No. _____

IN THE

Supreme Court of the United States

Peter Vu,

Petitioner,

vs.

San Francisco Police Department, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JOSHUA J. SCHROEDER
Counsel of Record
SCHROEDERLAW: LAW OFFICES OF
JOSHUA J. SCHROEDER
490 Lake Park Ave. #10422
Oakland, CA 94610
(510) 542-9698, josh@jschroederlaw.com

Question Presented

Is the *Iqbal* & *Twombly* fact-pleading standard applied and extended in the Ninth Circuit through the Prison Litigation Reform Act ("PLRA") in *Hebbe v. Pliler* legal, just, due, or prudent under PLRA, the Federal Rules of Civil Procedure ("FRCP"), the Court's common law principle of *stare decisis*, the U.S. Constitution, or for equitable or public policy reasons?

List of Parties

Peter Vu is the only Petitioner in this case. The San Francisco Police Department ("SFPD") was named on Petitioner's original complaint. The SFPD was properly omitted from Petitioner's first amended complaint, because the magistrate judge determined that SFPD was an improper party, and the district court adopted the change in the captions of its decisions and orders. Nevertheless, the court of appeals named SFPD as the first defendant in their decision to affirm the district court dismissal, and is thus named in the caption of this petition as well as it appeared in the Ninth Circuit decision. A list of the added defendants on Petitioner's first amended complaint are as follows: City of San Francisco, Officer William Scott, Officer Nicholas Rainsford, Officer Zoroski, and Officer E. Roberts.

Related Decisions

The opinion of the court of appeals is unpublished at *Vu v. San Francisco Police Dep't*, No. 21-15619, 2022 U.S. App. LEXIS 5123 (9th Cir. 2022). The adopted Report and Recommendation Re Review Under 28 U.S.C. § 1915 is unreported at *Vu v. City of San Francisco*, No. 4:20-cv-04579, Doc. 11 (N.D. Cal. 2020), *adopted by Vu v. City of San Francisco*, No. 4:20-cv-04579, Doc. 16 (N.D. Cal. 2020).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Secondary Sources:

Other Authorities:

Rules:

Constitutional Provisions:

No. _____

IN THE

Supreme Court of the United States

Peter Vu,

Petitioner,

vs.

San Francisco Police Department, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner, Peter Vu, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 25, 2022.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which was unpublished**,** was issued on February 25, 2022, is attached as Appendix A, and may be found at *Vu v. San Francisco Police Dep't*, No. 21-15619, 2022 U.S. App. LEXIS 5123 (9th Cir. 2022).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decision of the United States for which petitioner seeks review was issued on February 25, 2022. This petition is filed within 90 days of the United States Court of Appeals for the Ninth Circuit dismissal, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The United States Constitution, Amendment 14 provides, in relevant part:

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Amendment 7 provides, in relevant part:

> In Suits at common law . . . the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1915(e)(2)(B) provides, in relevant part:

> [T]he court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted . . . .

The Federal Rule of Civil Procedure 2 states in full:

> There is one form of action—the civil action.

The Federal Rule of Civil Procedure 8(a) states in relevant part:

> A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .

The Federal Rule of Civil Procedure 12(b) states in relevant part:

> [A] party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

The Code of Conduct for U.S. Judges Canon 3(A)(4) states in relevant part:

> [A] judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers . . . .

STATEMENT OF CASE

Petitioner is a 62 year old man of Vietnamese descent living in San Francisco, California. He is not a prisoner or a criminal. He represented himself *pro se* in a federal district court where his complaint was dismissed with prejudice under the Prison Litigation Reform Act ("PLRA") 28 U.S.C. § 1915(e)(2)(B) for failure to state plausible facts according to *Iqbal* & *Twombly* prior to directing the U.S. Marshal to serve his complaint on the defendants. Appendix A (citing *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010)) ("a plaintiff must allege facts sufficient to state a plausible claim").

Petitioner appealed his dismissal and the Ninth Circuit Appellate Court affirmed. He found *pro bono* counsel, and is no longer *pro se* for purposes of this petition. He now brings this petition for certiorari by and through undersigned counsel.

Petitioner experienced gaseous fumes emanating from gaps in his walls and floors connecting to his neighbors' downstairs apartment, and did what many would do if a serious crime or life threatening disaster was occurring. He called the police. However, after contacting the police several times, the police decided not to investigate the cause. Believing his voice was not heard for race-based reasons in the circumstance of a potential life threatening situation, he asked a federal court to review his case.

At the time of Petitioner's request for police assistance, the City of San Francisco was experiencing a highly publicized wave of anti-Asian violence, especially against elderly Asian residents. *See* Thomas Fuller, *Fear, Discord, Among Asian Americans Over Attacks in San Francisco*, N.Y. TIMES (July 18, 2021), https://www.nytimes.com/2021/07/18/us/asian-attacks-san-francisco.html ("Asian Americans in California and across the country

have been the victims of verbal and physical attacks during the coronavirus pandemic"). Petitioner's claims of racial bias at SFPD for failing to investigate his claims were also pursued in an era shaped by the televised police murder of George Floyd. *Id.* (noting that San Francisco "is torn between its commitment to criminal justice reforms in the wake of George Floyd's killing and the brutal reality of the city's most vulnerable residents being stabbed in the middle of the day on busy city streets"). The claims dismissed here were made by an Asian resident of San Francisco and do not seem implausible when put in context. *Id.*; Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School October 19, 2002*, 102 COLUM. L. REV. 1441, 1445–46 (2002) ("Judges do read the newspapers and are affected, not by the weather of the day, . . . but by the climate of the era.").

Petitioner's first amended complaint, written in layman's terms, contained (1) a wrong or omission committed by the defendants of failing to take an Asian American's police report seriously; (2) enough information to locate a federal statute (42 U.S.C. § 1983) that protects litigants in the alleged position of the Petitioner; and (3) a request for

relief in the form of a court order for the defendants to investigate the crime that Petitioner reported and damages in the amount of $5,000,000.

REASONS FOR GRANTING THE PETITION

There is a serious legal conflict between the U.S. Supreme Court and the Committee on Rules of Practice and Procedure (a government body overseen by the U.S. Supreme Court) over fact-pleading versus notice-pleading standards. The U.S. Supreme Court appears to be solely responsible for the conflict. This unresolved conflict between Committee and Court was extended to this case when the Ninth Circuit implied the fact-pleading standard from *Iqbal* & *Twombly* into the PLRA to dismiss this case, where PLRA appears to contain a notice-pleading standard like the one in the text of FRCP. Appendix A (citing *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010)).

Treating *in forma pauperis* litigants differently from those who are able to pay for access to the courts by using the PLRA to avoid serving defendants before dismissing a case *sua sponte* is a problem that strikes at the root of the legitimacy of the federal courts. *See id.*; U.S. CONST. amend. XIV. On the court's own motion the Petitioner's

claims were dismissed with prejudice before the defendants were served. Appendix A. This behavior contradicts the principle that federal courts are open courts. *Compare id.*, *with Ex parte Milligan*, 71 U.S. 2, 1866 U.S. LEXIS 861, at ***107–08 (1866) (speaking of the federal courts: "they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce").

The court closed its doors on the Petitioner and gave his complaint no adversarial process. Appendix A. It used a prisoner law to blockade a civil suit raised by a non-prisoner, emphasizing the crisis created by the federal courts regarding *pro se* litigation. *Id.* Like an inquisitorial Star Chamber determination, the dismissal appeared on its face to have treated a free and equal U.S. citizen as if he were a prisoner in order to dismiss his case before it began. *Id.*; *cf. Chambers v. Florida*, 309 U.S. 227, 237 n.10 (1940) (quoting U.S. CONST. pmbl) (noting that the U.S. Constitution's assurance of "the blessings of liberty" derived from England's earlier common law affirmation of the adversarial process through a rejection of the Star Chamber in England's first Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.)).

The advocates of indigent *pro se* litigants so far failed to convince the federal courts to take a more merciful stance toward *pro se* litigation.[1] For example, Judge Richard Posner famously retired from the bench in protest of the bad treatment of *pro se* litigants in federal court. David Lat, *The Backstory Behind Judge Richard Posner's Retirement*, ABOVE THE LAW (Sept. 7, 2017, 1:44 PM), https://abovethelaw.com/2017/09/the-backstory-behind-judge-richard-posners-retirement/ (relaying Judge Posner's statement: "I'm not taking senior status; my departure is total. It has to do with the fact that I don't think the court is treating the *pro se* appellants fairly, and none of the other judges agrees with me . . . ."); *cf.* Katherine A. Macfarlane, *Posner Tackles the Pro Se Prisoner Problem: A Book Review of* Reforming the Federal Judiciary, 83 MO. L. REV. 113, 113–14 (2018). Ironically, however, Judge Posner was one of the more rigorous adherents of the *Iqbal* plausibility standard that made *pro se* litigation

[1] *See, e.g.*, Joy Moses, *Grounds for Objection: Causes and Consequences of America's Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, CTR. AM. PROG. (June 2011), at 10, https://legalaidresearchnlada.files.wordpress.com/2020/03/objection.pdf (noting a missed opportunity in *Turner v. Rogers* for the Court to establish a "Civil Gideon" right to counsel); Travis Fife, *Reframing the Pro Se Litigation Crisis*, HARV. C.R.-C.L. L. REV.: AMICUS (Nov. 21, 2019), https://harvardcrcl.org/reframing-the-pro-se-litigation-crisis/.

more difficult. *Compare Swanson v. Citibank*, 614 F.3d 400, 407 (2010) (Posner, J., dissenting) (noting that the dismissal should not have been reversed "unless *Iqbal* is limited to cases in which there is a defense of official immunity"), *and id.* at 412 (ironically noting that the discovery concerns he felt were important to avoid by dismissing *Swanson* may be irrelevant, because it was unlikely "that the plaintiff is capable of conducting such proceedings as a pro se"), *with Bond v. United States*, 742 Fed. Appx. 735, 738 (4th Cir. 2018) (per curiam) (citing and quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)) (affirming denial of motion to reopen Judge Posner's *pro se* client's case), *cert. denied*, 139 S. Ct. 1619 (2019).

One way this Court can help address the *pro se* litigant crisis, and resolve some of the irony of Judge Posner's attempts to help the judiciary change course, is by reversing the erroneous extension of *Iqbal* & *Twombly* fact-pleading standards into the PLRA by the Ninth Circuit. Appendix A (citing PLRA, 28 U.S.C. § 1915(e)(2)(B); *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010)). The U.S. Supreme Court invented the *Iqbal* & *Twombly* fact-pleading standard by simultaneously (1) acknowledging that the court of appeals read

Conley v. Gibson's dicta about "'no set of facts' . . . in isolation" to describe "the standard for dismissal," and (2) reversing this isolated reading of *Conley* dicta to require plausible fact-pleading without actually reversing or repealing FRCP's notice-pleading standard. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)), *extended by Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009). The FRCP never required litigants to plead facts of any sort to overcome a 12(b)(6) motion to dismiss; rather, the FRCP and PLRA required only that a claim be pled—setting forth a standard known as notice-pleading in an explicit attempt directed by Congress to preclude the formal fact-pleading standards of yesteryear. FRCP 8, 12(b)(6) (requiring a short and plain statement of the claim); PLRA, 28 U.S.C. § 1915(e)(2)(B); *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) ("there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief'").

In this case, the Ninth Circuit Court of Appeals applied the *Iqbal* fact-pleading requirement while citing a statutory notice-pleading provision. Appendix A. The court appeared to presume that the

rationale given in *Iqbal* & *Twombly* was an interpretation, rather than a clear departure, from the FRCP's textual notice-pleading standard. *Id.*; *cf. Twombly*, 550 U.S. at 575 (Stevens, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."). Just because the U.S. Supreme Court contradicted the FRCP's notice-pleading standard in *Iqbal* & *Twombly*, does not mean that the Court intended to implicitly redefine all textual notice-pleading standards throughout every law and statute to imply contradictory fact-pleading standards. *Cf. Swanson v. Citibank*, 614 F.3d 400, 407 (2010) (Posner, J., dissenting) (suggesting that perhaps *Iqbal* should be expressly limited to cases involving a defense of official immunity).

The PLRA states that the Court should dismiss "the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B). Construction of this passage cannot follow *Iqbal* or *Twombly*, which applied a judge-made rule fashioned from the dicta of

Conley v. Gibson regarding "no set of facts" *instead* of construing FRCP's text. *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009) (noting "that *Twombly* retired the *Conley* no-set-of-facts test" and "called for a flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations") (internal quotation marks omitted). It appears that the only reason the Ninth Circuit implied a fact-pleading requirement under PLRA was the common text that PLRA shares with FRCP, which both indicate a notice-pleading standard. *Compare* 28 U.S.C. § 1915(e)(2)(B), *with* FRCP 12(b)(6). Unlike the FRCP, however, the PLRA was enacted directly by Congress and its adoption of a liberal notice-pleading standard that mirrored the FRCP in 1995 before *Iqbal* or *Twombly*, indicates that it should be applied as *Dioguardi v. Durning* and several similar circuit court decisions of the same period clarified as a preclusion of a fact-pleading requirement. *See Conley v. Gibson*, 355 U.S. 41, 46 n.5 (1957) (citing *Leimer v. State Mutual Life Assur. Col.*, 108 F.2d 302 (8th Cir. 1940); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Continental Collieries v. Shober*, 130 F.2d 631 (3d Cir. 1942)).

Like the FRCP, the PLRA adopted no express requirement that plausible facts, or facts at all, must be pled. *Compare* 28 U.S.C. § 1915(e)(2)(B), *with* FRCP 12(b)(6). The primary purpose of complaints was not to establish facts, but to give notice. *See* Arthur Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331, 333 (2013) (noting "an impressive unbroken string of Supreme Court decisions repeating and reinforcing the norm of notice pleading"). The facts, if there were any stated in the complaint, would be determined through a trial with the benefit of the adversarial process and a jury. *Id.*; *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting). The ultimate result of *Iqbal* & *Twombly's* departure from notice-pleading was seen in this case, as it was dismissed with no defendant notified, no jury, and no apparent process. Appendix A.

Instead, the Ninth Circuit extended a free floating fact-pleading standard from *Iqbal* & *Twombly* that does not exist in the text of the PLRA or the FRCP. *Id.* The Ninth Circuit did not explain how *Iqbal* & *Twombly* created a fact-pleading requirement that could be extended to statutes separate from the FRCP. *Id.* Neither *Iqbal*, nor *Twombly*,

appeared to hold that all textual notice-pleading standards must now imply fact-pleading. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (extending *Twombly* to potentially all FRCP 12(b)(6) dismissals, but deciding nothing about statutory dismissal provisions like the PLRA).

Extending the extremely unique fact-pleading standard of *Iqbal* & *Twombly* to notice-pleading statutes at large implies a bare use of the U.S. Supreme Court's equitable power. *Id.* Extending *Iqbal* or *Twombly* to any statute that allows ulterior grounds for dismissal for "failure to state a claim" is a radical extension of the court's equitable power, because neither of these cases engaged in statutory construction, or even a textual construction of the FRCP. Appendix A. It is dangerous to extend equity based on *Iqbal* & *Twombly's* public policy reasons for construing the FRCP in a way that contradicts its text, because the courts have no army or navy and must rely upon the coordinate branches of government to enforce their opinions. *See, e.g.*, *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), *enforced by* Exec. Order 10730, Sept. 23, 1959.

Therefore, if the U.S. Supreme Court has the power to create its own pleading standards, it should also fulfill its duty of explaining

whence this power comes. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As the Court has not yet fulfilled this emphatic and fundamental duty, granting this petition will be an auspicious opportunity. *See id.* It appears that the Court fashioned the plausibility standard upon the questionable foundation of reversed *Conley* dicta, but whether this is actually the case should be left to the Court to explain. *Id.* ("Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.").

There are two apparent reasons for this Court to overrule *Iqbal* & *Twombly* in order to fully restore the notice-pleading requirement as given in *Dioguardi*: The first is that fact-pleading is a subjective standard. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting) (noting that, for example, "the Field Code and its progeny required a plaintiff to plead 'facts' rather than 'conclusions,' a distinction that proved far easier to say than to apply"). Determining which pled fact is probable, plausible, possible, proper, or otherwise required is in the eye of the beholder. *Id.* The fact-pleading standard is so relative and disconnected from ordinary fact-*finding* standards at trial that reasonable judges can easily disagree with no clear way of

unifying the fact-pleading standard to ensure equal treatment for all federal litigants. *Id.*; *see, e.g., Swanson v. Citibank*, 614 F.3d 400, 411 (2010) (Posner, J., dissenting) (citing *Twombly's* "opaque language" in order to justify, through intuition, a statistical "range of probabilities" test); *cf.* Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 36 (2010) (opining on Judge Wood's majority opinion in *Swanson v. Holder*, that "we may be entering an age of storytelling pleading . . . [where t]he answer may lie in the eye of the beholder").

The second reason is that *Iqbal* & *Twombly* presume that the federal courts have a settled way of receiving and analyzing evidence pre-trial, and in this case pre-service of the complaint to the defendants. Appendix A; FRCP 12. The federal courts do not have a uniform way to receive evidence or to consider evidence through an adversarial process before a trial, and certainly not before the defendants have been served. *Cf.* FRCP 12. In fact, the *sua sponte* and *ex parte* procedure for dismissal under PLRA here seems to contradict the common law inheritance of the United States that is symbolized by the ancient rejection of the inquisitorial Star Chamber. PLRA, 28

U.S.C. § 1915(e)(2)(B) (allowing the court to dismiss a case brought *in forma pauperis* "at any time," and without a motion from opposing counsel); *see* Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.) (abolishing the Star Chamber), *mentioned by Chambers v. Florida*, 309 U.S. 227, 237 n.10 (1940).

Notice-pleading is not perfect, but it was the standard chosen by Congress and the Committee on Rules of Practice and Procedure. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting) (noting that the drafters of the FRCP "intentionally avoided any reference to 'facts' or 'evidence' or 'conclusions'"). The central question in evaluating a notice pleading is whether the complaint states a claim that would give adequate notice to the opposing and/or other interested parties. FRCP 8; *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting) (remembering the "liberal notice pleading of Rule 8(a)" and "that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function") (internal quotation marks and citations omitted). The elements of a legal claim adequate to give the parties notice remain constant enough that dismissal procedure may achieve enough

uniformity in the judicial system to ensure equal treatment under the law. U.S. CONST. amend. XIV, § 1 (requiring equal protection under the law); *cf. Twombly*, 550 U.S. at 575 (Stevens, J., dissenting).

The *Iqbal* & *Twombly* fact-pleading standard is problematic, because it resembles the formal system that the FRCP was created to abolish. *See Twombly*, 550 U.S. at 574 (Stevens, J., dissenting). As commemorated by *Dioguardi*, the express purpose of FRCP 2, which closed the forms, was to end the formalistic nature of fact-pleading and to replace it with liberal notice-pleading as set forth in FRCP 8. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944); Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U. L. REV. 1, 193, 197–99 (2021) (explaining how the liberal and open spirit of the common law writ of trespass on the case was implicitly embraced by FRCP 2). The entire purpose was to open the doors of the court to indigent *pro se* litigants like Petitioner in a way that was not done in the prior formal system. *Dioguardi*, 139 F.2d at 775; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *cf. Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200–01 (1938).

For example, in this case Petitioner repeatedly reported what he believed to be a serious crime against himself to the police and the police did nothing. Appendix B. Then, believing his rights as a U.S. citizen were violated, he reported this fact to the federal courts, and the federal courts did nothing. *Id.* The central question of Petitioner's rights to invoke the protection of law enforcement and the court were sidestepped by dismissal when the court decided in a *sua sponte*, *ex parte*, pre-service, pre-trial proceeding that it would not engage in the ordinary fact-finding processes of a trial to learn whether Petitioner's claims had merit. Appendix A; *cf. Twombly*, 550 U.S. at 574 (Stevens, J., dissenting) (remembering when the merits of a case were "sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial").

This is a serious problem, because it creates an appearance of judicial apathy for claims of injustice, especially for claims arising from indigent people. *See Bond v. United States*, 742 Fed. Appx. 735, 738 (4th Cir. 2018) (per curiam) (citing and quoting *Iqbal* to justify deciding against Judge Posner's *pro se* client), *cert. denied*, 139 S. Ct. 1619 (2019); *cf.* Joe Patrice, *The Fight For Pro Se Rights Produces*

Another Damning Supreme Court Brief, ABOVE THE LAW (Apr. 10, 2019, 3:15 PM), https://abovethelaw.com/2019/04/the-fight-for-pro-se-rights-produces-another-damning-supreme-court-brief/ (expressing hope that Judge Posner's attempt to vindicate *pro se* rights in *Bond v. United States* would succeed, because it was "an urgent issue of basic justice and exactly the sort of circuit split the Supreme Court should resolve"). It is a recipe for unrest if enough people stop believing that they have access to justice in this country. Yuvraj Joshi, *MLK Believed "No Justice, No Peace"*, JUST SECURITY (Jan. 18, 2021), https://www.justsecurity.org/74235/mlk-believed-no-justice-no-peace/; *cf. Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) ("here is another instance of judicial haste which in the long run makes waste"). It could be an existential crisis for the court if enough of the public stops believing that federal judges care whether justice is administered in America. *Cf. Ex parte Milligan*, 71 U.S. 2, 1866 U.S. LEXIS 861, at ***107–08 (1866) (counteracting the unjust military execution of Mary Surratt with a classic description of open federal courts); U.S. CONST. pmbl (noting that "establish[ing] Justice" is one of the first principles of the constitution); THE DECLARATION OF INDEPENDENCE paras. 2, 10 (U.S. 1776) (noting that the widespread obstruction of justice can be a

cause of revolution); *cf.* Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990) (explaining how the triad of founding documents successfully helped America avoid a fate similar to the French Reign of Terror).

There are several ways the Court could broach this issue. Most simply, the Court could attempt to explain that *Iqbal* and *Twombly* established a non-legal, judge-made, prudential doctrine. *Cf.* Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1489 (2013) (expressing hope that through judicial prudence judges might "apply the new pleading doctrine with Solomonic-wisdom . . . no matter how badly the Court may have bungled the doctrine or misinterpreted the rulemakers' prior intent" in *Iqbal* & *Twombly*). The newly recognized *Iqbal* & *Twombly* prudential standard could be hitched as an exception to the oft-reaffirmed general prudential doctrine of a "virtually unflagging obligation" of the Court to assert jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

The "virtually unflagging obligation" doctrine traces back to *Cohens v. Virginia*, in which Chief Justice Marshall expanded federal

jurisdiction, because the constitution was drafted to avoid what Alexander Hamilton called "a hydra in government." *Id.* at 817–18, *extending Cohens v. Virginia*, 19 U.S. 264, 404, 415–16 (1821) (quoting THE FEDERALIST NO. 80 (Alexander Hamilton)). The *Cohens* Court emphasized the judiciary's prudential interest in giving uniformity to federal standards that the state courts were incapable of establishing, and that this interest was enough to assert federal jurisdiction. *Cohens*, 19 U.S. at 415–16. For generations the U.S. Supreme Court innovated new ways of expanding federal jurisdiction according to the *Cohens* rationale in other seminal decisions like *McCulloch v. Maryland* and *Martin v. Hunter's Lessee*. *Id.*, *extending Martin v. Hunter's Lessee*, 14 U.S. 304, 364–65 (1816); *McCulloch v. Maryland*, 17 U.S. 316, 317 (1819) (extending federal jurisdiction over a private citizen's suit raised by John James who sued "for the state of Maryland").

Iqbal & *Twombly* undermined the strong federal interest in establishing a uniformity of the law applied in the United States by enabling a slew of relative fact-pleading standards. Ryan Charlson, *Flying Blind: The Lack of Uniformity in Federal Pleading after*

Twombly *and* Iqbal, 44 JOHN MARSHALL L. REV. 485, 494–501 (2011) ("Without the uniformity that existed in federal pleading during the *Conley* era, courts are indeed flying blind and indulging their 'subject[ive] judgments.'"). The "virtually unflagging obligation" doctrine appears to indicate that the purported judicial interest in the pre-trial dismissal of cases is generally an *imprudent* policy that encourages disunity and non-uniformity. *Colo. River Water Conservation Dist.*, 424 U.S. at 817; *Cohens*, 19 U.S. at 415–16, 423 (emphasizing "the necessity of uniformity" and extending "the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*"), *extending Martin v. Hunter's Lessee*, 14 U.S. 304, 364–65 (1816) ("another claim I may assert, in the name of the American people; in this Court, every State in the Union is represented; we are constituted by the voice of the Union, and when decisions take place which nothing but a spirit to give ground to harmonize can reconcile, ours is the superior claim upon the comity of the State tribunals"). Therefore, this Court is free to conceive of *Iqbal* & *Twombly* as an experimental exception to the usual prudential doctrine that expands federal jurisdiction, in order to find, in this case at least, that *Iqbal* & *Twombly* ran its course and failed

the test of time. *Cf.* 2 JAMES WILSON, COLLECTED WRITINGS OF JAMES WILSON 749 (Kermit L. Hall & Mark David Hall eds., 2007) ("Time is the wisest of things. If the qualities of the parent may, in any instance, be expected in the offspring; the common law, one of the noblest births of time, may be pronounced the wisest of laws.").

The Court has a legitimate prudential interest in promoting uniformity by resolving the legal split between the PLRA and FRCP's notice-pleading standards, and *Iqbal* & *Twombly*'s fact-pleading standard. *Cohens*, 19 U.S. at 415–16 (noting "the necessity of uniformity"). *Iqbal* & *Twombly* remained on the books long enough to be tested and the in-court results have failed to unify the judiciary in one understanding of what should be pled. Ryan Charlson, *Flying Blind: The Lack of Uniformity in Federal Pleading after* Twombly *and* Iqbal, 44 JOHN MARSHALL L. REV. 485, 494–501 (2011) (noting several divergent approaches among the circuit courts attempting to apply the plausibility standard); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting) (noting that the previous problem with the Field Code's fact-pleading standard was similar). Thus, *Iqbal* & *Twombly* should be overruled, and *Hebbe v. Pliler* should accordingly

be reversed so that the FRCP and PLRA's notice-pleading standards can be restored. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*stare decisis* is not an inexorable command").

This Court should thus grant certiorari to remand this case to lower courts to apply the FRCP and PLRA notice-pleading standards to Petitioner's complaint and to otherwise clarify, narrow, reverse and/or overrule any and all fact-pleading requirements inspired by *Iqbal* & *Twombly* and its progeny, including *Hebbe v. Pliler*. *Id.* The remainder of this petition will address several apparent grounds for clarifying, narrowing, or overruling *Iqbal* & *Twombly* that are included with and not limiting to other possible grounds for resolving the legal conflict over pleading standards.

(1) Iqbal *and* Twombly *contradict the liberal purposes of the Federal Rules of Civil Procedure and Congress's role in delegating Article III jurisdiction to the Court.*

In *Hebbe v. Pliler*, the Ninth Circuit declared: "We therefore join the five other circuits that have determined that *pro se* complaints should continue to be liberally construed after *Iqbal*." *Hebbe v. Pliler*, 627 F.3d 338, 342 n.7 (9th Cir. 2010) (joining the Second, Third, Fifth,

Seventh, and Tenth Circuits). Attempting to extend pre-*Iqbal* case law to construe *pro se* complaints liberally, the Ninth Circuit made an oxymoron. *Id.* Trying to apply *Iqbal* liberally is a paradox, as it was a candidly *illiberal* "transmogrification" of the FRCP's liberal notice-pleading standard into a fact-pleading standard that had the opposite *illiberal* purpose of excluding litigants. Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18 (2010).

In 1944, the Second Circuit clarified the liberality required under the FRCP: "Under the new rules of civil procedure there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief' . . . ." *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944). Professor Arthur Miller consistently vindicated the liberal purposes of the Rules on these grounds. Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 6 (2010) ("Perhaps the case that best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules is *Dioguardi v.*

Durning."). Thus, Miller aptly labeled *Iqbal* & *Twombly* a "transmogrification of notice pleading and the motion to dismiss" focusing on the Court's reversal of the liberal purposes of the FRCP. *Id.* at 18 ("The Rules, it was thought, were designed to keep cases in court at the pleading stage, rather than to exclude them.").

There is little agreement about whether *Iqbal* & *Twombly* compose a "heightened standard" as these decisions were notoriously vague. *Compare Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("Here, in contrast, we do not require heightened fact pleading of specifics . . . ."), *with id.* at 588 (Stevens, J., dissenting) ("the majority assures us that is not apply any 'heightened' pleading standard . . . I shall now explain why I have a difficult time understanding its opinion any other way"). Perhaps more relevant to the continued, apparent legitimacy of *Iqbal* & *Twombly*, is that the Court in *Iqbal* & *Twombly* appeared to believe that little or no explanation was required when transmogrifying the purpose of the FRCP from one opposite to the other. *See* Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 47 (2010) ("The federal court system once championed access for potentially

meritorious claims in all cases, but *Twombly* and *Iqbal* have swung the pendulum in the opposite direction, significantly confining a plaintiff's ability to reach information needed for a meaningful adjudication."). It is an ancient common law doctrine that when the reason for the law changes the law itself is changed, and, as *Marbury v. Madison* memorably stated, it is emphatically the duty of the Court to say what the law is. *Funk v. United States*, 290 U.S. 371, 385 (1933) (citing the maxim *cessante ratione legis, cessat ipsa lex*, which "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.") (internal quotation marks and quoted source omitted); *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

The Court's decisions in *Conley*, *Twombly*, and *Iqbal* exist in an extremely unique area of the law as they involve an enabling act by Congress to form a Committee administered by the U.S. Supreme Court to adopt the Federal Rules of Civil Procedure. The Rules Enabling Act, 28 U.S.C. §§ 2071–77. These cases do not involve usual agency law principles, as the executive branch had no role in the adoption of the FRCP. *Id.* (investing the U.S. Supreme Court with the power to prescribe rules through committee). Ordinary agency law

cannot intuitively explain why *Iqbal* & *Twombly* are legally valid as the only legal conflict here is between the U.S. Supreme Court and a Committee the U.S. Supreme Court itself administers. *Id.*; *compare* FRCP 8 (creating a notice-pleading requirement in compliance with rule-making procedures of the Rules Enabling Act), *with Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560–61 (2007) (creating a fact-pleading requirement *without* complying with rule-making procedures of the Rules Enabling Act).

The U.S. Supreme Court can, perhaps, create standards of pleading outside of the FRCP or PLRA if it decides to explain why and how the FRCP and PLRA do not legally control the Court. *Cf. Twombly*, 550 U.S. at 559 (creating a fact-pleading requirement based on public policy concerns, without addressing why or how FRCP or PLRA do not control the Court). In order to give this necessary explanation the Court *must* explain how it could legally create a fact-pleading requirement without complying with the unique rule making procedures prescribed by the Rules Enabling Act. *Compare id.*, *with* 28 U.S.C. § 2073 (requiring procedural rules to be adopted through committee). For the power of the Court is expressly delegated by

Congress alone, i.e., the federal judiciary has no inherent powers that come in from outside statutory law, i.e., all inherent judicial powers of the Court, if any, must flow through Congress. U.S. CONST. art. III, § 1 (the judicial power is "vested in one Supreme Court" by Congress); *id.* art. III, § 2, cl. 2 (noting that the U.S. Supreme Court's appellate jurisdiction is subject to "such regulations as Congress shall make").

Thus, such an explanation should include where in the Judiciary Act or related law Congress enabled the Court to standardize a fact-pleading requirement that contradicts the FRCP and PLRA. *Cf. Felker v. Turpin*, 518 U.S. 651, 660 (1996) (citing Judiciary Act of 1789, 1 Stat. 73) (implied repeals are disfavored). This may be difficult to show, as Congress clearly intended notice-pleading standards in both FRCP and PLRA for the purpose of avoiding the problematic fact-pleading required by the Field Code. FRCP 8; 28 U.S.C. § 1915(e)(2)(B); *Twombly*, 550 U.S. at 574–75 (Stevens, J., dissenting).

In short, there are several serious legal implications that arise from *Iqbal* & *Twombly*, including the possibility that the Court itself acted *ultra vires* by trying to change the FRCP without following the rule-making procedures prescribed by law for an unlawful, illiberal

purpose. *Twombly*, 550 U.S. at 574–75 (Stevens, J., dissenting). Congress expressly enabled the Committee to oppose strict formalism in favor of liberally opening the Court to unsophisticated claimants. *Id.* As an unelected body, the Court owes the Petitioner and the public an explanation for why and how *Iqbal* & *Twombly* contradicts and overrides the text of the FRCP, the text of PLRA, and legislative intent. FRCP 8, 12(b)(6), *enabled by* 28 U.S.C. § 2073; 28 U.S.C. § 1915(e)(2)(B). This case, which involves an unsophisticated claimant that was dismissed out of court with prejudice and without any apparent process, is an opportunity for the Court to provide this explanation. *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

(2) FTC Chairperson Lina M. Kahn's Observation of Fundamental Changes to Antitrust Policy after the Development of the Internet.

Iqbal & *Twombly* appeared to extend a plausibility standard from *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* regarding predatory pricing schemes, which then Professor Robert Bork conceived of as unlikely to become the basis of monopoly. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560–61 (2007) (extending the

plausibility standard from *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). However, current Federal Trade Commission ("FTC") Chairperson Lina M. Khan shook the legal world when she disrupted Bork's old idea that predatory pricing schemes should not be reviewed by the federal courts, because their potential damage to consumer interests was implausible. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 728 (2017) ("Citing to Bork's *The Antitrust Paradox*, the [*Matsushita*] Court concluded that predatory pricing schemes were implausible and therefore could not justify a reasonable assumption in favor of Zenith.").

Chairperson Kahn demonstrated that massive internet companies like Amazon disproved Judge Bork's old pre-internet ideas by successfully monopolizing entire supply chains from top to bottom and by consistently poaching customers with predatory pricing schemes. *Id.* In pre-internet days, Professor Bork posited that monopolies were unlikely to emerge from predatory pricing schemes and vertical mergers. *Id.* But now, with Amazon as a reference point, we can see exactly how they can and did. *Id.*

This case is an auspicious chance for the Court to rethink the wisdom of extending the *Matsushita* plausibility standard to potentially all civil cases through the FRCP. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560–61 (2007) (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Bork's old economic ideas quoted in *Matsushita* were premised on the idea that the consumer is inherently rational, which was thoroughly disproven by Daniel Kahneman & Amos Tversky's groundbreaking economic research summarized in Michael Lewis's biography of Kahneman & Tversky. MICHAEL LEWIS, THE UNDOING PROJECT 223, 278 (2016) ("the most sophisticated minds are prone to error . . . 'their intuitive judgments are liable to similar fallacies'"). In light of Kahneman & Tversky's correctives to economic theory and Kahn's direct undoing of Bork, this Court may decide to overrule *Iqbal* to limit the plausibility standard of *Twombly* to pertain only to antitrust cases, because the plausibility standard may soon be proven erroneous for its shifty reliance on old, debunked ideas about inherent human rationality. *Id.*; *but see Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8.").

(3) Common law stare decisis, the jury requirement, ex parte proceedings, and the adversarial process.

Stare Decisis. The Court can restore the force of regular *stare decisis* to *Conley*, *Dioguardi*, and several other like cases that were not overruled, but simply disregarded by *Twombly* & *Iqbal*. FRCP 8 (undisturbed by *Iqbal* or *Twombly*), *applied by Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944), *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (unanimous decision), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (unanimous decision), *and Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (unanimous decision); *cf. Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200–01 (1938) ("Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."). The Court need not restore *Conley's* "no set of facts" dicta in order to restore the notice-pleading standard that was vindicated by *Conley*. *Compare Conley*, 355 U.S. at 45–46 (stating dicta about "no set of facts" that was explicitly repudiated by *Twombly*), *with id.* at 47–48 (stating the notice-pleading standard from FRCP that *Twombly*

explicitly cited and purported to apply); *cf. Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010) (noting the court's continued duty to apply the FRCP liberally even after *Iqbal* & *Twombly*). The Court can surgically isolate *Twombly's* repudiation of *Conley* dicta for inappropriately implying that the FRCP required the pleading of a set of facts at all, by reaffirming the FRCP notice-pleading standard and abrogating the plausibility standard of *Twombly* & *Iqbal* on the same grounds, as misapplied *Conley* dicta. Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U. L. REV. 1, 228 (2021).

The Court may choose to "analyze this new brainchild with some care." *Jackson v. Virginia*, 443 U.S. 307, 327 (1979) (Stevens, J., concurring in the judgment). For it appears that *Twombly* & *Iqbal* rejected *stare decisis*, not by overruling any case or rule, but by ignoring several lines of notice-pleading precedent as if it were not there. *See, e.g., Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (undisturbed by *Twombly* & *Iqbal*); Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 7 n.22 (2010) (naming, as an example, five

U.S. Supreme Court decisions that upheld FRCP's notice pleading standards); *cf. Sablan v. A.B. Won Pat Int'l Airport Auth.*, No. 10-00013, 2010 U.S. Dist. LEXIS 130692, at *8–10 (D. Guam Dec. 9, 2010). Fraying precedent so that there are multiple contradictory precedents on the books, is a major problem in federal jurisprudence that appears to be heretofore unnoticed by this Court. *See* Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U. L. REV. 1, 228 (2021).

The Jury Requirement. The Seventh Amendment jury requirement symbolizes the commitment of the United States to the common law. U.S. CONST. amend. VII; *see id.* amends. V, XIV (requiring courts to apply due process); *cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020). Petitioner's right to a jury trial was unduly precluded without due process of the law. Appendix A. Petitioner was improperly dismissed for failing to plead facts under a law that required notice-pleading, and as such was erroneously stripped of his right to a jury trial. *Id.*

Ex Parte Proceedings. The questionable ethics of PLRA dismissals are concerning. For example, the Code of Conduct for U.S. Judges Canon 3(A)(4) precludes judges from "consider[ing] ex parte communications or consider[ing] other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Also, it appears that none of the five exceptions to Rule 3.5(b) of the Rules of Professional Conduct of the State Bar of California that precludes attorneys from communicating with or arguing to a judge or judicial officer in absence of opposing counsel appeared to apply in this matter. Petitioner is not an attorney, but the court should not have required him to violate ethical rules of an attorney since he was representing himself.

PLRA dismissals for failure to state a claim before serving defendants seem to be at odds with the Code of Conduct for U.S. Judges and the California Rules of Professional Conduct.

The Adversarial Process. The common law tradition of adversarial process precedes the United States, and began, perhaps, when English Parliament disbanded the Star Chamber, an inquisitorial tribunal established by feudal law. Habeas Corpus Act 1640, 16 Car. I c. 10

(Eng.) (abolishing the Star Chamber), *mentioned by Chambers v. Florida*, 309 U.S. 227, 237 n.10 (1940). An English Civil War ensued between the crown and Parliament, in part, because of the king's inquisitions that violated common law adversarial process. *Cf.* RACHEL ROBERTSON REID, THE KING'S COUNCIL IN THE NORTH 372, 380, 389–90, 445–46, 457 (1921) (noting how the crown maintained jurisdiction to keep "granting numerous patents of monopoly" to non-inventors that Parliament intended to abolish by enacting the *Statute of Monopolies*, contributing to the cause of the English Civil War); 3 EDWARD COKE, INSTITUTES *183. The United States inherited this anti-feudal, common law tradition from Lord Coke's stand on behalf of the English people, which is commemorated by the Suspension Clause, the Copyright & Patent Clause, and the right of life named in the Bill of Rights. U.S. CONST. art. I, § 8, cl. 8; *id.* art. I, § 9, cl. 2; *id.* amends. V, XIV; *cf.* Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U. L. REV. 1, 179–80, 274 (2021).

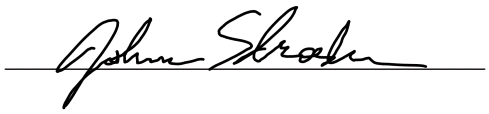
Petitioner was improperly dismissed *sua sponte*, before his complaint was delivered to the defendants. It was *ex parte*, irregular, and untested by adversarial process.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: May 24, 2022

Respectfully Submitted,



JOSHUA J. SCHROEDER
Counsel of Record
SCHROEDERLAW: LAW OFFICES OF
JOSHUA J. SCHROEDER
490 Lake Park Ave. #10422
Oakland, CA 94610
josh@jschroederlaw.com
(510) 542-9698