. 23).

state a claim for relief" as Findler "fails" "to provide any factual allegations", "which the Court can draw the reasonable inference that any of the defendants are liable for any misconduct", necessary to sustain Findler's Complaint under Fed. R. Civ. P. 12(b)(6). App. 26a.

The R&R, further recommended that Findler's "motion for leave to amend", "should be denied" as "the Court" "would conclude" "that it lacks subject matter jurisdiction" over Findler's proposed amended Complaint and Findler "has failed to state a claim upon which relief can be granted", as "Findler's proposed amended complaint is futile." App. 23a. The R&R then went on to recommend, "that this case be dismissed for failure to state a claim". App. 30a.

Findler timely filed specific objections to the R&R ("Objections") on November 25, 2019.[5]

The District Court in the Order adopting the R&R and dismissing the case ("Order"), overruled all of Findler's Objections to, and adopted all of the recommendations of, the Magistrate Judge's R&R, which included the recommendations that the Court "lack[ed] subject matter jurisdiction over Findler's claims" and as such "the Court [should] grant Defendants' motion and dismiss Findler's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1)" and that "[e]ven if the Court ha[d] subject matter jurisdiction over Findler's claims the Court should still dismiss those claims pursuant to Federal Rule of Civil Procedure 12(b)(6)." (quotations omitted). App. 11a-13a.

[5] *See* Objections to Report and Recommendation (ECF No. 26).

The District Court further denied Findler's Motion to File a First Amended Complaint, granted Defendants' Motion to Dismiss and dismissed Findler's Complaint with prejudice. App. 9a–15a.

The District Court went on to state "even if the Court concluded that it had subject matter jurisdiction over Findler's claims" and "allowed Findler to file his proposed First Amended Complaint, Findler still" "fail[ed] to state a cognizable claim" and his Complaint and proposed First Amended Complaint only contained "threadbare inferences" and no "specifically pleaded facts". App. 13a–14a.

On December 27, 2019, Findler, timely appealed, primarily assigning for error the District Court adopting the R&R, denying Findler leave to file his First Amended Complaint, dismissing Findler's Complaint with prejudice for failing to state a claim and the District Court determining that it lacked subject matter jurisdiction, in conjunction with, hypothetically imposing and bypassing the question of, subject matter jurisdiction, to make a determination that Findler failed to state a claim under Fed. R. Civ. P 12(b)(6).

On appeal, the Sixth Circuit affirmed, in whole, the District Court's judgement, stating that, "[a]lthough the district court adopted the magistrate judge's report and recommendation, which included alternative recommendations to dismiss under either Rule 12(b)(1) or Rule 12(b)(6)", "it focused its analysis on the fact that Findler had failed to state a cognizable claim for relief" and as such, "construe the dismissal as having been made under Rule 12(b)(6)." App. 4a.

Even assuming, arguendo, as the Sixth Circuit did, that the District Court focused its analysis "on the fact that Findler had failed to state a cognizable claim for relief', it did so after the District Court already adopted a recommendation that it lacked subject matter jurisdiction over Findler's claims and then proceeded to hypothetically impose and bypass the question of subject matter jurisdiction, to do so. App. 4a-15a.

The Sixth Circuit then goes on to independently make the determination that Findler's claims are not so "devoid of merit" as to "deprive the district court of subject-matter jurisdiction." App. 4a.

This conclusion, in and of itself, specifically contradicts the holdings of the District Court's Order and R&R, which the Sixth Circuit affirmed, in toto. App. 9a-15a. Further, the Sixth Circuit did not address the District Court "hypothetically" imposing jurisdiction to reach the underlying merits of Findler's claims, to dismiss Findler's claims with prejudice. App 1a-15a.

In evaluating Findler' complaint under Fed. R. Civ. P. 12(b)(6), the Sixth Circuit falsely characterized the facts alleged in Findler's Complaint and proposed First Amended Complaint and substantially misinterpreted, the requirements the pleading standards the Federal Rules of Civil Procedure convey, stating, in part, that Petitioner believes a "[f[acebook group is monitoring him and accessing his electronic devices" and not the Defendant Does, as alleged in Findler's Complaint and proposed First Amended Complaint, who are federal law enforcement officers, employees, supervisors or agents working for the Federal Bureau of

Investigation (FBI) or those in concert with them. App. 4a-5a.

The Sixth Circuit further falsely characterized facts alleged, including elements of the harassment campaign, his encounters with FBI employees and communications provided to him regarding the campaign, giving virtually no consideration to Findler's detailed allegations of the unlawful interception, access and surveillance of specific electronic devices of Findler's and communications of his activities thereof, which the Sixth Circuit disingenuously concluded were "conclusory assumptions" that did not "lead to a plausible inference" that any Defendant "violat[ed] his constitutional rights". App. 5a-6a.

The Sixth Circuit also made a determination that Findler's proposed, First Amended Complaint, did not state a "plausible claim for relief", and as a result, the District Court did not err in "declining to grant Findler permission to file it" and that the "district court did not abuse its discretion by dismissing the complaint with prejudice". App. 5a-6a.

This is with the understanding that, this was Findler's first attempt to amend his Complaint, no discovery had taken place, no answer was provided and the District Court provided no guidance on any deficiencies the District Court evaluated within Findler's Complaint or proposed First Amended Complaint, at any stage prior to issuing the R&R and subsequent Order denying leave to amend and dismissing the case with prejudice.

REASONS FOR GRANTING THE PETITION

I. THE ORDER OF THE SIXTH CIRCUIT CONTRADICTS THE PLEADING STANDARDS REQUIRED BY THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S RELEVANT DECISIONS

"[C]onsiderable latitude should be allowed the pleader. Rarely should a pleading be condemned for being over-specific; and then the objection should be considered one of form merely. On the other hand, generalities of allegation should not be objectionable in themselves so long as reasonably fair notice of the pleader's cause of action is given."

Charles E. Clark, *The Complaint In Code Pleading*, 35 Yale L.J., 259, 266 (1926)

A. The Circuit Courts are not applying federal pleading standards consistent with near and post *Iqbal* and *Twombly* decisions

This Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) are two of the most cited cases in history.[6]

Those decisions have also been interpreted to have heightened pleading standards necessary to state a claim for relief, to withstand a dismissal under Fed.

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[6] As of October 7, 2020, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) have been cited in cases, 226,230 and 252,963 times, respectively, according to Westlaw.

R. Civ. P. Rule 12(b)(6).[7] More recent decisions relating to pleading standards have been cited at a much reduced rate [8], naturally raising the question of whether lower federal courts have used *Iqbal* and *Twombly* to cast decisions that are not in keeping with this Court's more recent, and can be interpreted, as more liberal decisions, regarding disposition of cases for failure to state a claim. Careful analysis of *Iqbal* and *Twombly*, indicate that this Court may not have intended those decisions to introduce a regime of "fact" pleading, which would run inapposite to the system of "notice" pleading the Federal Rule of Civil Procedure was designed to implement.

The "plausibility" requirement of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) has been misinterpreted by federal courts, especially the Sixth Circuit. "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." *Id.* at 678. The factual allegations a plaintiff pleads, must "accepted as true", "plausibly suggest", "unlawful" behavior. *Id.* at 680. This interpretation is in keeping

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[7] *See*, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158U. PA. L. REV. 517 (2010); Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 Neb. L. Rev. (2009); Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293 (2010).

[8] As of October 7, 2020, excluding *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), all other U.S. Supreme Court cases decided after 2006, related to pleading standards, referenced in this Petition, have been cited in cases, 81,083 times, according to Westlaw.

with the principal, that a claim may only be dismissed under Fed. R. Civ. P. 12(b)(6) "on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) stated, "[o]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint". *Id.* at 563.

Ashcroft v. Iqbal, 556 U.S. 662 (2009) stated, "while a complaint requires, "more than an unadorned, the-defendant-unlawfully-harmed-me accusation", "it does not require "detailed factual allegations"" under Fed. R. Civ. P. Rule 8. *Id.* at 678.

Nevertheless, decisions of this Court, made near or after *Iqbal* and *Twombly*, have run counter to the interpretation that *Iqbal* and *Twombly* have heightened pleading standards and previous decisions of this Court cited approvingly in these decisions, indicate that *Iqbal* and *Twombly*, have limited relevance in determining whether a plaintiff has stated a claim for relief, at least within a civil rights context.

Erickson v. Pardus, 551 U.S. 89 (2007), chastised Circuit Courts deviating in "so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure" necessitating this Court "grant review", reiterating that "[s]pecific facts are not necessary" and a "statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Id.* at 90, 94 (citation omitted).

Johnson v. City of Shelby, 135 S. Ct. 346 (2014) stated, the basic objective of the Federal Rules of Civil Procedure is to "is to avoid civil cases turning on technicalities" and all a complaint must do is state, "events that, [as] alleged, entitle[] them to damages" and once defendants are informed of "the factual basis for [a] complaint, [a plaintiff is] required to do no more to stave off threshold dismissal". *Id.* at 347.

In *Skinner v. Switzer,* 562 U.S. 521 (2011) this Court acknowledged, a complaint need not be "a model of the careful drafter's art...[nor] pin plaintiff's claim for relief to a precise legal theory" to meet the pleading requirements of Fed. R. Civ. P. 8(a)(2). *Id.* at 530.

The low bar required to avoid dismissal under Fed. R. Civ. P. 12(b)(6) is well illustrated by a slight rephrasing of the central question used by federal courts in determining whether a complaint states a claim for relief. "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is ***not*** entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007) (emphasis added).

The alleged conduct is either not unlawful or there is a procedural bar (i.e. immunity or affirmative defense), that would preclude a plaintiff from pursuing those claims. Stated another way, "[d]ismissal under Rule 12(b)(6) is reserved for complaints...[where a] plaintiff pleads himself out of court". *Vincent v. City Colleges of Chicago*, 485 F.3d 919, 924 (7th Cir. 2007).

This is in keeping with both the design and intent of the liberal pleading standards incorporated by the Federal Rules of Civil Procedure and is plainly exemplified throughout. FED. R. CIV. P. 8(a)(2),

states a pleading should contain "a short and plain statement of the claim showing that the pleader is entitled to relief'. FED. R. CIV. P. 8(d)(2) declares, a "party may set out 2 or more statements of a claim or defense alternatively or hypothetically, . . . [and] the pleading is sufficient if any one of them is sufficient." FED. R. CIV. P. 8(d)(3) allows a party to "state as many separate claims or defenses as it has, regardless of consistency." FED. R. CIV. P. 8(e) avows, "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 12(e) asserts a "party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." FED. R.CIV. P. 12(f) permits a party to "move to strike", "redundant, immaterial, impertinent...matter".

"This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims" as "the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed" prior to the Federal Rules of Civil Procedure's inception "primarily and inadequately by the pleadings." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

While there were (and are) substantial benefits to the design of the Federal Rules of Civil Procedure, if there is a desire to heighten pleading standards, it should be done through "the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (of note

Fed. R. Civ. P. Rule 8(a) has been near unchanged since the Federal Rules of Civil Procedure's inception. *See Report of the Advisory Committee on Rules of Civil Procedure* - April 1937, pg. 22.)

While the practical effect of the decisions in *Iqbal* and *Twombly* have been mixed, there appears to be an increase, even if modest, in dismissals under Fed. R. Civ. P. 12(b)(6), post *Iqbal* and *Twombly*.[9] Controlling for parties, however, pro se plaintiffs bear the brunt of any increase in dismissals.[9] This is especially disheartening given the fact that pro se parties face numerous obstacles initiating civil actions in U.S. Courts, including bias within the legal community, resource limitations and most importantly, whether for pro se or counseled parties, any increase in dismissals appears not to have had the effect of screening out more meritless claims.[10] Further, contrary to popular belief, there hasn't been a rise in pro se litigation in federal courts and empirical data

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[9] *See* e.g., Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Gelbach, Jonah B. *Material Facts in the Debate over Twombly and Iqbal*. 68 *Stan. L. Rev.* 369. (2016); Joe S. Cecil et al., *Fed. Judicial Ctr., Motion to Dismiss for Failure to State a Claim After Iqbal* (Mar. 2011); Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, 96 Judicature 127 (2012); William H. J. Hubbard, "*The Empirical Effects of Twombly and Iqbal*," University of Chicago Public Law & Legal Theory Paper Series, No. 591 (2016).

[10] *See* Kroeper, K. M., Quintanilla, V. D., Frisby, M., Yel, N., Applegate, A. G., Sherman, S. J. & Murphy, M. C. (2020). *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*. Psychology, Public Policy, and Law, Vol. 26, No. 2, 198–212, http://dx.doi.org/10.1037/law0000229; Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011).

supports the conclusion that the perception of the burden created by pro se litigants is unfounded and pro se litigants may actually place a "lighter burden" on the judiciary. [11]

In any event, as the chief architect of the Federal Rules said, what "we need[] to get farthest away [from is] the demurrer. Even in the old days, when courts were supposed to be harsh, I can find essentially no case where final judgment was rendered on demurrer as such without leave to try again. Usually it [] just ... [led to] lawyers [] wasting their time." Charles E. Clark, *Pleading under the Federal Rules*, 12 Wyo. L.J. 177, 193 (1958).

As was stated long ago, the law should "not [be] used as a secret snare to entrap" one seeking vindication for violations of one's rights. *Heard v. Baskerville,* Hob. 232 (C. P. 1612), referring to the Statute of Elizabeth.

With these considerations and given the delta between the intended and practical effects of the decisions in *Iqbal* and *Twombly* on motions to dismiss for failure to state a claim and the reliance, by lower federal courts, of those cases in determining whether a complaint meets the threshold requirements of Fed. R. Civ. P. 8(a)(2), this court should use this opportunity to redefine the scope of the holdings of *Iqbal* and *Twombly* in light of intervening decisions on pleading standards by this Court.

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[11] *See* Gough, M. D., & Taylor Poppe, E. S. (2020). *(Un)Changing Rates of Pro Se Litigation in Federal Court*. Law & Social Inquiry, 45, 567–589; Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585 (2011).

B. The Sixth Circuit's decision is a prototypical example of a Circuit Court applying pleading standards at odds with those required by the Federal Rules

In Findler's case, the District Court concluded, Findler failed to "specifically plead[] facts that could support Findler's claims against the Defendants", with the Sixth Circuit stating that, the "allegations" do not lead to a "plausible inference that Wray, Slater, or any other FBI or federal official had any involvement in violating his constitutional rights" or "that his constitutional rights were violated at all". App. 5a, 13a-14a.

Even if one interprets *Iqbal* and *Twombly* as imposing a heightened pleading standard, those cases do not specify a requirement that a plaintiff must "specifically plead[] facts that could support" a plaintiff's claims. *See Iqbal*, 556 U.S. at 678 (a complaint "does not require "detailed factual allegations" under Fed. R. Civ. P. Rule 8); *Twombly*, 550 U.S. at 563 (2007)(a claim "may be supported by showing any set of facts consistent with the allegations in the complaint."). *See also Erickson*, 551 U.S. at 93 ("[s]pecific facts are not necessary").

The District Court also required "proof" of allegations to impart subject matter jurisdiction on the Court. App. 24a. Not only is "proof" not required to impart subject matter jurisdiction on a court, *see Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987) ("the Constitution does not require that the plaintiff offer [] proof as a threshold matter in order to invoke the District Court's jurisdiction"), it is not required to state a claim to avoid dismissal under Fed.

R. Civ. P 12(b)(6). *See Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974)(the court "intimate no evaluation...as to whether it will be possible to support [claims] by proof" and a court only determines that "on the allegations of" a "complaint[], [a plaintiff] is entitled to have them judicially resolved.")

On appeal, in evaluating Findler' complaint under Fed. R. Civ. P. 12(b)(6), the Sixth Circuit falsely characterized the facts alleged in Findler's Complaint and proposed First Amended Complaint and substantially misinterpreted, the requirements the pleading standards the Federal Rules of Civil Procedure convey, stating, in part, that Petitioner believes a "facebook group is monitoring him and accessing his electronic devices" and not the Defendant Does, as alleged in Findler's Complaint and proposed First Amended Complaint, who are federal law enforcement officers, employees, supervisors or agents working for the Federal Bureau of Investigation (FBI) or those in concert with them. App. 4a-5a.

The Sixth Circuit also falsely characterized other facts alleged, including elements of the harassment campaign, his encounters with FBI employees and communications given to him regarding the campaign giving virtually no consideration to Findler's detailed allegations of the unlawful interception, access and surveillance of specific electronic devices of Findler's and communications of his activities on those devices, which the Sixth Circuit disingenuously concluded were "conclusory assumptions" that did not "lead to a plausible inference" that any Defendant "violat[ed] his constitutional rights". App. 4a-6a.

The Sixth Circuit and the District Court only arbitrarily focused on Findler's allegation of "a widespread harassment and stalking campaign" that FBI employees and agents participated in, while discounting Findler's detailed allegations of "unlawful interception, monitoring and surveillance". App. 2a, 10a, 19a.

Even if one were to determine that the allegations of the harassment campaign are unlikely, they are not out of the realm of possibility. "Unlikely" is also not the standard which a complaint may be dismissed under Fed. R. Civ. P. 12(b)(6). *See Twombly*, 550 U.S. at 566 (a "complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable").

Notwithstanding, to "dismiss [even factual allegations deemed] as frivolous without any factual development is to disregard the age-old insight that many allegations might be "strange, but true; for truth is always strange, Stranger than fiction."" *Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (quoting Lord Byron, *Don Juan*, canto XIV, stanza 101 (T. Steffan, E. Steffan, W. Pratt eds. 1977)).

If one were to determine that these claims lack merit, and the substantially unaddressed allegations of unlawful interception, monitoring and surveillance of Findler's electronic devices, did not, or vice versa, a "court proceeds with the good and leaves the bad." *Jones v. Bock*, 549 U.S. 199, 221 (2007). *See also* FED. R.CIV. P. 8(d)(2)(a "party may set out 2 or more statements of a claim or defense alternatively or hypothetically, . . . [and] the pleading is sufficient if any one of them is sufficient.")

The Sixth Circuit and the District Court also seemingly disregarded the detailed allegations of what was intercepted, accessed and surveilled, how, in part, Findler became aware of the interception, access and surveillance, purpose and means on the part of the FBI and how the nature of the interception, access and surveillance would necessitate the knowledge and deliberate indifference of Respondents Christopher Wray and Timothy Slater. 1a-15a.

As a court "must accept as true all the factual allegations in the complaint" *Leatherman,* 507 U.S. at 164, it's perplexing how the District Court, came to the conclusion that, the facts alleged wouldn't "raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." App. 13a (citing *Twombly*, 550 U.S. at 556).

This case is a clear example of a "heightened [pleading] standard" that federal courts have applied to civil actions, specifically civil rights cases, since *Iqbal* and *Twombly* were decided, which the Sixth Circuit applied to Findler's Complaint and proposed Amended Complaint, that does not square with "the liberal system...set up by the Federal Rules". *Leatherman,* 507 U.S. at 168. This court should summarily reverse the Sixth Circuit's decision and redefine the scope of the holdings in *Iqbal* and *Twombly*, in light of intervening decisions on pleading standards by this Court.

II. THE SIXTH CIRCUIT AFFIRMING THE DENIAL OF THE ONLY OPPORTUNITY FOR LEAVE TO AMEND ON THE BASIS OF FUTILITY AT THE SAME TIME IT DISMISSES A CASE WITH PREJUDICE SHOULD BE REVIEWED AND SUMMARILY

REVERSED BY THIS COURT

> "Item, it is assented, That by the Misprision of a Clerk in any Place wheresoever it be, no Process shall be annulled, or discontinued, by mistaking in Writing one Syllable or one Letter, too much or too little; (2) but as soon as the Thing is perceived, by Challenge of the Party, or in other manner, it shall be hastily amended in due Form without giving Advantage to the Party that Challengeth the same because of such Misprision."

First Statute of Jeofails, year 1340, 14 Ed. III, C. VI.

This court stated in *Foman v. Davis*, 371 U.S. 178 (1962), that "Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded." *Id.* at 182. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id. Foman* further explained, that leave to amend can be denied, due to "undue delay", "bad faith" "dilatory motive", "repeated...amendments" "undue prejudice" or "futility of amendment", however "outright refusal to grant the leave without any justifying reason appearing for the denial" is an abuse of discretion. *Id.*

Foman did not address the contours of the reasons that a District Court may deny leave to amend a Complaint nor did *Foman* address whether the justifying reason for a denial of leave to amend should come prior to a dismissal with prejudice, so that a party may move to amend a complaint with the Court's direction. Specifically regarding "futility of amendment", *Foman* never identified whether the "futility" justification, would encompass a procedural bar to relief, or an analysis of a complaint's factual

allegations.

The Circuit Courts currently have differing interpretations on these questions, which are of exceptional importance given the percentage of cases dismissed prior to pre-trial proceedings.[12]

A. The Circuit Courts have alternate standards evaluating pleadings on the basis of "futility" and are divided on the question whether a complaint may be dismissed with prejudice prior to any opportunity to amend

This Court has cited, *Foman* just sixteen times, in their opinions, since deciding that case.[13] However, in those cases, none defined the contours of the stated reasons that a District Court may deny leave to amend, none involved leave to amend a complaint under Fed. R. Civ. P. 15(a)(2), none indicated whether notice, a ruling on the pleadings or a statement of deficiencies is required prior to denying leave to amend and none indicated whether at least one opportunity to amend a complaint be provided prior to dismissing a case with prejudice for failure to state a claim.

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[12] *See* e.g., U.S. Courts, Table 4.10, U.S. District Courts—*Civil Cases Terminated, by Action Taken*, During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2019.

[13] Based on a search of U.S. Supreme Court cases citing *Foman v. Davis*, 371 U.S. 178 (1962).

Neitzke v. Williams, 490 U.S. 319 (1989) stated, at a minimum, the "practical protections of Rule 12(b)(6)" include "notice of a pending motion to dismiss ***and*** an opportunity to amend the complaint before the motion is ruled on". *Id.* at 329. (emphasis added).

Denton v. Hernandez, 504 U.S. 25 (1992), stated a "court of appeals....should consider whether the district court abused its discretion by dismissing [a] complaint with prejudice or without leave to amend", "if it appears that" even "frivolous factual allegations could be remedied through more specific pleading." *Id.* at 34.

Virtually all Circuit Courts have an interpretation that an amendment is futile if the amended complaint could not withstand a Fed. R. Civ. P. 12(b)(6) motion to dismiss. *See Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010)(an "amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss."); same, *Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002); same, *Briggs v. Miss.*, 331 F.3d 499, 508 (5th Cir. 2003); same, *Runnion v. Girl Scouts of Greater Chi.*, 786 F.3d 510, 524 (7th Cir. 2015); same, *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007).

This can be problematic under the *Neitzke* standard, as a District Court denying leave to amend on the basis of futility under Fed. R. Civ. P. 12(b)(6), would necessarily require dismissing a plaintiff's original pleading on the same basis. One would necessarily question how much "practical protection" Fed. R. Civ. P. 12(b)(6) provides if a Court denies any opportunity to amend a complaint at the same time it

grants a Fed. R. Civ. P. 12(b)(6) motion and dismisses a plaintiff's claims with prejudice.

While one can't reasonably argue if a complaint's "deficiencies are truly incurable" and a complaint is "truly unamendable" that a dismissal, without prejudice, with or without leave to amend, would be of "little benefit to the litigant", and in those circumstances, dismissal with prejudice would be appropriate, those circumstances would seemingly be limited to an absolute bar to relief. *McLean v. U.S.*, 566 F.3d 391, 400-01 (4th Cir. 2009). Even dismissals based on avoidance or affirmative defenses, can, in some cases, be amended or refiled, at a later point, to potentially resolve those concerns.

As the Seventh Circuit has said, denying a motion for leave is "disfavored...."district courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiffs complaint without prejudice and give the plaintiff at least one opportunity to amend [their] complaint."" *Bausch v. Stryker Corporation*, 630 F.3d 546, 562 (7th Cir. 2010) (citation omitted).

The Third Circuit has held, "in civil rights cases", "leave to amend must be granted sua sponte before dismissing" a complaint. *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007). The Fourth Circuit "requires that [a] plaintiff be given every opportunity to cure a formal defect in his pleading" and a Court should "allow at least one amendment regardless of how unpromising the initial pleading appears". *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999).

Other Circuit Courts, while not requiring leave to amend prior to dismissing a case with prejudice, have delineated parameters where leave to amend must be granted prior to dismissing a case with prejudice.

In *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc), the Ninth Circuit stated "in a line of cases stretching back nearly 50 years, we have held that in dismissing for failure to state a claim under Rule 12(b)(6), "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."" (citations omitted). *Id.* at 1127.

As the D.C. Circuit explained, "[t]he standard for dismissing a complaint with prejudice is [and should be] high: dismissal with prejudice is warranted only when...the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency and a complaint that omits [] essential facts and thus fails to state a claim warrants dismissal pursuant to Rule 12(b)(6) but not dismissal with prejudice." *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006) (citations and quotations omitted).

The Eleventh Circuit has a more qualified version of the *Neitzke* standard, which applies to both pro se and counseled parties. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001)("where a more carefully drafted complaint may state a claim, a district court should generally grant at least one chance to amend a complaint before dismissing it with prejudice.")

The Second and Fifth Circuits have applied a more qualified version of the *Neitzke* standard, but only with plaintiffs proceeding pro se. *See Hale v. King*, 642

F.3d 492, 503 (5th Cir. 2011)("Pro se plaintiffs generally are allowed to amend their pleadings to present a claim ..."unless it is obvious from the record that the plaintiff has pled his best case."" (citations omitted)); *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014)("[a] pro se complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." (quotation marks omitted)).

The First, Sixth and Tenth Circuits appear not to have requirements, whether for pro se or counseled litigants, that would enforce an opportunity to amend prior to dismissing with prejudice, affording a plaintiff the "practical protections of Rule 12(b)(6)" which include "notice of a pending motion to dismiss and an opportunity to amend the complaint before the motion is ruled on". *Neitzke*, 490 U.S. at 329.

Even the Circuit Courts that provide at least one opportunity to amend a complaint, have qualifications, while ostensibly generous, are based on what is ultimately a subjective evaluation that one's claims are truly incurable by amendment. This is where some notice, a ruling on the pleadings or a statement of deficiencies is key, whether for a pro se, or counseled party, alike.....

B. The Circuit Courts are divided on the question of whether a pro se or counseled litigant, or both, are entitled to a definitive ruling on the pleadings, a statement of deficiencies or notice, prior to dismissing a case with prejudice

The Second, Fifth, Seventh, Ninth, Tenth and D.C. Circuit's require notice, a ruling on the pleadings or a statement of deficiencies prior to dismissing a case with prejudice for failure to state a claim, for pro se or counseled parties, or both.

The Second Circuit has stated, "[w]ithout the benefit of a [definitive] ruling [on the pleadings], many a plaintiff will not see the necessity of amendment." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015).

The Seventh Circuit concluded, "a district judge who believes a pleading has a fatal but possibly curable flaw needs to identify it and give the pleading party a fair opportunity to try to correct it." *Abu-Shawish v. United States*, 898 F.3d 726, 738 (7th Cir. 2018) (citations omitted).

The Tenth Circuit reversed a dismissal with prejudice, in part, because of a district court's failure to explain to a pro se plaintiff what is required by Fed. R. Civ. P. 8. *See Nasious v. Two Unknown, B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007). The D.C. Circuit has done so as well. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996).

The Ninth Circuit, which has historically had strong case law in upholding the central tenants of *Foman*, stated "a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of [a] action." *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

By providing notice, a definitive ruling on the pleadings or a statement of deficiencies prior to dismissing a case with prejudice for failure to state a

claim, whether for a pro se or counseled party, it allows for a party to amend with the District Court's direction and for the District Court to ascertain whether the claims can be amended to the District Court's satisfaction. If the claims cannot be amended to the District Court's satisfaction, a District Court subsequently dismissing a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), has crystalized, what is now, most likely, a pure question of law, for any further appellate review.

C. This case presents these questions in ideal form and warrants summary reversal

In this case, the District Court denied Findler his *first* request for leave to amend his complaint, on the basis of futility, at the same time the District Court dismissed Findler's claims with prejudice. App. 9a–15a. The District Court never provided a definitive ruling on Findler's Complaint, a statement of deficiencies or notice prior to dismissing Findler's claims with prejudice.

Even if one were to determine that Findler had failed to state a claim for relief, and Findler's Complaint and proposed amended complaint, would be susceptible to a Fed R. Civ P. 12(b)(6) dismissal, neither would be so "truly incurable" and "unamendable" that denial of leave to amend would be appropriate or that a dismissal, without prejudice or with leave to amend, would be of "little benefit". *McLean*, 566 F.3d at 400-01. The first opportunity to identify deficiencies *the Court* might see in Findler's proposed First Amended Complaint was the R&R, which Findler had 14 days to file objections to. App. 16a–31a; 28 U.S.C. §636(b)(1).

This deprived Findler of the "practical protections of Rule 12(b)(6)" which include "notice of a pending motion to dismiss ***and*** an opportunity to amend the complaint before the motion is ruled on". *Neitzke*, 490 U.S. at 329. (emphasis added). This also goes against the fundamental principles of Fed. R. Civ. P. 15(a)(2) that leave to amend "shall be freely given when justice so requires" and "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman,* 371 U.S. at 182.

III. THE SIXTH CIRCUIT AFFIRMED A DISTRICT COURT DECISION IN CONFLICT WITH THIS COURT'S JURISPRUDANCE ESTABLISHING JURISDICTION AS A THRESHOLD QUESTION WHICH ITS OWN ORDER CONTRADICTS

"Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Ex Parte McCardle, 74 U.S. 506, 514 (1868)

A. Federal Courts are continuing to violate this Court's jurisprudence establishing jurisdiction as a threshold question and will continue to do so without intervention from this Court

As Congress has the power to create lower federal courts under Art. III, § 1, U. S. Const., "[o]nly Congress may determine a lower federal court's

subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004); Art. III, § 1, U. S. Const. *See also United States v. Hudson Goodwin*, 11 U.S. 32, 33 (1812)("All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.")

As such, "subject-matter jurisdiction", "is an Art[icle] III as well as a statutory requirement". *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Federal law confers district courts with jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

In *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83 (1998), this Court rejected the "doctrine of hypothetical jurisdiction" where a federal court "assume[s] jurisdiction for purposes of deciding the merits" and reiterated the "requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Id.* at 94, 95 (quoting *Mansfield, C. L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (quotations omitted)).

A federal court lacks subject matter jurisdiction over claims, "so insubstantial, implausible, foreclosed by prior decisions...or otherwise completely devoid of merit as not to involve a federal controversy", and when a Court, makes such determination, that "court must dismiss the action." *Hagans v. Lavine*, 415 U.S.

528, 543 (1974) (quotations and citations omitted); Fed. R. Civ P. 12(h)(3).

While this Court's admonishment in *Steel* was explicit, lower federal courts have continued to hypothetically impose and bypass the question of, subject matter jurisdiction, to resolve the merits of a litigants claim, well beyond the bounds of any narrow exception, if one exists in practice. *See Garcia v. United States*, 18 Civ. 2200 (ER), at *7 (S.D.N.Y. Feb. 19, 2019)("Even if the Court had subject matter jurisdiction...it would still dismiss the complaint for failure to state a claim."); *Okuda v. Legal Aid of Or.*, No. 3:13-cv-01586-HZ, at * 3 (D. Or. Sep. 12, 2013)("Because this court lacks subject matter jurisdiction, I dismiss the complaint for failure to state a claim.").

See also Gamble v. Greater Cleveland Reg'l Transit Auth., No. 1:15 CV 1219, at * 5 (N.D. Ohio Sep. 30, 2015)("Even assuming the Court has subject matter jurisdiction over the Complaint, it fails to state a claim.")(dismissal for failure to state a claim); *Li v. Chertoff*, 06 Civ. 13679 (LAP), at * 3 (S.D.N.Y. Feb. 14, 2007)("Even if the Court had subject matter jurisdiction, Plaintiff fails to state a cognizable claim."); *Rodriguez v. McCulloch*, 9:19-CV-1608 (MAD/TWD), at * 7 (N.D.N.Y. June 22, 2020)("Even assuming that the Court had jurisdiction...Plaintiff fails to state a claim".); *Machie v. Rosenberg*, Civil Action No. 1:18-cv-01850 (UNA), at * 3 (D.D.C. Aug. 16, 2018)("this case will be dismissed for want of subject matter jurisdiction and for failure to state a claim.")(with prejudice); *Cowans v. Mississippi*, CIVIL ACTION No. 3:15-CV-101-MPM-JMV (N.D. Miss. Jan. 7, 2016)(dismissed "for lack of subject matter

jurisdiction and failure to...state a claim.").

Many of these cases involved dismissal of the underlying claims with prejudice when the District Court lacked subject matter jurisdiction. A dismissal for lack of subject matter jurisdiction, must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate the merits of a plaintiff's claims. *See* Fed. R. Civ. P. 41(b)("any dismissal", "except one for lack of jurisdiction, improper venue, or failure to join a party operates as an adjudication on the merits."). *See also Semtek International Inc., v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (the Federal Rules "make[] clear that an "adjudication upon the merits" is the opposite of a "dismissal without prejudice"".); *Lambert Co. v. Balt. Ohio R.R. Co.*, 258 U.S. 377, 381 (1922); *Barney v. Baltimore City*, 73 U.S. 280, 289 (1867); *Gaylords v. Kelshaw*, 68 U.S. 81, 83 (1863).

These decisions also represent the continuing and confounding practice of issuing "advisory opinion, disapproved by this Court from the beginning" as "a federal court is without power...to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Steel,* 523 U.S. at 101; *St. Pierre v. United States*, 319 U.S. 41, 42 (1943).

While many of these types of decisions have escaped appellate review, Circuit Courts have also affirmed decisions in whole, that have violated this Court's jurisprudence that without subject matter jurisdiction, a court "cannot proceed at all in any cause" and a Court has an "independent obligation to determine whether subject-matter jurisdiction exists". *Ex Parte McCardle,* 74 U.S. 506, 514 (1868); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

See Enyeart v. Minnesota, 218 F. App'x 560 (8th Cir. 2007)(affirming judgement "dismissing with prejudice, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)"); *Philogene v. Data Networks*, Inc., No. 18-1222 at * 2 (4th Cir. 2018)(affirming dismissal "with prejudice, under Federal Rules of Civil Procedure 12(b)(1), (6)"); *Medina v. City of Philadelphia*, 219 F. App'x 169 (3d Cir. 2007)(affirmed dismissal "with prejudice due to lack of subject matter jurisdiction."); *United States ex rel. Black v. Health & Hosp. Corp. of Marion Cnty.*, 494 F. App'x 285 (4th Cir. 2012)(affirming decision for lack of jurisdiction when decided on 12(b)(6) grounds).

B. This case represents a unique and clear example of Federal Courts violating this Court's jurisprudence establishing jurisdiction as a threshold question, issuing advisory opinions and violating the Federal Rules

Findler's case represents a unique and clear example, that addresses all of the above stated errors and concerns, in a manner that is not "harmless", as Findler's case was dismissed with prejudice, where the District Court managed to hypothetically impose, bypass the question of, and actually resolve that it lacked, subject matter jurisdiction, at different intervals, to proceed to make a determination on the merits of Findler's claims for relief, to dismiss Findler's case with prejudice. The Sixth Circuit compounded these errors by independently establishing that Findler's claims would not "deprive the district court of subject-matter jurisdiction" and then affirming, in whole, a District Court's judgment that Findler's claims did "deprive the district court of

subject-matter jurisdiction". App. 4a, 12a-14a.

The R&R specifically states that, "the Court lacks subject matter jurisdiction over Findler's claims, and his complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1)" as Findler's claims are "frivolous". 25a-26a. The R&R then goes on to conclude that, "[e]ven if the Court has subject matter jurisdiction over Findler's claims, his complaint should still be dismissed pursuant to Fed. R. Civ. P. 12(b)(6)". App. 24a-25a.

The District Court's Order, specifically references and adopts this finding of the Magistrate Judge's recommendation in the R&R. "The Magistrate Judge first determined that the Court "lack[ed]" subject matter jurisdiction over Findler's claims" because those claims were "frivolous" and that the "Court [should] grant Defendants' motion to dismiss Findler's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1)." App. 11a-12a. The District Court overruled all of Findler's Objections to the R&R, stating they are "without merit" "finding that the Defendant's [sic] Motion to Dismiss should be granted under Fed. R. Civ. P. Rule 12(b)(1)." App. 13a.

The District Court's then goes on to state, "even if the Court concluded that it had subject matter jurisdiction...and...allowed Plaintiff to file his proposed First Amended Complaint, Plaintiff still would fail to state a cognizable claim against the Defendants." App. 13a. The District Court adopted a recommendation, and overruled Findler's objections to that recommendation, that Findler's Complaint should be dismissed for lack of subject matter jurisdiction, then subsequently "hypothetically" imposed and bypassed the question of subject matter

jurisdiction, to argue why Findler's Complaint and proposed, First Amended Complaint failed to state a claim. App 11a–14a. Following this, the District Court went on to dismiss Findler's Complaint with prejudice. App. 11a–14a.

The District Court failed to establish "jurisdiction" as a "threshold matter", *Steel,* 523 U.S. at 94, "hypothetical[ly]" imposed "jurisdiction" "for the purpose of deciding the merits", *Id.*, failed to "dismiss [this] action" after it determined that "it lack[ed] subject-matter jurisdiction", Fed. R. Civ P. 12(h)(3), failed to dismiss this case without prejudice, after determining that it lacked subject matter jurisdiction, Fed. R. Civ. P. 41(b), and issued an "advisory opinion, disapproved by this Court from the beginning" one which "[a] federal court is without power...to give." *Steel*, 523 U.S. at 101; *St. Pierre v. United States*, 319 U.S. 41, 42 (1943).

C. The Sixth Circuit affirmed a decision where it's order directly conflicts with the District Court's holding that it lacked subject matter jurisdiction and where the District Court alternatively, "hypothetically" imposed and bypassed the question of, subject matter jurisdiction

The Sixth Circuit affirming, in whole, the judgement of the District Court, stated that, "[a]lthough the district court adopted the magistrate judge's report and recommendation, which included alternative recommendations to dismiss under either Rule 12(b)(1) or Rule 12(b)(6)", "it focused its analysis on the fact that Findler had failed to state a cognizable claim for relief" and as such, "construe the dismissal as having been made under Rule 12(b)(6)." App. 3a-

4a.

Even accepting the Sixth Circuit's premise, that the District Court focused its analysis "on the fact that Findler had failed to state a cognizable claim for relief" it did so after it already adopted a recommendation that it lacked subject matter jurisdiction over Findler's claims and then proceeded to hypothetically impose and bypass the question of subject matter jurisdiction, to do so. App. 4a; 11a–14a.

The Sixth Circuit then goes on to independently determine that Findler's claims are not so "devoid of merit" as to "deprive the district court of subject-matter jurisdiction." App. 4a. This conclusion, in and of itself, contradicts the holdings of the District Court's Order and R&R. Further the Sixth Circuit did not address the District Court "hypothetically" imposing jurisdiction to reach the underlying merits of Findler's claims, to dismiss Findler's claims with prejudice. App. 1a-15a.

The Sixth Circuit affirmed, in whole, the District Court's judgement, which the Sixth Circuit's own order, specifically contradicts (i.e. Findler's claims do not "deprive the district court of subject-matter jurisdiction.") App. 1a-6a.

The Sixth Circuit affirmed, in whole, the District Court's judgement, where a District Court failed to establish "jurisdiction" as a "threshold matter", *Steel Co.* 523 U.S. at 94, "hypothetical[ly]" imposed "jurisdiction" "for the purpose of deciding the merits", *Id.*, failed to "dismiss [this] action" after it determined that "it lack[ed] subject-matter jurisdiction", Fed. R. Civ P. 12(h)(3), failed to dismiss this case without prejudice, after determining that it lacked subject

matter jurisdiction, Fed. R. Civ. P. 41(b), and issued an "advisory opinion, disapproved by this Court from the beginning" one which "[a] federal court is without power...to give." *Steel*, 523 U.S. at 101; *St. Pierre v. United States*, 319 U.S. 41, 42 (1943).

D. This Court should summarily reverse the judgment of the Sixth Circuit

As a result of the compounding errors of the Sixth Circuit and District Court, deviating from virtually all tenants of this Court's jurisprudence relating to establishing jurisdiction over a civil action, Findler's claims were dismissed, *with prejudice*, on alternative grounds, for failure to state a claim. While Findler is not, and has not, argued, that the District Court lacks jurisdiction over Findler's claims, Findler is, and has, argued, the District Court made a determination that it did, which the Sixth Circuit upheld, even though the Sixth Circuit directly contradicted that conclusion in its Order affirming the District Court's judgement.

A "plaintiff [has] a right to assign for error, the want of jurisdiction in that Court to which he had chosen to resort." *Capron v. Van Noorden*, 6 U.S. 126 (1804). "It [is] the duty of the Court to see that they had jurisdiction, for the consent of parties [can] not give it. It is therefore an error of the Court, and the plaintiff has a right to take advantage of it." *Id.* at 127.

This Court should reverse the Sixth Circuit's decision, redefine the contours of this Court's holding in *Steel* and its progeny and delineate the bounds of what constitutes acceptable practice of lower federal courts in dismissing civil actions on the merits of a plaintiffs underlying claims when jurisdiction has either been established as lacking or was not

established at all.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari, resolve the questions presented and summarily reverse the decision below.

Respectfully Submitted,

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