No. 20-759

In the Supreme Court of the United States

ROBEL BING,

Petitioner,

v.

BRIVO SYSTEMS, LLC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On May 19, 2020, the Fourth Circuit Court of Appeals published their Opinion, 19-1220, having heard oral arguments on December 11, 2019. The published opinion has successfully resolved the question of appellate jurisdiction, in Sections I and II, and as such will not be included for further mention in this petition to the U.S. Supreme Court for writ of certiorari. The published dissent on sections III and IV, with respect to pro se pleading requirements, held in *Ashcroft v. Iqbal* (2009), *Bell Atl. Corp. v. Twombly* (2007), *Erickson v. Pardus* (2007), *Swierkiewicz v. Sorema N.A* (2002), by the district, appellate, and the US Supreme Court, as well as the resulting abruption of Rules of Federal Civil Procedure, have inspired this pro se petition to respectfully request a review of the following:

1. Did the 4th Circuit's Published Opinion, with dissent, err in its 2-1 majority affirmance of the district court's dismissal of Bing's pro se complaint, under Rule 12(b)(6); whereas:

   a. Premature invocation of Rule 12(b)(6) at the pleading stage, effectively allows it to supersede not only established pleading requirements for pro se complainants who bring disparate treatment and disparate impact claims of employment discrimination under Title VII of 42 U.S.C. §§ 2000e *et seq.* and race discrimination claims under 42 U.S.C. § 1981 *et seq.*; but, effectively renders the short and plain language of Federal Rule of Civil Procedure 8. as null, and;

   b. Does the district court, with the appellate court's affirmance in the decision to apply

Rule 12(b)(6), intend to so narrowly read application of pro se litigant's pleading standards, as read above, to effect the death of notice of pleading, summarily, and;

c. Does the district court and 4th circuit's departure from pleading standards and established criteria for the adjudication of complaints filed under Title VII of 42 U.S.C. §§ 2000e *et seq.* and race discrimination claims under 42 U.S.C. § 1981 *et seq.*; or, other similarly disadvantaged plaintiffs, resultingly impair its own adherence to due process, in its adoption of differently applying standards both in measures of federal rules for civil procedure and those of substantive due process, in tandem; produce a pattern of censorship for the court's want of evidentiary merit that could not be produced or attributed to the allegations but for the court's natural progression past pleadings to discovery, thereby causing irreparable harm to Civil Rights and Civil Liberties, observed under:

   i. U.S. Const. amend. I, ("Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances"), and;

   ii. U.S. Const. amend. V, "No person shall be held . . . nor be deprived of life, liberty, or property, without due process of law . . . without just compensation.", and;

d. Pursuant to Title VII of 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981 *et seq.*

LIST OF PROCEEDINGS

United States Court of Appeals for the Fourth Circuit
No. 19-1220
Robel Bing, Plaintiff v. Brivo Systems, LLC, Defendant
Date of Final Opinion: May 19, 2020
Date of Rehearing Denial: June 30, 2020

United States District Court for the District of Maryland, Greenbelt Division
Case No. 8:18-CV-01543-PX
Robel Bing, Plaintiff v. Brivo Systems, LLC, Defendant
Date of Final Order: January 22, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robel Bing, pro se, respectfully requests that this court issue a writ of certiorari to reverse and remand the decisions below; specifically, Sections III and IV, to resolve questions raised by the Fourth Circuit's published dissenting opinion, excluding the question of appellate jurisdiction, which was successfully answered in Sections I and II of the court's opinion.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, Greenbelt Division dated January 22, 2019 is included below at App.34a. The Opinion of the United States Court of Appeals for the Fourth Circuit, dated May 19, 2020, is included below at App.1a.

JURISDICTION

The timely filed Petition for Hearing or Rehearing en banc was denied on June 30, 2020. (App.62a). In accordance with U.S. Supreme Court Order 589, 150 days from the petition's denial for rehearing has been added to calculate the November 27, 2020 filing deadline.

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1981 et seq
Equal Rights Under the Law

> (a) Statement of Equal Rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b)"Make and Enforce Contracts" Defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection Against Impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2
Unlawful Employment Practices

(a)Employer Practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

Fed. R. Civ. P. 8(a)(2)
General Rules of Pleading

(a) Claim for Relief

A pleading that states a claim for relief must contain:

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

Fed. R. Civ. P. 12(b)(6)
Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(6) failure to state a claim upon which relief can be granted;

STATEMENT OF THE CASE

A. Introduction

Robel Bing (Plaintiff pro se-Appellant) first brought his concerns surrounding the circumstances and nature of his termination of employment directly to Brivo Systems, LLC (Defendant-Appellee) for internal remedy within the organization; however, after the CEO himself responded to Bing's email communications favorably at the outset of correspondence, he later ceased to engage, claiming that he was informed that the matter was resolved. The Plaintiff then timely filed a discrimination charge with the Equal Opportunity Employment Commission (EEOC) and subsequently was issued a Right to Sue Letter, which was included with the Plaintiff's pro se complaint, timely filed on May 29, 2018, in the United States District Court for the District of Maryland at Greenbelt. Plaintiff's pro se complaint detailed disparate impact and disparate treatment claims of employment discrimination under Title VII of 42 U.S.C. §§ 2000e *et seq.,* and a race discrimination claim under 42 U.S.C. § 1981*et seq.*; additionally, "Bing's *pro se* complaint also asserted claims under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 to 1681x. He does not pursue those claims on appeal." *Bing v. Brivo Sys., LLC*, 959 F.3d 605, n.1 (4th Cir. 2020). In response to the Defendant's Petition to Grant a Motion to Dismiss under Rule 12(b)(6), Plaintiff pro se responded by filing a Motion in Opposition to the Defendant's Motion to Dismiss under Rule 12(b)(6), with a supporting memorandum which asserted the Plaintiff's right to claim and

relief under Rule 8, among numerous other citations and material not admitted for consideration in the Fourth Circuit of Appeals, as only the May 29, 2018 submitted complaint was reviewed on its own merit in the appellate court. After dismissal from the district court, the plaintiff, through retained counsel from The Public Justice Center (PJC), timely filed a Notice of Appeal on May 28, 2019. Oral Arguments were heard on the matter of appeal on December 11, 2019. The Fourth Circuit published their Opinion, with dissent from Dr. Judge Traxler, on May 19, 2020, after satisfying appellate court's qualifying criteria for publication. Again, through counsel retained at PJC, the plaintiff filed on June 16, 2020, a *petition for hearing or rehearing en banc*, which was denied on June 30, 2020. At that time, the Public Justice Center had concluded its status as legal counsel for the plaintiff; and, from that time to present, the plaintiff has remained *pro se*.

A succinct overview of the plaintiff's employment history (before and after Brivo's termination with their company) is of significance and speaks to the fuller content of the man. He has worked multiple jobs with local school systems both public and private, assisting students with special needs; he has worked for the state of Maryland; he has work on a military base, which requires a DoD clearance at a minimum level of Secret. The plaintiff is familiar with background checks, varied they may be in their processes unique to their respective organizations, and the inherent need for full transparency in the disclosure of one's past. The plaintiff has not experienced any such treatment from employers before or since his experience with the Defendant.

B. District Court Dismissal

The district court's dismissal, with the majority appellate opinion to affirm that dismissal further narrows not only the effectiveness of federal civil procedural rules but summarily chills plausibility standards of interpretation nearly to the death of pleadings, particularly for pro se plaintiffs. This is at times painfully evident in reading the district court's opinion, as the dismissing judge did not seem to have read the complaint thoroughly, to include footnotes. In the original complaint, the Plaintiff's request for relief requested an equal monetary amount be directed to his university alma mater. This could have been done by the plaintiff himself after the merits of the case had been concluded; however, their inclusion speaks to the mindset of the plaintiff, to the belief that one's rights and liberties upheld today are preserved for all others in the future.

C. Appellate Court Dissent

Sections III and IV of the appellate court's dissenting decision are discussed below:

> Ultimately, a plaintiff bringing an employment discrimination claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 must provide supporting evidence through one of two methods: (1) "direct or circumstantial evidence" that discrimination motivated the employer's adverse employment decision, or (2) the *McDonnell Douglas* "pretext framework" that requires the plaintiff to show that the employer's stated permissible reason for taking an adverse employment action "is actually a pretext for discrimination." *Hill v. Lockheed Martin Logistics Mgmt.,*

> *Inc.*, 354 F.3d 277, 284-85 (4th Cir. 2004) (en banc), *abrogated in part by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119, (2009). Bing relies on the *McDonnell Douglas* framework to establish his claim. To prove a prima facie case of discrimination under the *McDonnell Douglas* framework, Bing must establish (1) membership in a protected class, (2) discharge, (3) while otherwise fulfilling Defendants' legitimate expectations at the time of his discharge, and (4) under circumstances that raise a reasonable inference of unlawful discrimination." *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995).")

Bing v. Brivo Sys., LLC, 959 F.3d 605, 617 n.8 (4th Cir. 2020) (App.19a).

In *Keys v. Humana, Inc.*, the 6th Circuit stated:

> The district court's requirement that Keys's complaint establish a prima facie case under *McDonnell Douglas* and its progeny is contrary to Supreme Court and Sixth Circuit precedent. In *Swierkiewicz v. Sorema*, the Supreme Court unanimously held that the prima facie case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement. 534 U.S. 506, 510, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). As the Court reasoned, "it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511, 122 S.Ct. 992. The Court explained that the precise requirements of a prima facie case can vary depending on the context and before discovery has unearthed

the relevant facts and evidence, it may be difficult to define the appropriate formulation. *Id.* at 512, 122 S.Ct. 992. Significantly, the Supreme Court identified the possibility that discovery may produce direct evidence of discrimination, rendering the *McDonnell Douglas* burden-shifting framework inapplicable to a plaintiff's claims. *Id.* at 511-12, 122 S.Ct. 992. The Supreme Court concluded that the ordinary rules of notice pleading apply and upheld the complaint because it gave "fair notice" of the basis of the plaintiff's claims. *Id.* at 514, 122 S.Ct. 992. The Supreme Court's subsequent decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz*. *Twombly* distinguished *Swierkiewicz*, explaining that the prior case "did not change the law of pleading," but simply reemphasized that application of the *McDonnell Douglas* prima facie case at the pleading stage "was contrary to the Federal Rules' structure of liberal pleading requirements." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955 (explaining that a plaintiff need not allege "'specific facts' beyond those necessary to state [her] claim and the grounds showing entitlement to relief"). Since *Twombly* and *Iqbal*, we have also recognized the continuing viability of *Swierkiewicz*'s holding. *See, e.g., Pedreira*, 579 F.3d at 728 (holding that the *McDonnell Douglas* prima facie case is not a pleading requirement and that "the ordinary rules for assessing the sufficiency of a complaint apply"); *Back v. Hall*, 537 F.3d 552, 558 (6th Cir.2008) (same). Recently, in *HDC, LLC v. City of Ann Arbor*, we again recognized the applicability of *Swierkiewicz*'s holding and further noted that it would be "inaccurate to

> read [*Twombly* and *Iqbal*] so narrowly as to be the death of notice pleading and we recognize the continuing viability of the 'short and plain' language of Federal Rule of Civil Procedure 8." 675 F.3d 608, 614 (6th Cir.2012). Therefore, it was error for the district court to require Keys to plead a prima facie case under *McDonnell Douglas* in order to survive a motion to dismiss")

Keys v. Humana, Inc., 684 F.3d 605, 609 (6th Cir. 2012)

> *Swanson v. Citibank*, 614 F.3d 400, 403-4 (7th Cir. 2010) ("It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, might suggest that something has happened to her that might be redressed by the law. *Cf. Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), disapproved by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("after puzzling the profession for 50 years, this famous observation [the `no set of facts' language] has earned its retirement"). The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a "plausibility" standard, but on the other hand, it has insisted that it is not requiring fact pleading,

nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2). Critically, in none of the three recent decisions — *Twombly, Erickson*, or *Iqbal* — did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure. To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window. It is therefore useful to begin with a look at the language of the rule:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
>
> * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .
>
> Fed. R. Civ. P. 8(a)(2)")

In *Swanson v. Citibank*, the 7th Circuit stated:

> "Plausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, "the plausibility standard is not akin to a probability requirement." 129 S.Ct. at 1949.

Swanson v. Citibank, 614 F.3d 400, 404 (7th Cir. 2010)

Nothing in the recent trio of cases has undermined these broad principles. As *Erickson* underscored, "[s]pecific facts are not necessary." 551 U.S. at

> 93, 127 S.Ct. 2197. The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: "the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* Instead, the Court has called for more careful attention to be given to several key questions: what, exactly, does it take to give the opposing party "fair notice"; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the court? This is the light in which the Court's references in *Twombly*, repeated in *Iqbal*, to the pleader's responsibility to "state a claim to relief that is plausible on its face" must be understood. *See Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *Iqbal*, 129 S.Ct. at 1949.

Swanson v. Citibank, 614 F.3d 400, 404 (7th Cir. 2010)

The appellate court's published dissent holds true to the above in the body of the dissent. The majority appellate decision erred in granting merit to the Defendant's reason for the Plaintiff's discriminatory experience, when the existence of the Defendant's proffered reason, by their own admission, was only available due to a racially motivated decision by the Defendant to subject the Plaintiff to additional layer of screening on the first day of employment with the company, even though he had successfully completed all background check processes before becoming an employee.

As observed in the dissent, *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 619-22 (4th Cir. 2020) ("In order to "survive a motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Paradise Wire & Cable Defined Ben. Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007)). Although Title VII cases often involve application of the *McDonnell Douglas* prima-facie case standard, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

Instead, a Title VII plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). Accordingly, the question in this case is whether Bing alleged facts sufficient to make it facially plausible that Brivo fired or otherwise discriminated against him in the conditions of employment because of his race. *See* 42 U.S.C. § 2000e–2 (a)(1). And because Bing filed his complaint *pro se*, we are obliged to view his allegations liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted

by lawyers.") (citation and internal quotation marks omitted).

Bing's factual allegations show a confusing about-face by Brivo. By all appearances, Brivo initially was enthusiastic about Bing, as it extended him an offer a day after the interview and encouraged him to start as soon as possible. Although the offer was contingent on Bing passing a background investigation, he passed that check and was permitted to report for work as expected and to begin the new-employee orientation. But despite the satisfactory background report, Wheeler decided upon meeting Bing that additional investigation was required, and he fired Bing without giving him a chance to explain the information that he uncovered. From these facts, Bing alleges that he was subject to an additional layer of background investigation because of his race. *See* J.A. 16 (alleging that Wheeler's internet search "serve[d] as a means for discrimination of protected groups, by allowing personal and perhaps implicit biases to explicitly permeate the work environment").

In my view, the facts alleged in Bing's complaint, along with the inferences that can reasonably be drawn from those facts, make Bing's claim of discrimination plausible. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). First, because Brivo had already hired a third-party to perform a background check and had made Bing's job offer contingent on passing the background check, it is reasonable to assume that Wheeler's additional investigation of an

employee who had already started work was not standard practice.

After all, if Brivo believed that the third-party report was inadequate to screen potential employees, Brivo would conduct its additional internet searches of applicants before they reported for work, so that unqualified applicants would never become employees. *See* J.A. 16 (questioning whether Brivo could "demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company"). Moreover, it is reasonable to infer that Wheeler, as Brivo's "Security Architect," would have had access to Bing's employment application and background report before Bing reported for work. Thus, as Bing alleges, the only new information Wheeler would have learned upon meeting Bing was Bing's race. *See* J.A. 16 (alleging that the only explanation for the additional background search was Bing's "(possibly unexpected) physical appearance as an African-American male").

Bing's *pro se* complaint thus contains sufficient factual information to support the allegation that Bing was subject to the additional layer of background investigation because of his race. Bing was qualified for the job at Brivo and he successfully passed the required background check. From the facts alleged in the complaint, the only thing that changed after Bing was hired and began work was Wheeler's knowledge of his race. Those facts take us beyond mere speculation and make it plausible that Wheeler's actions were motivated by race. Those facts also distinguish this case from *McCleary-Evans v. Maryland Department of Transportation*. In that case, an African-American female job applicant sued a state agency, asserting

that she was not hired for two positions she applied for because of her race and gender. 780 F.3d at 583. In her complaint, the plaintiff alleged that during her interview, "and based upon the history of hires within [that agency], . . . both [supervisors] predetermined to select for both positions a White male or female candidate." *Id.* We found the plaintiff's allegations insufficient to support a discrimination claim because "she alleged no factual basis for what happened during the course of her interview to support the alleged conclusion." *Id.* at 586 (internal quotation marks omitted). While "she repeatedly alleged that the Highway Administration did not select her because of the relevant decisionmakers' bias against African American women," we found those claims to be "naked" allegations and "no more than conclusions." *Id.* at 585 (internal quotation marks omitted).

As we explained, "the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is *consistent* with discrimination, [but] it does not alone support a reasonable inference that the decisionmakers were motivated by bias." *Id.* at 586. Because "[o]nly speculation can fill the gaps in [the plaintiff's] complaint-speculation as to why two 'non-Black candidates' were selected to fill the positions instead of her," we concluded that the complaint was properly dismissed. *Id.* ("*McCleary–Evans*' complaint stopped short of the line between possibility and plausibility of entitlement to relief.") (internal quotation marks and alteration omitted).

Unlike in *McCleary-Evans*, no speculation is required in this case. To survive the motion to dismiss, Bing was only required "to allege facts to satisfy the elements of a cause of action created by [Title VII]."

Id. at 585. Title VII makes it an unlawful employment practice "to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1).

Bing's allegations establish that he was subjected to what can reasonably be understood as an unusually timed, additional layer of background investigation, and Wheeler used the information found in that unusual search as the reason to fire Bing. The only new information Wheeler learned before conducting the unusual background check was Bing's race. Those facts are sufficient to support a reasonable inference that Brivo subjected Bing to additional investigation because of his race and fired him because of his race. When granting the motion to dismiss, the district court effectively viewed the allegations of the complaint in favor of Brivo rather than Bing when concluding that Bing "was terminated because of his involvement in the shooting incident." J.A. 176.

Contrary to the district court's conclusion, Bing did not plead himself out of court by acknowledging the existence of the newspaper article and his involvement in the shooting incident described in the article. While Bing alleged that Wheeler told him he was being fired because of his involvement in the shooting, Bing did not allege that was the true reason he was fired, and it was error for the district court to conflate the two. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 168 (4th Cir. 2016) (explaining that when considering a motion to dismiss, the court "should have treated [the plaintiff's] allegations [about statements made by defendant police officers] as what they were-

allegations that the [o]fficers made the quoted statements, not allegations that the statements themselves were true").

The incident described in the article is Brivo's defense to Bing's claims of discrimination; the district court's premature ruling prevented Bing from attempting to prove that any reason asserted by Brivo was pretext for discrimination. Moreover, accepting Brivo's claim that Bing was fired because of his involvement in the incident ignores the fact that Bing's complaint, liberally construed, alleges that he was subject to scrutiny and investigation that white employees were not. Thus, even if Brivo could prove that the discovery of the article was the true reason it terminated Bing, that does not make Bing's claim of discrimination in the conditions of employment implausible.

Nothing about the existence or content of the article renders implausible Bing's theories of liability. *See Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) ("[W]hile BNT need not establish a prima facie case at th[e motion-to-dismiss] stage, . . . we must be satisfied that the City's explanation for rejecting the loan does not render BNT's allegations implausible."). The district court therefore erred by assuming the truth of Brivo's defense when granting the motion to dismiss. While Bing's complaint does not include exhaustive factual allegations, we must remember the unusual circumstances of this case. Bing was fired on his first day on the job, not because of anything he did that day, but because of a news article that Bing was not permitted to explain.

Under these circumstances, Bing is in no position to assert whether newly hired white employees were subject to the same kind of additional internet

background check, or whether any white employees had been fired for similar, decade-old conduct. However, as discussed above, it is reasonable to assume that employers will conduct all necessary background checks before allowing new employees to start work. But in this case, Wheeler conducted the additional background search only after learning that Bing was black, and Wheeler fired Bing without permitting him to explain the article and his involvement in the underlying incident. In my view, these facts make Bing's claim of racial discrimination plausible. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (explaining that a complaint must contain "[f]actual allegations [sufficient] to raise a right to relief above the speculative level").")

This Court stated in *Haines v. Kerner*:

> The only issue now before us is petitioner's contention that the District Court erred in dismissing his *pro se* complaint without allowing him to present evidence on his claims.

Haines v. Kerner, 404 U.S. 519, 520 (1972)

REASONS FOR GRANTING THE PETITION

Oftentimes, to conflict is to create an opportunity to learn. However, the courts' conflicting interpretations of the very same legal case standards create a premature death of cases at the notice of pleading. The test of the court's process lies within the full observance of its process. The departure from established standards and procedures of the U.S. Supreme court as well as other circuits is discussed above, and presented within this petition's questions to the court.

CONCLUSION

If a Plaintiff before the Court, by Constitutional virtue of Civil Liberties and Civil Rights held, submits a petition to be heard in assertion that those same have met injury, the Plaintiff must be considered as a petitioner acting in good faith, and be recognized as not merely seeking an individual remedy alone; rather, for seeking to uphold the protections of all qualifying personages protected by those same Constitutional rulings, standards, statutes and provided clauses therein. Any such obstruction to those protections is more than a passing affront to one person. Irreparable harm to those protections processes, does not always occur overnight, and the cumulative effect must be considered carefully when seeking to balance access to courts with the qualifying integrity of its future rulings.

Respectfully submitted,

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NOVEMBER 27, 2020

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OPINIONS AND ORDERS

REHEARING ORDER