No. _____

In the Supreme Court of the United States

ELIAS KARKALAS,
Petitioner,

v.

LINDA MARKS, ESQUIRE; KIMBERLY BRILL;
UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a federal complaint subject to dismissal when the plaintiff fails to identify the source of his knowledge of specific information contained in the complaint that is otherwise sufficiently well pleaded?

STATEMENT OF RELATED PROCEEDINGS

Elias Karkalas v. Linda Marks, et al., No. 19-2816, U.S. Court of Appeals for the Third Circuit. Judgment entered on February 11, 2021. Denial of petition for panel rehearing and rehearing *en banc* entered on April 15, 2021.

Elias Karkalas v. Linda Marks, et al., No. 2-19-cv-00948, U.S. District Court for the Eastern District of Pennsylvania. Order and opinion on motion to dismiss was entered on July 31, 2019.

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The Third Circuit's decision has not yet been published in the Federal Reporter but is reported at 845 Fed.Appx. 114 and reprinted in the Appendix ("App.") at 1-17. Similarly, the district court's opinion has not been published but is reported at 2019 WL 3492232 and reprinted at App 18-82.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2021. A petition for rehearing was denied on April 15, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rules of Civil Procedure Rule 8 provides:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8

STATEMENT OF THE CASE

At issue in this case is whether a federal court may disregard facts pleaded in a complaint complaining of grand jury misconduct where the plaintiff did not identify the source of those facts. Purporting to rely upon *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), the Third Circuit raised the issue *sua sponte*, but did not allow the plaintiff to amend his complaint. No other court appears to have ever interpreted *Twombly* or any rule requiring such information to be pleaded, and such a practice marks a dramatic departure from accepted pleading requirements. Accordingly, the court of appeals' decision should be summarily reversed, and the matter remanded for further proceedings.

Petitioner Dr. Elias A. Karkalas (hereinafter "Petitioner"), a physician, brought an action against Kimberly Brill, a U.S. Drug Enforcement Investigator, and Linda Marks, Esquire, a U.S. Department of Justice attorney, along with the United States (collectively "Respondents"), pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Tort Claims Act for Respondents' malicious prosecution and knowing presentation of false and misleading testimony, and evidence to a grand jury. (App. 86-110). Petitioner's claims under *Bivens* arise out of that conduct and the resultant violations of his Fourth and Fifth Amendment rights. (App. 89).

Petitioner was indicted and charged with thirty-eight (38) felony counts in an eighty-five (85) count indictment for alleged violations of the Controlled

Substances Act, 21 U.S.C. § 801 *et seq*., mail and wire fraud, and international money laundering. (App. 87). Specifically, the indictment alleged that Petitioner was part of a "global cartel" that enabled United States citizens to obtain enormous quantities of potentially addictive prescription drugs from hundreds of linked Internet websites without a valid doctor-patient relationship. (App. 88-89). Petitioner was charged with, among other things, prescribing controlled substances without a valid prescription. (App. 88).

Following the indictment, Petitioner was detained pending trial and then, for many months, was subject to electronic monitoring which left him with permanent nerve damage and left his private medical practice, personal life, and health in ruins. The charges against Petitioner, however, were false, malicious and entirely fabricated. At no time did Petitioner issue prescriptions for controlled substances as the medication that he prescribed, Fioricet, has never been designated as a controlled substance. (App. 95). The criminal trial against Petitioner and numerous others lasted several weeks and resulted in no trial convictions. (App. 105).

The district court granted Respondents' motions to dismiss, dismissing the amended complaint "with prejudice." (App. 83). The district court did not articulate what standard of review it employed as to each of the Rule 12(b) challenges, or which party had the burden of proof as to the personal jurisdiction and subject matter jurisdiction challenges. The district court concluded, among other things, that Petitioner was seeking to imply a new basis for a *Bivens* remedy and that "special factors counseling hesitation" and

other reasons militated against finding such a remedy. (App. 33). The district court also concluded that it lacked personal jurisdiction over Brill and Marks, and that they were entitled to qualified immunity if such a *Bivens* remedy could be inferred. (App. 47-49; App. 54). The district court also dismissed the FTCA claims against the United States based on the discretionary function exception contained in the statute and because the Amended Complaint purportedly failed to state a claim for malicious prosecution. (App. 19).

On appeal, the Third Circuit affirmed the District Court's decision, but on different grounds, concluding that Petitioner's amended complaint failed to plausibly state a claim that his constitutional rights were violated. (App. 8, 12). It is noteworthy that at no point did the district court or Respondents ever raise a *Twombly* challenge, or otherwise contend there was a lack of notice or clarity as to what was alleged by Petitioner. In short, the Third Circuit "disregarded" all of Petitioner's factual allegations relating to grand jury misconduct, deeming them conclusory solely because Petitioner failed to set forth the factual basis for his purported knowledge, and further, did not permit Petitioner the opportunity to amend his complaint.

REASON FOR GRANTING THE PETITION

By creating a heightened pleading standard, one requiring a litigant to identify the source of his knowledge of certain facts, the Third Circuit distorted *Twombly* beyond its familiar plausibility standard. This additional pleading hurdle will require a litigant to identify, in his complaint, the source of his knowledge of certain facts in order for those facts to be

considered, properly pleaded and non-conclusory. If this decision is permitted to stand, it opens the door for lower courts to create their own heightened pleading standards and case-specific requirements, under the guise of *Twombly* without advancing its rationale.

This Court has on numerous occasions reigned in attempts by lower courts to implement heightened pleading standards on a variety of different discrimination and civil rights actions and should do so here. *See. e.g., Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164 (1993) (a federal court may not apply a standard "more stringent than the usual pleading requirements of Rule 8(a)" in "civil rights cases alleging municipal liability"); *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 512, (2002) (imposing a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)").

The Third Circuit ignored this Court's edict in *Twombly* and, *sua sponte*, found that "[w]ithout providing a factual basis for his purported knowledge of the grand jury proceedings, Karkalas's allegations that the individual defendants made false statements to the grand jury are "speculative" and "threadbare." (App. 7). To the contrary, the specific allegations at issue were hardly threadbare or conclusory, specifically that "Defendants made knowingly false presentations to the grand jury, namely, (i) that Fioricet is a

controlled medication, (ii) that Karkalas knew so, and (iii) that he would continue to prescribe it." (App. 10). The Third Circuit seemingly overlooked that grand jury secrecy is not absolute and simply did not address the issue.

Although the Third Circuit relied upon *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 596 (1st Cir. 2011), for support, the First Circuit merely held that "specific information, even if not in the form of admissible evidence, would likely be enough at this [pleading] stage; pure speculation is not." *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 596 (1st Cir. 2011). Specifically, the First Circuit found that there was no information set forth in plaintiff's complaint that tied the named defendants to the allegedly wrongful conduct that plaintiff complained of and was the subject of his 42 U.S.C. § 1983 action. *Id.* at 594.[1] Neither of the First Circuit's holdings support the Third Circuit's decision to disregard Petitioner's factual allegations solely based on his failure to identify how he obtained this information.

Finally, the lower federal courts' creation of procedural obstacles for litigants not contained in the Federal Rules of Civil Procedure raises important issues under the Rules Enabling Act of 1934, 28 U.S.C.

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[1] The First Circuit further clarified this position in *Rodriguez-Vives v. Puerto Rico Firefighters Corps of Puerto Rico*, 743 F.3d 278, where it stated that some factual allegations can be so threadbare that they are conclusory, "[b]ut this is only the case where the bareness of the factual allegations makes clear that the plaintiff is merely speculating about the fact alleged and therefore has not shown that it is plausible that the allegation is true." *Id.* at 286.

§§ 2071-2074. The Act establishes procedures for amending the Federal Rules of Civil Procedure, including requiring that changes in the rules be adopted by the Supreme Court and subjected to congressional approval. Whether the lower federal courts have authority to make an end-run around the Rules Enabling Act, by requiring additional procedural requirements not listed in the Federal Rules of Civil Procedure is an issue of immense importance to every lawyer in America filing a complaint in federal court.[2]

CONCLUSION

For the reasons set forth above, this Court should either summarily reverse the Third Circuit or grant the petition. Summary reversal is appropriate, as it is here, where a lower court decision is "so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument" is unnecessary. Stephen M. Shapiro, et al., *Supreme Court Practice* § 5.12(a) (10th ed. 2013).

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[2] Petitioner is aware that *Bivens* actions are now disfavored by the Court. Petitioner, however, has a compelling FTCA claim.

Respectfully submitted,

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