No. 18-820

In the Supreme Court of the United States

TERESA Y. WEINACKER,

Petitioner,

v.

NATIONAL LOAN ACQUISITIONS COMPANY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

TERESA Y. WEINACKER
PETITIONER PRO SE
21520 COUNTY ROAD 68 N
ROBERTSDALE, AL 36567
(251) 752-9395
TERESA.WEINACKER@GMAIL.COM

DECEMBER 20, 2018

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether lower courts can blatantly disregard U.S. Supreme Court, Eleventh Circuit and sister circuit precedent law, ignore landmark cases, disrespect the U.S. Constitution, ignore the United States Code and disregard Federal Rules of Civil Procedure and Federal Rules of Evidence?

2. Whether a complaint must meet the plausibility standard of *Twombly/Iqbal*, analyze standing and subject matter jurisdiction before determining merits?

3. Whether a notarized sworn statement be admissible as evidence instead of an affidavit?

4. Whether attorney disqualification for a conflict of interest is a confusing body of law in need of organization?

5. Whether process server's affidavit needs support to prove proof of delivery?

PARTIES TO THE PETITION

Petitioner

- Teresa Y. Weinacker is the Petitioner
- Petitioner's company Pet Friendly, Inc. n/k/a Xena Express, Inc. is no longer in operation, and thus is not a Petitioner herein.

Respondent

- National Loan Acquisitions Company is the Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion is in the Appendix (App.1a-7a). The order of the District Court of Alabama is in the appendix (App.8a-9a) adopting the magistrate's Amended Report and Recommendation is in the Appendix (App.10a-18a). The Default Judgment of the District Court of Alabama is in the Appendix (App.19a-20a). The Order of the Eleventh Circuit denying the rehearing petition is in the Appendix (App.21a-22a). The Affidavit is in the Appendix (App.23a-26a) and the Proof of Services is in the Appendix (App.27a-28a).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its judgment and opinion affirming the District Court's judgment on August 8, 2018. (App.1a-7a). A timely petition for rehearing was filed on August 29, 2018 and denied on October 2, 2018. (App.21a-22a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition has been timely filed within 90 days of that order. Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. Art. III, § 2, Cl. 1**

  The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—(to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.) The section in parentheses is modified by the Eleventh Amendment.

- **U.S. Const. amend V**

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

- **U.S. Const. amend VI**

  In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

- U.S. Const. amend XI

  The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

- **28 U.S.C. § 1746(2)**

  Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty

of perjury, and dated, in substantially the following form:

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date) (Signature)."

STATEMENT OF THE CASE

Petitioner, Teresa Weinacker ("Weinacker"), seeks review of an Eleventh Circuit decision. The underlying suit was to vacate a default judgment against the respondent, National Loan Acquisitions Company ("National").

This case presents an important question of whether U.S. Supreme Court, Eleventh Circuit and sister circuits' precedent law, can be blatantly ignored.

This case offers this Court the opportunity to address whether the U.S. Constitution, the United States Code and Federal Rules of Civil Procedure and Federal Rules of Evidence can be ignored when denying a Motion to Vacate.

This case needs a clarification on whether a complaint needs to meet the *Twombly/Iqbal* plausibility standard, analyze standing and subject matter jurisdiction before determining merits

A. Background Facts

Pet Friendly, Inc. (Pet Friendly) was founded, owned and operated by Weinacker. Since 1992 until the default judgment in 2009, Pet Friendly was a manufacturer and distributor researching, developing and distributing products for pets. Pet Friendly had acquired federal patent and trademark certificates. Pet Friendly had an active relationship with over 3,300 retail outlets, 2,000 warehouse clubs, 4,000 dollar stores and 3,300 drug stores.

Pet Friendly was certified as a woman-owned business. Pet Friendly not only instigated the "no-kill" shelter concept but supported many animal rescue operations. Pet Friendly hired the blind, deaf, and mentally challenged; participated in the welfare to work program and programs for convicted felons as well as supporting improvised programs.

Pet Friendly went out of business in 2009.

B. District Court Proceedings

Sometime in March 2009, National hired Hand Arendall, LLC ("Hand Arendall") who had been Weinacker's law firm since the 1990s. Hand Arendall had in its possession Pet Friendly's documents and records when the complaint was filed in 2009. There was a partner in the firm who had been a Pet Friendly majority shareholder, held an officer position and was a director in Pet Friendly. In 2009, when National's complaint was filed, Pet Friendly owed Hand Arendall attorney's fees.

In March 2009, Hand Arendall filed a complaint in the U.S. District Court Southern District of Alabama

Southern Division naming Pet Friendly, Inc., Charles W. Weinacker, Jr. and Teresa Y. Weinacker as defendants. In May, the district court signed a default judgment against all defendants. (App.19a-20a). With the default judgment in hand, Pet Friendly's account receivables were garnished. National did not prove they owned the debt when the complaint was filed. Actually no exhibits were filed with the complaint. National was not entitled to judgment as a matter of law.

In May 2009, Hand Arendall recorded a Foreclosure Deed in Baldwin County, Alabama from a non-judicial proceeding on Weinacker's personal real estate. Because the foreclosure was a non-judicial proceeding and Weinacker's own law firm was representing National, it was impossible to have full disclosure that the judgment was, in fact, a default judgment.

In June 2016, Weinacker filed, pro se, an unjust enrichment lawsuit in the Thirteenth Judicial Circuit, Mobile County, Alabama against National and Hand Arendall. At a hearing in this case, Weinacker learned the judgment from 2009 was actually a default judgment. Hand Arendall argued at the hearing that Weinacker could not collaterally attack the default judgment in another lawsuit.

After researching "collaterally attack," Weinacker filed, pro se, a Request for Judicial Notice, a Motion to Vacate Default Judgment and a Declaration in the U.S. District Court for the Southern District of Alabama Southern Division on May 12, 2017.

National is not pursuing any other defendant except Weinacker. Pet Friendly is out of business.

Weinacker filed no new evidence in support of the Motion to Vacate. Documents and evidence filed by National are in the district court records and the evidence relied on for the motion is filed in district court and the appeal.

Weinacker requested the default judgment be vacated in accordance with Federal Rules of Civil Procedure Rule 60(b)(4) for the following defects: (1) failure of adequate service; (2) lack of evidence; (3) lack of witness; (4) lack of subject matter jurisdiction; (5) fraud upon the court; (6) violations of due process, UCC, Unclean Hands Doctrine; and, (7) conflict of interest. Once challenged, jurisdiction cannot be 'assumed'; it must be proved to exist! *Stanard v. Olesen*, 74 S.Ct. 768 (1954).

In Weinacker's motion, subject matter jurisdiction was challenged; but, National filed no evidence to verify subject matter jurisdiction existed.

On May 30, 2017, the magistrate filed an Amended Report and Recommendation (R&R) stating, "as a preliminary matter, that any motion for relief under Rule 60(b)(1-3) is clearly untimely" quoting FRCP 60(c). "Thus, any relief under Rule 60(b)(1-3) is foreclosed." (App.15a-16a).

The magistrate recommended Weinacker's motion be denied. The magistrate's arguments concentrated on FRCP 60(b)(1-3), statute of limitations, and fraud on the court never addressing Weinacker's other arguments.

In June, Weinacker filed Objections to the R&R questioning subject matter jurisdiction. There was more than sufficient evidence in the district court records

which supported the motion to vacate be granted. Weinacker had a meritorious defense. Undoubtedly merits were an easier resolution than subject matter jurisdiction.

When the magistrate reviewed Weinacker's motion she definitely accepted that the motion was filed under FRCP 60(b)(1-3) (App.15a-16a) making it virtually certain Weinacker's motion was frivolously reviewed. Weinacker's Motion to Vacate was filed in accordance with FRCP 60(b)(4). Weinacker's motion never mentions FRCP 60(b)(1-3) and the magistrate's R&R never references FRCP 60(b)(4). (App.10a-18a)

The R&R was devoid of any specific rulings as to most of Weinacker's arguments failing to address; (1) adequate service; (2) subject matter jurisdiction; (3) adequate ownership; (4) adequate evidence; (5) adequate witness; and (6) conflict of interest. The magistrate and/or district judge did not address and didn't decide the issues central to the motion. Subject matter jurisdiction was questioned but the district court assumed it existed but it was never proven to exist. The district court did not grapple with the issues, it dodged them. This is not an acceptable way in which to decide any case.

A judicial notice was filed requesting a hearing. The district court ignored the request denying Weinacker due process. A party has a right to be heard on the propriety of taking judicial notice with the nature of the fact to be noticed as required in Federal Rules of Evidence 201(c).

The district court judge erred in law in adopting the magistrate's R&R as the opinion of the court. (App. 8a-9a). It was clear the district court merely rubber

stamped the magistrate's R&R denial recommendation. (App.10a-18a). An appeal was filed.

C. Eleventh Circuit Proceedings

In December 2017, Weinacker, pro se, challenged the denial of the Motion to Vacate in the Eleventh Circuit U.S. Court of Appeals. In preparing the motion, Weinacker relied on documents and evidence filed in the district court by National. Weinacker filed no new evidence in support of the Motion to Vacate.

In August 2018, the Eleventh Circuit's Opinion affirmed the district's court ruling. (App.1a-7a). The Eleventh Circuit's opinion states "there was evidence in the record as to National's damages, including a copy of the promissory note." (App.6a). The promissory note, the Eleventh Circuit refers to is a copy of the promissory note between Weinacker and Regions Bank ("Regions").

The Eleventh Circuit was incorrect in observing "Weinacker makes three arguments that the district court erred in denying her Rule 60(b) motion . . ." (App. 4a). The Eleventh Circuit states: "First, [Weinacker] argues lack of personal jurisdiction; second, [Weinacker] argues lack of subject matter jurisdiction; and, third, [Weinacker] argues the default judgment does not comport with due process of law because she was entitled to a hearing prior to the entry of default judgment."

The Eleventh Circuit was mistaken when asserting Weinacker only made three arguments. Weinacker actually made eight arguments "that the district court erred in denying her Rule 60(b) motion." Weinacker made the following arguments: (1) conflict of interest;

(2) personal jurisdiction; (2) subject matter jurisdiction; (3) lack of standing (4) fraud on the court; (5) district court's R&R and district court's opinion lacked ruling on all arguments; (6) hearing; (7) whether U.S. Supreme Court's and Eleventh Circuit's precedent law is important; and, (8) did the district court have the authority to challenge this Court's and Eleventh Circuit's precedent law.

The Eleventh Circuit did not address the conflict of interest argument neither did the district court.

The Eleventh Circuit addressed personal jurisdiction as did the district court but without addressing "corrected" proofs of service.

In the Eleventh Circuit's opinion background in a footnote they state " . . . because Xena Express a/k/a Pet Friendly had filed bankruptcy". (App.2a). The Eleventh Circuit's footnote addresses a totally irrelevant subject as to whether Weinacker's motion to vacate should be granted. (App.2a n.1) This case is on vacating a motion not anything else.

The Eleventh Circuit addressed subject matter jurisdiction by stating "National's complaint adequately alleged diversity . . . we thus reject her argument that subject matter jurisdiction was lacking." (App.5a)

National's diversity claim had to be amended in the appeal. In a footnote, the Eleventh Circuit stated "[t]his Court issued . . . a jurisdictional question asking whether Xena Express a/k/a Pet Friendly had . . . alleged citizenship of Charles and Teresa in its complaint . . . issued order constructing response to that question as a motion to amend . . . correcting jurisdictional defect". First, the jurisdictional question

was asked of Weinacker not Xena Express a/k/a Pet Friendly; and, second, it was not Weinacker's "complaint" but National's that needed correction as to "the diversity question of subject matter jurisdiction". (App.5a n.2)

In a footnote, the Eleventh Circuit stated "in Weinacker's subject matter jurisdiction argument, she contends National's documents were fraudulent" and "National's documents are unrelated to the court's subject matter jurisdiction." (App.6a n.3) The district court did not address the argument.

Weinacker's brief did not contend "fraudulent documents" but stated "there is no competent evidence in the district court records reflecting National actually owned the debt."

The Eleventh Circuit did not address the standing argument, neither did the district court.

However, for a dispute to be within the power (subject matter jurisdiction) of a federal court the plaintiff [National] must have standing—that is, the plaintiff [National] must have alleged a sufficient interest in the dispute. National had the burden to establish standing with the appropriate degree of evidence at each successive state of litigation. The plaintiff [National] cannot rest on mere allegations but must set forth specific facts establishing injury.

The Eleventh Circuit did not address fraud on the court; however, the district court was obsessed with it in the R&R. (App.14a-17a)

The Eleventh Circuit did not address the R&R and lack of rulings on all arguments. (App.1a-7a)

The Eleventh Circuit got it wrong in their opinion stating "prior to entry of default judgment." (App.6a). The default judgment was entered in 2009. The motion to vacate was filed in 2017. The district court or the Eleventh Circuit did not address the judicial notice which is what constituted the denial of due process rights as guaranteed by the Fifth Amendment of the U.S. Constitution not the hearing the Eleventh Circuit cited.

The Eleventh Circuit did not address whether this Court's and the Eleventh Circuit's precedent law is important.

The Eleventh Circuit did not address whether it had the authority to challenge this Court's and Eleventh Circuit's precedent law.

Weinacker sought rehearing en banc in the Eleventh Circuit, urging the court to conform to precedent law but the rehearing was denied. (App.21a-22a)

The Eleventh Circuit affirmed the district court's decision. (App.1a-7a). In doing so, the Eleventh Circuit erred in law. The Eleventh Circuit blatantly disregarded U.S. Supreme Court, Eleventh Circuit's and sister circuit precedent law and landmark cases. The Eleventh Circuit disrespected the U.S. Constitution. The Eleventh Circuit neglected Federal Rules of Civil Procedure and Federal Rules of Evidence. The Eleventh Circuit ignored the United States Code. The Eleventh Circuit did these things in affirming the district court's denial of Weinacker's motion.

ARGUMENT

The merits of this case raise questions of exceptional importance in allowing district courts and appellate courts to ignore and disregard precedent law, the U.S. Constitution, Federal Rules of Civil Procedure, Federal Rules of Evidence and the United States Code.

The Eleventh Circuit's decision directly contradicts "equal justice under law" which is written above the main entrance to this Court and expresses the ultimate responsibility of this Court.

"[I]t is this Court's prerogative alone to overrule one of its precedents." *United States v. Hatter*, 532 U.S. 557, 567 (2001) (*quoting State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This Court admonished the Seventh Circuit U.S. Court of Appeals in *State Oil v. Khan* to follow this Court's precedents until they explicitly overruled this Court's earlier opinions.

> Under reconsideration, the panel is of the view that under our circuit precedent . . . until it is overruled by this court en banc or by the Supreme Court.

United States v. Brown, 229 F.3d 1252 (11th Cir. 2002). *See, e.g., United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding.") *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) ("The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc

can judicially overrule a prior panel decision.") *see also Bonner v. City of Prichard Alabama*, 661 F.2d 1206, 1210 (11th Cir. 1981 (en banc)

The Eleventh Circuit's actions were so far out of bounds that Weinacker's arguments were not taken earnestly; and, the Eleventh Circuit's opinion was clearly against reason without reviewing arguments and evidence National filed in district court in support for the default judgment. National was not entitled to judgment as a matter of law.

The Eleventh Circuit contradicts this Court's precedent when analyzing National's complaint. Under this Court's *Iqbal/Twombly* analysis . . . a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face". *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

A claim has plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the relief sought. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. The plausibility standard "asks for more than a sheer possibility that a defendant has acted" so as to create liability. *Iqbal*, 556 U.S. at 678. Where a complaint pleads facts "merely consistent with" a defendant's liability, it "stops short between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557 (internal citations omitted)). [emphasis added]

The *Twombly/Iqbal* standard requires plaintiffs [National] to include far more detailed facts in a complaint. A complaint at issue must contain enough facts to show the claim was reasonable on its face.

National's complaint did not produce any evidence to support their claim actually no exhibits were filed with the complaint. The exhibits produced with National's "alleged affidavit" showed a relationship between Weinacker and Regions. National's exhibits are copies of Regions promissory note with Weinacker. There are no documents that show any relationship between Weinacker and National. National produced an "allonge" as an exhibit to their sworn statement. The allonge is a generic document never mentioning Weinacker or a loan number making it prove nothing. The allonge and assignment of guaranty refers to a Loan Sale Agreement which has never been produced.

This Court has concluded the plaintiff does have the obligation to provide the "grounds" of its "entitle-[ment] to relief," requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Twombly* 550 U.S. 662 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986))

This Court stated in *Iqbal*, "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

National had the burden of factually supporting any certainty that they had purchased the debt. National's complaint was supported only by conclusory statements which did not meet the plausibility standard of "entitlement to relief."

National's records indicated that they did not own the promissory note at issue. National's law firm, Hand Arendall, represented to the district court ownership passed to National in its entirety at some point,

and Regions properly transferred ownership of the promissory note from Regions to National.

However, National has provided no proof of ownership. There is no proof in the district court records that National suffered an injury let along a concrete injury. Weinacker's motion requested the district court review National's evidence of ownership but they did not and neither did the Eleventh Circuit. National produced various documents that, according to the district court and the appellate court, indicated National had an ownership of the promissory note.

REASONS FOR GRANTING THE PETITION

I. WHEN SUBJECT MATTER JURISDICTION IS IGNORED; AND, HOW IMPORTANT IS *IQBAL/TWOMBLY*

When standing is reasonably uncertain, the argument arises when it is not clear whether the plaintiff has ever personally suffered concrete injury from the defendant's actions. This occurs when a plaintiff [National] alleges that the defendant's [Weinacker's] actions toward someone else [Regions] have caused the plaintiff injury. This makes the plaintiff's injury more speculative, and the courts have to decide whether that indirect injury rises to the level such that the plaintiff has standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that when a plaintiff's asserted injury arises from the defendant's allegedly unlawful action toward "someone else, much more is needed") (emphasis in *Lujan*).

The documents National proffered did not indicate that any such transfer was ever completed and did not establish National owned the promissory note at issue. National failed to produce any written document or other credible evidence that National owned the promissory note. National was required to prove ownership before attempting to collect on the promissory note. Essentially this means that National was required to get their paperwork right if they wanted to sue Weinacker.

Ownership is important to standing when the note is payable to someone other (Regions) than the plaintiff (National). The Eleventh Circuit erred by stating "there was evidence in the record as to National's damages." There is no evidence of National's damages. National's evidence is copies of someone else's [Regions'] documents proving Weinacker had a relationship with Regions not National. There is no proof of a relationship between Weinacker and National. National did not certify prior amounts, transactions, credits, debits, charges, and fees where proper and correct. When proof of the debt is missing the court does not have jurisdiction. National has failed to demonstrate a "concrete injury" and thus has not met the requirements for standing. Weinacker utilized court records and documents filed by National for her arguments that National did not have standing to sue or subject matter jurisdiction.

Applying *Iqbal*'s two-pronged approach, this Court found that the plaintiffs failed the second prong of *Iqbal* because the well-pleaded factual allegations failed to support an injury in fact sufficient for standing under Article III of the Constitution. Specifically,

this Court held that a plaintiff's claim of injury in fact could not be based solely on a defendant's gain; it must be based on a plaintiff's loss. However, the plaintiffs failed to allege that they had lost anything of value as a result of the alleged misconduct. This Court has long cautioned that the injury in fact be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

As it is axiomatic that the word of the attorneys for National does not constitute legally competent evidence, a plain reading of the complaint, absent the assertions clearly leaves the evidence in want and renders it void as a matter of law.

The complaint was filed without any supporting documentation. In fact, National has not met its obligation under the law to validate and to verify their claim in the case because it failed to enter into the record any legally competent evidence in support of their claims supported by a competent witness. Plaintiff's complaint did not state a claim upon which relief could be granted.

This Court in *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S.Ct. 1540 (2016), emphasized the requirement of an injury in fact, holding that a bare procedural violation of a federal statute, divorced from any concrete harm, is insufficient to confer constitutional standing upon a litigant. To invoke the subject matter jurisdiction of a federal court, the plaintiff must plead (and prove) that the alleged violation caused the plaintiff to suffer actual harm and it is fairly traceable to the defendant's actions.

In *Spokeo*, this Court vacated and remanded by a vote of 6-2 a ruling from the Ninth Circuit on the

basis that the Ninth Circuit had not properly determined whether the plaintiff had suffered an "injury-in-fact" when analyzing whether he had standing to bring his case in federal court. While the Ninth Circuit identified particular harms to *Robins*, it erred, according to this Court, by not also determining that those harms were "concrete."[1]

This Court wrote that the analysis of the Ninth Circuit on the standing issue was incomplete, because the appeals court focused on only one of the requirements of injury-in-fact (particularity) while ignoring the other requirement (concreteness). This Court stated particularization is "necessary . . . .but not sufficient to establish "injury in fact." An injury also must be "concrete."

This Court said that a concrete injury must be "de facto"—*i.e.*, "it must actually exist." A concrete injury must be "real" and not "abstract." This Court emphasized that a concrete injury is required for standing "even in the context of a statutory violation," stating that "*Robins* could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement." Although tangible harms such as risk can be concrete, this Court clarified "bare procedural violations" cannot.[2]

In evaluating a challenge to subject matter jurisdiction, the Seventh Circuit explained that a court must first determine whether a defendant has raised a factual challenge (there is no subject matter juris-

---

[1] The Supreme Court, *2015 Term—Leading Cases*, 130 Harv. L. Rev. 437 (2016).

[2] *Supra*, note 1.

diction) or a facial challenge (the plaintiff has not sufficiently alleged a basis for jurisdiction). The court found that the defendants' Rule 12(b)(1) motion was a facial challenge because the defendants contended that the plaintiffs' complaint lacked sufficient factual allegations to establish standing. *Silha v. ACT, Inc.* 807 F.3d 169 (7th Cir. 2015)

This Court held, under *Lujan*, that standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof" (504 U.S. at 559-60). The Seventh Circuit discussed this Court's clarification of the standard for pleading a claim in *Twombly*, 550 U.S. 544 (2007), and *Iqbal*, 556 U.S. 662 (2009), in which a court must both: (1) identify the well-pleaded factual allegations by discarding those that are "no more than conclusions;" and, (2) determine whether the remaining well-pleaded factual allegations "plausibly give rise to an entitlement of relief."

The Eleventh Circuit did not apply precedent law as to the plausibility requirement or subject matter jurisdiction in this case. Standing is often self-evident and the Eleventh Circuit was mistaken when ignoring the constitutional minimum of standing in their decision as to whether subject matter jurisdiction existed or not.

National's complaint lacked sufficient factual allegations to establish that, in fact, they owned the debt. That is, if a complaint's factual allegations do not assure the court it has subject matter jurisdiction, then the court is without power to do anything in the case. *See Goodman ex rel. Goodman v. FDIC*, 259 F.3d 1327, 1331, n. 6 (11th Cir. 2001) A court has

no jurisdiction over a claim made by a plaintiff without standing to assert it.

On appeal—even for the first time at the Supreme Court—a party may attack jurisdiction after the entry of judgment in the district court. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)

"Subject matter jurisdiction cannot be waived or conferred on a court by consent of the parties." *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1118 (11th Cir. 1983); *Iqbal*, 556 U.S. at 671 (2009) ("[s]ubject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt.").

The constitutional standing requirement serves judicial efficiency by "prevent[ing] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 687 (1973).

The Eleventh Circuit's decision ignores the U.S. Constitution to the resolution of cases and controversies. Their decision disregarded this Court's precedent law as to standing and ignored *Twombly-Iqbal*'s facial plausibility requirement for pleading a claim.

The U.S. Constitution stands as the irreducible minimum with which courts, parties, and attorneys must comply. For these reasons, subject-matter jurisdiction must be present in every federal-court action; and, if a party or the court discovers a potential defect at any time, even on appeal, the defect may be raised and may serve as a reason to undo any judgment and dismiss the action.

Article III of the Constitution limits the "judicial power" to the resolution of "cases and controversies" One element of the "bedrock" case-or-controversy requirement is that plaintiffs must establish that they have standing to sue. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

On many occasions, we have reiterated the three requirements that constitute the "'irreducible constitutional minimum'" of standing. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotation marks and citation omitted).

Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court.'" *Lujan*, 504 U.S. at 560-561 (*quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

Third, a plaintiff must show the "substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Stevens*, 529 U.S. at 771.

Based on this Court's precedent, the Seventh Circuit clarified that the *Twombly-Iqbal* facial plausibility requirement for pleading a claim is incorporated into the standard for pleading subject matter jurisdiction in the Seventh Circuit. In doing so, the

Seventh Circuit joined a number of its sister circuits that require a court to use *Twombly-Iqbal*s "plausibility" requirement not only to evaluate facial challenges to claims under FRCP 12(b)(6), but also to evaluate a facial challenge to subject matter jurisdiction under Rule 12(b)(1). The Seventh Circuit affirmed the judgment of the district court and held that the plaintiffs' failed to meet their burden of establishing subject matter jurisdiction.

This Court observed in *DaimlerChrysler Corp.*: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 341 (2006).

In *Steel Co. v. Citizens for a Better Environment*, this Court reaffirmed the long-standing principle that a federal court must confirm the existence of its jurisdiction over the subject matter of a dispute before resolving the merits. ("For a court to pronounce upon the [merits] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co.*, 523 U.S. 83, 101-02 (1998)). In *Steel Co.*, this Court repudiated the doctrine of "hypothetical jurisdiction," holding that a federal court may not set aside a subject-matter jurisdiction determination in favor of an easier resolution on the merits, even if the prevailing party on the merits would be the prevailing party if jurisdiction were denied. *Id.* at 93.

Subject-matter jurisdiction's paramount importance and resulting alleged inflexibility stems from

its basis in the Constitution.[3] A federal court cannot overlook a constitutional requirement, particularly a constitutional requirement limiting the court's power over the very matter at issue.[4] Nor may a party simply sidestep constitutional requirements by inattention or scheme to do so by guile. *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp.*, 362 F.3d 136, 139 (1st Cir. 2004) (citation omitted) ("Just as a federal court cannot expand its jurisdictional horizon, parties cannot confer subject matter jurisdiction on a federal court 'by indolence, oversight, acquiescence, or consent.'").

A federal court has subject matter jurisdiction only where an alleged injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42. Likewise, a "party cannot show an injury in fact by mere 'allegations of possible future injury.'" *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 672 (8th Cir. 2012) (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)

The district court and the Eleventh Circuit ignored this Court's, Eleventh Circuit's and sister circuit's precedent law as to whether subject matter jurisdiction existed and if sufficient evidence had been presented to prove ownership.

---

[3] *See, e.g.*, 5B Wright & Miller, Federal Practice and Procedure § 1350 (3d ed. 2015) (noting that subject-matter jurisdiction involves the courts' power to hear cases and comes from Article III of the Constitution).

[4] Restatement (Second) of Judgments § 11 cmt. d (Am. Law Inst. 1982) ("[A] court is powerless to decide a controversy with respect to which it lacks subject matter jurisdiction.").

This Court should grant review, and should summarily reverse.

II. WHETHER A NOTARIZED SWORN STATEMENT BE ACCEPTABLE WHEN GRANTING A JUDGMENT

When it comes to important decisions, relying on accurate information is essential. Neither the district court nor the Eleventh Circuit reviewed National's affidavit in this case for technical completeness and correctness. National's "affidavit" in this case is only a notarized signed statement. (App.23a-26a).

A party who submits evidence in the form of affidavits must do so in the proper, authenticated form. Even at a preliminary stage, courts should not permit admission of documents that do not strictly comply with procedural rules. It is imperative that a party's sworn submission be sufficient in execution and substance, as well as consistent with prior assertions, to ensure the integrity of the process.

National's affidavit is not in compliance with 28 U.S.C. § 1746(2) because it allows National to avoid the penalties for perjury in signing intentional falsehoods. (App.23a-26a). National never declared their affidavit "under penalty of perjury;" therefore, the affidavit must be disregarded in this case.

The mere signing of a statement in the presence of a notary, or a notary's placement of an "acknowledgement" on a statement, does not constitute a sworn affidavit. In *Orsi v. Kirkwood*, 999 F.2d. 86, 91 (4th Cir. 1993), the plaintiff argued that courts should be "lenient" in accepting documents at the summary judgment stage, "as long as they are 'probative,' or at least 'evidence of evidence' that could later be intro-

duced at trial." The court rejected this argument, holding: "We have no desire to make technical minefields of summary judgment proceedings, but neither can we countenance laxness in the proper . . . presentation of proof." *Id.* at 92. Every court should hold to this rule to ensure the integrity of the process.

In one precedential case, the Fifth Circuit Court of Appeals was confronted with the issue of whether a party's signed statement, given in the presence of a notary, constituted competent summary judgment evidence. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1305 (5th Cir. 1988). The acknowledgment at the end of the purported affidavit considered by the Court read as follows:

> BEFORE ME, the undersigned authority, on this day personally appeared Mrs. Rukmini Sukarno Kline, known to me to be the person whose name is subscribed to the foregoing Affidavit, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.
>
> /s/ Rukmini Sukarno Kline
>
> Given under my hand and seal of office this 17th day of April, 1983.
>
> /s/ Robert C. Bennett, Jr.
> Notary Public in and for Harris County, Texas

Id. at 1306. In spite of opposing counsel's argument that the evaluation of its submission was "hypertechnical," the court held that this acknowledge was insufficient to convert the unsworn statement into a

valid affidavit and thus was properly disregarded as competent summary judgment evidence. The Fifth Circuit held:

> [T]he only evidence in the summary judgment record purporting to justify [appellant's position] was her own rendition of facts contained in a notarized, self-described "affidavit." This affidavit is neither sworn not its contents stated to be true and correct under penalty of perjury.

Id. at 1305-06.

Courts throughout the country unanimously agree with the *Nissho-Iwai* court's holding, that the mere signing of a statement in the presence of a notary or the notary's placement of an acknowledgment on the statement does not then render the document a sworn statement admissible as evidence.

National's signed statement given in the presence of a notary does not contain "under penalty of perjury" nor an acknowledgement "Before me, the undersigned authority, on this day personally appeared . . . "

The requirements for a sworn statement or affidavit do not exist merely to irritate practitioners with inconsequential formalities. It has become too commonplace for practitioners to ignore the requirements for a proper affidavit and for some courts to avoid enforcing the requirements for fear of being perceived as too hyper-technical. The requirements for sworn statements and affidavits exist to protect the integrity of the truth-seeking process and to guard the rights of the parties from abuse. Failure of practitioners and courts to strictly enforce the requirements undermines

the legitimacy of a justice system that is dependent on truthful testimony.

The Eleventh Circuit's opinion contradicts other decisions made by this Court and sister circuits. The Eleventh's opinion challenges justice.

This Court should grant review, and should summarily reverse.

III. WHETHER REGULATING ATTORNEY'S CONDUCT IS THE COURT'S DUTY

Trust is central, to the proper functioning of our American system of justice, and is a principal tenet upon which the entire legal profession is founded. People interested in the different problems of conflicts of interest in criminal cases will find that those problems have received more attention in case law than those on the civil side.

If right to counsel, guaranteed by the Sixth Amendment to the Constitution, is to serve its purpose every defendant has the right to effective assistance of counsel. However, the right to effective assistance whether counsel is appointed or privately retained is only for criminals. In 1984, this Court implemented the *Strickland*[5] test as to adequacy of representation for criminal cases.

Conflicts of interest present intriguing challenges, court decisions and attorney general views have different opinions on when a conflict of interest exists in a criminal case—what about when a conflict of interest exists in a civil case. Whether criminally or

---

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

civilly, shouldn't everyone have the same constitutional right to effective assistance of counsel? True, most civil cases privately retain a lawyer, but still what if a conflict of interest exists. Even though a conflict of interest is an ethical dilemma and nothing is done, shouldn't civil have the same rights as criminal when it comes to effective assistance of counsel. Should the court's failure to recognize the potential conflict of interest be an error of such magnitude that fundamental fairness requires the court to order further proceedings under the circumstances?

The Eleventh Circuit's opinion erred when they failed to investigate the conflict-of-interest issue raised by Weinacker. The district court did not consider the conflict of interest when raised in Weinacker's motion. Conflict-of-interest existed between National's and Weinacker's law firm, Hand Arendall. There was evidence that showed more than a possibility of a conflict of interest. Hand Arendall, National's law firm, was in possession of Weinacker's legal records and documents when they filed the complaint in 2009. Hand Arendall was owed legal fees by Weinacker at the time the complaint was filed. The conflict of interest argument was raised in the motion and the objections filed in district court and raised again in the briefs and rehearing petition filed in the Eleventh Circuit.

In the Eleventh Circuit's opinion they state "National moved for a garnishment against Wal-Mart Stores, Inc. whom it alleged Pet Friendly had been doing business." National's law firm, Hand Arendall knew of Pet Friendly's relationship with Walmart confirming conflict of interest. (App.2a).

In the magistrate's R&R, she confirms acknowledgement of the conflict of interest because of the attorney-client relationship between Weinacker and Hand Arendall but does not address it. (App.11a, n.5)

A lawyer cannot sue a current client, even in an unrelated matter. There is a strong policy against an attorney appearing in a position adverse to that of even a former client. If an attorney who finds himself in an adverse position to a former client possesses confidential information which could be advantageous to his present client in the civil litigation, the attorney should redraw.

This policy is so guarded that on occasion courts have reversed judgments solely because of the conflict. National's law firm had represented Weinacker and learned extensive private business and financial information about Pet Friendly and had in their possession company records and documents.

> [N]othing rules out the raising of a conflict-of-interest problem apparent in the record . . . mandates a reversal when the court failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."

Cuyler v. Sullivan, 446 U.S. 335, 347 (1980); *Wood v. Georgia,* 450 U.S. 261 (1981).

Several themes are repeated in many conflict of interest cases: the potential for abuse of confidences, inability of counsel to serve clients fully; and, the need to preserve the profession from the appearance of impropriety. Each of these should be the concerns

of the courts. A conflict of interest exists even if no unethical or improper act results.

The court's power to disqualify attorneys for a conflict of interest stems from the district court's duty to regulate the conduct of attorneys practicing before it. *See Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975) ("courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries"); *see also Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983); *Central Milk Producers Co-Op. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978); *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *United States v. Ott*, 489 F.2d 872, 874 (7th Cir. 1973)

Practically every federal court recognizes that the American Bar Association ("ABA") has established the proper standards of conduct for attorneys practicing before the court.

Although the ABA standards carry great weight in a court's examination of an attorney's conduct, "[t]he scope of such an inquiry . . . should encompass more than the ABA [standards]." The proper judicial role in developing conflict-of-interest law turns on the extent to which courts should rely on ABA rules or other rules as opposed to making ad hoc decisional law or "common law" to set the standard of conduct with respect to litigators' conflicts of interest.

In addressing disqualification motions in civil cases, many courts refer to the conflict rules in determining whether a lawyer improperly undertook or continued to represent a party in the face of an actual

or potential conflict of interest. But other courts, such as the Fifth Circuit, have rejected the idea that conflict rules set the exclusive standard for litigators, opting instead to derive the applicable standard of conduct by contemplating the legal profession's norms "in light of the public interest and the litigants' rights." *In re American Airlines, Inc.*, 972 F.2d 605, 611 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993) (citations omitted); *see In re Dresser Industries*, 972 F.2d 540, 543-44 (5th Cir. 1992) ("When presented with a motion to disqualify counsel in a more generic civil case [not governed by statutory or constitutional provision], however, we consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights.")

Even though every state bar in the country has an ethical rule involving conflict of interest; shouldn't some conflicts of interest be a violation of the constitution in a civil case as well as a criminal case. What if the conflict did adversely impact the quality of representation in a civil case? "It [reversal] is the only remedy that is consistent with the legal profession's historic and universal condemnation of the representation of conflicting interests without the full disclosure and consent of all interested parties." *Mickens v. Taylor*, 535 U.S. 162 (2002). The lower court's analyses are mistaken and should be vacated.

This Court should grant review, and should summarily reverse.

IV. WHETHER PROCESS SERVER'S AFFIDAVIT NEEDS ADDITIONAL SIGNATURE TO SHOW PROOF OF DELIVERY

Proof of Service also Affidavit of Service is an important document signed and provided by process servers after they have "successfully" served documents to someone. This affidavit is a "notarized" testimony signed by the server that details the time, date, manner of service, and identity of the person served. Who notarizes the affidavit? Is the process server a notary? Can you notarize your own affidavit?

But if a defendant in a case claims to not have been notified of the pending legal action, a Proof of Service is presented to prove otherwise. However, the only real proof of delivery is the process server's unsupported assurance that the documents were delivered.

The Proof of Service declares under penalty of perjury the court documents were served. (App.27a-28a). There is no verification the documents were, in fact, served. How can service be disputed if the document was delivered or not? There is no witness except the one delivering the document. There is no need for a perjury penalty on the document. If service is disputed—it is the process server the court believes. How can proof of service be disputed without a witness or acknowledgement?

Failure to appear can have dire consequences. Being the defendant in a civil case and failing to appear in court the judge decides the case in the plaintiff's favor and enters a judgment for the amount of the suit, plus court costs and attorney fees. Without knowledge of the lawsuit, the defendant could lose everything, even a defendant who is not a party to

the lawsuit. Certainly, with so much at stake for the defendant, is it too much to ask for the court to trust only the process server.

A defendant cannot prove if they actually received service because there is no witness to dispute the server—seems only fair that the person who was actually served—sign the proof along with the server. The Proof of Service needs more than one signature to "actually prove" service especially when the consequences of not appearing can have serious penalties. Two signatures on the proof of service would not exist to upset lawyers with an irrelevant procedure but to allow everyone due process, an opportunity to be heard, as guaranteed by the Constitution.

Debt collection attorneys engage in some of the most egregious debt collection misconduct. There are hundreds of thousands of default judgments against unsuspecting people, mostly low income, by filing false affidavits with the court. Attorneys use these fraudulently obtained judgments to freeze bank accounts, garnish wages and coerce people into entering "voluntary" payment agreements.

In 2016, Human Rights Watch documented widespread abuses by debt collection attorneys in courts across the country, where people never received notice of the suits, all of which resulted in wrongful judgments often against the wrong people. When experienced debt collection attorneys face off against unrepresented, unsophisticated consumers, consumers nearly always lose.

Personal service requires the documents be personally delivered to the party being served. This means the server hands the papers to that party; though

this may take place anywhere the defendant can be located. The person serving the papers must ensure the identity of the person they are serving, then hand the documents to them, and inform them that they are court documents. But what if the person serving the papers does not ensure the identity of the person?

Unless service, is waived, proof of service must be by the server's affidavit. However, an affidavit is a written statement of fact under an oath or affirmation administered by a person to do so by law. An affidavit contains signatures of both the author and witness. The proof of service should contain a caption with a venue and title in reference to judicial proceedings. But this is not so on Proof of Services filed in courts. With no proof and no affirmation, how can a proof of service without the required information be a true affidavit of proof of service? How does someone dispute service?

The proof of service contains only the server's signature, that the documents were actually delivered, delivered to the correct individual, or simply left on the ground in front of the door or even delivered at all or if the documents were thrown away. Without a signature of someone other than the server themselves, there is actually no proof of the court documents being served.

Most case-initiating paperwork, such as Summons, Complaints, and Orders to Show Cause, Ex Parte Motions, or Restraining Orders generally require Personal Service. With a proof of service that the document was mailed it is usually by certified return receipt. The proof of service is having the return receipt attached to the proof of service therefore actu-

ally proving the court documents were delivered to the correct address. An acknowledgment should also be required when hand delivering court documents to actually prove the court documents were delivered.

The proof of service in the district court records reveal it was the proof of service filed with the original complaint. One would have to ask was the proof of service signed by the clerk of the court before it was "served?"

Weinacker cannot prove she was served or that she was not served. The district court and the Eleventh Circuit state "service was proper." The courts have the process server's signature as proof and produced it as "proof." But how can they be certain "service was proper?" In the district court records in Weinacker's case there are "corrected" proofs of service filed. Why?

The process server states Weinacker was served at this address. The filed Proof of Service contains service address, Weinacker's name, service date and server's information stating the court documents were served. There is no caption with a venue or a title in reference to which judicial proceedings. The proof of service could be from another proceeding or even incorrect. Where is the "actual" proof? The process server's "sworn" statement. (App.27a-28a)

Weinacker's proof of non-delivery is she was not living at the service address. Weinacker was staying with her mother and can produce her father's obituary. He passed in March 2009. The courts only have the process server's signature which by the court is the "most reliable" evidence of service.

This Court should grant review, and should summarily reverse.

CONCLUSION

For the foregoing reasons, Weinacker respectfully prays the petition for a writ of certiorari be granted.

Respectfully submitted,

TERESA Y. WEINACKER
PETITIONER PRO SE
21520 COUNTY ROAD 68 N
ROBERTSDALE, AL 36567
(251) 752-9395
TERESA.WEINACKER@GMAIL.COM

DECEMBER 20, 2018