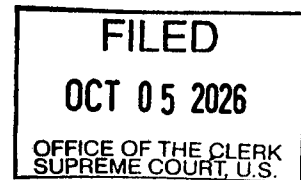


26-5817
No. 5



IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY TRUPIA,
Petitioner,

v.

BOB MOORE ENTERPRISES, L.L.C.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, without a lawyer, sued over two automated text messages under the Telephone Consumer Protection Act, a statute that gives private plaintiffs a damages remedy. The district court dismissed his federal claims with prejudice and without leave to amend, holding that the complaint did not plausibly allege the capacity of the defendant's texting equipment. In a separate suit before the same district judge, petitioner challenged the plausibility standard itself; that court held the question "resolved by the Supreme Court" and told him that his remedy was "to appeal the disposition in the particular case." He did. The court of appeals held his challenge forfeited because he had not raised it in the district court, added that it was "bound to apply" *Twombly* and *Iqbal* in any event, and held every other issue waived for inadequate briefing. The questions presented are:

1. Whether the plausibility pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which changed the operative meaning of Federal Rule of Civil Procedure 8(a)(2) by adjudication rather than through the Rules Enabling Act, and which authorizes a judge to dismiss a claim for legal relief before discovery by weighing the plausibility of the plaintiff's inferences, is consistent with 28 U.S.C. § 2072 and the Seventh Amendment.

2. Whether a court of appeals may refuse to consider, as forfeited for want of a district-court objection, a challenge to the validity of a pleading standard that only this Court can revisit, where the challenge was briefed on appeal, the court of

appeals passed upon it, and the district court had already ruled in a parallel case that the question was closed and belonged on appeal.

3. Whether a court of appeals may hold waived, for inadequate briefing, an-unrepresented appellant's challenge to a dismissal with prejudice entered without leave to amend, and as to one claim on a ground the defendant never raised, when the duties to construe a pro se pleading liberally and to permit amendment of a curable claim are duties this Court places on the courts themselves.

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is the subject of this petition are listed below. No party has a stock ticker symbol.

Anthony Trupia, petitioner here, was the plaintiff-appellant below.

Bob Moore Enterprises, L.L.C., respondent here, was the defendant-appellee below.

RELATED CASES

- *Trupia v. Bob Moore Enterprises, L.L.C.*, No. 25-6130, U.S. Court of Appeals for the Tenth Circuit. Judgment entered May 29, 2026. Rehearing and rehearing en banc denied July 7, 2026.

- *Trupia v. Bob Moore Enterprises, L.L.C.*, No. 5:25-cv-00568-HE, U.S. District Court for the Western District of Oklahoma. Order dismissing federal claims and remanding state-law claims entered Aug. 5, 2025.

- *Trupia v. Bob Moore Enterprises, LLC*, No. CJ-2025-2993, District Court of Oklahoma County, Oklahoma. Journal entry of dismissal of the remanded state-law claims filed Jan. 9, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Trupia respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order and judgment of the court of appeals (App. 1a–9a) is unpublished. The order of the district court dismissing petitioner's federal claims (App. 11a–22a) is unpublished. The order of the court of appeals denying panel rehearing and rehearing en banc (App. 23a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on May 29, 2026. App. 1a. A timely petition for panel rehearing and rehearing en banc was denied on July 7, 2026. App. 23a. This petition is filed within ninety days of that order. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1, 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Rules Enabling Act, 28 U.S.C. § 2072, provides in relevant part: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts

(including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right."

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading stating a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Federal Rule of Civil Procedure 12(b)(6) permits a party to assert by motion the defense of "failure to state a claim upon which relief can be granted."

The pertinent text of 47 U.S.C. § 227(a)(1), (b)(1)(A)(iii), and (b)(3), and of Federal Rule of Appellate Procedure 28(a)(8)(A), is set out at App. 24a–26a.

STATEMENT OF THE CASE

A. Two automated texts and a pro se complaint

In June 2024, petitioner Anthony Trupia contacted respondent Bob Moore Enterprises, L.L.C., an Oklahoma City car dealership, to arrange service for his vehicle. Compl. ¶ 5 (D. Ct. Doc. 1-1). He alleged that respondent then, without his prior express written consent, "enrolled [him] in a marketing campaign involving automated text messages." *Id.* ¶¶ 6, 10. Months apart, on December 16, 2024 and March 5, 2025, he received the same message, word for word: "Hello Anthony, this is Amber at Bob Moore Enterprises, L.L.C.. Our records indicate that it's already time for your next service visit. Can I help you schedule an appointment? Opt-out reply STOP." *Id.* ¶¶ 7–9. He alleged that the messages "were sent using an automatic telephone dialing system (ATDS) or prerecorded messages, as evidenced by their generic, automated nature and the identification of 'Amber' as an AI virtual assistant by a Bob Moore Enterprises, L.L.C. employee." *Id.* ¶ 11; see App. 2a.

1

Petitioner filed suit in the District Court of Oklahoma County, Oklahoma, under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, the Oklahoma Telephone Solicitation Act, and Oklahoma common law. App. 2a; App. 11a. The TCPA authorizes exactly that forum: a person "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" an action to recover "\$500 in damages for each such violation," trebled for willful violations. 47 U.S.C. § 227(b)(3). Count I alleged calls to a cellular telephone "using any automatic telephone dialing system," and Count II alleged calls using "an artificial or prerecorded voice," both under § 227(b)(1)(A)(iii). App. 15a, 19a. Counts III and IV alleged caller-identification and disclosure violations. *Id.* at 18a–19a. Each count sought statutory damages. Compl. ¶¶ 17–18, 21–22.

Respondent removed the case to the United States District Court for the Western District of Oklahoma on May 27, 2025, invoking federal-question jurisdiction over the TCPA counts. App. 11a–13a; see *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). It then moved to dismiss under Rule 12(b)(6), arguing that the complaint did not plausibly allege an automatic telephone dialing system and that the messages were informational. App. 14a–16a, 19a–20a. Respondent's motion did not argue that a text message cannot be an "artificial or prerecorded voice." See *id.* at 9–10.

Petitioner opposed. He argued that the capacity of respondent's equipment is a technical question for discovery, quoting decisions holding that "as a practical matter, no plaintiff will have personal knowledge of the defendant's telephone system at the pleadings stage—only the defendant will have that knowledge." Pl.'s

Opp. ¶¶ 9–15 (D. Ct. Doc. 25) (quoting *Libby v. Nat'l Republican Senatorial Comm.*, 551 F. Supp. 3d 724, 729 (W.D. Tex. 2021)). He argued that consent is an affirmative defense, not an element. *Id.* ¶ 22. He pointed out that respondent had not addressed Count II at all. *Id.* ¶¶ 27, 43(a). He conceded that Counts III and IV carry no private right of action. *Id.* ¶ 20. He directed the court to his then-pending suit before the same court challenging "the obscene difficulties involved in modern pleading," and asked the judge "to read it to see how the complaints contained within match the Motion to Dismiss at debate in this case." *Id.* ¶ 40 (citing *Trupia v. Roberts*, No. 5:25-cv-00621 (W.D. Okla.)). And he asked, in terms, for "[l]eave to file electronically" and for "[l]eave to amend under FRCP 15(a)(2) if any claims are deficient." *Id.* at 23 (Requested Relief ¶¶ c, d).

B. Dismissal with prejudice, without leave to amend

On August 5, 2025, the district court dismissed all four TCPA counts with prejudice under Rule 12(b)(6). App. 21a.

On Count I, the court held the allegation of an automatic telephone dialing system "conclusory" and the additional allegations insufficient. App. 17a. It then went further. Reasoning from the allegation that respondent enrolled petitioner in a campaign after he arranged service, the court found it "apparent from the facts that have been alleged that plaintiff cannot establish that defendant used an ATDS," because "[a]ccording to the facts alleged and the reasonable inferences from those facts, plaintiff's telephone number was not automatically or randomly generated, but selected from information defendant possessed after plaintiff arranged for vehicle service." *Id.* at 17a–18a. For that conclusion the court cited four decisions of

other circuits. *Id.* at 17a–18a (citing *Soliman v. Subway Franchisee Advert. Fund Tr., Ltd.*, 101 F.4th 176 (2d Cir. 2024); *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022); *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867 (3d Cir. 2022); and *Beal v. Outfield Brew House, LLC*, 29 F.4th 391 (8th Cir. 2022)). Two of those four were decided at summary judgment, after discovery into the defendant's equipment. See *Panzarella*, 37 F.4th 867 (reviewing grant of summary judgment for the caller); *Beal*, 29 F.4th 391 (affirming summary judgment for the defendants). The court held that "Count I is subject to dismissal with prejudice." App. 18a.

On Count II, the court acknowledged that respondent had argued only that the messages were informational and consented to. App. 19a–20a. It nonetheless dismissed the count on a ground respondent had not raised, holding it "patently obvious" that a text message is not "an artificial or prerecorded voice," and that "allowing him an opportunity to amend his complaint would be futile in light of existing law." *Id.* at 20a (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). It dismissed Count II with prejudice. *Ibid.* It dismissed Counts III and IV on petitioner's concession. *Id.* at 18a–19a.

The court never addressed petitioner's request for leave to amend. It declined supplemental jurisdiction over the state-law claims and remanded them. *Id.* at 21a. And it struck as moot petitioner's pending "Motion for Leave to Use Electronic Filing." *Id.* at 12a, 21a.

C. The parallel challenge, and the instruction to raise it on appeal

Two months before that dismissal, on June 9, 2025, petitioner had filed *Trupia v. Roberts*, No. 5:25-cv-00621-HE (W.D. Okla.), a pro se complaint asserting

claims against proposed defendant classes of federal judges, members of the American Bar Association, and members of the state bars. The complaint alleged that the plausibility standard of *Twombly*, the routine use of Rule 12(b)(6) motions, the removal of TCPA cases from the state courts Congress named in § 227(b)(3), and the exclusion of unrepresented litigants from electronic filing together deprive ordinary litigants of meaningful access to the courts and of the civil jury guaranteed by the Seventh Amendment. Roberts Compl. ¶¶ 13–54 (Roberts D. Ct. Doc. 1). It pleaded this very case as an example. *Id.* ¶¶ 62–74. It asked the court to "restore the fair, practical, and correct standards of pleading as articulated in *Conley v. Gibson*." *Id.* at 53 (Prayer ¶ 4). The *Roberts* case was assigned to the same district judge who decided this one.

On September 30, 2025, the district court dismissed *Roberts* in its entirety. It described the complaint as contending "that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) was wrongly decided, that [its] plausibility standard for pleading sufficiency unreasonably restricts access to the courts, and that motions to dismiss are overused or abused as a result." Order at 1, *Trupia v. Roberts* (W.D. Okla. Sept. 30, 2025) (Roberts D. Ct. Doc. 17). It held:

Whether *Twombly* was correctly decided has, obviously, been resolved by the Supreme Court in that case. Further, issues such as whether motions to dismiss were properly granted in a particular case or whether particular cases are properly removable are ones to be resolved in those cases, not via some free-floating attack on legal procedures generally in a separate case, even one purportedly brought as a class action. If plaintiff objects to the disposition of particular cases, his remedy is to appeal the disposition in the particular case.

Id. at 2. The order identified this case by name. *Id.* at 2 n.1. The district court later denied petitioner leave to appeal *Roberts* in forma pauperis. *Roberts* D. Ct. Doc. 22. Petitioner appealed. *Trupia v. Roberts*, No. 25-6172 (10th Cir.).

D. The appeal

Petitioner appealed this case pro se. He filed his opening brief on paper. He listed forty-two issues, among them the dismissal of Count I despite allegations that suffice "at the pleading stage" (Issue 1), the treatment of equipment capacity as a pleading requirement rather than a matter for discovery (Issues 2–4), the sua sponte dismissal of the prerecorded-voice claim (Issues 11, 42), the dismissal with prejudice without leave to amend under *Foman v. Davis*, 371 U.S. 178 (1962) (Issue 12), and the denial of electronic filing (Issue 23). Opening Br. 3–12 (10th Cir.). In a separate argument section he contended that the plausibility standard of *Twombly* and *Iqbal*, "as applied to dismiss Appellant's pro se TCPA claims without opportunity for discovery or amendment, violates the Seventh Amendment right to jury trial and . . . due process," because it permits judges "to evaluate the 'plausibility' of factual allegations at the pleading stage" and so usurps "the jury's fact-finding role," and he asked the court to recognize the problem or certify it "to the Supreme Court for reconsideration of the standard's constitutionality." *Id.* at 18–19 (Issue 41). His reply brief invoked *Hormel v. Helvering*, 312 U.S. 552 (1941), and *Singleton v. Wulff*, 428 U.S. 106 (1976), and reminded the court that the district judge had the *Roberts* complaint before him throughout. Reply Br. 1–3 (10th Cir.).

The court of appeals affirmed in an unpublished order and judgment. App. 1a–9a. It held that petitioner "has waived appellate review of the district court's

order dismissing his TCPA claims, remanding his state-law claims, and denying his pending motions," because his brief listed issues without developed argument or record citations. *Id.* at 5a–6a (citing *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005)). It recognized one "lone exception": petitioner's argument that the plausibility standard "violates the Seventh Amendment's right to a jury trial and the Fourteenth Amendment's guarantee of due process." *Id.* at 6a–7a. That argument, the court held, was forfeited because petitioner "did not raise this argument in the district court" and had not argued for plain-error review. *Id.* at 7a (citing *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011)). The court added: "In any event, the Supreme Court has not overturned *Twombly* or *Iqbal*; they remain controlling law, and like the district court, we are bound to apply them." *Ibid.* The court denied respondent's motion for sanctions. *Id.* at 7a–8a.

Petitioner sought panel rehearing and rehearing en banc, contending among other things that the plausibility standard was installed by adjudication in violation of the Rules Enabling Act and abridges the Seventh Amendment jury right. The court accepted the petition for filing, denied panel rehearing, and denied rehearing en banc after no judge requested a poll. App. 23a.

E. Jurisdiction in the courts below

The district court had federal-question jurisdiction over the TCPA claims under 28 U.S.C. § 1331, on removal under 28 U.S.C. § 1441(a). App. 12a–13a. The court of appeals had jurisdiction under 28 U.S.C. § 1291. App. 1a.

REASONS FOR GRANTING THE PETITION

Every court that has touched petitioner's challenge to the plausibility standard has disclaimed the power to decide it. The district court, in the parallel case, called the question "obviously" resolved by this Court and sent petitioner to appeal in the individual case. The court of appeals, in the individual case, held the challenge forfeited because petitioner had not raised it in the district court, and then added that it was "bound to apply" *Twombly* and *Iqbal* in any event. Both lower courts were right about one thing: only this Court can decide whether the standard it announced is valid. What they did together, though, is ensure that no court ever answers the question, while a pleading rule that this Court installed by adjudication extinguishes, with prejudice and before discovery, a statutory damages claim that a jury was entitled to decide.

That is a compelling reason for review. Sup. Ct. R. 10(c). The validity of the plausibility standard under the Rules Enabling Act and the Seventh Amendment is an important question of federal law that this Court has never decided and that governs every civil action in every federal court. The forfeiture ruling that kept it from being decided below is no obstacle here, because the question was pressed in, and passed upon by, the court of appeals. And the waiver ruling that disposed of everything else inverted the duties this Court has placed on courts toward unrepresented litigants. This case, decided on the pleadings with the complaint as the entire record, presents all three questions cleanly.

I. Whether the plausibility standard is valid under the Rules Enabling Act and the Seventh Amendment is an important question this Court has never decided.

A. *Twombly* and *Iqbal* changed the operative meaning of Rule 8 without changing its text.

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." That text has not changed in substance since 1938. For half a century this Court read it to mean what it says. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim"; they require only "a short and plain statement of the claim" that gives the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A complaint could not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45–46. And the design was deliberate: "[s]uch simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47–48.

The Rules' principal draftsman said the same thing. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283 (1988) (describing "Judge Charles Clark, the principal draftsman of the Rules"). Writing for the Second Circuit, Judge Clark reversed the dismissal of a pro se complaint that was "obviously home drawn," holding that "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of

action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944). He had warned in 1938, the year the Rules took effect, that "[t]o attempt to make the pleadings serve as [a] substitute [for trial] is in very truth to make technical forms the mistress and not the handmaid of justice." Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U. L.Q. 297, 319 (1938). And he explained Rule 8 to the bar in the plainest terms: "What we require [in Rule 8] is a general statement of the case We do not require detail. We require a general statement." Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958). This Court built its own pro se cases on that foundation. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam) (citing *Conley* and *Dioguardi*).

Twombly retired *Conley*'s standard: "after puzzling the profession for 50 years, this famous observation has earned its retirement." 550 U.S. at 562–63. In its place the Court held that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. *Iqbal* applied the new requirement to every civil action: a complaint must now "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" and deciding plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 556 U.S. at 678–79. The words of Rule 8(a)(2) stayed the same. Their operative meaning did not. A complaint that once survived if it gave fair notice and could be supported by some set of facts now fails unless a judge, drawing on experience and common sense, finds the pleaded facts and inferences plausible before any discovery has been taken. As two leading

scholars of federal procedure put it, the Court "effectively amend[ed] the relevant Federal Rules under the guise of interpretation." Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 Harv. C.R.-C.L. L. Rev. 399, 400 (2011).

B. The Rules Enabling Act forbids amending a Federal Rule by adjudication, and this Court has said so repeatedly.

Congress delegated the power to make the Federal Rules to this Court through a defined process. 28 U.S.C. §§ 2072–2074. The Court has explained what that process means. "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.' § 2072(b)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The Court has bound itself to the same rule: "we are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999).

The Court applied that principle to Rule 8 itself, twice, in the years just before *Twombly*. Refusing to impose heightened pleading on civil-rights claims against municipalities, it held: "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added

specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993). And unanimously again: "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting *Leatherman*, 507 U.S. at 168).

Twombly and *Iqbal* did what *Leatherman* and *Swierkiewicz* said may be done only by amendment, and they did it across the board rather than for one category of claims. *Conley*'s standard was this Court's understanding of Rule 8 and Rule 12(b) (6) as the Rules were adopted and applied for fifty years; under *Ortiz*, that understanding binds the Court until the Rule is changed through the Enabling Act. The change was made instead in an opinion. In the words of Burbank and Subrin, "[s]uch changes are precisely what the Supreme Court told lower courts could not be effected except through the Enabling Act process or by Congress," and "[i]n *Twombly* and *Iqbal*, the Supreme Court side-stepped not only congressional review, but the entire rulemaking process that Congress prescribed, including multiple steps designed to facilitate broad public participation." 46 Harv. C.R.-C.L. L. Rev. at 408.

This matters to validity, not merely to pedigree. A Federal Rule carries a presumption of validity because it passed through that process: a court may refuse to apply a Rule only if "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms

of the Enabling Act nor constitutional restrictions." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The plausibility standard never received that judgment. No Advisory Committee proposed it, no public comment tested it, and Congress never had the chance to review it before it took effect. It operates as a Federal Rule without ever having been one.

C. The plausibility standard abridges the Seventh Amendment jury right that the Enabling Act was written to protect.

The rulemaking power is limited in substance as well as in process. Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Act as originally enacted made the jury right an express limit: in uniting law and equity, "the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 8 (1941) (quoting the Act of June 19, 1934). The Court later quoted the Act as providing that rules "shall preserve the right of trial by jury." *Hanna*, 380 U.S. at 464. And the test for whether a Rule stays within its delegation is "whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them." *Sibbach*, 312 U.S. at 14.

Petitioner's claims carried a jury right. "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194 (1974). The TCPA

creates exactly that: a private action "to receive \$500 in damages for each such violation," trebled for willful violations. 47 U.S.C. § 227(b)(3). Because the case was dismissed before respondent answered, the time to serve a jury demand had not yet begun to run. See Fed. R. Civ. P. 38(b)(1) (demand due "no later than 14 days after the last pleading directed to the issue is served").

The measure of whether a procedure is consistent with the Seventh Amendment is whether it preserves "the basic institution of jury trial in . . . its most fundamental elements," as opposed to "the great mass of procedural forms and details." *Galloway v. United States*, 319 U.S. 372, 392 (1943). Weighing the probability of competing inferences from facts is the most fundamental element of the jury's work. At common law, the only device that could end a case before trial on the pleadings, the demurrer, required the moving party to admit the opponent's facts and inferences; as Professor Suja Thomas has shown from the English sources, "[a]ny inferences for the opposing party, however improbable, were accepted. Whether an inference was probable or not was for a jury to decide." Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 Minn. L. Rev. 1851, 1878 (2008). This Court's own early description of a permissible pretrial device followed the same rule: the facts stated "will be accepted as true." *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320 (1902). *Conley's* "no set of facts" standard matched that baseline. The plausibility standard departs from it. It directs a judge to ask whether the plaintiff's inferences are plausible in light of "judicial experience and common sense," *Iqbal*, 556 U.S. at 679, and to dismiss when an "obvious

alternative explanation" seems more likely, *Twombly*, 550 U.S. at 567. That is the jury's function, reassigned to the judge, before any evidence exists.

This case shows the reassignment at work. The decisive question on Count I was a fact question about respondent's equipment: whether it had "the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1); *Facebook, Inc. v. Duguid*, 592 U.S. 395, 404 (2021) ("the equipment in question must use a random or sequential number generator"). This Court has itself recognized that equipment drawing from a list of known customers may still use such a generator: "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time." *Duguid*, 592 U.S. at 407 n.7. Petitioner alleged an automated system, identified by respondent's own employee as an artificial-intelligence assistant, sending identical scripted messages months apart. The district court did not accept those allegations and the inferences they support. It drew the opposite inference, that petitioner's number "was not automatically or randomly generated, but selected from information defendant possessed," and on that inference held it "apparent" that petitioner "cannot establish" the element. App. 17a–18a. It then made the dismissal permanent. Whether respondent's system had the statutory capacity is knowable only from respondent's system; as one court put it, "no plaintiff will have personal knowledge of the defendant's telephone system at the pleadings stage—only the defendant will have that knowledge." *Libby*, 551 F. Supp. 3d at 729. Under the common-law baseline, the court had to take petitioner's inference as true and leave

its probability to a jury. Under the plausibility standard, the court weighed it against a competing inference and ended the case.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007), does not answer the question. *Tellabs* sustained a pleading standard that Congress itself enacted for securities-fraud claims, reasoning that "Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim." *Id.* at 327. That rationale has no application to a transsubstantive standard announced by this Court under a delegation that forbids abridging substantive rights. And *Tellabs* addressed the Seventh Amendment only in a footnote observing that "[i]n numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment," citing the exclusion of expert testimony under *Daubert*. *Id.* at 327 n.8. The footnote did not examine the common-law demurrer, and it did not involve the Enabling Act. The question presented here has never been decided.

D. The question is recurring, important, and only this Court can answer it.

The plausibility standard governs every civil action filed in or removed to a federal court. Its consequences fall hardest where information is in the defendant's hands. The Tenth Circuit itself has acknowledged the chief criticism of the standard: where information is asymmetric and the defendant holds all the evidence, a plaintiff will need discovery before he can plead plausibly. *See Gee v. Pacheco*, 627 F.3d 1178 (10th Cir. 2010). As the Third Circuit observed in the first year after *Twombly*, "[f]ew issues in civil procedure jurisprudence are more

significant than pleading standards, which are the key that opens access to courts." *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). And plausibility review "formally asks judges—for the first time since the advent of the Federal Rules—to engage in a merits-based analysis at the pleading stage based on their 'judicial experience and common sense,'" with "only the factual allegations in the complaint at their disposal." Alexander A. Reinert, *The Burdens of Pleading*, 162 U. Pa. L. Rev. 1767, 1769 (2014).

Autodialer claims illustrate the problem with unusual clarity. Congress made private suits the primary enforcement mechanism of the TCPA and placed them in the state courts in the first instance. 47 U.S.C. § 227(b)(3). Since *Mims* held that federal courts share jurisdiction, defendants can remove those suits, as respondent did here, into a forum where the plausibility screen applies. The decisive element after *Duguid*, the capacity of the defendant's equipment, is information the plaintiff cannot have. And the courts of appeals that have resolved the capacity question on a developed record did so after discovery. See *Panzarella*, 37 F.4th 867 (summary-judgment record); *Beal*, 29 F.4th 391 (same). The Tenth Circuit has never decided whether list-based equipment that uses a generator to set dialing order is covered, and the district courts have divided over the question. See *Scherrer v. FPT Operating Co.*, No. 19-cv-03703-SKC, 2023 WL 4660089, at *3 (D. Colo. July 20, 2023) (collecting cases discussing footnote 7 of *Duguid*). Yet the claim here was ended on the pleadings, with prejudice, on an inference against the plaintiff. If a "plausibility" screen honestly applied cannot let through an allegation that a car dealership sent identical automated texts to a customer list, the standard is not

measuring plausibility at all. Automated messaging is among the most common conduct in commercial life; that is why Congress legislated against its abuse.

Only this Court can resolve the question. Lower courts are bound by *Twombly* and *Iqbal*, as both courts below said. The validity of a standard this Court created, under a statute that delegates rulemaking to this Court, is a question no other court has authority to settle. It has been debated in the scholarship since *Twombly* was decided, see, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 Wis. L. Rev. 535; Thomas, *supra*, but it has never been presented to and decided by this Court. This petition presents it on a record consisting of nothing but a complaint.

II. The forfeiture ruling is no obstacle to review, and the way it was applied here is itself a reason to grant.

A. The question was pressed in, and passed upon by, the court of appeals.

This Court's "traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). The rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.* "It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is . . . one of importance to the administration of federal law." *Id.* at 41–42 (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991)).

The first question presented satisfies both halves of that rule. It was pressed: the court of appeals identified petitioner's Seventh Amendment and due-process challenge to *Twombly* and *Iqbal* as "[t]he lone exception" to its inadequate-briefing holding, App. 6a, which is to say the one argument the court found adequately presented. And it was passed upon: the court ruled that "[i]n any event, the Supreme Court has not overturned *Twombly* or *Iqbal*; they remain controlling law, and like the district court, we are bound to apply them." *Id.* at 7a. That is a ruling that the standard governs notwithstanding petitioner's challenge. It is the only ruling a court of appeals could make, and it is why the question must be decided here.

Forfeiture of an argument in a lower court is not a jurisdictional bar. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), and "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below," *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Ibid.*

B. Requiring a district-court objection to a standard the district court had already declared closed, after telling petitioner to raise it on appeal, leaves no forum at all.

The court of appeals faulted petitioner for not challenging *Twombly* in the district court. But the district court could not have granted that challenge; the court

of appeals said as much when it observed that, "like the district court," it was "bound to apply" *Twombly* and *Iqbal*. App. 7a. The purpose of requiring an objection below is to give the first court a chance to correct its own error. No district court can correct this one.

And the district court did have the challenge before it. In his opposition to the motion to dismiss, petitioner directed the court to his pending action challenging "the obscene difficulties involved in modern pleading" and asked the judge to read that complaint "to see how the complaints contained within match the Motion to Dismiss at debate in this case." D. Ct. Doc. 25 ¶ 40. That complaint, pending before the same judge, challenged the plausibility standard of *Twombly* as a denial of the Seventh Amendment jury right and asked the court to restore *Conley*. Roberts Compl. ¶¶ 13–24, 33–38; *id.* at 53 (Prayer ¶ 4). A pro se filing is "to be liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Liberally construed, petitioner's opposition put the challenge before the very judge who decided this case.

That judge then ruled on it. Eight weeks after dismissing this case, the district court dismissed *Roberts*, holding that "[w]hether *Twombly* was correctly decided has, obviously, been resolved by the Supreme Court in that case," that the propriety of a dismissal in "a particular case" must be "resolved in those cases," and that "his remedy is to appeal the disposition in the particular case." Order at 2, *Trupia v. Roberts* (W.D. Okla. Sept. 30, 2025). The order named this case. *Id.* at 2 n.1. Petitioner did what he was told. On appeal in the particular case, he was told the argument came too late.

The two rulings, taken together, describe a closed loop. The district court will not hear the challenge because this Court has decided it and because it belongs in an appeal; the court of appeals will not hear it because it was not raised in the district court and because this Court has decided it. Neither court suggested where a litigant could present the question, and none exists below this Court. More than a century ago, this Court held that a scheme that conditions access to judicial review in a way that leaves the litigant no practical path "is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question." *Ex parte Young*, 209 U.S. 123, 148 (1908). That case concerned penalties rather than preservation rules, but the principle is the same: a condition on review that "work[s] an abandonment of the right" cannot be the reason a right goes unadjudicated. *Id.* at 147. A preservation rule applied so that no court ever reaches a pure question of law that only this Court can decide is not a rule that promotes the ends of justice. *Hormel*, 312 U.S. at 557.

The court of appeals' alternative requirement that petitioner have argued for plain-error review by name, App. 7a (citing *Richison*, 634 F.3d at 1131), does not change the analysis. Whether applying the plausibility standard was error at all is the very question only this Court can answer. And the Tenth Circuit's own precedent recognizes discretion to reach a forfeited argument where "the issue was purely a question of law." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993) (collecting cases). The validity of a pleading standard is as pure a question of law as there is.

III. The decision below inverts the duties this Court places on courts toward unrepresented litigants.

A. Liberal construction and the opportunity to amend are duties of the court.

A pro se complaint, "however inartfully pleaded," is held "to less stringent standards than formal pleadings drafted by lawyers," and allegations that meet that standard "are sufficient to call for the opportunity to offer supporting evidence." *Haines*, 404 U.S. at 520–21; *Hughes v. Rowe*, 449 U.S. 5, 9–10 (1980) (per curiam). Two weeks after *Twombly*, this Court summarily vacated a Tenth Circuit judgment that had affirmed the dismissal of a pro se complaint as "conclusory," explaining that the holding "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review," and that "[s]pecific facts are not necessary." *Erickson*, 551 U.S. at 90, 93. Leave to amend "shall be freely given when justice so requires," and "[i]t is too late in the day, and entirely contrary to the spirit of the Federal Rules of Civil Procedure, for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman*, 371 U.S. at 181–82. A plaintiff facing a Rule 12(b)(6) motion "is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon," procedures that "alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond." *Neitzke v. Williams*, 490 U.S. 319, 329–30 (1989). And the Federal Rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam).

The Tenth Circuit has embraced these duties in its own terms. "[T]he plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint." *Hall*, 935 F.2d at 1110. Dismissal of a pro se complaint "is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001). A careful judge explains a pleading's deficiencies, so that a litigant with a meritorious claim can then file an adequate complaint. *See Gee v. Pacheco*, 627 F.3d 1178 (10th Cir. 2010). And before dismissing with prejudice, a court must consider whether a lesser measure will serve, so that an unrepresented party does not lose access to the courts over a technicality. *See Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162–64 (10th Cir. 2007) (reversing dismissal with prejudice of a pro se complaint).

Every one of these is a duty the court owes on its own motion, precisely because an unrepresented litigant does not know to demand it.

B. The courts below enforced the litigant's obligations and none of the court's.

Count I was the claim *Hall* describes: allegations that, if they lacked anything, lacked a detail about equipment that only the defendant could supply. Petitioner asked for leave to amend. D. Ct. Doc. 25, at 23. The district court did not address the request. It did not explain what a sufficient pleading would contain. It drew the decisive inference against petitioner and dismissed with prejudice. App. 17a–18a.

Count II was dismissed on a theory respondent never advanced. Respondent argued only that the messages were informational and consented to. App. 19a–20a. Petitioner had pointed out that respondent never addressed the count. D. Ct. Doc. 25 ¶¶ 27, 43(a). The court nonetheless decided the count on a different ground, found it "patently obvious" that petitioner could not prevail, and dismissed with prejudice without notice of the theory or any opportunity to respond. App. 20a. Whatever the ultimate answer to the question the court raised for itself, the procedures *Neitzke* describes, notice of the legal theory and a chance to meet it, were not afforded. 490 U.S. at 329–30.

On appeal, petitioner identified each of these rulings as error. He challenged the inference against him on Count I and the demand for equipment detail before discovery (Issues 1–4), the sua sponte dismissal of the prerecorded-voice claim (Issues 11, 42), and the dismissal with prejudice without leave to amend, citing *Foman* (Issue 12). Opening Br. 3–7, 12. The court of appeals did not reach any of it. It held everything waived under Federal Rule of Appellate Procedure 28(a)(8)(A) because the issues were listed without developed argument. App. 5a–6a. The circuit precedent it relied on recognizes "discretion . . . to delve for substance in a pro se pleading," which that court declined to exercise only because the briefs there contained "no argument of substance" and a "scurrilous tone." *Garrett*, 425 F.3d at 840. The court did not explain why the same discretion should not be exercised here, where the errors were identified with specificity and the governing authority was cited.

The result is that the duties *Haines*, *Erickson*, *Foman*, and *Neitzke* place on the court went unperformed in the district court, and their non-performance went unreviewed because the unrepresented litigant did not brief the court's failure to perform them with enough polish. A rule that requires the unrepresented party to argue, in lawyerly form and on pain of waiver, that the court failed to give him the protections he was owed because he is unrepresented, turns those protections inside out. That conflicts with this Court's decisions. Sup. Ct. R. 10(c).

C. The cumulative effect is a denial of meaningful access to the courts.

"[W]ithin the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (internal quotation marks omitted). The Due Process Clause "requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." *Tennessee v. Lane*, 541 U.S. 509, 523 (2004). The federal government is held to no lesser standard; "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); see *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (collecting decisions grounding access to the courts in, among other sources, "the Fifth Amendment Due Process Clause"). The adequacy of a procedure turns on "the private interest that will be affected," "the risk of an erroneous deprivation of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards," and the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Consider the procedures this unrepresented litigant met, each lawful when viewed alone. He filed in the state court that Congress named in § 227(b)(3); respondent removed the case into a forum governed by the plausibility standard. The decisive element turned on facts only respondent possessed. His request to file electronically, the tool every lawyer in the case used, was struck as moot. App. 12a, 21a. His request to amend was never addressed. His claims were dismissed with prejudice on an inference against him and, as to one claim, on a theory no party raised. His challenge to the standard was sent to the court of appeals by the district court, and turned away by the court of appeals for not having been presented in the district court. His identification of every other error was held waived for want of polish. And he files this petition on paper, because this Court's electronic filing system is open only to members of its Bar. Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System ¶ 2 (Mar. 2026).

Under *Mathews*, the private interest, a statutory damages claim triable to a jury, is real. The risk of erroneous deprivation is at its height when a claim is ended permanently on a judge's inference about facts the defendant alone holds. The additional safeguards are ones the law already requires: take the allegations as true, explain what is missing, and permit one amendment. Their cost is trivial. This Court has held that ordinary considerations of cost and convenience cannot, by themselves, justify a State's failure to provide meaningful access to the courts. See *Tennessee v. Lane*, 541 U.S. 509 (2004). What happened here is not a series of

unfortunate rulings in one case. It is how the system now operates for people who cannot afford lawyers, and it warrants this Court's review.

IV. This case is an appropriate vehicle.

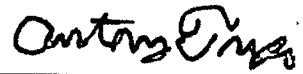
The questions are purely legal and the record is a complaint. No fact is disputed, because no fact was ever found. The plausibility standard was outcome-determinative: Count I was dismissed because the court weighed petitioner's inference against a competing one, and it could not have been dismissed under the standard *Conley*, *Haines*, and *Dioguardi* applied. The forfeiture and waiver holdings that prevented review below are not independent obstacles to review here; they are the subjects of the second and third questions presented. The decision below is unpublished, but the rules it applied, *Garrett's* inadequate-briefing waiver and *Richison's* plain-error requirement, are published circuit law applied to unrepresented litigants as a matter of course, and the first question is the same in every civil case in every federal court. This Court has repeatedly taken up pleading questions on the petitions of unrepresented litigants, including in *Haines*, *Hughes*, and *Erickson*, the last on review of the same court of appeals.

If the Court does not grant plenary review of the first question, it should at a minimum grant the petition, vacate the judgment, and remand for the court of appeals to address petitioner's challenges to the dismissal of Counts I and II with prejudice and without leave to amend, cf. *Erickson*, 551 U.S. at 94–95 (vacating and remanding).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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