NO. _____

In the Supreme Court of the United States

JOHN GARLAND, ET AL.,

Petitioners,

v.

NEW YORK CITY FIRE DEPARTMENT, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When are pleadings sufficient to state a claim under the standard set in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and applied in a broader context in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)? Did the courts below apply that standard appropriately here, where the Court found that the plaintiffs failed to plead information that was, by its nature, available to plaintiffs only after discovery? Is it time for the Court to revisit the controversial *Iqbal/Twombly* pleading standards or limit their application?

2. Have employees who received a hearing only after an adverse employment action received adequate due process when they did not have an opportunity to challenge a new work requirement before being suspended for not meeting that requirement?

3. When is it proper for a court to deny leave to amend? Did the courts below deny it appropriately in this case, where the court indicated that plaintiffs pled a plausible case for violation of state law, but did not include stand-alone state law claims, and where the court acknowledged that a sham process for religious accommodations to a vaccine mandate would violate due process, and plaintiffs described the process and implied that it was a sham, but did not use the word "sham" to describe it until their reply brief?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

John Garland; Vincent Bottalico; Timothy A. Heaton; Joseph Bevilacqua; Joseph Cicero; Joseph Columbia; Andrew Costello; James Daniel Daly, III; Vincent Defonte; Kenneth DeForest; Salvatore DePaola; Brian F. Doyle; Nathan Evans; Christopher Filocamo; Kevin Garvey; Charles Guarneiri; Daniel J. Oshea; Margot Loth; Michael Lynch; Dennis O'Keeffe; Brian Patrick Smith; Kurt Pflumm; Christopher Raimondi; Paul Schweit; Joseph T. Johnson; David Button; Paul Parr; Mark Sinclair; Daniel Baudille; John Dreher; Thomas Olsen; Giuseppe Robert Penoro; Matthew Connor; Nicholas Mullgan; Randall Santana; Anthony Perrone; Scott Ettinger; Anthony Mastropietro; Rashaad Taylor; Anthony Ruggiero; Joseph Murdocca; Keith Klein; Paul Vasquenz; Mark Henesy; Ryan K. Hall; Jude Pierre; Michelle Santiago; Robert DiTrani; Brian T. Denzler; Michael McGoff; Christopher Infante; George J. Murphy; Thomas Fejes; John Costello; Brandon Phillips; Joseph DePaola; Brendan McGeough; Jason Charles; Anthony C. Cardazone; Owen Fay; Michael Fadda; Joseph M. Palmieri; Jared Dychkowski; John Twomley; Matt Koval; Glenn Clapp; Robert Yuli; Matthew Sinclair; Tim Rivicci; John Armore; Michael Samolis; Felicia J. Tsang; William John Saez; Rosario Curto; David Summerfield; Kevin Erkman; Bernadette Mejia; Daniel Young; Sean Fitzgerald; Craig Leahy; Daniel Stroh; Stephen Inguagiato; Stephen Buttafucco; Phillip J. Darcey; Ainsley Atwell; and Rodney Colon

Respondents and Defendants-Appellees Below

New York City Fire Department; Daniel A. Nigro; John Doe #1-10; Jane Doe #1-10; City of New York; Henry Garrido; District Council 37, AFSCME AFL-CIO, Local 2507; District Council 37, AFSCME AFL-CIO, Local 3621; and District Council 37, AFSCME AFL-CIO

CORPORATE DISCLOSURE STATEMENT

The petitioners are all individuals. There are no corporate petitioners.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Second Circuit

No. 23-663

John Garland, et al., *Plaintiffs-Appellants*, v.
New York City Fire Department, et al.
Defendants-Appellees

Date of Final Order: February 6, 2024

U.S. District Court, Eastern District of New York

No. 21-cv-6586

John Garland, et al., *Plaintiffs*, v.
New York City Fire Department, et al., *Defendants*

Date of Final Judgment: March 31, 2023

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Garland, et al., request that this Court issue a writ of certiorari to allow the Petitioners to seek reversal and remand of the decisions below.

OPINIONS BELOW

The United States District Court for the Eastern District of New York Division at Brooklyn on March 29, 2023, granted Respondents' motion to dismiss for failure to state a claim upon which Relief could be granted. (App.16a). On February 6, 2024, the Second Circuit affirmed (App.1a), which is unpublished as *Garland v. New York City Fire Dep't*, 2024 U.S. App. LEXIS 2651 (U.S. App. Ct. 2nd Cir. Feb. 6, 2024).

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 2024. (App.1a). Justice Sotomayor granted an extension to file this petition through July 5, 2024. (Sup. Ct. No. 23A971). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VII

> 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

U.S. Const. amend. XIV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules Enabling Act, 28 U.S.C. §§ 2071-2077

> **§ 2071**
>
> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appro-

priate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

[. . .]

Fed. R. Civ. P. 15(a)

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course no later than:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs are eighty-six members of the New York City Fire Department ("FDNY" or the "Department") who were in good standing when the City of New York (the "City") announced its COVID-19 vaccination requirement on October 20, 2021. That announcement required City employees, including members of the FDNY, to receive one of the available COVID-19 vaccinations by October 29, 2021. If they had not received a vaccination, the firefighters were subject to Leave Without Pay status ("LWOP") and/or termination.

According to the Taylor Law, N.Y. Civil Service Law § 200 *et seq.*, the City was required to bargain with its civil service unions regarding the vaccine requirement.

The City entered into no such negotiations, however, before mandating the vaccine, with the exception of District Council 37, AFSCME AFL-CIO ("DC37"), which was the sole bargaining agent for FDNY employees engaged in emergency medical services. DC37 negotiated an agreement whereby the Department could terminate members who had not received the COVID-19 vaccination by December 1, 2021.

As part of its implementation of the vaccine mandate, the City offered accommodations for religious or medical reasons if the employees submitted requests by October 27, 2021. At the time of its Amended Complaint, which plaintiffs filed on January 5, 2021,

77 plaintiffs had requested an exemption from the vaccine, and zero had received one. Of these, 71 had received an outright denial, and six were awaiting an initial determination. The remaining plaintiffs objected to the vaccine but had no means of challenging the requirement before being subject to LWOP status and/or termination. FDNY placed all of the plaintiffs on LWOP status.

B. Procedural History

The firefighters sued for injunctive relief on November 24, 2021, which the District Court for the Eastern District of New York denied on December 6, 2021. They filed an amended complaint on January 5, 2022, which requested a declaratory judgment against the DC37 agreement and added conspiracy claims under 21 U.S.C. § 1983. The District Court granted Defendants' motion to dismiss on March 29, 2023. (App.18a) The District Court denied plaintiffs leave to amend their complaint on the grounds that amendment would be futile. (App.48a)

Plaintiffs appealed the decision to the Second Circuit Court of Appeals. The Court held arguments on January 9, 2024, and issued a decision on February 6, 2024. (App.1a)

Acknowledging that the plaintiffs have a constitutionally protected property interest in their pay and continued employment with the FDNY, the Second Circuit focused on whether the plaintiffs received constitutionally adequate process when they were deprived of that interest. (App.6a)

The Court found that, although "[t]he plaintiffs advance a plausible argument that the process by which the NYFD imposed and enforced the vaccine

mandate violated state and municipal law [. . .] the plaintiffs have not raised stand-alone state-law claims in this action; rather, they have invoked alleged violations of state and municipal law only to support their federal due-process claim." It went on to uphold the District Court's denial of the opportunity to amend. (App.8a-9a)

The Court continued by conceding that, "if the accommodation process was indeed a sham—that is, if the NYFD or the city-wide panel indiscriminately denied all or most meritorious accommodation requests—that might indeed violate the requirements of the Due Process Clause, pursuant to which the opportunity to be heard must be granted in a meaningful manner." (App.11a) (citations omitted). It ruled, however, that "[n]either the plaintiffs' amended complaint nor their briefing indicates whether the accommodation requests that were denied were frivolous or meritorious." (App.12a). It concluded that "the plaintiffs have failed to state a claim that the putative class members who requested accommodations were denied due process." *Id.* As noted above, the Court also foreclosed on the possibility of amendment.

Finally, with respect to the plaintiffs who had no religious objection or medical contraindication to the vaccine, the Court found that, although they were "entitled to an opportunity to argue that they could not be terminated for refusing to take the vaccine because the implementation and enforcement of the vaccine mandate violated New York law," they received an opportunity to do so, because, "as their counsel conceded at oral argument, the plaintiffs had the opportunity to raise this issue in an Article

78 proceeding, and some NYFD employees have in fact done so successfully." *Id.*

REASONS FOR GRANTING THE PETITION

Sixty-two years ago, this Court issued a decision in the case of *Foman v. Davis*, 371 U.S. 178 (1962). There, in circumstances similar in procedural posture to the case at hand, the Court reversed a decision finding that the plaintiff, a daughter seeking her claimed share of her mother's estate, had erred in filing two notices of appeal, which the First Circuit dismissed.

In reversing the appeals court, this Court opined that, "[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 [. . .] mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id* at 181-82.

As the case at hand demonstrates, in the intervening years since *Foman*, pleading has devolved into just the thing this Court rejected so forcefully: a game of skill, or in this case luck or hide-the-ball, where one misstep turns out to be decisive to the outcome of claims recognized as viable that eighty-six FDNY firefighters brought in order to protect their livelihoods.

The decision below illustrates how the *Iqbal/Twombly* standard has become an impossible bar for certain plaintiffs to clear, in this case where the plaintiffs happen to hold disfavored and minority views on controversial topics.[1] It is an illustration of how far the reality of its application deviates from the standard set in the Federal Rules of Civil Procedure and from long-established expectations for the

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[1] William A. Galston, *Vaccine mandates are more popular than you think*, BROOKINGS, August 5, 2021, at https://www.brookings.edu/articles/vaccine-mandates-are-more-popular-than-you-think/ ("64% of Americans now support mandatory vaccinations for everyone, and 70% support them as a requirement for boarding airplanes."); Christen Gall, *Most Americans continue to support vaccine mandates — and want more*, NORTHWESTERN NOW, October 13, 2021, at https://news.northwestern.edu/stories/2021/10/survey-shows-most-americans-continue-to-support-vaccine-mandatesand-want-more/ ("Recent polling shows that most Americans continue to support his mandates so far — and 65% support a universal mandate."); Adriel Bettelheim, *POLITICO-Harvard poll: Most Americans support vaccine mandates for schoolkids*, POLITICO, October 08, 2021, at https://www.politico.com/news/2021/10/08/poll-support-vaccine-mandates-students-515657 ("Nearly three in four Democrats favor a vaccine mandate for the students while 59 percent of Republicans are opposed."); Lew Blank, *POLL: Voters Overwhelmingly Support Vaccine and Mask Mandates*, DATA FOR PROGRESS, August 19, 2021, at https://www.dataforprogress.org/blog/2021/8/19/voters-overwhelmingly-support-vaccine-and-mask-mandates ("Clear majorities of voters also support vaccine mandates for public transit staff, restaurant and grocery staff, mail carriers and delivery service workers, politicians and government employees, and construction workers . . . "); Uncredited, *Most Americans support vaccine mandates in certain public spaces, survey finds,* UCHICAGO NEWS, August 23, 2021,, at https://news.uchicago.edu/story/most-americans-support-vaccine-mandates-certain-public-spaces-survey-finds ("More than half of Americans support vaccination requirements for government workers, members of the military, and workers who interact with the public, like at restaurants and stores.")

accessibility of relief for plaintiffs—standards that are rooted in the Bill of Rights.

The decision below also fails to apply the standard for the due process requirements for the deprivation of property interests in the 14th Amendment. This case provides the opportunity to re-assert those standards and their proper application.

Finally, the courts below refused the Plaintiffs leave to amend their complaint despite acknowledging that, if the Plaintiffs had only added one or two claims or one or two facts, they would have a case against their employer, a state actor whom they allege violated their due process rights. This Court in *Foman* had something to say about amendments as well, when it stated, "[i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be freely given." *Foman*, 371 U.S. 182 (1962). In so refusing leave to amend, the courts below offered conflicting justifications for their refusal, and therefore failed to adhere to any standard for amendment. This case provides an opportunity for this Court to affirm a clear standard for the circumstances when amendment is appropriate.

I. THE COURT SHOULD NOT HAVE DISMISSED THIS COMPLAINT UNDER FRCP 12(B)(6) BECAUSE THE *IQBAL* STANDARD IS IN NEED OF CLARIFICATION, LIMITATION, OR OVERTURNING, AND BECAUSE THE PLAINTIFFS MET THE FLAWED *IQBAL* STANDARD.

A. The Plausibility Requirement Held to Apply to All Pleadings in *Ashcroft v. Iqbal* Should Be Overturned or Limited to the Facts of That Case.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007), citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). Notice pleading was the general pleading standard until *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), wherein the Court mandated that a complaint must contain factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*, at 663.

Iqbal has set the federal pleading standards in conflict with many state pleading standards, with prominent voices in legal academia, and with the 7th Amendment itself. More importantly, it has caused mass confusion for federal court plaintiffs and handed too much power to courts to dismiss disfavored topics and plaintiffs. It is time either to retire or limit the bounds of the opinion.

1. Courts Apply the Plausible Pleading Standard Inconsistently Because It Lacks Objective Guidance and Leaves Federal Court Plaintiffs Unsure of What Standard Exists.

There is no objective criteria under *Iqbal*'s plausibility standard to guide plaintiffs in determining what they need to plead to survive a motion to dismiss. Quite the opposite, as the Court in *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 609–10 (Tex. App. 2017) acknowledged, the lone guidepost for determining plausibility is judicial "experience and common sense." *Id.*, citing *Iqbal*, 556 U.S. 679 (2009). The plausibility standard according to this telling is a subjective standard that will naturally vary from judge to judge, as each judge's experience is different, as is each judge's idea of "common sense." In practice, the plausibility requirement unfairly asks only whether a judge believes a claim will succeed, based on the pleadings, and permits dismissal where the judge does not believe in the claim.

The elements of the test for determining plausibility under the *Iqbal* standard lead to the same problem. Under *Iqbal*, first, Courts are to disregard "conclusory allegations," after which, if the remaining "non-conclusory allegations" by themselves are sufficient plausibly to suggest an entitlement to relief, then the complaint survives a motion to dismiss. Unfortunately, *Iqbal* offers no objective criteria to determine what constitutes a "conclusory allegation." Whether an inference follows from the facts alleged is also a subjective determination.

Jurists and advocates will often disagree about whether an inference is warranted or "conclusory."

For an allegation of fact to be "conclusory," it is also necessary that the judge doubt the inferential link that the pleader believes exists. Meier, Luke (2012) "Why Twombly is Good Law (But Poorly Drafted) and Iqbal will be Overturned," INDIANA LAW JOURNAL: Vol. 87: Iss. 2, Article 5. The term "conclusory" will only arise in the context of pleadings when the person reading the pleading disagrees with the factual inferences that the pleader believes are warranted. *Id.* One court's "warranted conclusion" is another's "conclusory allegation." *Id.* Put differently, the determination as to whether an allegation is "conclusory" or "plausible" are analytically one and the same. *Id.* Both ask only whether the judge believes the allegation.

The subjectivity of the plausible pleading standard leaves federal court plaintiffs to guess what is, or more accurately what a court will later determine to be, required of their pleadings. In practice, the plausibility standard encourages judges to impose *ad hoc* pleading requirements believed to make the claims "plausible." Federal court plaintiffs have no reliable means of anticipating these requirements. This case demonstrates this conundrum.

2. State Courts Throughout the Nation Have Expressly Rejected the Application of the Plausibility Standard in State Court Pleadings.

Several high courts of the individual states have refused to adopt the plausibility standard as a requirement of pleading in their state courts. These include but are not limited to:

- Tennessee, *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422 (Tenn. 2011)

- Washington, *McCurry v. Chevy Chase Bank, FSB*, 169 Wash. 2d 96, 233 P.3d 861 (2010)
- Minnesota, *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598 (Minn. 2014)
- Hawaii, *Bank of Am., N.A. v. Reyes-Toledo*, 143 Haw. 249, 428 P.3d 761 (2018), as corrected (Oct. 15, 2018)
- Iowa, *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012)
- *Delaware, Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del.2011)
- West Virginia, *Roth v. DeFeliceCare, Inc.*, 226 W.Va. 214, 700 S.E.2d 183, 189 n. 4 (2010).

The Supreme Court of Tennessee offers analysis in line with this Petition. "[T]he *Twombly* and *Iqbal* decisions reflect a significant and substantial departure from the United States Supreme Court's prior interpretations of Fed. R. Civ. P. 8 and the seventy-year history of a liberal notice pleading standard as envisioned by the Federal Rules of Civil Procedure and recognized in *Conley*." *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011). The *Webb* court continued:

> The result of this change has been a loss of clarity, stability, and predictability in federal pleadings practice. *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems,* 95 IOWA L. REV. 821, 832 (2010) ("The two cases profoundly changed the law of pleading by adopting a

> procedural mechanism without precedent in the law. No prior model exists to help us understand how to test factual sufficiency now."); Miller, *A Double Play,* 60 DUKE L.J. at 2, 21–22 ("*Twombly* and *Iqbal* have destabilized both the pleading and the motion-to-dismiss practices as they have been known for over sixty years. . . . Most significantly, the decisions have unmoored our long-held understanding that the motion to dismiss simply tests a pleading's notice-giving and substantive-law sufficiency."); Seiner, *The Trouble With Twombly,* 2009 U. ILL. L.REV. at 1038 (observing that *Twombly* "has already generated significant confusion and conflicting decisions in the appellate courts").
>
> [. . .]
>
> " . . . [A] number of commentators and observers have noted the possibility that the *Twombly/Iqbal* standard requiring a demonstration of plausibility at the pre-discovery phase of the case results in the disproportionate dismissal of certain types of potentially meritorious claims that require discovery to be proven, including actions for violations of civil rights, employment discrimination, antitrust, and conspiracy."

Webb v. Nashville Area Habitat for Human., Inc., 346 S.W.3d 422, 431, 434 (Tenn. 2011).

Fifteen years after *Iqbal*, the confusion over the pleading standards remains. Many of the high courts of the various states agree that the plausibility stan-

dard is not warranted at the pleading stage. For this reason, the Court should re-examine its holding in *Iqbal* or at least the permissible reach thereof.

3. The Plausibility Requirement Threatens Plaintiffs' Seventh Amendment Rights.

As the Tennessee Supreme Court noted in *Webb*, the *Iqbal* standard, which requires "the trial court to scrutinize and weigh the well-pleaded facts to determine if they present a plausible claim" and allowing the Court to dismiss it because it is not plausible in light of its "judicial experience and common sense," implicates that state's constitutional mandate that "the right of trial by jury shall remain inviolate." *Webb*, 346 S.W.3d 432 (Tenn. 2011)(citing Tenn. Const. art. I, § 6).

Similarly, the Seventh Amendment to the United States Constitution reads, "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 same concerns that the Tennessee Supreme Court raised in the context of that state's own constitution apply as forcefully to the Seventh Amendment of the United States Constitution. Plausibility does not ask whether a plaintiff demanded a jury trial. In the context of a jury demand, as here, plaintiffs are often denied that "preserved right" without having the opportunity to gather evidence and build a factual record. In this case, facts that were unavailable to the plaintiffs would have helped to demonstrate

whether the religious accommodation process was frivolous or meritorious.

This Court should grant certiorari to consider the impact of the plausible pleading standard on the right to a jury trial preserved in the Seventh Amendment.

4. Overturning or limiting *Iqbal* does not require overturning *Twombly*, as it is Possible to Read *Twombly* to Apply Only to Claims Brought Under § 1 of the Sherman Act.

Twombly left open the question of whether the newly discussed plausibility standard applied to all pleadings in federal court, which *Iqbal* later answered in the affirmative. *Twombly*, however, was an antitrust case brought under the Sherman Act, in which the Court explicitly stated, "This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). The *Twombly* Court continued, "In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." The *Twombly* decision, then, can be limited to claims brought under § 1 of the Sherman Act. Since *Iqbal* was necessary to extend the plausibility standard discussed in *Twombly*

to all pleadings in federal court, there is no need to overturn *Twombly* to limit the reach of plausible pleading.

If not done away with altogether, the plausible pleading standard is in dire need of defined boundaries. First, if the Court is not inclined to overturn *Iqbal* altogether, the holding can be limited to the facts of that case, requiring plausible pleading where discriminatory intent is alleged against high-ranking federal officials. Second, at least one commentator has urged that *Twombly* plausibility standard can be read as applicable, or "triggered," only where a complaint has first been determined to be deficient under Fed. R. Civ. P. 8(a), and in this way plausibility can be used as a way to save a complaint that otherwise might be factually deficient rather than a way to set aside a complaint that otherwise meets the requirements of Fed. R. Civ. P. 8(a). *See* Meier, Luke (2012) "Why Twombly is Good Law (But Poorly Drafted) and Iqbal will be Overturned," INDIANA LAW JOURNAL: Vol. 87: Iss. 2, Article 5. There are several ways *Iqbal*, *Twombly*, and the plausibility standard can be altered to return fairness to federal court plaintiffs.

5. Applying the Plausibility Requirement to Every Pleading is Tantamount to an Amendment to the Federal Rules of Civil Procedure.

The Rules Enabling Act, 28 U.SC. §§ 2071-2077, gives the Supreme Court the power "to prescribe general rules of practice and procedure" and establishes a formal process for doing so. The Act does not, however, give the Supreme Court the power to amend pleading practice through judicial opinion. Meier,

Luke (2012) "Why Twombly is Good Law (But Poorly Drafted) and Iqbal will be Overturned," INDIANA LAW JOURNAL: Vol. 87: Iss. 2, Article 5. *See also*, for example, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (stating, "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.").

A Court opinion that adds a new requirement for all pleadings in federal court has the effect of an amendment to the Federal Rules of Civil Procedure. Since this Court issued its opinion in *Iqbal*, however, "plausibility" has not been added to either Fed. R. Civ. P. 8 or 12. "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." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). "Indeed, the rulemaking process has important virtues. It draws on the collective experience of bench and bar, *see* 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

Iqbal is a substantial departure from the well-recognized procedure of amending the Federal Rules of Civil Procedure. One further reason to revisit *Iqbal* is that, through the ruling, the Court impermissibly

bypassed the rulemaking procedures necessary to amend the Federal Rules of Civil Procedure.

B. The Courts Below Applied an *Ad Hoc* Pleading Standard to this Case, yet the Plaintiffs Met that Standard.

The Second Circuit's opinion below demonstrates the problem that the subjective plausibility standard of *Iqbal* creates, which is license for courts to impose *ad hoc* pleading requirements that Plaintiffs cannot reasonably anticipate.

As indicated above, the circuit court here stated that, "if the accommodation process was indeed a sham—that is, if the FDNY or the city-wide panel indiscriminately denied all or most meritorious accommodation requests—that might indeed violate the requirements of the Due Process Clause, pursuant to which the opportunity to be heard must be granted in a meaningful manner." (App.11a) (citations omitted). It ruled, however, that "[n]either the plaintiffs' amended complaint nor their briefing indicates whether the accommodation requests that were denied were frivolous or meritorious." (App.12a) It concluded that "the plaintiffs have failed to state a claim that the putative class members who requested accommodations were denied due process." *Id, citing Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016) ("The Court must . . . consider[] whether the 'factual content' 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'") (citations omitted). Due to this alleged defect, the Second Circuit upheld the district court's dismissal.

The Court here is faulting the plaintiffs and denying their claims because they did not use certain specific phrases that the Court had in mind but were not discoverable until after the motion to dismiss phase of the proceedings. The critical issue here is the lack of notice to Plaintiffs of what is required of their pleading. If a judge simply disbelieves a claim, she can state any reason or any missing word, phrase, or concept to find that a complaint lacks plausibility because plausibility lacks objective criteria. The opinion below demonstrates this problem. There is no precedent for Plaintiffs to follow, nor does the Second Circuit cite any, that would have alerted Plaintiffs to know that the proper words to use, and the *only* words to use, were "meritorious" and "frivolous." It was not enough to describe something that was frivolous in enough detail to demonstrate its frivolity and then call it a "sham." Plausibility in practice is a subjective *ad hoc* standard.

Iqbal's subjective plausibility standard leaves plaintiffs with no reasonable means of determining what standard they are actually attempting to meet, and they are thus left to guess. It disadvantages federal court plaintiffs, and this explains why the plausibility standard has been expressly rejected by numerous high courts of the individual states. The time to reexamine the standard has come.

II. THE COURT DEVIATED FROM THE ESTABLISHED STANDARD FOR DETERMINING THE PROCESS DUE FOR A DEPRIVATION OF PROPERTY RIGHTS IN FINDING THAT DUE PROCESS WAS ADEQUATE WHERE THERE WAS NO PRE-HEARING PROCESS.

In analyzing plaintiffs' procedural due process claims, the Second Circuit started by noting this

Court's distinction between claims based on established state procedures and claims based on random, unauthorized acts by state employees. *See*, *Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986).

When a deprivation occurs in the context of established state procedures rather than random acts, "the availability of postdeprivation procedures will not, *ipso facto*, satisfy due process." *Hellenic Am. Neighborhood Action Comm. v. City of N.Y.*, 101 F.3d 877, 880 (2d Cir. 1996), *citing Hudson*, 468 U.S. at 532 (1984); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982).

Here, the court contradicted established precedent in doing essentially just that, ruling that the availability of postdeprivation procedures satisfy due process *ipso facto*. Although the Court stated that, "[t]he firefighters without a religious objection or medical contraindication to prevent them from taking the vaccine were nonetheless entitled to an opportunity to argue that they could not be terminated for refusing to take the vaccine because the implementation and enforcement of the vaccine mandate violated New York law," it ruled that, "[g]iven the availability of subsequent judicial review under Article 78, the city did not violate the plaintiffs' right to due process by not affording an opportunity to make this argument prior to being terminated or placed on LWOP status." (App.12a)

Citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985), the Second Circuit quotes this Court to say, "a pre-termination hearing does not purport to resolve the propriety of the discharge, but

serves mainly as a check against a mistake being made by ensuring there are reasonable grounds to find the charges against an employee are true and would support his termination." (App.13a).

Loudermill, however, stood explicitly for the rule that a pretermination hearing is "necessary." *Loudermill*, 470 U.S. 545 (1985). This was also the essential holding of previous Second Circuit precedent, (*See, e.g.*, *Locurto v. Safir*, 264 F.3d 154, 173 (2d Cir. 2001)("[D]ue process guarantees notice and a hearing prior to the termination of a tenured public employee.")

Other precedent has acknowledged that "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780, 1787-88 (1988). In applying that standard, this Court has applied a three-part test to determine what process is constitutionally due. *Gilbert v. Homar*, 520 U.S. 924, 931-32 (1997) (citations omitted) ("[T]o determine what process is constitutionally due, we have generally balanced three distinct factors: First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest.") That analysis is absent here—the Second Circuit did not apply the proper standard in this case, and they reached the wrong result.

III. THE COURT SHOULD HAVE GRANTED LEAVE FOR PLAINTIFFS TO AMEND THEIR COMPLAINT.

The Courts below, especially the Second Circuit, should not have foreclosed on the possibility of amendment. Its refusal to do so provides this Court an opportunity to further clarify when a Court ought to allow for amendment.

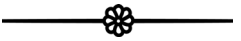
FRCP 15(a) provides that, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

Here the decision below from the Second Circuit put a fine point on the justice of allowing the plaintiffs to amend: it identified state claims that would be plausible if brought and identified (App.8a-9a) and federal claims that would be plausible with more information about their merits. (App.11a-12a) It is furthermore "the usual practice upon granting a motion to dismiss to allow leave to replead" in the Second Circuit *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

The District Court in this case denied amendment, reasoning that amendment would be futile. The Second Circuit Court, however, went on to demonstrate how an amendment would result in a viable pleading, but denied the possibility for amendment, claiming that the plaintiffs had enjoyed ample opportunity to develop viable pleadings.

The reality, however, is that the information the Circuit Court found plaintiffs to be lacking—namely information about the meritoriousness or frivolity of the religious accommodations process—is information that plaintiffs could best develop after a chance for

discovery, which has not happened here. Furthermore, the focuses on federal due process claims as opposed to state claims as the case moved through the preliminary injunction stage into the first amended complaint is understandable, and leave for an amendment in order to focus more intently on the state claims that the Second Circuit identified as viable would serve the ends of justice better than a result that leaves viable claims on behalf of these 86 FDNY firefighters identified but unexplored and undeveloped.



CONCLUSION

This Court should grant this Petition for Writ of Certiorari because this case demonstrates the extent to which federal pleading has devolved into a game in which plaintiffs must pass through a gauntlet of subjective criteria in order to have claims heard, that the reviewing courts themselves admit would be meritorious with only a few adjustments. This Court has the chance to correct these circumstances on behalf of 86 of New York's finest.

Respectfully submitted;

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