No. 24-1052

IN THE

Supreme Court of the United States

OPEN JUSTICE BALTIMORE, *et al.*,
Petitioners,

v.

BALTIMORE CITY LAW DEPARTMENT, *et al.*,
Respondents.

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

BRIEF FOR SCHOLARS OF CIVIL PROCEDURE AND FIRST AMENDMENT ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI CURIAE[1]

Amici are scholars whose research and teaching focus on civil procedure, including pleading standards; an organization that provides legal assistance at no charge to individuals who have had their rights violated, including First Amendment rights; and a nonprofit,

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief at least 10 days prior to its due date.

nonpartisan organization dedicated to defending freedom of speech, freedom of the press, and the people's right to know. Their expertise is relevant to the impacts of the legal issue in this case on civil procedure and the First Amendment. Amici also have a strong professional interest in the proper disposition of cases involving civil procedure and ensuring the efficient disposition of meritorious legal claims. They write separately to address the circuit splits regarding alternative explanations, the goals and purposes of the Federal Rules of Civil Procedure throughout history, and the detrimental impact that the Fourth and Ninth Circuit standards, if allowed to stand, will have on plaintiffs who suffer from informational disadvantages when filing a complaint.

The following amici are scholars of civil procedure who submit this brief in their individual capacities and include their affiliations for identification purposes only:

- Suzette Malveaux, Washington and Lee School of Law
- Maureen Carroll, University of Michigan Law School
- Charlton C. Copeland, University of Miami School of Law
- Deseriee Kennedy, Touro Law Center
- Portia Pedro, Boston University School of Law
- Victor Quintanilla, Indiana University Maurer School of Law

The following amici are organizations that defend First Amendment rights:

- First Amendment Coalition
- The Rutherford Institute

SUMMARY OF ARGUMENT

In the decision below, the Fourth Circuit improperly placed the burden on plaintiffs to rule out defendants' proffered obvious alternative explanation. Under this Court's decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *National Rifle Ass'n of America* v. *Vullo*, 602 U.S. 175 (2024), a motion to dismiss should be denied if the plaintiff has plausibly stated a claim, drawing all inferences in the plaintiff's favor. If the defendant offers an obvious alternative explanation, that explanation is only relevant to the extent it renders the plaintiff's claim implausible. However, the Fourth Circuit here concluded the obvious alternative explanation was itself a sufficient basis to dismiss, simply because it was consistent with the alleged facts.

The Fourth Circuit's decision conforms to the Ninth Circuit's exacting approach, which requires a plaintiff to plead facts affirmatively raising doubt about obvious alternative explanations proffered by a defendant. *In re Century Aluminum Co. Securities Litigation*, 729 F.3d 1104, 1108 (9th Cir. 2013). In contrast, the Second, Eighth, and D.C. Circuits all correctly consider obvious alternative explanations as only one consideration in the larger question of whether plaintiff's theory of liability is plausible. *See L-7 Designs, Inc.* v. *Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011); *McDonough* v. *Anoka Cnty.*, 799 F.3d 931, 953-954 (8th Cir. 2015); *Strike 3 Holdings, LLC* v. *Doe*, 964 F.3d 1203, 1211 (D.C. Cir. 2020).

The Fourth Circuit's approach conflicts with the original scheme designed by the drafters of the Federal Rules of Civil Procedure. Rule 8's pleading standard was intended to alleviate the burdens of the then-existing common-law and code-pleading regimes. These

systems were complex, technical, and often resulted in the premature dismissal of meritorious claims. To remedy these challenges and enable meaningful access to the courts, the Federal Rules drafters set forth a liberal pleading standard that did away with rigid procedural rules. The Fourth Circuit's approach strays from that original scheme by imposing heightened pleading requirements whenever a defendant raises an obvious alternative explanation.

The Fourth and Ninth Circuits' standards have particularly detrimental consequences for plaintiffs disadvantaged by informational asymmetries. Whenever critical information is in the sole possession of the defendant before discovery, placing the burden on the plaintiff to plead facts tending to rule out an obvious alternative explanation would preclude meritorious claims. This is precisely what the drafters of the Federal Rules of Civil Procedure meant to prevent. And numerous Circuits have diverged from the Fourth Circuit's approach here by recognizing that parties cannot be expected to plead facts they lack at such an early stage in the proceedings.

The Court should review the Fourth Circuit's decision and clarify that plaintiffs do not bear the burden to rule out alternative explanations when they state an otherwise plausible claim.

ARGUMENT

The petition raises the important question of which party bears the burden of showing or refuting an obvious alternative explanation raised by a defendant in a motion to dismiss under Federal Rule of Civil Procedure

12(b)(6).[2] Amici support petitioners' position that a defendant should bear the burden of showing that its explanation renders the plaintiff's theory implausible. Certiorari is appropriate to establish that a plaintiff does not bear the burden of ruling out an alternative explanation as a threshold requirement to establish plausibility.

Here, the Fourth Circuit improperly required petitioners to not only plead facts establishing the plausibility of their claims, but also to plead facts that would tend to rule out the alternative explanation proffered by respondents. But under this Court's decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *National Rifle Ass'n of America* v. *Vullo*, 602 U.S. 175 (2024), a motion to dismiss should be denied so long as plaintiffs have plausibly stated a claim. A defendant's alternative explanation is only relevant to the extent that it renders the plaintiff's claim implausible. Requiring plaintiffs to plead facts that rule out an alternative explanation is inconsistent with the Court's requirement that, when considering a motion to dismiss, all reasonable inferences must be drawn in favor of the plaintiff. *See Vullo*, 602 U.S. at 194-195. Rule 8(a) "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" supporting the allegations. *Twombly*, 550 U.S. at 556.

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[2] For brevity, we generally refer to an "obvious alternative explanation" as an "alternative explanation" in the remainder of the brief. Amici take the position that only "obvious" alternative explanations may be properly considered in the motion to dismiss plausibility analysis, *see Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007), but understand that the petition does not raise the issue of what makes an alternative explanation "obvious."

There is a circuit split on the issue. The Fourth Circuit's decision in this case puts the court in the company of the Ninth Circuit, which requires a plaintiff to plead facts affirmatively raising doubt about any proffered alternative explanation. *In re Century Aluminum Co. Securities Litigation*, 729 F.3d 1104, 1108 (9th Cir. 2013).

In contrast, the Second, Eighth, and D.C. Circuits only allow dismissal based on an alternative explanation if the court concludes based on the pleadings in their entirety that the plaintiff's theory of liability is not plausible, even when construed in the plaintiff's favor. *See L-7 Designs, Inc.* v. *Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011); *McDonough* v. *Anoka Cnty.*, 799 F.3d 931, 953-954 (8th Cir. 2015); *Strike 3 Holdings, LLC* v. *Doe*, 964 F.3d 1203, 1211 (D.C. Cir. 2020). The decisions in other Circuits demonstrate ongoing confusion about how to consider alternative explanations as part of a motion to dismiss. *Compare, e.g.*, *Doe* v. *Emory Univ.*, 110 F.4th 1254, 1261 (11th Cir. 2024)*; with Adinolfe* v. *United Techs. Corp.*, 768 F.3d 1161, 1175-1176 (11th Cir. 2014).

The Fourth Circuit's decision here contravenes not only this Court's precedents, but also the original intent of the Federal Rules of Civil Procedure's drafters. The drafters intended that the pleading standard be sufficiently permissive to enable meritorious cases to proceed to discovery, rather than being dismissed at the pleading stage. The risk of premature dismissal for meritorious claims is particularly high when critical facts are in sole possession of the defendant, i.e., when an informational asymmetry exists. A plaintiff may be at an informational disadvantage in many types of cases, including antitrust, civil rights, data privacy, and trade secrets. A plaintiff with a meritorious case should not be penalized for lacking knowledge of facts she cannot access without discovery. *See Cunningham* v. *Cornell*

Univ., ___ S. Ct. ____, 2025 WL 1128943, at *6 (Apr. 17, 2025) (noting it would be "illogical" to require plaintiffs to preemptively plead facts expected to be in defendants' possession). Indeed, this is why numerous Circuits have held that the plausibility standard for pleading must take into consideration how much information is available to the plaintiff. *See Brown* v. *City of Tulsa*, 124 F.4th 1251, 1268 (10th Cir. 2025); *Taylor* v. *Salvation Army Nat'l Corp.*, 110 F.4th 1017, 1029 (7th Cir. 2024); *Ramirez* v. *Paradies Shops, LLC*, 69 F.4th 1213, 1220 (11th Cir. 2023); *Innova Hospital San Antonio, Ltd. Partnership* v. *Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 730 (5th Cir. 2018); *Garcia-Catalan* v. *United States*, 734 F.3d 100, 104 (1st Cir. 2013).

In order to ensure the consistent application of this Court's precedents regarding the proper standard for motions to dismiss, and to set aside the approaches of the Fourth and Ninth Circuits that improperly require a plaintiff to rule out alternative explanations, the Court should grant Certiorari and reverse the Fourth Circuit's decision.

I. In Conflict With This Court's Precedents, The Fourth And Ninth Circuits Place The Burden On Plaintiffs When Weighing Alternative Explanations

In its decision below, the Fourth Circuit improperly placed the burden on the plaintiffs to rule out defendants' alternative explanation. The Fourth Circuit erred in relying on defendants' alternative explanation to dismiss plaintiffs' case without determining that the explanation made plaintiffs' claims implausible.

Placing such a burden on plaintiffs is inconsistent with the Court's precedents. Under *Twombly* and *Iqbal*, a court must accept a plaintiff's well-pleaded factual

allegations as true and draw all reasonable inferences in favor of the plaintiff. *See Vullo*, 602 U.S. at 194-195. This is true even when a defendant offers an alternative explanation, *id.* at 195, and "even if … actual proof of [the alleged] facts is improbable," *Twombly*, 550 U.S. at 556.

The Fourth Circuit's reasoning also ignored the informational asymmetry between the parties. Rather than recognize that Open Justice Baltimore faced an informational disadvantage when pleading facts about the Baltimore Police Department's policies and practices, the Fourth Circuit faulted Open Justice Baltimore for failing to provide more detail—detail that it reasonably did not have at the pleading stage. Other circuits have denied motions to dismiss under similar circumstances because they do "not require a plaintiff to plead facts over which it has no personal knowledge." *Brown* v. *City of Tulsa*, 124 F.4th 1251, 1268 (10th Cir. 2025); *see infra* Part III.

The Ninth Circuit also improperly places the burden to rule out alternative explanations on plaintiffs. In *In re Century Aluminum Co. Securities Litigation*, 729 F.3d 1104 (9th Cir. 2013), the Ninth Circuit explained that "[w]hen faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation." *Id.* at 1108. Instead, the Ninth Circuit held that "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true" in order to render the claim plausible. *Id.* That is, if a judge concludes that an alternative explanation is consistent with the alleged facts, the claim must be dismissed, regardless of the plausibility of claimant's own theory. Competing explanations that are concurrently

plausible are resolved in the defendant's favor. *Id.* (noting that a claim fails when it "remain[s] stuck in 'neutral territory.'"). Thus, the Ninth Circuit strays from the standard articulated in *Iqbal* and *Twombly* and applied in *Vullo*.

The Ninth Circuit's rule and the Fourth Circuit's approach here are inconsistent with the pleading standards of other circuits. Specifically, the Second, Eighth, and D.C. Circuits permit dismissal based on an obvious alternative explanation only when coupled with the conclusion that the plaintiff's theory of liability is not plausible; they have no requirement that a plaintiff rule out the alternative explanation. *See L-7 Designs, Inc.* v. *Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011); *McDonough* v. *Anoka Cnty.*, 799 F.3d 931, 953-954 (8th Cir. 2015); *Strike 3 Holdings, LLC* v. *Doe*, 964 F.3d 1203, 1211 (D.C. Cir. 2020). Meanwhile, other circuits have conflicting case law demonstrating confusion about how to analyze "obvious alternative explanations." *Compare, e.g.*, *Doe* v. *Emory Univ.*, 110 F.4th 1254, 1263 (11th Cir. 2024) (holding plaintiff must plead facts tending to discredit alternative explanations), *with Adinolfe* v. *United Techs. Corp.*, 768 F.3d 1161, 1175 (11th Cir. 2014) (holding implicitly that plaintiff need not discredit alternative explanations at the pleadings stage).

To the extent that the Court is concerned about screening out meritless claims, *Twombly* and *Iqbal* have already clarified that the pleading standard contains a plausibility component. *Twombly*, 550 U.S. at 570; *Iqbal*, U.S. at 678. Placing a burden on the plaintiff to plead facts that rule out alternative explanations goes well beyond plausibility pleading and the holdings of this Court's decisions. Indeed, it is wholly inconsistent with Rule 8 of the Federal Rules of Civil Procedure and the purpose espoused by the Federal Rules' architects.

II. THE FEDERAL RULES OF CIVIL PROCEDURE WERE INTENDED TO PREVENT RESTRICTIVE PLEADING REQUIREMENTS FROM BLOCKING DETERMINATIONS ON THE MERITS

When the Federal Rules of Civil Procedure were enacted in 1938, their drafters made the deliberate choice to "prioritize[] easy access to the court system and resolution of cases on their merits over procedural gamesmanship." Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C.L. Rev. 2403, 2410 (2022) (footnotes omitted).

The Federal Rules marked a distinct shift from the then-existing pleading rules. Under the English common law system that formed the foundation for early American practice, parties were burdened by "rigid and rarefied" pleading requirements. Subrin, *How Equity Conquered Common Law*, 135 U. Pa. L. Rev. 909, 917 (1987). The common-law pleading system had Byzantine rules and numerous writs, each with their own distinct formalities. Lawyers had to use "highly stylized verbal formulations to present even simple grievances." Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 437 (1986). These complexities made it easy for parties to lose meritorious cases for technical reasons; cases were increasingly decided on the adequacy of the pleadings rather than the underlying facts. *Id.* In 1934, a federal judge lamented that "'questions of practice and procedure, not affecting the merits of the question, too often prevent success in a meritorious case. Technicalities of the common law pleading result always in delay and often in miscarriage of justice.'" Subrin, 135 U. Pa. L. Rev. at 958. At the same time, these rigid pleading formulations provided little useful information about a case. *See*

id. Litigation increasingly focused on procedural formalities rather than the underlying facts prompting the lawsuit in the first place.

By the mid-nineteenth century, reformers were urging a break from the common law approach. The first significant reform occurred in 1848 with New York's enactment of the Field Code ("Code"). The Code's advocates hoped it would "eliminate decisions based on technicalities" by codifying and streamlining civil-procedure rules. Marcus, 86 Colum. L. Rev. at 438. In particular, the Code's pleading standard was simplified to a "statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." *An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State*, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521 (repealed). By 1928, thirty U.S. jurisdictions had adopted some form of code pleading. Clark, *Handbook of the Law of Code Pleading* 19-20 (1928).

However, enthusiasm for the Code soon waned as it too became encumbered by technicalities. The trend towards formality is apparent from the length of the Code itself: The Code had only 391 provisions at enactment; by the end of the nineteenth century it had 3441. Subrin, 135 U. Pa. L. Rev. at 940. Contemporary bar committees uniformly described the Code as "too long, too complicated, 'too minute and technical, and lack[ing] elasticity and adaptability.'" *Id.* (brackets in original). Judge Learned Hand critiqued the Code as being "'as barbarous as could well be designed.'" *Id.* at 958.

The Code's pleading standard stood out as particularly unworkable. The Code as interpreted required courts to categorize allegations into one of three buckets:

(1) "allegations of ultimate fact," which were proper, (2) "mere evidence," which were improper, and (3) "conclusions," which were also improper. Marcus, 86 Colum. L. Rev. at 438. The distinctions between these categories were nebulous at best. *Id.*; *see also* Cook, *Statements of Fact in Pleading Under the Codes*, 21 Colum. L. Rev. 416, 417 (1921) (arguing the categories lacked any "logical distinction"). Such formalities continued to prevent meritorious cases from surviving past the pleadings.

Demands for reform continued. For example, one bar committee recommended in 1898 that "'[t]he practice in civil cases should be made so simple and elastic that courts and judges may be able to pass upon the substantive rights of the parties in each case, with as little restraint as is consistent with an orderly administration of justice[.]'" Subrin, 135 U. Pa. L. Rev. at 941. The committee explained that "'[t]he science of statement should not be deemed of more importance than the substance of rights.'" *Id.* And, as Senator Elihu Root observed, the focus on form over substance gave rise to "a class of lawyers whose sole business and reputation is built upon their ability to make use of statutory technicalities whereby delays are practically endless." *Id.* at 959 n.291.[3] These practitioners were frequently accessible only to those who could pay a premium for their services.

The demanding pleading standards of the time also elicited practical concerns. Most especially, procedural unpredictability generated alarm for the business community. In a 1922 House Judiciary Committee hearing, one reformer complained that "'frequently, a sensible man, a business man, a practical business man, sits in the

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[3] *See also* Root, *The Layman's Criticism of the Lawyer*, 20 Va. L. Reg. 649, 660-661 (1915).

courtroom and sees his case thrown out on a technicality that he can not understand.'" Subrin, 135 U. Pa. L. Rev. at 959. As a consequence, it was feared that the business community would shift away from the unpredictable courts and resort to administrative agencies with simpler, more predictable rules instead.

These concerns led to the passage of the 1934 Rules Enabling Act, which authorized this Court to establish rules of procedure and evidence for federal courts. 28 U.S.C. §§ 2071-2077.

In 1935, this Court appointed an Advisory Committee to draft the Federal Rules of Civil Procedure. *Appointment of Committee to Draft Unified System of Equity and Law Rules*, 295 U.S. 774 (1934). Charles E. Clark, Dean of Yale Law School and later Chief Judge of the Second Circuit, was appointed Reporter of the committee and was the "principal draftsman" of the Federal Rules of Civil Procedure. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 283 (1988). Clark was a scholar of civil procedure who maintained a consistent throughline in his writing: "[P]rocedural technicality stands in the way of reaching the merits, and of applying substantive law." Subrin, 135 U. Pa. L. Rev. at 962. In Clark's view, it was unreasonable for "proof of the case to be made through the pleadings." Clark, *The New Federal Rules of Civil Procedure*, 23 A.B.A. J. 976, 977 (1937). Instead, Clark thought the only requirement of the pleading should be to give "a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." *Id.*

"[S]teeped in the history of the debilitating technicalities and rigidity that characterized the prior English and American procedural systems," the Advisory

Committee to the Federal Rules designed Rule 8(a)(2) as "an easily satisfied pleading regime" in which "[r]elatively little was demanded of the plaintiff." Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Defamation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 288-289 (2013). Accordingly, the Committee avoided the artificial distinctions between ultimate facts, mere evidence, and conclusions of law that plagued code pleading.

To illustrate Rule 8(a)(2)'s more permissive pleading standard, the Advisory Committee developed standardized Forms to accompany the Federal Rules. For example, Form 9's sample complaint for negligence was sufficient despite only including four simple sentences regarding jurisdiction, a brief factual account of the events that led to the harm, and the monetary relief sought. Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U.S.C. App., p. 829 (2000). This Court has recognized Form 9 as the exemplar of "'the simplicity and brevity of statement which the rules contemplate.'" *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002). In Clark's view, the Forms were essential to clarifying what was necessary under Rule 8(a)(2)'s succinct language because "when you can't define you can at least draw pictures to show your meaning." Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958). While the Forms are no longer part of the Federal Rules, they still model the intentions of the drafters.

In 1955, the Advisory Committee made what Clark credited as a "final and completely definitive statement" about Rule 8(a)(2)'s meaning. Clark, 12 Wyo. L.J. at 186. In its report to the Supreme Court that year, the Committee explained "[t]he intent and effect of the rules is to permit the claim to be stated in general terms." Advisory Committee on Rules for Civil Procedure, *Report of*

Proposed Amendments to the Rules of Civil Procedure for the United States District Courts 19 (1955). The Committee further explained "the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement." *Id.*

The Rule 8 pleading standard was intended to allow plaintiffs to set forth claims without getting bound up by formalistic rules. As this Court has recognized repeatedly, "the distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation." Miller, 88 N.Y.U. L. Rev. at 288. The Fourth and Ninth Circuit's stringent pleading expectations thus defy the original intent of the Federal Rules drafters. Rule 8(a)(2)'s permissive pleading standard must be given the meaning that its creators and contemporaneous legal practitioners understood at the time of its enactment, which has been affirmed by this Court's precedent.

III. As Many Circuits Have Recognized, Placing The Burden On Plaintiffs To Counteract Alternative Explanations Will Result In The Dismissal Of Meritorious Claims When An Informational Asymmetry Exists

The standards of the Fourth Circuit here and the Ninth Circuit, if allowed to stand, will have a detrimental impact on a plaintiff who suffers from informational disadvantages due to key information residing solely with the defendant. When an informational asymmetry exists, a plaintiff often cannot make the detailed factual pleadings required to rule out the defendant's proffered

alternative explanations. Thus, if the burden is placed on plaintiffs to rule out alternative explanations, a defendant would be able to improperly win dismissal of the complaint even where discovery would show that the plaintiff's allegations were true.

Informational asymmetry presents an obstacle for a plaintiff whenever a claim requires information that is either in the sole possession of the defendant or is more readily available to the defendant. For example, civil rights claims are vulnerable to dismissal because proving intentional discrimination often requires establishing a state of mind or animus, yet often only the defendant has sole knowledge of its subjective motivation before discovery commences. *See* Malveaux, *Front Loading and Heavy Lifting*, 14 Lewis & Clark L. Rev. 65, 87 (2010).

Like with intentional discrimination, allegations of illegal institutional practices (e.g., First Amendment retaliation) may be plausible even when a plaintiff cannot rule out alternative explanations at the pleading stage. This Court recently recognized as much in *Gonzalez* v. *Trevino* where it held that indicia of similarly situated individuals being treated differently are sufficient to survive a motion to dismiss challenging a claim of illegal government conduct, even where alternative explanations existed. *See* 602 U.S. 653, 658 (2024). Without discovery it is often exceedingly difficult, if not impossible, for a plaintiff to plead facts that show intent or pattern of practice while simultaneously tending to rule out alternative explanations. Indeed, this is precisely the situation that petitioners here find themselves in. Pet. 35.

Informational asymmetry is not limited to the civil-rights context. It may occur with claims as diverse as antitrust, criminal conspiracy, digital data protection,

products liability, and trade secrets. In these contexts, the observable facts that spawn litigation are often amenable to multiple interpretations, some of which will give rise to liability and some of which are benign. Malveaux, 14 Lewis & Clark L. Rev. at 87; Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1, 28, 33–34 (2009). Thus, the concrete allegations plaintiffs are able to make may be consistent with both illegal and legal conduct. Despite the plausibility of their allegations, plaintiffs in these circumstances may be unable to plead specific, non-speculative facts that *rule out* an alternative explanation raised by the defendant. Even so, their plausible claims still must survive a motion to dismiss.

Moreover, these claims are often the very kinds of claims that the Rules intended to protect. For example, individual veterans alleging wrongful termination because of their military service and small businesses facing potential intellectual property theft from a larger rival are particularly likely to encounter informational asymmetries when challenging wrongdoing by powerful, established institutions. Indeed, that is precisely the dynamic that occurred here, where plaintiffs sought information relevant to potential wrongdoing by members of the Baltimore police. As the drafters of the Federal Rules of Civil Procedure recognized, such cases must proceed past the pleading threshold in order for individuals to enforce important substantive rights and for effective rule of law.

Consistent with the Federal Rules and this Court's precedents, numerous Circuits have concluded that the factual allegations required to state a claim vary based on the level of information available to the plaintiffs. Consider, for example, *Innova Hospital San Antonio, Ltd. Partnership* v. *Blue Cross & Blue Shield of Georgia, Inc.*, 892 F.3d 719, 730 (5th Cir. 2018), an Employee

Retirement Income Security Act of 1974 ("ERISA") case. When reversing in part the district court's grant of a motion to dismiss as to ERISA plan benefit claims, the Fifth Circuit explained that there exists a "principle that when discoverable information is in the control and possession of a defendant, it is not necessarily the plaintiff's responsibility to provide that information in her complaint." *Id.* The Fifth Circuit recognized concerns that plaintiffs could file a complaint in an effort to go on a "fishing expedition," but still held that the court "must … take account of [her] limited access to crucial information" because, "'[i]f plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the [ERISA] statute will fail, and the crucial rights secured by ERISA will suffer.'" *Id.* at 731 (quoting *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009)) (first brackets in original). The same logic applies to all claims that operate in environments of asymmetrical information. Allowing claims to move forward in such circumstances is necessary to protect the substantive rights provided for by law. *See* Spencer, 109 Mich. L. Rev. at 35 (noting that many public interest claims that reflect public-policy choices involve "suppositions about subjective motivations, states of mind, or concealed activities").

The First Circuit has similarly explained that "some latitude may be appropriate in applying the plausibility standard" to "cases in which a material part of the information needed is likely to be within the defendant's control." *Garcia-Catalan* v. *United States*, 734 F.3d 100, 104 (1st Cir. 2013) (quotation marks omitted). The Seventh, Tenth, and Eleventh Circuits have reached similar conclusions. *See Brown*, 124 F.4th at 1268 ("[W]e do not require a plaintiff to plead facts over which it has no

personal knowledge[.] The plausibility inquiry properly takes into account whether discovery can reasonably be expected to fill any holes in the pleader's case."); *Taylor* v. *Salvation Army Nat'l Corp.*, 110 F.4th 1017, 1029 (7th Cir. 2024) ("Our expectations at the pleading stage must be commensurate with the information available at this pre-discovery stage."); *Ramirez* v. *Paradies Shops, LLC*, 69 F.4th 1213, 1220 (11th Cir. 2023) (finding allegations sufficient in a data breach case in part because plaintiff could not reasonably be expected to know facts about defendant's security vulnerabilities); *see also In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1212 (8th Cir. 2010) ("[A] plaintiff's pleading burden should be commensurate with the amount of information available to them.") (Melloy, J., concurring in part). The First, Fifth, Seventh, Tenth, and Eleventh Circuits have all concluded that when information is limited, drawing all reasonable inferences in favor of the plaintiff requires taking informational asymmetry into account when deciding if a pleading is sufficient.

Similarly, this Court has recognized it would be "illogical" to require plaintiffs to plead facts tending to rule out certain affirmative ERISA defenses because the relevant defenses "turn on facts one would expect to be in the [defendant's] possession." *Cunningham*, 2025 WL 1128943, at *6. In order to prevent the dismissal of otherwise meritorious claims, the Court should again recognize the hurdles information asymmetries pose.

The Court should review the Fourth Circuit's decision so that it can clarify that plaintiffs do not bear the burden to rule out alternative explanations when they state an otherwise plausible claim.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted.

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