No. 23-

IN THE
Supreme Court of the United States

FACEBOOK, INC.,
now known as Meta Platforms, Inc.,

Petitioner,

v.

ROSEMARIE VARGAS, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Twelve of the thirteen courts of appeals have held that in analyzing whether a plaintiff has alleged Article III standing, courts must apply the plausibility standard set out in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). But the Ninth Circuit has held that plausibility is "ill-suited" to questions of Article III standing, *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011), and that courts analyzing allegations of standing should instead demand only "'general factual allegations of injury,'" *id.*; *accord Ernest Bock, LLC* v. *Steelman*, 76 F.4th 827, 835 (9th Cir. 2023). Here, a divided panel of the Ninth Circuit applied that antiquated standard, over a dissent that would have applied *Twombly* and *Iqbal*. And rather than grant rehearing to resolve the 12–1 circuit conflict, the panel later amended its opinion to delete its reference to Ninth Circuit precedent that rejects the *Twombly-Iqbal* plausibility standard, while leaving the rest of its analysis untouched.

The question presented is:

Does the *Twombly-Iqbal* plausibility standard apply to a plaintiff's allegations of Article III standing?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioner Facebook, Inc., now known as Meta Platforms, Inc., was the defendant in the district court and the appellee below. Meta is publicly held (NYSE: META) and has no parent corporation.

2. Respondents Rosemarie Vargas, Kisha Skipper, Jazmine Spencer, Deillo Richards, and Jenny Lin were plaintiffs in the district court and the appellants below.

3. Neuhtah Opiotennione and Jessica Tsai were plaintiffs in the district court but were not parties to the appeal.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Vargas* v. *Facebook, Inc.*, No. 21-16499, 2023 WL 4145434 (9th Cir. June 23, 2023) (reversing order granting motion to dismiss), *amended*, 2023 WL 6784359 (9th Cir. Oct. 13, 2023).
- *Vargas* v. *Facebook, Inc.*, No. 19-cv-5081, 2021 WL 3709083 (N.D. Cal. Aug. 20, 2021) (order granting motion to dismiss).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Facebook, Inc., now known as Meta Platforms, Inc., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is unreported but available at 2023 WL 4145434. Pet. App. 12a-21a. The Ninth Circuit's order amending the opinion and denying Facebook's rehearing petition is unreported but available at 2023 WL 6784359. Pet. App. 1a-11a. The district court's order dismissing the complaint is unreported but available at 2021 WL 3709083. Pet. App. 22a-33a. The district court's order dismissing a previous iteration of the complaint is unreported but available at 2021 WL 3709083. Pet. App. 34a-47a.

JURISDICTION

The Ninth Circuit issued its opinion on June 23, 2023, Pet. App. 12a-21a, and issued an amended opinion and order denying rehearing on October 13, 2023, *id.* at 1a-11a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III of the Constitution extends the judicial power only to "Cases" and "Controversies." U.S. Const. art. III, § 2.

INTRODUCTION

Whether a plaintiff has sufficiently alleged Article III standing is the threshold question in every case in federal court. The standard courts must apply in

assessing allegations of Article III standing is therefore of the utmost importance. The Ninth Circuit—alone among the courts of appeals—has adopted a watered-down standard solely for assessing allegations of Article III standing.

All circuits but the Ninth have held that in assessing the sufficiency of allegations of Article III standing, courts must apply the plausibility standard set out in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Applying the *Twombly-Iqbal* plausibility standard comports with this Court's decisions, which hold that plaintiffs must establish their Article III standing "in the same way as any other matter on which [they] bear[] the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And it ensures that courts meaningfully review whether the party invoking federal jurisdiction has shown that it satisfies Article III's requirements.

But in the Ninth Circuit, the *Twombly-Iqbal* plausibility standard has no application to allegations of Article III standing. *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). Instead, the Ninth Circuit directs courts to return to the long-defunct pleading standard under *Conley* v. *Gibson*, 355 U.S. 41 (1957), and ask only whether a complaint contains "'general factual allegations of injury.'" *Maya*, 658 F.3d at 1068; *accord, e.g.*, *Ernest Bock, LLC* v. *Steelman*, 76 F.4th 827, 835 (9th Cir. 2023).

The Ninth Circuit's antiquated rule drove the outcome here. The panel majority, rejecting *Twombly-Iqbal* in favor of the more lenient *Conley*-era standard, held that respondents' conclusory allegations of injury

were enough to survive dismissal. Judge Owens, dissenting, would have applied *Twombly-Iqbal* and held that respondents' allegations failed to account for equally plausible innocent explanations for their asserted injuries and so did not nudge their complaint across the line from conceivable to plausible.

In response to Facebook's petition for rehearing, respondents did not defend the Ninth Circuit precedent the majority had applied. They argued only that a separate panel had since purported to clarify that the Ninth Circuit's prior case law is "no longer good law." *Jones* v. *L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1056 n.1 (9th Cir. 2023). But one Ninth Circuit panel cannot overrule another—so, unsurprisingly, even after that supposed clarification, both the Ninth Circuit itself and district courts throughout the Circuit have continued to reject the *Twombly-Iqbal* plausibility standard in favor of the more lenient *Conley*-era standard when it comes to assessing the sufficiency of allegations of standing. *E.g.*, *Ernest Bock*, 76 F.4th at 835; *Powers* v. *McDonough*, 2023 WL 8884353, at *23 (C.D. Cal. Dec. 14, 2023).

The Ninth Circuit's indefensible rule allows cases to remain in federal court even when the plaintiffs offer only general, conclusory, and implausible allegations of Article III injury. And although it could have granted en banc review to correct course and bring itself in line with its sister circuits, the Ninth Circuit chose to leave its rule in place. As a result, in the country's largest circuit, case law on the standard for assessing allegations of standing is significantly confused at best and flatly inconsistent with this Court's precedent at worst. This Court should intervene to bring the Ninth Circuit in line with every other court of appeals on this important issue.

STATEMENT OF THE CASE

1. Facebook, a social media service, generates revenue by selling space for ads to third-party advertisers. 2-ER-242-44. Facebook offers valuable resources for advertisers across all industries. 2-ER-245. Any advertiser hoping to use Facebook's service must agree to abide by its rules, including policies expressly forbidding discrimination in advertising. 2-ER-170, -173.

Facebook gives advertisers tools they can use to try to reach their target audiences. One such tool allows, but does not require, advertisers to narrow the "eligible audience" for an ad using a variety of considerations. 2-ER-248. For instance, a school-supply store can promote a sale to local parents, an organization offering resources for people with disabilities can direct ads to users with an interest in accessibility issues, and companies can run Spanish-language ads targeted to Spanish speakers. 2-ER-249. If an advertiser chooses to narrow the eligible audience for an ad, Facebook will direct the ad only to users in that group. 2-ER-247-49.

In 2019, following litigation by public-interest groups and a discrimination charge by the Department of Housing and Urban Development, Facebook made industry-leading changes to its advertising service, eliminating certain audience-selection tools for housing ads. 2-ER-203.

2. Respondents, five Facebook users, sued Facebook shortly after that change. They claim that the now-defunct audience-selection tools, by "enabl[ing] housing advertisers to steer advertisements" toward specified groups, violated the Fair Housing Act and related state statutes. 2-ER-234-36, -278-85.

Respondents allege that from 2016 through mid-2019, they used Facebook to search for housing but did not see ads for units of the size, location, and price they hoped for. Vargas, for instance, sought a "three-bedroom apartment located in lower Manhattan in the rental price range of $1,700.00 per month," but saw ads for such apartments only in "neighborhoods outside of Manhattan, like the Bronx." 2-ER-255-56. Skipper was similarly unsuccessful in searching for two- to three-bedroom homes in Yonkers or Westchester for under $2,000. 2-ER-258-59. And Spencer, who sought two-bedroom units under $1,450 in New York City or New Jersey, saw ads for housing in Newark, New Jersey, but felt the "crime rates" in that area were too high. 2-ER-260; *see* 2-ER-262-64 (remaining respondents).

Respondents do not allege that any housing units of the size, location, and price they wanted were available at the time they searched. Nor do they allege that any advertisers had paid to advertise those units on Facebook at the time. But they assert that they must have been "prevented from" seeing such ads, on the theory that unidentified advertisers used Facebook's optional audience-selection tools to exclude groups of which they were members from seeing the ads. 2-ER-257, -259, -261-62, -264.

3. Facebook moved to dismiss the complaint for lack of Article III standing under Federal Rule of Civil Procedure 12(b)(1). D.C. ECF 64 at 1, 7-9.

The district court initially dismissed respondents' complaint with leave to amend. Pet. App. 34a-47a. Because Facebook brought a "facial attack on the sufficiency of the allegations" of Article III standing, the court applied the same standards as under

Rule 12(b)(6), accepting respondents' allegations as true but disregarding "conclusory" allegations and "'unreasonable inferences.'" *Id.* at 38a-39a.

The district court ruled that respondents had failed to plausibly allege any Article III injury. Pet. App. 34a-35a. It explained that although respondents had asserted that "some unidentified housing advertisers may have used the Facebook tools that were available to target housing advertisements away from them," and that this "may" have led them to miss seeing ads that others saw, they did not allege facts plausibly indicating that was true. *Id.* at 40a. Respondents' allegations, the court continued, suggested only that they "could *theoretically* have been injured *if* housing advertisers in fact used the [audience-selection] tools to exclude users" like them "from ads that *might* have been within [their] spheres of interest." *Id.* at 44a. Because the allegations made it "speculative" at best whether respondents "were plausibly injured personally" by the advertising tools they challenged, the court dismissed the complaint under Rule 12(b)(1). *Id.* at 44a-45a.

Respondents amended their complaint, adding details about the types of housing they were looking for. 2-ER-255-65. But their amended complaint still did not allege any facts about whether such housing was available, whether it was being advertised on Facebook at the time, whether any advertisers used Facebook's tools to exclude groups from seeing the ads, or whether those choices affected respondents' experience on Facebook.

The district court again dismissed the complaint for lack of Article III standing, this time without leave to amend. Pet. App. 22a-33a. It reasoned that

respondents still had not alleged that housing satisfying their criteria "*was generally available* in their desired markets," much less that paid ads for such housing "*were being placed [o]n Facebook*" at that time. *Id.* at 26a-27a. And although Vargas, who claimed discrimination based on her race, had alleged that she and a white friend "sat side-by-side" and conducted similar searches but received different results, 2-ER-257, she did not allege that the ads she saw were for housing matching her criteria or were *paid* ads (and thus subject to audience-selection tools) rather than "consumer-placed ads" (for which audience-selection tools were unavailable), Pet. App. 27a-28a.

Ultimately, the court explained, respondents "*assume* (but plead no facts to support)" that "unidentified advertisers theoretically used Facebook's [audience-selection] tools to exclude them" from seeing ads "that they assume (again, with no facts alleged in support) were available and would have otherwise met their criteria." Pet. App. 29a. Because respondents had "failed to plead facts supporting a plausible injury in fact," the court dismissed their complaint. *Id.* at 30a.

4. The Ninth Circuit reversed in a 2–1 opinion.

The panel majority held that the district court had erred in analyzing the sufficiency of respondents' allegations of Article III standing. Pet. App. 13a. Invoking the decision in *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011), the majority asserted that "the bar to allege standing is not high" and that the plausibility standard from *Twombly* and *Iqbal* did not apply to motions to dismiss for lack of standing under Rule 12(b)(1). *Id.* Instead, the majority explained, a complaint can survive dismissal under Rule 12(b)(1)

so long as it contains "general factual allegations of injury," even without the "specific facts" needed to substantiate the allegations. *Id.* (quoting *Lujan* v. *Defs. of Wildlife.*, 504 U.S. 555, 561 (1992)).

Applying that lenient standard, the majority concluded that respondents had alleged enough to survive dismissal. Pet. App. 13a-15a. It principally relied on general allegations that respondents were "prevented from having the same opportunity to view ads for housing." *Id.* at 13a-14a. And although the majority acknowledged that Vargas had not alleged whether the ads her friend saw were *paid* ads subject to audience-selection tools, it disregarded that defect on the ground that Facebook generally "hosts a vast amount of paid advertising." *Id.* at 15a.

Judge Owens dissented. Unlike the majority, he would have applied the *Twombly*-*Iqbal* plausibility standard to determine whether respondents had sufficiently alleged Article III standing. Pet. App. 20a. Under that standard, Judge Owens would have affirmed the dismissal of the complaint. In his view, respondents had not alleged sufficient facts to account for "'obvious alternative explanation[s]'" for the fact they did not see ads for housing of the sort they hoped for—including "that suitable housing was not available or not advertised on Facebook" at the time they searched. *Id.* at 20a-21a.

5. Facebook sought rehearing, pointing out that the Ninth Circuit rule the panel majority had applied—under which the *Twombly*-*Iqbal* plausibility standard is "ill-suited to application in the constitutional standing context," *Maya*, 658 F.3d at 1068—conflicts with case law from every other court of appeals and with this Court's precedent. C.A. ECF 80 at

8-13. In opposing rehearing, respondents did not defend the *Maya* rule the panel majority had applied, arguing only that the Ninth Circuit had recently "abandoned" the rule as "no longer good law." C.A. ECF 86 at 7-8 (emphasis omitted) (quoting *Jones* v. *L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1056 n.1 (9th Cir. 2023)).

In response, the panel amended the opinion. Pet. App. 1a. It did not alter any aspect of the majority's analysis of respondents' allegations or Judge Owens's dissent. Instead, the majority merely deleted its references to *Maya* and the pleading standard predating *Twombly* and *Iqbal*, and replaced them with a statement that plaintiffs "must allege sufficient facts that, taken as true, 'demonstrate each element' of Article III standing." *Id.* at 4a (quoting *Jones*, 74 F.4th at 1057).

With that modification, the Ninth Circuit denied rehearing. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This case presents a stark, 12–1 conflict on a question of vital importance for cases in federal court: in analyzing the sufficiency of a plaintiff's allegations of Article III standing, should courts apply the *Twombly-Iqbal* plausibility standard, or some lesser standard? That question, relevant in nearly all cases and outcome-determinative in many, has a ready answer in this Court's case law: plausibility is the test for allegations of standing no less than for any other issues on which the plaintiff bears the burden. Yet the Ninth Circuit has resisted that conclusion for over a decade, instead requiring courts to assess the adequacy of

standing allegations through a forgiving lens derived from *Conley*'s long-abandoned pleading standard.

The Court should grant review to create uniformity on this critical, threshold issue. The Ninth Circuit is the largest in the country, and its case law should not differ so fundamentally from the law of all of its sister circuits. The panel majority's cosmetic effort to bury that conflict in this case—while making no changes to its assessment of respondents' allegations—does nothing to change the fact that the Ninth Circuit's flawed precedent will continue to lead courts throughout the Circuit (including future panels) astray. Whether by summary reversal or full review, the Court should resolve the conflict and hold litigants alleging Article III standing to the same standard that applies in assessing whether they have stated a claim on the merits.

I. THE NINTH CIRCUIT'S CASE LAW CONFLICTS WITH DECISIONS FROM EVERY OTHER CIRCUIT.

Every court of appeals has held that the *Twombly-Iqbal* plausibility standard applies when courts assess the sufficiency of allegations of Article III standing—except for the Ninth Circuit. The Ninth Circuit has refused to apply *Twombly* and *Iqbal* to allegations of Article III standing, favoring instead a more lenient pleading standard that permits complaints with no plausible allegations of injury in fact to survive dismissal. That conflict drove the decision below: the panel majority applied the Circuit's more lenient standard, while the dissenting judge would have applied *Twombly-Iqbal*. And the conflict is deeply entrenched—the Ninth Circuit declined to resolve it in this case, and courts throughout the Circuit continue to apply its one-of-a-kind rule.

A. In all circuits but the Ninth, courts apply the *Twombly-Iqbal* plausibility standard when a defendant challenges the sufficiency of a plaintiff's allegations of Article III standing. *Hochendoner* v. *Genzyme Corp.*, 823 F.3d 724, 730-31 (1st Cir. 2016); *Calcano* v. *Swarovski N. Am. Ltd.*, 36 F.4th 68, 75 (2d Cir. 2022); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243-44 (3d Cir. 2012); *S. Walk at Broadlands Homeowner's Ass'n* v. *OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013); *Earl* v. *Boeing Co.*, 53 F.4th 897, 903 (5th Cir. 2022); *Ass'n of Am. Physicians & Surgeons* v. *FDA*, 13 F.4th 531, 543-44 (6th Cir. 2021); *Silha* v. *ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015); *Stalley* v. *Cath. Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007); *COPE* v. *Kan. State Bd. of Educ.*, 821 F.3d 1215, 1220-21 (10th Cir. 2016); *Trichell* v. *Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020); *Kareem* v. *Haspel*, 986 F.3d 859, 865-66 (D.C. Cir. 2021); *Apple Inc.* v. *Vidal*, 63 F.4th 1, 16 (Fed. Cir. 2023).

Two settled principles have driven that body of precedent. First, because "[f]ederal courts are courts of limited jurisdiction" and "standing is a prerequisite to a federal court's subject matter jurisdiction," courts must meaningfully assess whether plaintiffs have standing even at the outset of a case. *E.g.*, *Hochendoner*, 823 F.3d at 730. Second, as the Court explained in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Given that mandate, "it follows that the *Twombly-Iqbal* facial plausibility requirement for pleading a claim is incorporated into the

standard for pleading subject matter jurisdiction." *Silha*, 807 F.3d at 174.

The widespread agreement on that point has been significant for the same reasons *Twombly* and *Iqbal* were significant. "Assessing plausibility is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Calcano*, 36 F.4th at 75. Plausibility "demand[s] 'more than a sheer possibility that a defendant has acted unlawfully,'" *Schering Plough*, 678 F.3d at 243, and precludes plaintiffs from relying on general assertions of injury that "'stop[] short of the line between possibility and plausibility,'" *S. Walk*, 713 F.3d at 185. A plaintiff cannot plausibly allege an Article III injury by relying on "'mere conclusory statements,'" *COPE*, 821 F.3d at 1220-21, or alleging facts that lend themselves to a "more obvious" or equally plausible inference, *Earl*, 53 F.4th at 903. Nor can plaintiffs avoid dismissal through allegations based only "on information and belief" without "'a statement of the facts upon which the allegations are based.'" *Kareem*, 986 F.3d at 866. And courts must assess whether factual allegations of injury are equally "'compatible with . . . [or] more likely explained by'" behavior that does not support standing. *Id.* at 869.

B. The Ninth Circuit is alone in holding that it is "inappropriate[]" to apply the *Twombly*-*Iqbal* plausibility standard in assessing the sufficiency of allegations of Article III standing. *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011); *see, e.g.*, *Silha*, 807 F.3d at 174 (recognizing the Ninth Circuit's rule).

1. In *Maya*, the Ninth Circuit held that "*Twombly* and *Iqbal* are ill-suited to application in the constitutional standing context." 658 F.3d at 1068. It reasoned that while *Twombly* and *Iqbal* require a court

to "assess[] the merits" of a plaintiff's case, the "threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits." *Id.* Based on the notion that standing "'precedes, and does not require, analysis of the merits,'" *Maya* held that a court commits legal error if it applies the *Twombly-Iqbal* plausibility standard in assessing the sufficiency of allegations of standing. *Id.* It instructed courts instead to apply the pleading standard predating *Twombly* and *Iqbal*, under which courts "presume[d] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (cleaned up).

Courts throughout the Ninth Circuit have long cited *Maya* in ruling that allegations of Article III standing "need not satisfy the pleading standards of *Twombly* and *Iqbal*." *Vizcarra* v. *Unilever U.S., Inc.*, 2020 WL 4016810, at *6 (N.D. Cal. July 16, 2020); *accord, e.g.*, *Potere* v. *Bd. of Trs.*, 2021 WL 8441197, at *6 (C.D. Cal. Dec. 28, 2021), *report & recommendation adopted*, 2022 WL 1091193 (C.D. Cal. Apr. 12, 2022); *AshBritt, Inc.* v. *Ghilarducci*, 2020 WL 7388071, at *6 (N.D. Cal. Dec. 16, 2020); *In re German Auto. Mfrs. Antitrust Litig.*, 497 F. Supp. 3d 745, 759-60 (N.D. Cal. 2020), *aff'd mem.*, 2021 WL 4958987 (9th Cir. Oct. 26, 2021); *Tabak* v. *Apple, Inc.*, 2020 WL 9066153, at *5 (N.D. Cal. Jan. 30, 2020); *Schutza* v. *Union City Invs. LLC*, 2020 WL 905605, at *3 (S.D. Cal. Feb. 25, 2020); *Johnson* v. *Alhambra & O Assocs.*, 2019 WL 2577306, at *2 (E.D. Cal. June 24, 2019). Those decisions have explained that, in "[t]he Ninth Circuit," "*Twombly* and *Iqbal*'s familiar plausibility standard is not relevant" when it comes to Article III standing. *German Auto.*, 497 F. Supp. 3d at 760. In some cases, *Maya* has led courts to conclude that implausible allegations of injury are "adequate[] . . . for purposes of Article III

standing" even though the same allegations would fall short "for purposes of . . . 'the merits.'" *AshBritt*, 2020 WL 7388071, at *6.

Secondary sources agree about the Ninth Circuit's rule. The latest edition of a prominent practice guide, for instance, highlights the lopsided conflict over "whether constitutional standing must be pled plausibly" and cites *Maya* as holding that plausibility is "'inappropriate' and 'ill suited' when pleading standing." Stevenson & Fitzgerald, Rutter Prac. Guide—Fed. Civ. Proc. Before Trial § 9:77.11 (Cal. & 9th Cir. ed., Apr. 2023 update).

2. The Ninth Circuit's commitment to its rule runs deeper still. Even decisions that do not cite *Maya* directly have nonetheless applied the approach it adopted by relying on the more lenient pleading standard that predated *Twombly* and *Iqbal*.

In *Defenders of Wildlife*, this Court held that Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561. Before *Twombly* and *Iqbal*, that instruction meant that, "[a]t the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (cleaned up) (citing *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990), which itself cites *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). That language is a relic of the era before *Twombly* and *Iqbal*, which is why this Court has not invoked the "general factual allegations" standard for over twenty-five years. *See Bennett* v. *Spear*, 520 U.S. 154, 168 (1997).

Yet the Ninth Circuit has repeatedly invoked the articulation of the pleading standard at the time of *Defenders of Wildlife* as the standard that governs allegations of standing *now*. It did so in *Maya*, holding that courts should accept "'general factual allegations of injury'" on the theory that "'general allegations embrace those specific facts'" needed to substantiate them. 658 F.3d at 1068. And in the decade-plus since *Maya*, the Ninth Circuit has repeatedly returned to that formulation, including in recent years. *E.g.*, *Ernest Bock, LLC* v. *Steelman*, 76 F.4th 827, 835 (9th Cir. 2023) ("'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice.'"); *accord, e.g.*, *Cal. Rest. Ass'n* v. *City of Berkeley*, — F.4th —, 2024 WL 23986, at *3 (9th Cir. Jan. 2, 2024); *Mecinas* v. *Hobbs*, 30 F.4th 890, 896-97 (9th Cir. 2022).

District courts throughout the Ninth Circuit have followed suit, noting the "contrast" between the plausibility standard that applies to merits questions and the "general factual allegations" standard that applies to questions of Article III standing. *Fernandez* v. *CoreLogic Credco, LLC*, 593 F. Supp. 3d 974, 982-83 (S.D. Cal. 2022); *accord, e.g.*, *Olympus Spa* v. *Armstrong*, — F. Supp. 3d. —, 2023 WL 3818536, at *6 (W.D. Wash. June 5, 2023); *Williams* v. *Apple, Inc.*, 449 F. Supp. 3d 892, 902-03 (N.D. Cal. 2020).

So in the Ninth Circuit, courts and litigants at the pleading stage face a fork in the road, with dramatic consequences. When a defendant moves to dismiss under Rule 12(b)(6) and challenges a plaintiff's allegations on the merits, the court applies *Twombly-Iqbal*. But when a defendant moves to dismiss under Rule 12(b)(1) and challenges a plaintiff's allegations of Article III standing, the court must go back in time

and ask if there are "general factual allegations" of injury—a holdover from the days when courts reviewed only if allegations put the defendant "on fair notice" of the plaintiff's theory. *See, e.g.*, *Down E. Energy Corp.* v. *Niagara Fire Ins. Co.*, 176 F.3d 7, 12 (1st Cir. 1999) (citing *Conley*, 355 U.S. at 47-48); *see also Ass'n of Am. Physicians*, 13 F.4th at 543 (recognizing that the "general allegations" standard reflects "the old pleading test from *Conley*").

C. The 12–1 conflict among the courts of appeals played out in miniature here.

The panel majority applied *Maya* in reversing the district court's order dismissing the complaint. Pet. App. 13a. *Maya*'s conclusion that "*Twombly* and *Iqbal* are ill-suited to application in the constitutional standing context," 658 F.3d at 1068, was the majority's authority for its assertion that "the bar to allege standing is not high," Pet. App. 13a. And instead of relying on *Twombly* and *Iqbal*, the majority recited the defunct standard requiring only "general factual allegations of injury." *Id.* (quoting *Defs. of Wildlife*, 504 U.S. at 561).

Judge Owens dissented. Pet. App. 20a-21a. In lieu of the *Maya* rule, he invoked the *Twombly-Iqbal* plausibility standard. *Id.* at 20a. That standard led him to a different conclusion as to the sufficiency of respondents' allegations, principally because they had alleged no "facts supporting an inference that housing discrimination" (even if it existed) "is plausibly the reason [they] failed to find housing ads meeting their respective search criteria." *Id.* And while *Twombly-Iqbal* would require consideration of "'obvious alternative explanation[s],'" including "that suitable housing was not available or not advertised on Facebook"

at the time, *id.*, the majority's reliance on the *Maya* rule relieved it of that requirement.

After Facebook sought rehearing, the panel amended its opinion, erasing the majority's reference to *Maya* and the *Conley*-era pleading standard and replacing them with a statement that plaintiffs "must allege sufficient facts that, taken as true, 'demonstrate each element' of Article III standing." Pet. App. 4a. But not a word from the majority's actual analysis of the allegations here—analysis that had proceeded under the *Maya* standard, which the panel had described as "not high" and more lenient than the *Twombly-Iqbal* standard, *id.* at 13a—was changed.

D. Below, respondents asserted the Ninth Circuit had already "ma[de] clear that *Twombly-Iqbal* applies in the standing context." C.A. ECF 86 at 5 (citing *Jones* v. *L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1056 n.1 (9th Cir. 2023)). But nothing the Ninth Circuit has done recently, in this case or others, eliminates the conflict or will prevent further misapplication of the pleading standard in future cases.

One Ninth Circuit panel can depart from a prior panel decision only if the earlier decision is clearly irreconcilable with "*intervening* higher authority." *Miller* v. *Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (emphasis added). The *Jones* footnote respondents cited below makes no sense under that rubric. It asserts that *Maya* cannot be squared with this Court's statement in *Spokeo, Inc.* v. *Robins*, 578 U.S. 330 (2016), that the plaintiff must "clearly allege facts demonstrating each element" of Article III standing. *Id.* at 338 (cleaned up). But that portion of *Spokeo* is merely quoting *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975), which predated *Maya* by nearly four decades. *Maya* therefore remains Ninth Circuit precedent

unless and until it is disavowed in an en banc proceeding—something the Ninth Circuit declined to do here—or this Court intervenes.

The Ninth Circuit's own case law confirms that *Jones* has not solved the problem. Even after *Jones*, the Circuit has turned to the same *Conley*-era pleading standard that *Maya* requires for purposes of assessing the sufficiency of allegations of Article III standing. *Cal. Rest. Ass'n*, 2024 WL 23986, at *3 (requiring only "'general factual allegations of injury'"); *Ernest Bock*, 76 F.4th at 835 (same).

Recent district-court decisions likewise demonstrate that *Jones* has not solved the problem *Maya* created. Courts throughout the Ninth Circuit continue to cite *Maya* for its rule that the "general factual allegations" standard governs questions of Article III standing at the pleading stage. *E.g.*, *Powers* v. *McDonough*, 2023 WL 8884353, at *23 (C.D. Cal. Dec. 14, 2023); *accord, e.g.*, *Planned Parenthood Greater Nw.* v. *Labrador*, — F. Supp. 3d —, 2023 WL 4864962, at *9 (D. Idaho July 31, 2023) (citing *Unified Data Servs., LLC* v. *FTC*, 39 F.4th 1200, 1209 (9th Cir. 2022), which itself cites *Maya*). And courts have continued to apply the more lenient "general factual allegations" standard with no mention of *Twombly* or *Iqbal*. *E.g.*, *Saeedy* v. *Microsoft Corp.*, 2023 WL 8828852, at *3 (W.D. Wash. Dec. 21, 2023); *People of City of L.A. Who Are Un-Housed* v. *Garcetti*, 2023 WL 8166940, at *10 (C.D. Cal. Nov. 21, 2023); *Vanness* v. *Aguilar*, 2023 WL 6992603, at *2 (D. Nev. Oct. 20, 2023); *Jeremiah M.* v. *Crum*, — F. Supp. 3d —, 2023 WL 6316631, at *11 (D. Alaska Sept. 28, 2023); *Correll* v. *Amazon.com, Inc.*, 2023 WL 6131080, at *2 (S.D. Cal. Sept. 19, 2023).

The Ninth Circuit had every opportunity to grant rehearing en banc and bring its precedent in line with this Court's decisions and the overwhelming consensus of its sister circuits. Instead, the court chose to obscure the conflict in this case through cosmetic modifications to its opinion. The result is not only the unfortunate survival of a rule that no party here defends, but also the possibility that the rule will be applied in an inconsistent or outcome-driven manner in future Ninth Circuit cases.

II. THE NINTH CIRCUIT'S APPROACH IS WRONG.

There is a good reason the Ninth Circuit is on the lonely end of a 12–1 conflict: its rule is indefensible. Even respondents have agreed the "correct[ ]" rule is "that *Twombly-Iqbal* applies in the standing context." C.A. ECF 86 at 5. Yet as this case illustrates, the Ninth Circuit's approach allows complaints to remain in federal court based on conclusory, speculative, and implausible assertions of injury.

A. This Court's case law precludes a more lenient pleading standard for questions of Article III standing as compared to "any other matter on which the plaintiff bears the burden of proof." *Defenders of Wildlife*, 504 U.S. at 561. When *Defenders of Wildlife* was decided, that meant *Conley*'s more lenient "general factual allegations" standard. *Id.* Today, it means *Twombly-Iqbal*'s more rigorous plausibility standard. So "[j]ust as [a] plaintiff bears the burden of plausibly alleging a viable cause of action" under *Twombly-Iqbal*, "so too the plaintiff bears the burden of pleading facts necessary to demonstrate standing" under the same "plausibility standard." *Hochendoner*, 823 F.3d at 730-31.

If anything, the rigorous approach of *Twombly-Iqbal* is even more fitting when it comes to questions of Article III standing. In the Rule 12(b)(6) context, the plausibility standard allows defendants to ensure that the court "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-79 (2009). But in the Rule 12(b)(1) context, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009). Applying the *Twombly-Iqbal* plausibility standard to questions of standing serves the judiciary's unflagging duty to police the boundaries of Article III jurisdiction.

B. This case shows why the *Twombly-Iqbal* plausibility standard matters.

Respondents' theory of injury depends on bridging the gap between (i) allegations that they searched for but did not find ads for housing matching their preferred criteria on Facebook and (ii) their assertion that third-party advertisers must have used the audience-selection tools to exclude groups of which they were members from seeing such ads. Yet respondents allege nothing to cross that divide:

- They do not allege that any housing matching their specific (and often plainly unrealistic) criteria actually existed.
- Nor do they allege that such housing was available during the specific periods they searched for housing on Facebook.
- Nor do they allege that, even if it existed and was available, such housing was being advertised on Facebook during those periods.

- Nor do they allege that ads for such housing were *paid* ads subject to the audience-selection tools they challenge.
- Nor do they allege that any specific third-party advertiser actually used audience-selection tools to exclude groups of which they were members from seeing specific ads.

Those gaps in respondents' allegations, which remained even after three amendments of their complaint, are especially telling because it should have been easy to fill them if respondents' conclusory assertions had any foundation. Countless websites post information about housing, including which units are available to buy or rent. *See, e.g.*, Nesbit, *The 10 Best Apps for Finding Your Next Apartment*, U.S. News & World Report (Sept. 5, 2023), http://tinyurl.com/mvjxajy7. And Facebook makes available to all users an Ad Library with extensive information about all ads live on the service at any given time. *Understanding the Ad Library*, Meta (Dec. 3, 2021), http://tinyurl.com/mpcu8wd5.

But respondents, perhaps aware that their housing preferences were unrealistic, made no effort to use those resources when amending their complaint. And the only allegation made with any specificity—that Vargas sat with a white friend and searched for housing using the same search criteria but saw fewer "ads for housing in locations that were preferable" than her friend, 2-ER-257—does not plausibly point to any Article III injury. The complaint contains no details regarding the specific searches they ran or the ads that Vargas and her friend saw—though it does state that whatever housing was being advertised was not "suitable" in Vargas's view. *Id.* And respondents likewise omitted any mention of whether those ads were *paid*

ads subject to the audience-selection tools—even though Facebook users can easily "distinguish paid ads from user-generated ads." Pet. App. 20a-21a (Owens, J., dissenting).

That leaves respondents with only generalities. They allege, for instance, that the audience-selection tools made it generally *possible* for advertisers to include certain groups or exclude others, 2-ER-235, and that unidentified advertisers may have used those tools in assertedly unlawful ways in instances not involving respondents, 2-ER-252-53. But by failing to allege facts raising a plausible inference that *they* were injured by the audience-selection tools they challenge, respondents failed to "nudge[] their claims across the line from conceivable to plausible." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007).

Plaintiffs with implausible allegations of Article III injury should not be able to proceed to discovery in federal court. That would have been the result had this case been adjudicated in any other circuit in the country. The majority reached a different result only because it applied the Ninth Circuit's standalone rule.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Whether the *Twombly-Iqbal* plausibility standard applies when courts consider allegations of Article III standing is of paramount importance.

Standing is "the threshold question in every federal case." *Warth*, 422 U.S. at 498. And it is a fundamental question at that. Article III standing " 'is built on a single basic idea—the idea of separation of powers.' " *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 422 (2021). Enforcing Article III's limits, and ensuring that plaintiffs invoking federal jurisdiction have a

sufficiently "personal stake in the case," ensures "that federal courts exercise their proper function in a limited and separated government." *Id.* at 423 (cleaned up).

Diluting Article III's limits, conversely, "not only would violate Article III but also would infringe on the Executive Branch's Article II authority" by delegating to "*unharmed* plaintiffs . . . not accountable to the people" the delicate "choice of how to prioritize and how aggressively to pursue legal actions." *TransUnion*, 594 U.S. at 429. In short, maintaining a rigorous approach to Article III is how courts "remain faithful to th[e] tripartite structure" on which our government depends. *Spokeo*, 578 U.S. at 337.

This Court has already held that plaintiffs, who bear the burden of establishing their Article III standing, must carry that burden at every stage of the litigation, in accordance with the standards that govern other issues on which they bear the burden. *Defs. of Wildlife*, 504 U.S. at 561. There is no way to reconcile that mandate with the Ninth Circuit's approach, under which the *Twombly-Iqbal* plausibility standard applies to plaintiffs' claims on the merits while the more lenient *Conley*-era standard governs plaintiffs' Article III standing.

The insights of *Twombly* and *Iqbal*, and the many cases since that have honed their standard, are anything but trivial. As leading commentators have recognized, those decisions "represent[ed] a significant transformation in federal pleading practices." 5 Wright & Miller, Fed. Prac. & Proc. Civ. § 1216 (4th ed. Apr. 2023 update). The difference between the two sides of the conflict, then, is neither marginal nor linguistic: it is whether the party invoking federal

jurisdiction faces a meaningful or only a negligible hurdle in alleging compliance with Article III.

Nearly 20% of all cases in the federal system are filed in the Ninth Circuit. *Cases Commenced, Terminated, and Pending*, U.S. Courts, https://tinyurl.com/48c2mnu5 (as of Mar. 31, 2023). One-fifth of cases in federal court should not be subject to a long-defunct pleading standard that governs only whether there are adequate allegations to invoke federal jurisdiction in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted. Given the irreconcilable conflict between the Ninth Circuit's rule and this Court's precedent, the Court may wish to consider summarily reversing the Ninth Circuit's judgment.

Respectfully submitted.

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