**NO. _____**

**IN THE**

# SUPREME COURT OF THE UNITED STATES

**CHRISTINE CLIFFORD, (AS ADMINISTRATOR OF THE ESTATE OF JOHN CLIFFORD), et. al., Petitioners**

**v.**

**RICHARD FEDERMAN, et. al., Respondents**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This Court created the governing standard for substantive Fed. R. Civ. P. 12 ("Rule 12") and 8 ("Rule 8") review of federal civil pleadings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007) and *Ashcroft v. Iqbal*, 556 *U.S.* 662, 678 (2009). Accordingly, no other federal court may create its own separate or competing standard to determine whether federal civil pleadings: (i) state a claim upon which relief can be granted to survive a Rule 12 motion to dismiss; (ii) comply with Rule 8(a)(2)'s short and plain statement of the claim showing that the pleader is entitled to relief requirement; and/or (iii) provide defendants fair notice of the claims against them and the grounds upon which they rest.

Since 1985, the Eleventh Circuit has been in direct conflict with this Court's governing *Twombly* and *Iqbal* standard. Specifically, Eleventh Circuit courts routinely apply the "shotgun pleading" rule to determine whether pleadings comply with Rule 8(a)(2) and/or state a claim upon which relief may be granted without applying the *Twombly* and *Iqbal* standard.

The question presented is therefore whether the Eleventh Circuit's "shotgun pleading" rule used to strike pleadings with prejudice directly conflicts with the *Twombly* and *Iqbal* standard for Rule 12 and Rule 8 substantive merit review of a pleading.

## CORPORATE DISCLOSURE STATEMENT

The corporate Petitioners do not have a parent corporation and there is no publicly held corporation that owns ten percent (10%) or more of their membership.

## PARTIES TO THE PROCEEDING

All parties do **not** appear in the case caption on the cover page. Petitioners Christine Clifford (as Administrator of the Estate of John Clifford); Craig Clifford; Scott Clifford; Paul Clifford; Stephen Dazzo; Kasolas Family & Friends VG Investment, LLC; and Jersey Cord Cutters, LLC ("Petitioners") were the appellants in the court of appeals. Respondents were appellees in the court of appeals. Respondents are: 1094 Digital Distribution LLC; 2251 Lake Park Investment Group, LLC; 2496 Digital Distribution LLC; Arthur, Daryl; Ashcraft, Katie; Ashcraft Opperman & Associates, LLC; Business Consulting, LLC; Cascade Northwest, Inc.; Clippard, Heather; Doc Maandi Movies LLC; DMM-Expendables 3 LLC; Emmenegger, Jan; Federman, Richard; Gotham Media Corporation; Gotham Media Services, Inc.; Guthrie, Todd; Hairston, George; Johnson, Winston; Kimberlyte Production Services, Inc.; Kostensky, Robert; KT Communications Consulting, Inc.; Maandi Entertainment LLC; Maandi Media Holdings International LLC; Maandi Media Productions LLC; Maandi Media Productions Digital LLC; Maandi Park MS LLC; Megatone Music, LLC; Poole, Lori; Rickshaw Productions, LLC; Robert Half International, Inc. (D/B/A The Creative Group And D/B/A Robert Half Technology); Shaw, Patrick; SST Swiss Sterling, Inc.; Su, Justin; Tech CXO, LLC; Thurman, Kristy; Winsonic Digital Cable Systems Network Holdings, Ltd.; Winsonic Digital Cable Systems Network, Ltd.; and Winsonic Digital Media Group, Ltd.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The court of appeals' May 5, 2021 Written Opinion & Order is unpublished (1a-10a) but reported at 2021 WL 1788472. The district court's January 7, 2020 Written Opinion & Order (96a-105a) is unpublished but reported at 2020 WL 377026. The district court's June 15, 2020 Written Opinion & Order (106a-112a) and three Written Opinions and Orders dated March 22, 2019 are all unreported. (11a-95a)

## JURISDICTION

The court of appeals' affirmance of the district court's three rulings below striking Petitioner's complaints with prejudice on shotgun pleading grounds was entered by Written Opinion & Order on May 5, 2021. (1a-12a). This Court therefore has jurisdiction to hear this petition pursuant to 28 U.S.C. 1254(1) since it requests the Court review a federal circuit court of appeal's final judgment by writ of certiorari.

## RELEVANT COURT RULES

Federal Rules of Civil Procedure 8(a)(2), 12(b)(6) and 12(c).

## STATEMENT OF THE CASE

The district court's jurisdiction below was invoked per 28 U.S.C. § 1330. This action was filed under United States law: (i) Section 10(b) of the Securities & Exchange Act of 1934 (the "Securities Act"); (ii) SEC Rule 10b-5; and (iii) the Racketeer Influenced & Corrupt Organization Act ("RICO") at 18 U.S.C. §§ 1961-1968.

The jurisdiction of the district court below was also invoked pursuant to 28 U.S.C. § 1332 because this

action is between citizens of different states and the amount in controversy exceeds $75,000, with Petitioners' aggregate damages being approximately $6,000,000.

In *Twombly*, this Court promulgated the governing standard under Rule 8 for pleading a claim upon which relief can be granted to survive a Rule 12 motion to dismiss. In *Iqbal*, this Court confirmed *Twombly's* governing pleading standard applies to "all civil actions" in federal courts. Neither case references or authorizes any other governing standard for reviewing pleadings for compliance with Rule 8 and/or surviving Rule 12 motions to dismiss – whether on technical form or substantive grounds.

Nevertheless, the Eleventh Circuit has been implementing its own separate shotgun pleading rule for over 35 years to conduct Rule 8 and Rule 12 analyses without reviewing pleadings under *Twombly* and *Iqbal*, to determine whether such pleadings state viable claims and give defendants notice of such claims. The shotgun pleading rule contains strict "form" requirements that have no substantive nexus to whether a complaint satisfies Rule 8 and/or should survive a Rule 12 motion. The shotgun pleading rule is routinely and openly used in Draconian fashion to strike with prejudice patently viable pleadings stating viable claims on technical form grounds and that otherwise would survive a Rule 12 motion to dismiss under *Twombly*/*Iqbal*. The Eleventh Circuit ignores the *Twombly*/*Iqbal* standard, and is in direct conflict with the *Twombly*/*Iqbal* standard Rule 8 and Rule 12 substantive merits analyses. Consequently, this Court's review is necessary to determine the shotgun pleading rule's legitimacy and viability.

## A. Legal Background

In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), this Court created the governing standard for evaluating whether a complaint is enough to survive a motion to dismiss. The Court held that Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id.* at 555. *Twombly*

determined Rule 8 does not require "detailed factual allegations" but demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*

*Twombly* ruled that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Those factual allegations "must be enough to raise a right to relief above the speculative level," and "must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555-556.

Therefore, under *Twombly,* "the threshold requirement of Rule 8(a)(2) [is] that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'" *Id.* at 556. Surviving a Rule 12 motion under *Twombly* "requires a complaint with enough factual matter (taken as true) to suggest" a cause of action against a defendant(s). *Id. Twombly* firmly articulated the governing Rule 12 and Rule 8 "accepted pleading standard: once 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 (emphasis added). To therefore "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." *Id.* at 570.

This Court expanded on *Twombly* in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) by holding that: "**Rule 8 marks a notable and generous departure from the *hyper-technical, code-pleading regime of a prior era***." *Id.* at 678-679 (emphasis added). *Iqbal* added that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 678-679. *Iqbal* also ruled that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 680-684. *Iqbal/Twombly* "was based on [this Court's] interpretation and application of Rule 8

[which]" in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts.'" *Id.*

### B. The Directly Competing 11th Circuit Shotgun Pleading Rule

In the Eleventh Circuit, a purported "failure" to comply with Rule 8(a)(2) is not the type of failure described in *Twombly* and *Iqbal*. Quite the contrary.

The first published opinion to discuss shotgun pleadings in any meaningful way described the [Eleventh Circuit's perceived] problem with shotgun pleadings under the federal rules. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2005)(citing *T.D.S. Inc. v. Shelby Mut. Ins. Co.,* 760 F.2d 1520) (11th Cir.1985). The shotgun pleading rule emanated in 1985 before *Twombly* and *Iqbal* in a "footnote, which began by quoting Rules 8(a)(2) and 10(b)":

> The purpose of these rules is self-evident, to require the pleader to present his claims discretely and succinctly, so that, his adversary can discern what he is claiming and frame a responsive pleading, the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted, and, at trial, the court can determine that evidence which is relevant and that which is not. "Shotgun" pleadings, calculated to confuse the "enemy," and the court, so that theories for relief not provided by law and which can prejudice an opponent's case, especially before the jury, can be masked, are flatly forbidden by the [spirit], if not the [letter], of these rules. *Weiland, supra.* at 1320-21, n. 2.

That "footnote described the complaint in *T.D.S.* as 'a paradigmatic shotgun pleading, containing a variety of contract and tort claims interwoven in a haphazard fashion.'" *Id.* The "*T.D.S.* [footnote] was [its] first shot in what was to become a thirty-year salvo of criticism aimed at shotgun pleadings, and there is no

ceasefire in sight." *Id.* at 1321. In developing its shotgun pleading rule, the Eleventh Circuit "examined more than sixty published decisions issued since the *T.D.S.* decision in 1985, [and] looked for how many types of shotgun pleadings have been used, wittingly or unwittingly, by attorneys and litigants." *Id.* at 1321-22.

The Eleventh Circuit in *Weiland* describes at least four (4) different categories of shotgun pleadings existing within the shotgun pleading rule as of 2015. In doing so, it acknowledged its own rule for substantively reviewing pleadings under Rule 8 and Rule 12 directly conflicts with this Court's governing *Twombly*/*Iqbal* standard:

> Though the groupings cannot be too finely drawn, we have identified four rough types or categories of shotgun pleadings. The most common category —by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint.
>
> The next most common category, at least as far as our published opinions on the subject reflect, is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action.
>
> The third shotgun pleading category is one that commits the sin of not separating into a different count each cause of action or claim for relief.
>
> Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.
>
> The unifying characteristic of all categories of shotgun pleadings is that they fail in one

> degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.

*Id.* at 1322-1323.

The "unifying characteristic" described, however, is already governed by *Twombly/Iqbal*. Notably, the at least four (4) shotgun pleading variants above are not prohibited or discussed in *Twombly/Iqbal*. More importantly, they do not necessarily or axiomatically render a complaint a category of pleading that does not fairly "give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* Moreover, *Twombly/Iqbal,* Rule 8 and/or Rule 12 do not include any subjective list of "technical form" requirements allowing non-substantive dismissal of pleadings with prejudice that otherwise satisfy *Twombly/Iqbal*. In fact, nothing in *Twombly* or *Iqbal* prohibits the pleading practices the shotgun pleading rule prohibits, if such pleading satisfies *Twombly/Iqbal* by: (i) stating a claim upon which relief can be granted after review; and (ii) providing adequate notice and sufficient supporting facts to an adversary of the claims asserted against the adversary.

Notably, the Eleventh Circuit recently created a fifth shotgun pleading variant characterized as the "too many facts pled" category, further conflicting with *Twombly/Iqbal*. See *Barmapov v. Amuial*, 986 F.3d 1321 (11th Cir. 2021). This expansion further supports granting this petition. The shotgun pleading rule also predates *Twombly* and *Iqbal* by over two decades, yet has been aggressively proliferated and expanded by Eleventh Circuit courts to strike complaints otherwise satisfying *Twombly/Iqbal*.

### C. Factual Background & Proceedings Below

Petitioners filed this action to recover approximately $6,000,000 aggregately invested in a fraudulent investment scheme hidden behind Gotham Media Corporation ("GMC"). This highly complex investment scheme centered upon a phony "over-the-top" internet cable television service described as

"VIDGO" designed to defraud investors. The VIDGO scheme was orchestrated and perpetrated by a select group of respondents with various levels of assistance and involvement from the other respondents. The investment scheme was executed to steal Petitioners' investment funds earmarked for capitalizing and launching VIDGO.

In response to Petitioners' Complaint, virtually all respondents filed either Answers and/or Rule 12 motions to dismiss (with moving and reply briefs) *without* moving to strike on 11th Circuit shotgun pleading rule grounds. (48a-49a). After those motions were briefed, respondents Federman and Johnson (and Johnson's various alter-ego defendant companies) also moved to dismiss on Rule 12(b)(6) grounds. *Id.* Johnson and his 17 defendant alter-ego companies (hereinafter, the "Johnson Defendants") also concurrently moved to strike on shotgun pleading grounds, with Federman joining that motion. No other respondents that filed Answers/Rule 12 motions made such shotgun pleading motions. *Id.*

On March 22, 2019, the district court granted the Johnson Defendants' motion to strike the Complaint as a "shotgun pleading." (55a-59a). This despite only the Johnson Defendants and Federman claiming they could not decipher the Complaint to formulate a responsive pleading (despite their Rule 12 motions), and despite the other respondents' responsive Answers and Rule 12 motions. The district court never decided any of the Rule 12(b)(6) or Rule 12(c) motions filed on their merits (save for a limited Private Securities Litigation Reform Act ("PSLRA") issue), and even struck Petitioner's Complaint as to respondents that filed an Answer.

On March 22, 2019, the district court entered two separate Written Opinions and Orders: (i) denying KTC's/Thurman's motion to dismiss on personal jurisdiction grounds (64a-95a); and (ii) granting Spellman's motion to dismiss on personal jurisdiction grounds (15a-46a), despite the shotgun pleading determination. The Written Opinion granting Spellman's personal jurisdiction motion had its Facts section incorporated into the district court's separate March 22, 2019 Written Opinion striking the Complaint on shotgun pleading grounds. *Id.*

In conflict with its shotgun pleading determination, the district court made a limited Rule 12(b)(6) motion determination that Petitioners' federal RICO claims were barred by the PSRLA since the Complaint asserted securities fraud as a predicate. That determination contradicted the district court's shotgun pleading determination that the Complaint was "virtually impossible" to understand. The ability to review the Complaint to decide certain personal jurisdiction issues and the PSLRA issue raised in some Rule 12 motions objectively demonstrates the district court and opposing counsel could decipher the facts and claims alleged against respondents in the Complaint.

Per routine shotgun pleading practice, the district court's March 22, 2019 Order imposed the following shotgun pleading requirements upon Petitioners for re-pleading their Amended Complaint:

> (i) Petitioners may not incorporate all 312 factual paragraphs into each count, but instead indicate which of the factual paragraphs are alleged to support each individual count alleged;
>
> (ii) Each individual count may only be based on a single legal claim for recovery (legal fraud, fraud in the inducement and alter-ego all separated);
>
> (iii) Plaintiffs could assert a single count against multiple defendants provided they identify the precise conduct attributable to each defendant separately in each count. (79a-81a).

After Petitioners filed their Amended Complaint addressing the district court's directives for addressing the shotgun pleading deficiencies, certain respondents again filed Answers, Rule 12(b)(6) motions and Rule 12(c) motions *without* raising a shotgun pleading argument (including some of the same). Additional parties filed motions to strike on shotgun pleading grounds claiming the March 22, 2019 directives were not complied with. Despite a new judge acknowledging Petitioners "technically complied" with the "repeating and realleging" directive while finding no fault with Petitioners separating each cause of action into single counts, the district court issued a January 7, 2020 Order

again striking the Amended Complaint with prejudice on shotgun pleading grounds. (100a-101a).

The January 7, 2020 shotgun pleading determination was based upon Petitioners allegedly incorporating too many facts into each count, a limitation never imposed by the March 22, 2019 Order and that was not at that time a shotgun pleading category. *Id.* It is also not a limitation imposed by Rule 8(a)(2), *Twombly* or *Iqbal.* The district court also determined Petitioners' pleading did not detail which factual allegations were asserted against which Respondents in each count. This conclusion was reached despite that the Fact section in both pleadings separating out and organizing all factual allegations as to each "silo" of respondents under separate headings before the Counts section, and those numbered paragraphs being specifically referenced in the first paragraph of each count. (102a).

Petitioners then moved for reconsideration of the January 7, 2020 Order seeking leave to amend and/or to modify the dismissal to "without prejudice", so Petitioners could pursue their state law claims in state court, which comprised all of their claims except for the dismissed federal RICO counts and two (2) securities fraud counts. The district court denied reconsideration. Petitioners then appealed all three-district court shotgun pleading rulings. (106a-112a).

The Eleventh Circuit affirmed the shotgun pleading determinations on the same grounds, and again refused Petitioners any substantive merits-based review of their claims in either complaint. (1a-12a).

The shotgun pleading rule below resulted in tremendous injustice to Petitioners after being defrauded of approximately $6,000,000. They received virtually no Rule 12, *Twombly* and *Iqbal* substantive merits-based review of their claims. As detailed below, this is the identical result that numerous other Eleventh Circuit litigants and their counsel are unjustifiably suffering in all civil litigation types due to the shotgun pleading rule's application. This occurred in this instance (and others detailed below) despite respondents and their counsel demonstrating clear ability to review, understand and file responsive Answers and Rule 12 motions to both complaints stricken on shotgun pleading

grounds. This also occurred despite the district court being able to make a substantive determination from the Complaint dismissing Petitioners' federal RICO claims per the PSRLA based on its factual allegations.

## REASONS FOR GRANTING THE PETITION

This case presents an issue of first impression concerning the Eleventh Circuit's shotgun pleading rule routinely implemented since 1985, and specifically whether the Eleventh Circuit (or any federal circuit) may impose its own pleading requirements using the shotgun pleading rule to dismiss complaints otherwise satisfying *Twombly/ Iqbal*. The shotgun pleading rule was developed without this Court's authority based upon the Eleventh Circuit's own competing interpretation of what Rule 8(a)(2) requires, contrary to *Twombly/Iqbal*. This case presents a compelling opportunity for this Court to review the Eleventh Circuit's shotgun pleading rule to determine whether it conflicts with the governing *Twombly/Iqbal* standard for Rule 8 and Rule 12 scrutiny.

Compelling reasons exist to grant this petition since this case satisfies all criteria for a writ of *certiorari* to issue. First, an important federal question of first impression is presented: the direct conflict existing between the Eleventh Circuit's shotgun pleading rule and this Court's *Twombly/Iqbal* standard for reviewing pleadings to determine whether they state a claim for relief under Rule 12 and Rule 8. See Rule 10(c). The direct conflict presented specifically invokes this Court's Rule 10(c) since it is between the Eleventh Circuit's shotgun pleading rule and this Court's controlling authority.

The Court's review and determination of this conflict will have significant impact in all civil litigations within the Eleventh Circuit, and far beyond just this case and the Petitioners. This includes impacting the ultimate substantive outcomes of hundreds of cases that will be improperly stricken with prejudice in the future using a competing standard other than *Twombly*/*Iqbal*. Notably, petitioners' application is not based upon any erroneous factual findings or the misapplication of a properly stated rule of law, but rather a specific issue of

first impression involving the direct conflict of federal law between *Twombly*/*Iqbal* and the Eleventh Circuit's shotgun pleading rule.

This direct and apparent conflict is "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery,* 349 U.S. 70, 74 (1955). To the contrary, it has resulted in hundreds of viable complaints being improperly stricken for approximately thirty-five years on non-merit/technical form grounds in violation of this Court's governing standards concerning Rule 12 and Rule 8 scrutiny - both before and after the *Twombly* and *Iqbal* decisions. Over sixty Eleventh Circuit published cases exist involving pleadings stricken on shotgun pleading grounds, with countless others not published or reported.

Consequently, this petition involves serious importance to the public as distinguished from mere importance to these particular Petitioners, including: (i) attorneys practicing in the Eleventh Circuit and its states; (ii) litigants bringing real and significantly substantive claims satisfying Rule 8, Rule 12, *Twombly* and *Iqbal* in Eleventh Circuit courts that are nevertheless stricken on shotgun pleading grounds; (iii) creation of potential and unwarranted legal malpractice claims against attorneys (and all related consequences) doing nothing improper in drafting complaints satisfying *Twombly/Iqbal;* (iv) inappropriate dismissal of substantive claims brought by numerous already harmed litigants on hyper-technical and non-merit based grounds never approved by this Court's authority or the Federal Rules of Civil Procedure; and (v) the shotgun pleading rule's spread to other circuits already in progress. See *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). For all practicing attorneys and litigants, the shotgun pleading rule "has become a most troublesome question in the administration of justice." *Linkletter v. Walker,* 381 U.S. 618, 620 (1965).

Comparing this Court's *Twombly/Iqbal* standard to the Eleventh Circuit's shotgun pleading rule demonstrates they are directly at odds. By creating and implementing its shotgun pleading rule, the Eleventh Circuit ignores the *Twombly/Iqbal* standard in favor of its own shotgun pleading rule that equates to a separate

"court rule" never approved by this Court. By doing so, the Eleventh Circuit routinely "decide[s] a federal question in a way that conflicts with applicable decisions of this Court," thereby necessitating certiorari review under this Court's Rule 10(c). See e.g., *U.S. v. Bass*, 536 U.S. 862 864 (2002)(granting certiorari because the Sixth Circuit's decision was contrary to this Court's *U.S. v. Armstrong* decision); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997)(certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents"); *Army & Air Force Exchange Serv. V. Sheehan,* 456 U.S. 728, 733 (1988)(ruling below "appeared to be in conflict with our precedents").

The Eleventh Circuit's use of the shotgun pleading rule rather than the controlling *Twombly/Iqbal* standard constitutes "a departure" from "the usual course of judicial proceedings," as does its disregard for the Federal Rules of Civil Procedure that contain no support for the shotgun pleading rule categories. Per this Court's Rule 10(a), this direct conflict calls for *certiorari* to exercise this Court's "judicial supervision of the administration of justice," in order to "maintain standards of procedure and evidence." *McNabb v. U.S.,* 318 U.S. 332, 340-41. The Eleventh Circuit's practice of striking substantively viable complaints with prejudice on "shotgun pleading grounds" requires intervention per this Court's Rule 10(a), since this practice "has so far departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *Hollingsworth v. Perry,* 558 U.S. 183, 196 (2010) (This Court "has a significant interest in supervising the administration of the [federal] judicial system"); *U.S. v. Beggerly,* 524 U.S. 38 (1998)(reviewing the construction of the federal rules of civil and criminal procedure).

Third, the Question Presented is an important and repeatedly recurring one, evidenced not only by this matter, but also by the number of published shotgun pleading decisions. This includes the recent *Barmapov* decision reaffirming the shotgun pleading rule through the Eleventh Circuit's most senior judge's concurring opinion ***even if*** a complaint satisfies *Twombly/Iqbal*.

Lastly, "fairly included" within the Question Presented is whether the shotgun pleading rule constitutes an unauthorized equivalent of its own distinct "Federal Rule of Civil Procedure" without proper amendment or this Court's approval. Such inquiry constitutes a "subsidiary question fairly included" per this Court's Rule 14.1(a). *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992). The foregoing conflict argued in this petition respectfully illustrates that the shotgun pleading rule essentially does constitute an unauthorized equivalent of the Eleventh Circuit's own distinct Federal Rule of Civil Procedure. Broadening the scope of Federal Rules of Civil Procedure can only be accomplished "by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 515 (2002); (*Leatherman v. Tarrant County,* 507 U.S. 163, 168 (1993).

Accordingly, this case is the ideal vehicle for determining the Question Presented. It took over thirty-five (35) years for the Question Presented to reach this Court and it may never do so again. This includes over one decade since the *Twombly* and *Iqbal* decisions, during which time Eleventh Circuit courts have more aggressively expanded and routinely implemented the shotgun pleading rule. Petitioners confronted the shotgun pleading rule at all phases below while arguing as to its conflict with *Twombly*/*Iqbal*, since most respondents' course of conduct in filing Answers, Rule 12(b)(6) and Rule 12(c) motions rather than shotgun pleading motions confirmed the complaints were sufficiently pled.

### A. The Shotgun Pleading Rule Directly Conflicts with *Twombly/Iqbal*

Creation and use of the shotgun pleading rule to strike pleadings without substantive review on the merits directly conflicts with *Twombly/Iqbal*. The Eleventh Circuit's reasoning for the shotgun pleading rule (i.e. to ensure a pleading provides a party "adequate notice of the claims against them and the grounds upon which each claim rests") is already governed by *Twombly* and *Iqbal*. This Court's governing standard for motions to dismiss for failure(s) to satisfy Rule 8 or Rule 12 does

not include any subjective list of technical "form" pleading practices authorizing the non-substantive dismissal of pleadings with prejudice otherwise satisfying *Twombly/Iqbal*, such as the five (5) shotgun pleadings types described here. There is simply nothing in *Twombly* or *Iqbal* prohibiting the "form" pleading practices the shotgun pleading rule admonishes where a pleading otherwise satisfies *Twombly/Iqbal*.

First, nowhere does *Twombly* or *Iqbal* hold that a "complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint," is an improper pleading practice: (i) violating Rule 8 or Rule 12; and/or (ii) making it "virtually impossible" for an adversary to understand or be on notice of the claims asserted against them. The district court utilized this shotgun pleading variation to strike both pleadings below. Tellingly, even after Petitioners corrected that practice per the district court's directive, the district court determined the Amended Complaint still violated this variation and struck it again on shotgun pleading grounds. This despite acknowledging Petitioners' "technically complied" with this directive, and while never applying *Twombly/Iqbal* to determine if either pleading satisfied that governing standard.

Second, while not an issue below, a pleading "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action" does not necessarily mean a pleading does not satisfy *Twombly/Iqbal* for proper pleading under Rule 8 and Rule 12. Even the Eleventh Circuit published shotgun pleading cases demonstrates no need for that shotgun pleading category in such scenarios, since motions for more definite statements have existed before and since the shotgun pleading rule's creation in 1985. This second shotgun pleading category therefore should not allow "striking" a pleading with prejudice on such technical grounds without review on the merits.

Third, "not separating into a different count each cause of action or claim for relief in a complaint" does not axiomatically render a pleading deficient so as to not satisfy Rule 8 or Rule 12, or one that does not fairly

apprise an adversary of the claims asserted. This shotgun pleading variation too patently contradicts *Twombly/Iqbal*. The district court took issue with Petitioners' first pleading (which Petitioners corrected) merely because one count in the original Complaint stated petitioners' claims for fraud and alter-ego in the same count, while ignoring whether the complaint provided fair and adequate notice to the adversaries regarding the claims asserted against them.

Fourth, the shotgun pleading variation of "asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against," also falls within *Twombly/Iqbal* for Rule 12 and Rule 8 review. Such "defects" are addressable on Rule 12 motions to dismiss or a Rule 12(e) motion for a more definitive statement. There is consequently no justification to "strike" a pleading with prejudice in that scenario that may still place the adversary on notice of the claims against them. This shotgun pleading variation is also highly subjective and confusing.

Lastly, the recently created "too many facts" form of shotgun pleading directly conflicts with the *Twombly/Iqbal* minimum threshold standard for Rule 8 and Rule 12 for scrutiny and equates to its own pleading standard.

The rulings below demonstrate the same district court striking Petitioner's pleading on purported shotgun pleading grounds could still nevertheless rule on the pleadings' merits and personal jurisdiction issues, by deciphering the facts and claims asserted in it. This confirms the direct conflict between *Twombly/Iqbal* and the shotgun pleading rule.

### B. *Weiland* Confirms the "Shotgun Pleading" Rule Conflicts

*Weiland v. Palm Beach County Sheriff's Office,* 792 F.3d 1313 (11th Cir. 2005) illustrates the shotgun pleading rules directly conflicts with *Twombly/Iqbal* standard, consequently creating unjust results for litigants whose pleadings otherwise satisfy Rule 12 and Rule 8 motion scrutiny. In *Weiland,* the 11th Circuit

reversed the district court's dismissal of plaintiff's claims based upon the two shotgun pleading practices of: (i) "repeating and re-alleging all of the factual allegations in Paragraphs 1 through 49 inclusive"; and (ii) failing "to identify which allegations are relevant to the elements of which legal theories" and "which constitutional amendments govern which counts." *Id.* at 1324.

Highlighting the shotgun pleading rule's conflict with *Twombly/Iqbal*, the district court "dismissed those claims ***even though it was able*** to determine from the complaint that the plaintiff stated a claim for relief against [defendants] under the Fourth Amendment and for conspiracy to violate his constitutional rights." *Id.* at 1324. Tellingly, the district court's "reasoning for dismissing with prejudice claims that ***it could*** discern from the complaint was that it had given plaintiff an opportunity to replead his complaint, and his amended pleadings "duplicate[d] the [purported] violations of Rule 8(a)(2) and 10(b) which formed the basis of the [c]ourt's [earlier] dismissal of th[o]se counts." *Id.* (emphasis added).

The Eleventh Circuit reversed because defendants **were still able to identify the specific causes of action against them, and which defendants those claims were asserted against**. *Id.* at 1324. In other words, while the complaint violated the shotgun pleading rule, the pleading nevertheless satisfied *Twombly/Iqbal* by apprising defendants of the claims against them and the supporting factual allegations supporting those claims. That direct conflicting result demonstrates the shotgun pleading rule cannot co-exist with *Twombly/Iqbal*.

Specifically, in *Weiland,* the plaintiff repeated and re-alleged paragraphs 1 through 49 before each count; the "most common type of shotgun pleading." That "failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Id.* The defendants did not move for a more definite statement under Rule 12(e) or otherwise argue they had difficulty knowing the allegations against them or what they were liable for.

The Eleventh Circuit found that determining which of the 49 paragraphs incorporated into count one were relevant to plaintiff's claims was "hardly a task at all." The exercise was "greatly simplified" by organizing the 49 paragraphs of facts into three subsections with separate headings and consisted of 23 paragraphs spanning six pages. *Id.* While deeming one subsection "over-inclusive" for excessive force claims (including 10 paragraphs being irrelevant to plaintiff's claim), they "clearly and concisely" describe facts supporting plaintiff's claims. While "not a model of efficiency or specificity," the Eleventh Circuit found the complaint adequately put defendants] on notice of the specific claims against them and the supporting factual allegations. *Id*. It made the same determination as to count three regarding defendants' conspiracy to deprive plaintiff's constitutional rights. While only one of those alleged deprivations stated a cognizable claim, it was (like count one) enough "to give defendant" adequate notice of the claims against them and the factual allegations that support those claims." *Id*. at 1324-1325.

*Weiland* inherently acknowledges the shotgun pleading rule's direct conflict with *Twombly*/*Iqbal*. This results in viable Eleventh Circuit complaints under Rule 8, Rule 12 and *Twombly*/*Iqbal* being unfairly "stricken" with prejudice on non-substantive grounds over "form" superficialities, unrelated to whether adversaries are fairly apprised of claims asserted against them and the facts supporting those claims. Tellingly, the Eleventh Circuit was compelled to defend the *Weiland* deviation from the shotgun pleading rule, since both it and the district court knew the complaints pled viable claims:

> In concluding that the court should not have dismissed those two counts, we are not retreating from this circuit's criticism of shotgun pleadings, but instead are deciding that, whatever their faults, these two counts are informative enough to permit a court to readily determine if they state a claim upon which relief can be granted. The district court implicitly recognized as much when it observed in the orders dismissing counts one and three that they **do state claims upon which relief can be**

> **granted**. Whether those observations are correct is a question to which **we now turn [via Rule 12 motion]**.

*Id.* at 1326. (emphasis added).

### C. Creation of the Fifth Shotgun Pleading Variant Based On "Too Many Facts" Pled

The shotgun pleading rule is being aggressively expanded, resulting in an increasing number of substantively viable complaints like *Weiland* being superficially stricken without ever receiving substantive merits-based review. Recently in *Barmapov v. Amuial*, 986 *F.*3d 1321 (11th Cir. 2021) decided shortly before this matter, the Eleventh Circuit (with a lengthy concurrence by its most senior judge who created the shotgun pleading rule) confirmed its creation of a fifth variant of shotgun pleading characterized as the "too many facts" category. This despite some of that complaint stating claims that could survive a Rule 12 motion.

In *Barmapov*, the plaintiff filed a complaint amended five (5) months later. The amended complaint set forth a 20-count action against twenty-three (23) defendants and twenty (20) fictious defendants. The amended complaint was 116 pages long and contained 624 paragraphs. About 350 of the paragraphs were incorporated into each of the twenty (20) counts. The district court dismissed the original complaint on shotgun pleading grounds citing three of the four shotgun pleading categories. *Id.* at 1323.

Barmapov's counsel then filed a second amended complaint: (i) reducing the number of defendants to 16; (ii) reducing the number of pages to 92; (iii) reducing the number of paragraphs to 440; and (iv) removing all federal claims, leaving only state claims. See *id.* Rather than apply *Twombly/Iqbal*, the district court applied the shotgun pleading rule to strike Barmapov's pleading with prejudice. It determined Barmapov's second amended complaint "still fail[ed] to provide a short and plain statement justifying relief and ... allegations that [were] simple, concise, and direct." Nine of Barmapov's counts "incorporate[d] by reference all of the allegations contained in Paragraphs 21–269." It also found many of

these allegations "irrelevant to the case and "serve[d] to confuse the issues." *Id.* at 1324-1325. It further determined Barmapov continued "to impermissibly lump [d]efendants together ..., rendering it unclear and confusing as to which [d]efendant [was] being charged with which specific conduct." Since Barmapov did not follow the district court's "specific instructions and warnings" about "how to formulate a proper pleading," his complaint was stricken with prejudice. *Id.*

The *Barmapov* ruling directly conflicts with this Court's *Twombly/Iqbal* standard, and represents a patent refusal to apply this Court's governing standard for Rule 12 motions under the semantic veil of a "motion to strike on shotgun pleading grounds." In *Barmapov*, the Eleventh Circuit confirmed this openly direct conflict in detailing the purpose of the shotgun pleading rule:

> A shotgun pleading is a complaint that violates either Federal Rule of Civil Procedure 8(a)(2) or Rule 10(b), or both. *(citation omitted)*. Rule 8(a)(2) requires the complaint to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 10(b) requires a party to "state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Rule 10(b). "If doing so would promote clarity," Rule 10(b) also mandates that "each claim founded on a separate transaction or occurrence ... be stated in a separate count ...." *Id.* The "self-evident" purpose of these rules is "to require the pleader to present his claims discretely and succinctly, **so that[ ] his adversary can discern what he is claiming and frame a responsive pleading."** (citations omitted). These rules were also written for the benefit of the court, which must be able to determine "which facts support which claims," "**whether the plaintiff has stated any claims upon which relief can be granted**," and whether evidence

> introduced at trial is relevant. (citations omitted).

*Id.* at 1325. (emphasis added).

The shotgun pleading rule's direct conflict with *Twombly/Iqbal* was further acknowledged in *Barmapov*. After concluding the second amended complaint did not fall within the first, third and fourth category of "shotgun pleadings", the Eleventh Circuit struck Barmapov's pleading with prejudice on "second category" shotgun pleading grounds:

> the second amended complaint undoubtedly falls into the second category of shotgun pleadings. It is rife with immaterial factual allegations, including five pages and 24 paragraphs of irrelevant details about the alleged criminal backgrounds of some of the defendants. To make matters worse, the complaint then incorporates these paragraphs into 13 of the 19 counts, including counts against defendants who had no part in this background history. Other examples of inconsequential details include Barmapov's business background; the relationships among Yossi, Guy, and Avrham Amuial, Terry Rafih, and John Obeid; Barmapov's history with Reuben Sastiel; the experiences of Barmapov's grandson working for the Amuials; and the contentious business meetings between Barmapov, the Amuials, and Sastiel. In addition, the second amended complaint indiscriminately incorporates and repeats 249 numbered paragraphs of factual allegations—spanning 50 pages—into nine of the 19 counts, without any effort to connect or separate which of those 249 factual allegations relate to a count. As a result, these nine counts include factual allegations that are immaterial to the underlying causes of action.

*Id.* at 1325.

These shotgun pleading "defects" have no correlation to whether the pleading adequately provided

notice to the adversaries concerning what claims were asserted against them, or whether the pleading contained sufficient supporting facts. Immaterial facts are easily ignored by a court or deemed so in applying *Twombly/Iqbal* scrutiny against such pleadings, and those pertinent are highlighted with appropriate citations to a court on motion practice in briefing.

In fact, after *Barmapov's* concurring opinion "explain[ed] the roles that plaintiff's counsel, district courts, and defense counsel play in paring down [shotgun] pleadings, as well as the policies that inform those roles", the senior judge acknowledged that *Barmapov* second amended complaint "[may] identify a claims that may satisfy [Rule] 12(b)(6)," but nevertheless "explain[ed] why Barmapov's potentially viable claim ***must nevertheless be dismissed*** **under our shotgun pleading case law**":

> With these principles in mind, I turn to Barmapov's claims. At the outset, it is worth noting that the district court was correct: Barmapov's Second Amended Complaint is undoubtedly "a rambling, dizzying array of nearly incomprehensible pleading." **But it is not so impenetrable as to prohibit a close look at the claims he has attempted to plead. Indeed, after a careful review of the Second Amended Complaint, I *believe* Barmapov *may have pled some claims that could have survived a Rule 12(b)(6) motion to dismiss***.

*Id*. at 1326-1327, 1330-1331. (emphasis added).

The question then becomes why the Eleventh Circuit in *Barmapov* did not apply *Twombly/Iqbal* to determine that specific issue rather than the competing shotgun pleading rule never authorized by this Court under Rule 8 or Rule 12. Worse, after acknowledging many so called "shotgun pleadings" are not drafted for any improper purpose or are perhaps poorly drafted per shotgun pleading technical requirements, the concurrence openly acknowledged that many shotgun pleadings "**may contain meritorious claims"** but are "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of

action" are subject to dismissal under our shotgun pleading case law." *Id.* The concurrence then openly acknowledged the shotgun pleading rule's direct conflict with *Twombly* and *Iqbal*:

> [t]o an ***outside observer***, **disposing** of these ***otherwise viable claims*** because a plaintiff's lawyer pled ***too many*** **facts** may seem like strong medicine, **particularly in light of *Ashcroft v. Iqbal*'s requirement that a complaint include *more* than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements**." And ***it is strong medicine***, but for good reason.

*Id.* at 1327. (emphasis added)

The foregoing reasons behind the fifth "too many facts" variant of "shotgun pleadings" are perhaps the most convincing and illustrative example of its conflict with *Twombly/Iqbal*. The concerns for: (i) an adversary understanding the claims against it to frame a responsive pleading; and (ii) whether a complaint states claims upon which relief can be granted are already governed by *Twombly*/*Iqbal*. Nevertheless, *Barmapov* imposed the Court's own standard rather than adhere to the *Twombly/Iqbal* standard striking an admittedly otherwise viable complaint:

> Taking the allegations of his Second Amended Complaint as true—as we must, (citations omitted)—**it appears that Barmapov *may have pled enough*** in Count X to survive a Rule 12(b)(6) motion. For the first element, Barmapov alleges that Yossi (among others) made false statements at meetings between January 17 and January 24, 2017, regarding the division of profits from the car dealership and the control Barmapov would have over the dealership. Barmapov claims that these were material misrepresentations because he relied on them when deciding whether to invest in the dealership. For the second element, Barmapov alleges that Yossi knew that the representations he made to Barmapov were false and that he never

> intended for Barmapov to have any control over the dealership. On the third element, Barmapov repeatedly alleges that Yossi intended to induce him to invest millions of dollars into the dealership. And on the fourth element, Barmapov alleges that he in fact invested—and lost—nearly $4,000,000 in the venture as a result of Yossi's representations.
>
> An outside observer may feel as though this is enough: Barmapov has alleged that he was harmed, and he has pled facts sufficient to make out a claim of fraud under Florida law. Admittedly, this perspective has some appeal. Reading the Second Amended Complaint, *it does appear* that Barmapov was swindled by Yossi Amuial and the other Defendants, and one might sympathize with a man who, relying on the representations others made to him, invested millions of dollars in a scam.
>
> But considering the policies I outlined in Part I, ***even the potentially viable claims contained in Barmapov's Second Amended Complaint must be dismissed***. Faced with a shotgun pleading, the district court—as we have repeatedly instructed—ordered Barmapov's counsel to amend the First Amended Complaint and to address the identified deficiencies.

*Id*. at 1331-1332. (emphasis added).

The *Barmapov* concurrence continued expressing no regard for *Iqbal/Twombly* or the striking of Barmapov's pleading on shotgun pleading grounds in contravention of this Court's standard:

> So, though the panel's conclusion today results in an ***unfortunate outcome*** for Mr. Barmapov, it is correct. Critics of this Circuit's shotgun pleading case law may condemn the ***emphasis we place on form***, but as I have explained, the ***form of pleadings*** imposes very real costs on courts, lawyers, and the rights of litigants. ***For over thirty-five years***, lawyers

> practicing in this Circuit have been aware of ***our*** stance on shotgun pleadings, and thus I have little sympathy for lawyers who draft slapdash complaints that are ultimately dismissed. Going forward, it is my hope that this opinion will serve as a guide for lawyers who truly seek to vindicate their client's rights—and avoid ***unfortunate outcomes*** for their clients—***by filing clear, precise pleadings.***

*Id.* at 1332. (emphasis added).

Even the most forgiving reading of *Barmapov* illustrates how directly in conflict the shotgun pleading rule is with the governing *Twombly/Iqbal* standard for Rule 8 and Rule 12 review. No circuit court of appeals has the authority to implement an "our" rule when this Court has already promulgated the governing standard for a particular area of federal law or practice. Petitioners' own pleadings were repeatedly stricken with prejudice in a similar manner, despite their adversaries and opposing counsel ably preparing responsive answers and Rule 12 motions, and the district court ably reviewing and understanding specific claims.

### D. The Shotgun Pleading Rule Operates As Its Own Rule

The conflict between the *Twombly/Iqbal* standard and shotgun pleading rule is patently obvious since Eleventh Circuit courts employ; (i) *Twombly/Iqbal* for "Rule 12" substantive merits review; (ii) Rule 12(e) to determine whether a more definitive pleading is warranted; ***and*** (iii) the shotgun pleading standard to avoiding ***any*** substantive review on the merits to strike a pleading on technical form grounds.

Reading the *Barmapov* concurrence leaves no doubt the "rule" operates as its own separate equivalent of a Federal Rule of Civil Procedure conflicting with *Twombly/Iqbal* and Rule 12 motion alternatives:

> When faced with a complaint that bears the hallmarks of a shotgun pleading, defense counsel typically has two options. First, they can move the court for a more definite statement pursuant to Federal Rule of Civil

> Procedure 12(e). Or second, they can move to dismiss the complaint for failure to state a claim under Rule 12(b)(6). In the event the motion is defense counsel's first response to the shotgun complaint, the result will likely be the same under either rule. Under Rule 12(e), the district court will grant defense counsel's motion for a more definite statement and order plaintiff's counsel to redraft the pleading such that it complies with Rules 8(a)(2) and 10(b). If that order is not obeyed "within 14 days after notice of the order or within the time the court sets, the court may strike the [complaint] or issue any other appropriate order." Rule 12(e). And for a Rule 12(b)(6) motion, the district court will dismiss the complaint without prejudice on the grounds that the pleading does not comply with Rules 8(a)(2) and 10(b); the court will then give plaintiff's counsel "one chance to remedy" the complaint's defects before dismissing the case with prejudice.
>
> **But most importantly, defense counsel should *never* respond to a *shotgun pleading* in kind**. (citations omitted). We have expressly condemned the filing of shotgun answers that contain "affirmative defenses that fail to respond explicitly to the specific claims plaintiffs are independently asserting."

*Id.* at 1329-1330. (emphasis added).

*Wagner v. First Horizon Pharmaceuticals Corp.*, 464 F.3d 1273 (11th Cir. 2006) further highlights both the conflicting nature of the shotgun pleading rule, and its independent existence competing with this Court's *Twombly/Iqbal* standard. In *Wagner,* the plaintiff filed a class action securities fraud against the defendant pharmaceutical company. *Id.* at 1275-1277. In response to a Rule 12(b)(6) motion, the district court dismissed the complaint because it failed to satisfy the Rule 9(b) and PSLRA specificity requirements. After the district court conditioned leave to amend on the payment of attorneys'

fees and cost, plaintiff appealed both orders. *See id.* at 1276.

On appeal, the Eleventh Circuit determined the complaint not only failed to comply with the Rule 9(b) and PSLRA specificity requirements, but also determined the complaint was a "proverbial shotgun pleading." It made the determination because the complaint "did not clearly link any" of "the great deal of factual allegations" to the complaint's "causes of action." *Id.* at 1279-1280. Nevertheless, the Eleventh Circuit again deviated from its shotgun pleading rule and disagreed with the dismissal "because these observations sound more clearly in Rule 12(e)'s remedy of ordering repleading for a more definite statement of the claim, rather than in Rule 12(b)(6)'s remedy of dismissal for failure to state a claim." *Id.* Therefore, the Eleventh Circuit deviated again from the shotgun pleading rule and held the proper remedy was Rule 12(e) repleading. *Id.* at 1279-1280. Nevertheless, the Court affirmed the District court, but did so contrary to the district court's application of the shotgun pleading rule finding that plaintiffs' failure to "connect" their causes of action to the facts alleged rendered the complaint deficient.

Not only do the so-called "connectivity" issues above have no foundation in *Twombly/Iqbal*, but *Wagner* (like *Weiland* and *Barmapov*) further demonstrates: (i) how the shotgun pleading rule operates independently on its own separate from *Twombly/Iqbal*; and (iii) how it directly conflicts with this Court's governing standard for reviewing pleadings under Rule 12 and Rule 8.

### E. The *Sledge* Case Illustrates the Shotgun Pleading Rule Undermines *Twombly* and *Iqbal* to Strike Viable Complaints

The Eleventh Circuit's ruling in *Sledge v. Goodyear Dunlop Tires,* 275 F.3d 1014, 1015-106 (11th Cir. 2001), *abrogated on other grounds*, *Douglas Asphalt v. QORE, Inc.*, 657 F.3d 1146 (11th Cir. 1998) demonstrates the injustice of using the shotgun pleading rule to dismiss viable pleadings. In *Sledge*, a black plaintiff employee sued his employer tire manufacturer

under Title VII claiming race discrimination after being repeatedly passed over for a Maintenance Department promotion. Out of 107 mechanics in the Maintenance Department, only one was black. *Id.* at 1019. Additionally, when the plaintiff applied for the three positions filled by white employees, he was not afforded an interview, with subsequent events inferring he was not interviewed because he was black. See *id.*

The human resources, maintenance mechanics and the maintenance department supervisors determined plaintiff was qualified for the promotion. Supervisors' recommended plaintiff be promoted, but human resources precluded him from taking the written examination. This despite the employer certifying two white men for the promotion interview who had not taken the written examination. After the two white males were promoted, a third white male employee took the exam and failed. Nevertheless, human resources still certified him for interview, and he was selected. Another white male employee was also awarded the promotional position despite failing the exam twice. *Id.* at 1020.

After the district court granted summary judgment in the employer's favor, the Eleventh Circuit reversed and vacated since the record below presented questions of fact concerning whether the defendant employer racially discriminated against plaintiff. See *id.* at 1019-1020. Critical to Question Presented, the Eleventh Circuit described both the initiating complaint and responsive answer as "shotgun pleadings." This despite the litigants not believing while completing discovery and moving for summary judgment:

> The complaint is a typical "shotgun" pleading, in that it does not identify the occasion, or occasions, when, but for Goodyear's intent to discriminate, he would have been promoted. One has to canvass the record to determine the occasions he actually complains of. Faced with a shotgun complaint, Goodyear has replied in kind, filing an answer consisting of little more than generalized statements. Goodyear's answer contains a general denial: Sledge has never been refused a

promotion to Maintenance mechanic based on his race. *Id.* at 1018-1019.

Had the district court applied the shotgun pleading rule at *Sledge* inception to plaintiff's pleading when the defendant employer and its counsel actually understood the Title VII claims sufficiently to file a responsive answer, the plaintiff's substantively viable Title VII claims would have been stricken (and affirmed on appeal) on shotgun pleading grounds. Since both the district court and defendant counsel though believed the pleading passed Rule 12(b)(6) scrutiny, the case proceeded, and discovery developed plaintiff's rather strong case. Notably, *Twombly* and *Iqbal* had not yet been decided in 2001 when *Sledge* was decided, but the older Rule 12 standard at that time was even more favorable to plaintiffs. Nevertheless, the *Sledge* complaint would still have unjustly been stricken on "shotgun pleadings" grounds, despite stating claims providing fair notice to defendant of the claims asserted and supporting facts so a response could be prepared.

## F. The Shotgun Pleading Rule Is Spreading to Other Circuits

The shotgun pleading rule is spreading to other federal circuits whose courts are adopting Eleventh Circuit shotgun pleading authority. This necessitates granting the instant petition to avoid further contagion of the shotgun pleading rule undermining *Twombly*/*Iqbal* in other federal circuits, especially given how long it took the Question Presented to arrive before this Court (and how much longer it will take– if ever – to arrive again).

For example, the Eastern District of Pennsylvania in *Bartol v. Barrowclough,* 251 F.Supp.3d 855, 857-860 (E.D.P.A. 2017) struck a plaintiff's pleading on shotgun pleading grounds in reliance upon the 11th Circuit's authority. The district court actually recited the four (4) variants of "shotgun pleadings" recognized at that the time (2017) in the Eleventh Circuit, and added that the "Third Circuit has criticized 'the all too common shotgun pleading approach' to complaints." *Id.* at 859. It cited other Third Circuit cases like *Hynson v. City of Chester*, 864 *F.2d* 1026, 1031, n. 13 (3rd Circuit 1988) and *Wright*

*v. City of Philadelphia,* # 01-6160, 2005 WL 3091883, at 11 (E.D.Pa Nov. 17, 2005) supporting that proposition.

Specifically, the district court applied the "relatively rare" fourth variant of shotgun pleading (i.e. multiple claims against multiple parties without specifying which of the defendants are responsible for which acts or omissions, or which the defendants the claim is brought against). *Id.* It dismissed the complaint without prejudice for repleading because it constituted a "'shotgun pleading' that fail[ed] to comply with Rule 8(a)(2)," and since it "fail[ed] to give defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.*

The above legal analysis did not require use of the Eleventh Circuit's shotgun pleading rule. Rather, it required applying Rule 12(b)(6) and the *Twombly/Iqbal* standard, or perhaps Rule 12(e) for a more definitive statement. *Bartol* is therefore a paradigm for how the shotgun pleading rule has and will spread to other federal circuits in contravention of this Court's *Twombly/Iqbal* standard if the Question Presented is not addressed at this time. If anything, denying this petition will only embolden the Eleventh Circuit and other federal courts to implement and/or expand the shotgun pleading rule.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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