NO. 21-146

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

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

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Carl J. Soranno, Esq.
Counsel of Record
Bob Kasolas, Esq.
Brach Eichler LLC
101 Eisenhower Pkwy
Roseland, NJ 07068
973.228.5700
csoranno@bracheichler.com
bkasolas@bracheichler.com
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

A. The Shotgun Pleading Rule Creates Its Own Form Technical Pleading Requirements Conflicting with *Twombly/Iqbal* That Were Never Authorized by Amendment to the Rules of Civil Procedure or This Court

Respondents Tech CXO, LLC ("Tech CXO") and Robert Half International, Inc. ("RHI") contend the Eleventh Circuit's shotgun pleading rule is merely a "mechanism" to determining compliance with *Twombly/Iqbal*. Respondents though fail to explain why any additional competing "mechanism" is required to apply the governing *Twombly/Iqbal* standard for reviewing pleadings on their substantive merits. No supporting citation for such an extraordinary proposition is presented either. Rule 8, 9 and 10 contain no such "mechanism," nor is one required. Rather, those Rules dictate their own requirements. Once met, the pleading moves forward in accordance with *Twombly/Iqbal* if a defendants has adequate notice of the claims pled against them. The fact the shotgun pleading rule significantly predates *Twombly/Iqbal* confirms it has no legitimate use.

In contrast, the shotgun pleading rule injects additional technical form requirements into such analysis requiring subjective discretion, when the only governing standard is adequate notice of the claims pled. This so called "mechanism" therefore creates an improper barrier to litigants that allows defendants and Eleventh Circuit courts to cry "shotgun pleading," in turn avoiding the need to defend/address meritorious claims despite having adequate notice of the claims pled. Such a "mechanism" constitutes its own competing pleading standard and is not a mere "mechanism." The shotgun pleading rule is therefore improper, especially without having been formerly adopted as an amendment to the Federal Rules of Civil Procedure.

Furthermore, respondents contend the shotgun pleading rule's purpose is to ensure a pleading provides adequate notice of the claims against a defendant(s). This argument confirms the shotgun pleading rule directly conflicts with the *Twombly/Iqbal* standard since this Court's governing standard in those cases already serves to accomplish the exact purpose which the shotgun pleading rule is allegedly designed to do.

There is consequently no need for a separate and competing Eleventh Circuit standard imposing additional "technical form" requirements on pleading practice that were expressly disposed of in *Iqbal* ("Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era."). *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). This is especially true given the recent *Barmapov* decision, where the Eleventh Circuit openly flaunted that its application of the shotgun pleading rule results in pleadings satisfying *Twombly/Iqbal* still being dismissed on shotgun pleading grounds nonetheless. Such a result (mirrored in other published cases that petitioners' writ discusses) is the hallmark of a direct conflict between this Court's governing authority and a lower court's separate rules creating inconsistent results on identical paramount legal issues. Respondents never present any legal justification or precedent for these incongruent results. They also never address the inconsistent results in the published Eleventh Circuit cases petitioners' cite where the Eleventh Circuit acknowledges a "shotgun pleading" can nevertheless satisfy the *Twombly/Iqbal* standard.

Perhaps most importantly, petitioners fail to distinguish that while some other courts outside the Eleventh Circuit may characterize a pleading as a "shotgun pleading, "kitchen sink pleading," etc. for purposes of directing a more definitive pleading be re-filed, none of those courts have their **own separate** shotgun pleading rule and/or their **own thirty-five (35) year massive body of case law** (stemming from both before and after the this Court's *Twombly* and *Iqbal* decisions) directly competing with this Court's governing standard for reviewing pleadings on their substantive merits per Rule 8 and Rule 12. To the contrary, Respondents contention that lower courts have the authority to manage their dockets simply does not vest those courts with any authority to alter the Rules of Civil Procedure, or this Court's governing standards for applying them. This Court has systematically reversed lower courts from doing so as an unauthorized departure from the Federal Rules of Civil Procedure governing pleading requirements. The shotgun pleading rule is no different.

In *Jones v. Brock,* 549 U.S. 199, 202-207 (2007), this Court reviewed an inmate's separate §1983 actions against numerous correctional officers. Specifically, this Court reviewed the validity of procedural rules that the Sixth Circuit adopted for implementing the Prison Litigation Reform Act's ("PLRA") exhaustion requirements, and reversed the Sixth Circuit's own self-created pleading rules. *Jones* held that the Sixth Circuit's rules were not required by the PLRA, and that the crafting and imposition of such self-made rules exceeded the proper limits of the Sixth Circuit's judicial role. *Id.* Moreover, *Jones* further held that federal courts should "generally not depart from the Federal Rules' usual practice based on perceived public policy concerns" *Id*. at 212 (citing *Leatherman v. Tarrant County,* 507 U.S. 163, 167-168 (1993). In doing so, *Jones* cited this Court's body of specific controlling authority expressly prohibiting lower federal courts from creating their own more specific or heightened pleading requirements for any type of action without: (i) formal amendment of the Rules of Civil Procedure; and/or (ii) this Court's authorization.

First, *Jones* highlighted the *Leatherman* holding that "added specificity requirements" for pleading specific types of claims "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 212-213 (citing *Leatherman,* 507 U.S. at 168). The Court in *Jones* further highlighted its holding in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) unanimously reversing the Second Circuit for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination. *Id.* at 213. *Swierkiewicz* held that that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," and a "requirement of greater specificity for particular claims" must be obtained by amending the Federal Rules. *Swierkiewicz*, 534 U.S. at 515 (citing *Leatherman*).

Furthermore, *Jones* applied this Court's holding in *Hill v. McDonough*, 547 U.S. 573, 582 (2006). *Jones,* 549 U.S at 213. In *Hill*, this Court unanimously rejected a proposal that § 1983 suits challenging a method of execution must identify an acceptable alternative,

determining that "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." (citing *Swierkiewicz*). *Hill*, 547 U.S. at 582.

Jones, Leatherman, Swierkiewicz and *Hill* all convincingly demonstrate the Eleventh Circuit has no authority to create its own competing shotgun pleading rule for determining whether pleadings provide adequate notice to defendants of the claims asserted against them. *Jones* concluded by leaving no doubt about this legal reality, despite whatever altruistic or public policy reasons the Eleventh Circuit and respondents advance for encroaching upon this Court's governing *Twombly/Iqbal* standard for reviewing pleadings on the substantive merits:

> We understand the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context, but that effort cannot fairly be viewed as an interpretation of the PLRA. "Whatever temptations the statesmanship of policy-making might wisely suggest," the judge's job is to construe the statute-not to make it better. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L.Rev. 527, 533 (1947). The judge "must not read in by way of creation," but instead abide by the "duty of restraint, th[e] humility of function as merely the translator of another's command." *Id*., at 533-534. *See United States v. Goldenberg*, 168 U.S. 95 (1897) ("No mere omission ... which it may seem wise to have specifically provided for, justif [ies] any judicial addition to the language of the statute"). Given that the PLRA does not itself require plaintiffs to plead exhaustion, such a result "**must be obtained by the process of amending the Federal Rules, and not by judicial interpretation**." *Leatherman*, 507 U.S., at 168. *Jones,* supra, at 216-217.

This Court' foregoing precedent confirms the Eleventh Circuit cannot apply its own competing standard in direct conflict with this Court's *Twombly/Iqbal* standard to determine whether pleadings provide adequate notice to adversaries of the claims asserted against them.

B. The Question Presented Has Never Been Before This Court for Consideration

Tech CXO disingenuously suggests that petitioners' Question Presented was previously passed on in *Tran v. City of Holmes Beach*, 20-881 ("*Tran*"), 2021 WL 1725178 (Mem), U.S., May 3, 2021)(cert. denied). That contention is patently false. This explains why respondent did not recite the actual questions presented in *Tran* for this Court's review.

The denied *Tran* petition involved more than one question presented, while the one referencing the Eleventh Circuit shotgun pleading rule contained four (4) subpart "subsidiary questions." Nothing in that Question Presented or its "subsidiary questions" raised whether the Eleventh Circuit's shotgun pleading rule directly conflicts with this Court's *Twombly/Iqbal* standard governing Rule 12 and/or Rule 8 substantive merit review of pleadings. Certainly, *Tran* did not present the issue that petitioners now present to the Court for the first time. Specifically, the *Tran* question presented that Tech CXO alludes was as follows:

> The first broad question is whether strict shotgun pleading rules, a category of heightened standard, is permissible as used (excessively) in the Eleventh Circuit to dispose of complaints and deprive litigants equal access to federal courts to seek equal justice, relief and secure their constitutional rights on the merits under 42 U.S.C. § 1983 and the Fourteenth Amendment? *Tran, supra* at p. i.

In further arguing its position, the *Tran* petitioners described their question presented as "shotgun pleading and equal access to justice on the merits for various classes of litigants, particularly the pro se litigants with civil rights under §1983 and constitutional issues." *Tran, supra,* at p. 16. This issue also has nothing to do with petitioners' Question

Presented to this Court concerning whether the shotgun pleading rule conflicts with this Court's governing *Twombly/Iqbal* standards for substantive merit based review of pleadings. Moreover, the Eleventh Circuit has a "heightened pleading" standard for Rule 8 in §1983 cases, further convoluting what actual questions the *Tran* petition presented. *See id.* at i. Furthermore, *Tran* asked this Court to review the Finality Requirement of *Williamson City,* 473 U.S. 172 (1985), and related issues including exhaustion of administrative remedies. *See id.* at ii.

Moreover, the four (4) relatively non-specific and confusing "subsidiary questions" in the *Tran petition* under that specific "first broad question presented" pertained to: (i) the *Ashwander* rule and "serious constitutional questions" over denying justice on a pleading technicality; (ii) whether the district court and Eleventh Circuit should have provided guidance for each claim the petitioners pled; (iii) whether petitioners had to identify and name all individuals acting as a collective body within the City Code Enforcement Board or separate the claim for each individual sued under 42 U.S.C. §1983, §1985 and §1986; and (iv) whether each government official could be liable within the claims petitioner presented. *See id.* Once again, none of these "subsidiary questions" have anything to do with petitioners' Question Presented on this petition. Even in their section citing involved authority at issue, the *Tran* petitioners only referenced: (i) the First, Fifth, Eight and Fourteenth Amendments to the U.S. Constitution; (ii) 42 U.S.C. §§ 1983, 1985 and 1986; (iii) the "Federal Rules of Civil Procedure"; and (iv) Florida statutes and codes/ordinances. *Tran*, *supra,* at p. 1.

Moreover, the *Tran* petition was submitted and filed **before** the Eleventh Circuit's recent decision in *Barmapov v. Amuial,* 986 F.3d 1321 (11th Cir. 2021). This is notable since *Barmapov* highly details the Eleventh Circuit's open acknowledgment that its shotgun pleading rule directly conflicts with *Twombly/Iqbal*, while operating as an independent rule with a minimum of five (5) variants. *Barmpapov* openly admits to the Eleventh Circuit's routine dismissal of viable pleadings with prejudice on shotgun pleadings grounds, even when those pleadings actually plead valid

claims meeting this Court's *Twombly/Iqbal* standard for Rule 12 and Rule 8 substantive merit analysis. *See* Petitioner Writ at pp.18-26. Accordingly, the Question Presented is before this Court for the first time.

C. Litigation Realties Dictate the Shotgun Pleading Rule Must Be Eliminated

Respondents dedicate time to claiming what federal court actually do in analyzing cases as "shotgun pleadings." Meanwhile, they never addressed the litigation realities the instant petition highlights where Eleventh Circuit courts acknowledge their shotgun pleading rule directly conflicts with *Twombly/Iqbal*.

In *Corbitt v. Home Depost, U.S.A., Inc.*, 573 F.3d 1223, 1261-1262 (11th Circ. 2009), *vacated and superceded*, 539 F.3d 1136 (2009), *rehearing en banc granted*, 598 F.3d 1259 (11th Cir 2010), the concurring opinion noted the district court and Eleventh Circuit actually applied the shotgun pleading standard to a summary judgment motion. This after defendants failed to "properly" raise the shotgun pleading argument at the pleading stage so the district court could order a more definite statement. In doing so, the concurrence acknowledged that:

> the majority's approach does not reflect the realities of federal litigation. A significant portion of complaints filed in federal court could, in whole or in part, meet the definition of "shotgun pleading." Nevertheless, where the meaning of the complaint is reasonably discernable, parties and courts tend to proceed to discovery. *Id.* at 1261-1262.

The *Corbitt* concurrence captures the true problem with the shotgun pleading rule being allowed to continue in direct conflict with this Court's *Twombly/Iqbal* standard.

D. Respondents "Function Over Form" Argument is Baseless

None of the shotgun pleading variants are required by Rules 8, 9 or 10. The reality therefore is that the shotgun pleading rule is manufactured to permit courts to otherwise reject meritorious actions where such actions (like this one) may be highly complex, or

where the actions of multiple parties form a basis for numerous causes of action. While respondents contend (like the Eleventh Circuit) the shotgun pleading rule stresses "function over form" (*Weiland v. Palm Beach Cty.,* 792 F.3d 1313 (11th Cir. 2005)), the rule does exactly the opposite by placing technical form requirements expunged by *Iqbal* over substantive function. Once the requirements of Rule 8, 9 and 10 have been met, then discretion is no longer required. Petitioner's writ does not the present the question of whether petitioner's complaint was properly dismissed, and their petition does not ask for review of the lower court's discretion. Rather, petitioners ask this Court to review whether the "shotgun pleading mechanism" supersedes and directly conflicts with this Court's *Twombly/Iqbal* standard and the Federal Rules of Procedure governing substantive review of pleadings – especially since this makeshift rule calls for harsh "strong medicine" dismissal of pleadings that otherwise permits each defendant to understand and address the claims pled against them.

E. Respondents Citation to Other Court Rulings Cannot Support Their Position

TechCXO cites to sporadic cases around the country contending they somehow evidence other district courts apply shotgun pleading standards in reviewing claims on the merits. The contention is irrelevant even it were true. This is because no lower court has any authority to create its own separate competing and/or accommodating rule regarding this Court's governing pleading standard in *Twombly/Iqbal*. Even if every lower court were doing so, that would not alter the legal reality that no lower court can do so given the controlling *Twombly/Iqbal* standard.

Moreover, in all the sporadic cases respondents cite, none of those courts have their own separate and distinct "shotgun pleading" rule equivalent with their own body of cause law applying strict "variant" technical form requirements for pleadings. Rather, they merely use the term to characterize a pleading that the reader cannot decipher in terms of which claims are being asserted against which defendant – which is already governed by Rule 12(e) allowing for motions compelling a more definitive pleading.

Notably, respondents cite to ultra-extreme scenarios as in *Gurman v. Metro Housing Redev. Auth.*, 842 F.Supp.2d 1151, 115 (D. Minn. 2001) to support their position. *Gurman* though merely reinforces why petitioners' petition should respectfully be granted. In *Gurman*, the plaintiffs were two (2) elderly couples living in Section 8 housing demanding a two-bedroom apartment rather one-bedroom units. *See id.* at 1152. This very simple case devolved into a 60-page and 250 count complaint that was substantively incomprehensible since it involved 17 claims against all 17 defendants filed by the 7 plaintiffs' counsel. *See id.* The district court determined the pleading violated *Rule 11(b)(2)* and was frivolous, and further determined it was a "kitchen sink" or "shotgun" pleading. In doing so, it cited the Eleventh Circuit's decision in *Davis v. Coca-Cola Bottling,* 516 F. 3d 595 (11th Cir. 2008) despite not being authority binding the District of Minnesota. *See id.* at 1153. The district court continued referencing the complaint as a "kitchen sink" complaint (not a "shotgun" pleading") and determined it violated Rule 8 as well. *See id.*

Tellingly, the district court did not apply the Eleventh Circuit's shotgun pleading rule or its variants in dictating technical form pleading requirements for any amended pleading. It also did not apply its own "home grown" form technical pleading requirements or related variants to axiomatically determine if the pleading otherwise satisfied *Twombly/Iqbal,* or strike the pleading with prejudice for failure to adhere to such technical form requirements. Rather, it merely directed re-pleading with specific limits on word count per Rule 12(e) given the extremely simple facts and claims in that matter. *See id.* at 1153-1154.

Gurman is not the situation in the instant petitioners' pleading or in most of the highlighted Eleventh Circuit cases that petitioners' instant petition cites. If anything, an outlier case like *Gurman* reinforces that a Rule 12(e) motion for a more definitive statement is appropriate and in harmony with this Court's governing standards – not use of a completely different and conflicting self-made "technical form" rule to automatically dismiss pleadings with prejudice on technical form grounds. Outlier cases like *Gurman*

(along with those referenced in this petition) further demonstrates the shotgun pleading rule threatens this Court's *Twombly/Iqbal* standard if other district courts or circuits also begin applying the rule to undermine, disregard or modify *Twombly/Iqbal*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bob Kasolas, Esq.
Carl J. Soranno, Esq.
Counsel of Record
BRACH EICHLER LLC
101 Eisenhower Parkway
Roseland, NJ 07068
973.228.5700
csoranno@bracheichler.com
bkasolas@bracheichler.com

Dated: October 5, 2021