ORIGINAL

24-70

In the
Supreme Court of the United States

ILYA KOVALCHUK,
Petitioner,

v.

CITY OF DECHERD, TENNESSEE
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This dispute concerns municipal liability in a § 1983 action against the City of Decherd, Tennessee ("City"), and a Decherd police officer. The officer violated Petitioner's Fourth Amendment rights and the City deliberately failed to investigate the officer's background before hiring him, causing injury to Petitioner. The City moved to dismiss, and two members of the Sixth Circuit Court of Appeals' panel held that the police chief's failure to screen the officer's background before hiring was insufficiently pled under *Twombly* and *Iqbal*—requiring allegations to be plausible—to subject the City of Decherd to liability. One member of the panel dissented, asserting Petitioner sufficiently pled a claim for *Monell* failure-to-screen liability, and that discovery was the appropriate mechanism for proving or foreclosing the claim on summary judgment.

QUESTION 1

Whether the Sixth Circuit's rejection of the "plausibility" of Petitioner's *Monell* claim is erroneous, given its departure from the *Twombly* standard as followed by other circuits.

QUESTION 2

Whether limited discovery, as suggested by the Second Circuit, should be allowed to Petitioner, who would not otherwise have been able to obtain it without a federal subpoena prior to the dismissal of his complaint.

LIST OF PARTIES

The caption contains the names of all parties.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

LIST OF DIRECTLY RELATED CASES

Kovalchuk v. City of Decherd, Tennessee, and Mathew Ward, Case No. 1:22-cv-154 (E.D. Tenn. 2022).

Kovalchuk v. City of Decherd, Tennessee, and Mathew Ward, Case No. 23-5229 (6th Cir. 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ilya Kovalchuk ("Kovalchuk") respectfully petitions for a writ of certiorari to review a judgment of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals appears at Appendix B, and is reported at *Kovalchuk v. City of Decherd*, 95 F.4th 1035 (6th Cir. 2024). The order of the Sixth Circuit Court of Appeals denying the petition for rehearing en banc appears at Appendix A, is unpublished and can be found at 2024 WL 174283. The opinion of the U.S. District Court for the Eastern District of Tennessee appears at Appendix C, is unpublished and can be found at 2022 WL 19264280 and 2022 U.S. Dist. LEXIS 240443.

JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on March 18, 2024. Kovalchuk timely petitioned for rehearing en banc, which was denied on April 17, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 8(a)(2) and 8(e)

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

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

STATEMENT OF THE CASE

On June 13, 2021, Petitioner Kovalchuk was driving westbound on Interstate-24 in Rutherford County, Tennessee. A off-duty police officer employee, Mathew Ward of the City of Dechard in Franklin County, Tennessee, was also driving westbound in his personal vehicle, and without wearing a uniform. Ward began driving erratically, swerving next to Kovalchuk's car and motioning for him to pull over. Kovalchuk exited the Interstate and pulled over at a safe location.

Kovalchuk stepped out of his vehicle to face the aggressor, leaving his pregnant wife in the passenger seat. Ward screamed at Kovalchuk to "get on the ground," pointing his department-issued gun at Kovalchuk. The exchange drew in concerned bystanders who began to record the scene. Scared for his life, Kovalchuk tried to reason with Ward, stating "you're not even on duty." Ward, still holding Kovalchuk at gunpoint, replied "I'm always on duty." Only when the Rutherford County Sheriff's deputies arrived, called to the scene by a bystander, did Ward finally put away his weapon. Ward was arrested and charged with aggravated assault.

Ward's unlawful detention and assault of Kovalchuk caused severe emotional damage and mental anguish.[1]

Officer Ward was hired by the then-Decherd-Police-Chief, Ross Peterson. As the final decision-maker for the City of Decherd's hiring of police officers, Peterson had ordered his subordinate officer, investigator Greg King, not to consult references or previous employment records for Ward prior to his

[1] Officer Ward has since been ordered to pay monetary damages in the amount of $1,000,000.00 plus interest to Petitioner.

hiring. In fact, Ward's previous employment history revealed he was asked to resign due to concerns about his demeanor, professionalism, and failure to complete training programs, with additional red flags noted on his employment records from two different police departments, the Fort Walton Beach Police Department in Florida, and another police department in Alabama.

Respondent City of Decherd systematically failed in screening those hired with the city police department. Moreover, the City retained a Chief of Police who misused city-issued weapons while intoxicated, and allowed him to make policy decisions regarding the hiring of law enforcement officers. The Chief of Police not only hired unqualified, unfit, and dangerous individuals to be part of the City of Decherd's police department, but he also recklessly and intentionally instructed subordinates not to complete background checks on these individuals, including a fired Fayetteville police officer who changed his name to Tristan De La Cruz and was hired without appropriate screening. In the process of hiring these individuals, the Chief of Police, acting as final decision-maker, issued these unqualified and unfit individuals dangerous service weapons, leading to a highly predictable probability that one or more of them would violate citizens' constitutional rights. The deliberate failure of Respondent to screen prospective law enforcement employees, or to supervise and train policy officials on adequate hiring practices, was the cause and moving force behind the injury suffered by Petitioner.

Petitioner filed a complaint under 42 U.S.C. § 1983 against Respondent City of Decherd in the United States District Court for the Eastern District of Tennessee on June 13, 2022, making out, *inter alia*, a claim under *Monell v. Dep't of Soc. Servs.*, 436

U.S. 658 (1978) for municipal liability for a Fourth Amendment violation arising from its failure to screen police employees, as well as a related claim for negligence under Tennesee law.

Respondent moved to dismiss on the ground that Petitioner failed to state a plausible claim of relief against the City for violation of his Fourth Amendment rights. Petitioner demonstrated that his complaint alleged specific facts, as set forth *supra*, regarding the City's unlawful and negligent hiring policies and failures to adequately train Officer Ward or supervise the Chief of Police. On December 9, 2022, the District Court granted the City's motion to dismiss.

Petitioner appealed to the Sixth Circuit, which ruled that the police chief's failure to adequately screen Ward's background before hiring him was insufficient to subject the City to liability. The Sixth Circuit held that Petitioner's failure-to-screen claim was not "plausible," and that the district court did not err in dismissing it. Specifically, two members of the panel disregarded the deliberate instruction of the police chief not to investigate Ward's troubled background as an "ambiguous allegation[], which merely allude[s] to negligent hiring by the City" and held that Kovalchuk was required "to plead facts plausibly alleging that the 'known or obvious consequence' of the hiring decision was that [Ward] 'was highly likely to inflict the particular injury suffered by the plaintiff' (being held at gunpoint following an unconstitutional stop)."[2]

The third member of the panel, Circuit Judge Clay, dissented, affirming that the allegations were sufficient to state a claim that, with the Chief of Police as final decisionmaker, "the City's deliberately

[2]*Kovalchuk* at 1041. App. 12a.

skeletal screening process in hiring Ward led to Kovalchuk's injuries," citing *Bd. Of Comm'rs of Bryan Cnty. v. Brown,* 520 U.S. 397, 412-413 (1997). "[I]f a full review of [Ward's] record reveals that [his unconstitutional arrest] would be a plainly obvious consequence of the hiring decision," then the municipality may be liable for failing to adequately screen."[3]

Petitioner applied for a rehearing en banc, and was denied on April 17, 2024.

REASONS FOR GRANTING THE WRIT

"Wandering officers"[4] are law-enforcement officers fired by one department, sometimes for serious misconduct, who then find work at another department. According to one study, "wandering officers are far more likely . . . to be fired from their next job" and "more likely to receive complaints . . . for 'moral character violations.'" Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1687 (Apr. 2020). Such officers, left unchecked, are a menace to citizens and a threat to their constitutional rights.[5]

When municipalities deliberately fail to screen new hires for any background of misconduct, the public is put at risk. Hiring such officers without screening is often a cause and moving force of constitutional violations, particularly if a plaintiff

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[3] *Kovalchuk* at 1044, App. 19a.

[4] Nancy Leong, *Civil Rights Liability for Bad Hiring*, 108 MINN. L. REV. 1, 8 (Dec. 23, 2023) (explaining that job hopping is so common in law enforcement that "officers who jump jurisdictions are nicknamed 'wandering officers'").

[5] *See* William H. Freivogel & Paul Wagman, *Wandering Cops Shuffle Departments, Abusing Citizens*, The Associated Press (Apr. 28, 2021).

can prove that the past conduct of the law-enforcement officer was highly predictable of misconduct rising to said violation.

Yet, when plaintiffs attempt to find redress under § 1983 for municipal liability for failure to train, supervise, or screen employees, they are often turned aside. This is in part due to the strict standards for municipal liability under § 1983 set forth by this Court in *Bd. Of Comm'rs of Bryan Cnty. v. Brown,* 520 U.S. 397 (1997), which is often *misused* at the pleading stage to foreclose claims against municipalities by requiring a plaintiff to allege facts arising to a *probable* claim, rather than a *plausible* claim as is required under this Court's precedence re Fed. R. Civ. P. 8.

A. Plausibility standards

To state a claim under 42 U.S.C.A. § 1983, a plaintiff must set forth facts establishing that a deprivation of rights secured by the Constitution (or laws of the United States) occurred, and that said deprivation of rights was caused by a person acting under color of state law. For a complaint to sufficiently plead allegations to uphold claims under § 1983, the allegations must contain enough facts to be deemed "plausible" by the district court, just as all other federal civil pleadings.

Three cases set the parameters regarding the plausibility standard for pleadings under Fed. R. Civ. P. 8. First, in *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002), this Court determined that a heightened pleading standard "conflicts with Rule 8(a)(2)'s express language, which requires simply that the complaint give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 513 (citing *Conley v. Gibson,* 355 U.S.

41, 47 (1957)). *Swierkiewicz* also affirmed that Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." *Id.* at 514.

Five years after *Swierkiewicz,* in *Bell Atlantic Corporation et al v. William Twombly*, 550 U.S. 544, 562 (2007), this Court held that "a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory" (again citing *Conley, supra*). *Twombly* further states that "the accepted rule [is that] a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 561. This Court reiterated that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face," drawing a line between conceivable and plausible. *Id.* at 570.

Finally, in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), this Court again emphasized that what is necessary to survive a motion to dismiss is sufficient factual allegations to rise above "unadorned, the-defendant-unlawfully-harmed-me accusation[s]."

B. Municipal Liability

In setting forth claims under § 1983 against a municipality, a plaintiff must plead that a municipality's policy or custom led to an alleged federal right violation in order to prevail on a motion to dismiss. In *Monell v. Department of Social Services of City of New York*, 136 U.S. 658, 692 (1978), this Court ruled that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the

injury that the government as an entity is responsible under § 1983." In *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986), this Court held that a municipality may be liable under 42 U.S.C. § 1983 for harm caused by a single act of a policy-making officer in a matter within his authority.

Four avenues exist in which a plaintiff may demonstrate liability against a municipality for the existence of an illegal policy or custom: 1) a municipality's legislative enactments or official agency policies; 2) actions taken by officials with final decision-making authority; 3) a policy of inadequate training or supervision; or 4) a custom of tolerance or acquiescence of federal rights violations. *Monell* at 694; *Pembaur* at 480.

In *Bd. Of Comm'rs of Bryan Cnty. v. Brown, supra,* this Court reversed a case decided after a jury trial found the municipality liable for failing to adequately review a sheriff's deputy's background (which included assault and battery). This Court stated the new standard:

> A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of the applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Id., at 411. The culpability of the municipality depended, said this Court, on a finding that a particular officer—who had been inadequately screened—was "highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong." Id. at 412. Again, however, this determination was made after plaintiff had opportunity for discovery, and had prevailed in a jury trial.

Petitioner herein alleged a deliberate, complete failure-to-screen upon hiring, not an inadequate screening, and this deliberate action was taken by an official with final decision-making authority who would have otherwise discovered the applicant's previous conduct was serious enough that it resulted in a forced resignation from a Florida police department. From this allegation, it can reasonably be inferred that the particular injury suffered by Petitioner would have been highly likely to be inflicted by the officer. Thus, Petitioner alleged that the City caused and was the moving force behind the constitutional injuries he suffered at the officer's hands.

C. Inconsistent review of pleadings denies equal protection for all plaintiffs

There is an inconsistency in reviews of the federal pleading standard rendering it variable and uncertain. This Court should re-examine the *Twombly* plausibility standard in light of the diverse interpretations across the circuits, but particularly in light of the misapplication of *Brown, supra,* to undo the *Twombly/Iqbal/Swierkiewicz* pleading standard. The Fourth Circuit's interpretation of the federal

pleading standard aligns most closely with *Twombly*, and this Court would greatly assist all litigants and parties by affirming and solidifying the Fourth Circuit's interpretation. In the absence of this Court's application of a *consistent* interpretation of the federal plausibility standard for § 1983 cases, and particularly municipal liablity cases, this ongoing void will detrimentally affect the equal right of every present and future civil rights plaintiff to be heard on his complaint against a municipality which deliberately ignores the public safety by failing to screen police department applicants.

D. Allegations: the who, what, when, and where

Twombly does not impose a heightened pleading requirement on plaintiffs, and some circuits have taken care to ensure that well-pleaded allegations survive motions to dismiss without requiring that plaintiffs provide *evidence* rather than sufficient factual allegations to rise above "the-defendant-unlawfully-harmed-me accusation." *Iqbal* at 678.

In *Doe v. Columbia University*, 831 F.3d 46, 48 (2d Cir. 2016), involving a Title IX claim, the Second Circuit applied the pleading standard as requiring allegations "plausibly sufficient to state a legal claim." The Court reiterated that "the court ... must ... construe ambiguities in the light most favorable to upholding the plaintiff's claim." It concluded:

> ... the Complaint adequately pleads facts that plausibly support at least the needed minimal inference of sex bias. Accordingly, we vacate the district court's dismissal of the Title IX claim and remand for further consideration. Our decision to reinstate the

> complaint in no way suggests that our Court has any view, one way or the other, on the likely accuracy on what Plaintiff has alleged. We recognize that the facts may appear in a very different light once Defendant Columbia has had the opportunity to contest the Plaintiff's allegations and present its own version. The role of the court at this stage of the proceedings is not in any way to evaluate the truth as to what really happened, but merely to determine whether the plaintiff's factual allegations are sufficient to allow the case to proceed. At this stage, the Court is compelled to assume the truth of the plaintiff's factual allegations and draw all reasonable inferences in his favor.

Id. at 59. (internal citations omitted)[6]

In *SD3, LLC v. Black & Decker, Inc.* 801 F.3d 412 (4th Cir. 2015), *cert. denied,* 579 U.S. 917 (2016), the Fourth Circuit articulated the *Twombly* pleading requirements in the context of the Sherman Antitrust Act, 15 U.S.C. § 1. It found that the district court, in dismissing a group boycott claim against table saw manufacturers, *improperly* imposed a

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[6] The language employed across the circuits discussing the *Twombly/Iqbal* plausibility standard illustrates the inconsistency in the standard of review. For instance, contrary to the Second Circuit's holding in *Columbia,* the Sixth Circuit held in *Doe v. Miami University,* 882 F. 3d 579, 589 (6th Cir. 2018) that "[w]hatever the merits of the Second Circuit's decision in *Columbia University,* to the extent [it] reduces the pleading standard in Title IX claims, it is contrary to our binding precedent. ... [W]e reconciled these cases differently in *Keys,* 684 F 3d at 609-10, and held that a Plaintiff asserting a Title VII claim may plead sufficient factual allegations to satisfy *Twombly* and *Iqbal* in alleging the required element of discriminatory intent."

heightened pleading requirement rather than asking whether plaintiffs SD3 and SawStop had alleged parallel action among the manufacturer group sued and something "more" that indicated agreement among them. The plaintiffs alleged enough to suggest a plausible agreement to engage in a group boycott, and "[a]lthough that claim may not prove ultimately successful at trial, or even survive summary judgment, the complaint offers enough to survive the defendants' motion to dismiss," said the *SD3* Court, citing *Twombly* at 556: "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 418.

Noting that *Twombly*'s requirement to plead something "more" than parallel action among the antitrust defendants to show an actual *agreement* or conspiracy to restrain plaintiffs' trade, the Fourth Circuit explained that this something "more" does "not impose a probability standard at the motion-to-dismiss stage," citing *Iqbal*, *supra* at 678. The Fourth Circuit warned against confusing "probability and plausibility" as well as cautioning that courts are "not to import the summary-judgment standard into the motion-to-dismiss stage." *Id.* at 425. Indeed, "a plaintiff may only have so much information at his disposal at the outset," and it cannot be expected that a plaintiff has built his entire case at the motion-to-dismiss stage. *Id.* at 426.

The district court in *SD3* had erroneously required plaintiffs to "show an agreement" among the defendants rather than "asking whether the allegations 'plausibly suggest[ed]' such an agreement,"and it looked to summary judgment cases to define the relevant standards. *Id.* at 426. Further, the district court had applied a standard closer to probability than plausibility. SD3, however,

had identified the particular time, place, and manner in which the group boycott of its products had initially formed, a separate meeting held during the Power Tool Institute's October 2001 annual meeting. The complaint named six individuals who took part in forming the boycott, and alleged they sealed the agreement by majority vote. "And the complaint then explains how the manufacturers implemented the boycott: refusing to respond to entreaties from SawStop, going silent after long negotiations, or offering only bad-faith terms that were intended to be rejected." *Id.* at 430.

In sum, the plaintiff in *SD3* had provided the "who, what, when, and where" (and even the why, alleging the motive to conspire) of the boycott agreement. This is in accord with this Court in *Swierkiewicz* at 506 (a Title VII complaint should not have been dismissed where it "detailed the events leading to his termination, provided relevant dates,and included the ages and nationalities of at least some of the relevant persons involved with his termination").

Similarly, the "who, what, when and where" of Petitioner's complaint sufficiently pled allegations against the City which met the threshold of the federal plausibility standard and the *Monell* doctrine. First, Petitioner alleged the "who" as Chief of Police Ross Peterson, and his investigator Greg King. The "what" alleged was the deliberate instruction of Peterson to his subordinate King *not to investigate* the background of Officer Ward before hiring him, and that he knew or should have known that there was a high probability that failure to screen would result in the injuries suffered by Kovalchuk. The "when" alleged was clearly during the police department's pre-hiring process stage. The "where" is

inferred from the official actions alleged as the Decherd police department.

Moreover, the requisite element material to municipal liability was alleged: that Ross Peterson, who deliberately failed to screen Ward and at least one other previously fired police officer, and instructed another to fail to screen, was the final decisionmaker of the City on hiring policies and practices. "The act of the municipality is the act only of an authorized policymaker or of an employee following the policymaker's lead," J. Souter, dissenting in *Brown* at 417, citing Pembaur at 480.

On *de novo* review of the district court's dismissal, however, the Sixth Circuit adopted a precedent that followed *all the errors* the Fourth Circuit warned of in *SD3*: confusing "probability and plausibility," importing a standard applicable to a later stage of litigation into the motion-to-dismiss stage, expecting the plaintiff to have built his entire case at the outset, and requiring a plaintiff to "show" detailed facts rather than plausibly alleging a claim.

The Sixth Circuit panel majority held that "Kovalchuk was required to plead facts plausibly alleging that a 'known or obvious consequence' of the hiring decision was that 'this officer' (Ward) 'was highly likely to inflict the particular injury suffered by the plaintiff' (being held at gunpoint following an unconstitutional stop)." *Kovalchuk v. City of Decherd,* at 1040. The panel further claimed that "the mere fact that Ward may have been likely—even exceedingly likely—to commit unconstitutional conduct in general would not have put the City on notice that Ward would commit the "specific constitutional violation" here." *Id.* at 1040–1041.[7]

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[7] App. 12a.

Judge Clay, dissenting, pointed out that the "Rule 12(b)(6) standard is not demanding," and that the majority's "onerous application of the plausibility standard misreads the pleading requirements delineated in *Twombly* and *Iqbal*. Rather than viewing these failure-to-screen allegations in the light most favorable to Kovalchuk, "the majority jump[ed] to premature conclusions regarding the City's ultimate liability, before affording Kovalchuk the opportunity to gather additional evidence to prove his claims." *Id.* at 1043. The majority required "much more than plausibility," and while "Ward's demeanor, professionalism, and failure to complete training may not—*at a later stage of litigation*—rise to the demanding standard required for municipal liability articulated in *Brown*," Kovalchuk was not required to "establish" his entitlement to relief, nor to convince the court that relief is *probable*. The correct pleading standard, plausibility, "falls somewhere between possibility and probability," and relies upon "judicial experience and common sense."*Id.* at 1046.[8]

Applying the appropriate standard to Petitioner's allegations, as Judge Clay did, and drawing commonsense inferences, "one can fairly conclude that a disaster of this nature was a highly predictable consequence of the City's actions." *Id.* And unlike the plaintiff in *Brown*, who was required to conclusively establish each element of his failure-to-screen claim at a jury trial, Kovalchuk only needed to allege facts to *plausibly* raise a failure-to-screen claim.

The extreme discrepancy between the Fourth Circuit's application of the pleading standard in an antitrust case, and the Sixth Circuit's application of

[8] App. 23a.

the same standard in a § 1983 municipal liability case—embracing all the errors which the Fourth Circuit decried—illustates the need for this Court to resolve the uneven application of pleading standards so that litigants are equally treated in every circuit. The repeated substitution of standards appropriate to later stages of litigation for the pleading standard is particularly troubling with respect to municipal liability cases, since it bars injured plaintiffs from effective redress as authorized by Congress, and encourages municipalities to continue secretive and reckless hiring practices which endanger the public.

E. Limited discovery preserves right to redress

As Judge Clay pointed out in his dissent below, without the benefit of discovery, and "with the vast majority of the evidence in Defendant's control," Petitioner's "failure-to-screen allegations are more than sufficient to survive a 12(b)(6) motion. *See, e.g., Lipman [v. Bush]*, 974 F.3d [726], 748 [(6th Cir. 2020)] (highlighting the plaintiff's lack of an opportunity to engage in discovery and holding that his complaint survived a 12(b)(6) motion by sufficiently alleging a *Monell* custom.)"[9]

Plaintiffs who sue municipalities are at a disadvantage in that most of the records necessary to prove their case are generally in the hands of that municipality, which has no legal reason, short of a court subpoena, to disclose particular details of an employee's record. Indeed, providing negative information to the public can result in a defamation claim against the municipality; even if unfounded,

[9] *Kovalchuk* at 1046, App. 24a.

such claims are expensive and time-consuming.[10] Further, as attested by the sworn affidavit of Travis Robinson, an individual with considerable experience as police officer and instructor, "it would be extremely unlikely that a police department of the State of Florida would voluntarily release the contents of a former officer's personnel file upon the request of an attorney from the State of Tennessee without having first been served with a subpoena, due to Human Resource Department policies, as well as the potential threat of a legal action for violation of privacy interests." *See* Appendix D.

The Second Circuit in *Iqbal v. Hasty*, 490 F.3d 143, 158-159 (2d Cir. 2007) emphasized that Rule 8(a) precludes any heightened pleading standard in the context of qualified immunity. In order to safeguard both the plaintiff's right to redress and the purpose of qualified immunity in shielding defendants from unnecessary litigation, it is necessary at times to conduct a *limited* discovery:

> [S]ome of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, allowing some of the Plaintiff's claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified

[10] *See* Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, WM. & MARY L. REV. 1397, 1402–03 (2012) (explaining that past employers are often unwilling to provide useful information to prospective employers due to defamation concerns).

immunity privilege was intended to prevent.

...

[I]n order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic [Twombly]*, a conclusory allegation concerning some elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. *See* Fed. R. Civ. P. 12 (e). In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct.

...

We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but *"must* exercise its discretion in a way that protects the substance of the qualified immunity defense... so that officials [or former officials]

> are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El,* 523 U.S. at 597-98, 118 S. Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that ... no constitutional violation took place. *See Harlow*, 457 U.S. at 821, 102 S. Ct. 2727 (Brennan, J., concurring) ("[S]summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred.")

The Second Circuit's interpretation aligns with the requirements under *Twombly* and *Iqbal* and does not force litigants to plead allegations under a heightened pleading standard. Even more, it allows litigants to obtain discovery often not available or possible without subpoenas. In the event such reasonable discovery is unfruitful, a summary judgment motion would terminate expenditures and limit the waste of judicial time. Furthermore, this access to the federal forum will allow justice to prevail and give litigants access to prosecute blatant civil rights violations and rightly hold municipalities liable.

If limited discovery provides sufficient facts which support Petitioner's claims, his right to be compensated by the City under § 1983 will be upheld, rather than summarily *foreclosed* via the Sixth Circuit's imposition of a heightened and unrealistic pleading standard violative of Fed. R. Civ. P. 8. The complaint below should be reinstated, and if necessary, Petitioner should be allowed limited

discovery to flesh out or terminate his cause of action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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