14-969

IN THE

Supreme Court of the United States

GREG LANDERS,

Petitioner,

—v.—

QUALITY COMMUNICATIONS, INC., *et al.*,

Respondents.

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

MOTION AND BRIEF OF CIVIL PROCEDURE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF CIVIL PROCEDURE LAW PROFESSORS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Civil Procedure law professors identified in Appendix A respectfully move for leave to file a brief as *amici curiae* in support of the Petitioner. Counsel of record for the parties received timely notice of *amici curiae*'s intent to file this brief as required by this Court's Rule 37.2(a). Counsel for Petitioner consented in writing to the filing of the brief, and their written consent has been lodged with the Clerk's office. Counsel for Respondents stated that they did not consent to the filing of this brief, necessitating the filing of this motion.

Amici curiae have a deep and abiding interest as scholars and teachers in the interpretation and application of the Federal Rules of Civil Procedure, and in particular the rules of pleading. Many *amici* have participated before this Court in amicus briefs regarding pleading and other issues relating to the application and interpretation of the Federal Rules of Civil Procedure. Arriving at a consistent and understandable pleading doctrine is therefore of great interest to *amici*. Our continuing interest in the clarity and simplicity of the rules of pleading has been intensified by the growing confusion created by the perceived changes in the requirements for stating a valid claim.

This confusion is highlighted by the present case, and thus the case affords an excellent opportunity to provide guidance to the lower courts. The Court of Appeals for the Ninth Circuit held that the complaint filed by Petitioner was inadequate be-

cause it did not provide enough specific facts to meet the pleading standard enunciated by this Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Amici* seek leave to file this brief in support of the Petition because the Ninth Circuit's decision is at odds with this Court's decisions in *Twombly* and *Iqbal*, and because lower courts continue to be mired in conflict and confusion over how to apply the decisions in those cases. This case therefore provides this Court with an opportunity to clarify the meaning of those decisions and thereby reduce the uncertainty that lingers over pleading doctrine.

Amici curiae therefore respectfully request that they be granted leave to file the accompanying brief in support of the Petitioner.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars with expertise in civil procedure who have an interest in the proper interpretation of federal pleading standards following *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Amici* file this brief because the decision by the Court of Appeals for the Ninth Circuit in this case cannot be squared with proper pleading doctrine and goes far beyond any reasonable interpretation of this Court's holdings in *Twombly* and *Iqbal*. Certiorari is warranted to correct the Ninth Circuit's application of these cases and to clarify the rampant confusion that has emerged in the lower courts in the wake of *Twombly* and *Iqbal*.

REASONS FOR GRANTING THE PETITION

Amici curiae submit this brief in support of the petition for a writ of certiorari because the Ninth Circuit's decision is a radical application of pleading doctrine, reflecting broad confusion that has arisen in the lower courts concerning the proper application

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[1] As explained in the accompanying motion, counsel of record for the parties received timely notice of *amici curiae*'s intent to file this brief as required by this Court's Rule 37.2(a), but counsel for Respondents did not provide written consent to the filing of the brief. Petitioner had provided written consent to the filing of this brief, a copy of which has been lodged with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, its counsel, or Outten & Golden LLP made a monetary contribution to the brief's preparation or submission.

of this Court's decisions in *Twombly* and *Iqbal*. The instant case involves Petitioner's allegations that Respondents failed to pay overtime wages required by the Fair Labor Standards Act (FLSA). *See* Pet. 3-4. Among other allegations, Petitioner alleged that he regularly worked more than 40 hours per week, but was not paid overtime on these occasions, and that Respondents attempted to obscure this fact by falsifying employment records. App. 51a-53a. The Ninth Circuit held that Petitioner's complaint must be dismissed with prejudice[2] because the complaint did not allege that he had "worked more than forty hours in a *given* workweek without being compensated for the overtime hours worked during that workweek," App. 16a (emphasis added), and did not "estimate the length of [his] average workweek during the applicable period and the average rate at which [he] was paid, the amount of overtime wages [he] believes [he] is owed, or any other facts that will permit the court to find plausibility," App. 17a. Contrary to this Court's admonition in *Iqbal* and *Twombly*, the Ninth Circuit applied a heightened fact pleading standard to FLSA claims, and required more from a FLSA plaintiff at the pleading stage than might be required at trial, given the FLSA's requirement that employers maintain accurate payroll records.

Review of the Ninth Circuit's decision is important for several reasons.[3] First, lower courts

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[2] Because the district court did not specify the nature of the dismissal, it operates as a dismissal with prejudice. *See* Fed. R. Civ. P. 41(b).

[3] The petition and the decision below identify quite clearly the conflict among the circuits that has arisen with respect to

have openly expressed confusion regarding the application of *Twombly* and *Iqbal*, particularly with respect to policing the line between "factual" and "conclusory" allegations. This case presents an ideal opportunity to provide needed guidance to the lower courts. Second, the Ninth Circuit's decision was erroneous, because it ignored the FLSA context in which the instant case arose, and because it insisted on an overly formalistic pleading requirement that betrays this Court's admonition in *Iqbal* and *Twombly* that the Federal Rules do not require the pleading of "specific" facts. *See Twombly*, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, ..."); *see also Iqbal*, 556 U.S. at 686-87 (distinguishing between pleading under Fed. R. Civ. P. 8 and the "particularity" required when pleading matters encompassed by Fed. R. Civ. P. 9(b)). The Ninth Circuit's decision makes pleading a technical game and will take courts further from the merits adjudication that was one of the principal goals of the Federal Rules of Civil Procedure. *See*, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). In sum, the Ninth Circuit's decision applies a heightened pleading standard that finds no home in Federal Rules of Civil Procedure 8 or 12, or in this Court's decisions in *Twombly* and *Iqbal*.

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the proper pleading of FLSA claims. *See* Pet. 15-20; App. 13a-16a. *Amici* therefore will not address that particular division in the lower courts.

I. The Petition Should Be Granted Because Lower Courts Are in Conflict Regarding the Application of Pleading Standards Following *Twombly* and *Iqbal*.

Iqbal and *Twombly* introduced a change in federal pleading standards that had remained formally static for five decades, since this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). Under *Conley*'s regime, complaints satisfied Rule 8(a)(2) so long as they provided fair notice to the defendant of the nature of suit, 355 U.S. at 47–48, and Rule 12(b)(6) was to be invoked in those rare cases in which no viable legal theory supported a plaintiff's claim. *Twombly*, a complex antitrust case, introduced significant change. While *Twombly* did not cast doubt on *Conley*'s fair notice standard – in fact, it quoted that part of *Conley* with approval. 550 U.S. at 555, and also endorsed *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), a decision that applied notice pleading to an employment discrimination complaint – the decision articulated a "plausibility" inquiry, 550 U.S. at 556–57, a term that was new to Rule 12 adjudications. Two years later, *Iqbal* made clear that *Twombly*'s approach applied in all civil cases, not just to antitrust claims or cases in which the costs of discovery were likely to be high and settlement-coercing. 556 U.S at 684.

Iqbal also articulated a two-step process for evaluating the sufficiency of a complaint. First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion. *Id.* at 680-81. Second, courts must conduct a plausibility analysis that assesses the fit between the non-conclusory

facts alleged in the complaint and the relief claimed. *Id.* at 681. The judge may assess plausibility by calling on his or her "judicial experience and common sense," in some cases relying on assessments of the existence of alternative lawful explanations for the conduct alleged in the complaint. *Id.* at 679, 681-82.

Lower courts have experienced difficulty in applying this federal pleading standard, in part because some courts perceive tension between *Iqbal* and *Twombly* on the one hand, and prior decisions—including ones that this Court has continued to cite with approval—on the other. *See*, *e.g.*, *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 254 (2d Cir. 2014) ("Since *Twombly* and *Iqbal, Swierkiewicz*'s continued vitality has been an open question in this Circuit."); *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798, 807 (8th Cir. 2013) ("*Iqbal* says that *Twombly* applies to all civil actions, but *Swierkiewicz* . . . , reaffirmed by *Twombly*, provides that the simplified notice pleading standard of Rule 8(a) likewise applies to all civil actions."); *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, 128 S. Ct. 2101 (2012) ("To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard."); *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 319 n.17 (3d Cir. 2010) (noting disagreement within Third Circuit regarding how to interpret *Swierkiewicz* in light of *Iqbal*); *Swanson v. Citibank,*

N.A., 614 F.3d 400, 403 (7th Cir. 2010) (courts are "still struggling" with how to apply federal pleading standards after *Twombly* and *Iqbal*); *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (noting that *Iqbal* had created tension with prior Circuit cases involving pleading of equal protection claims). On its own, this confusion is sufficient ground to grant certiorari in this case, but as both the Petition and the decision below explain, there also is a deep and acknowledged split among the courts of appeals with respect to how to apply federal pleading standards in FLSA cases. *See* Pet. 15-20; App. 13a-16a.

Although this Court has addressed pleading after *Iqbal*, it has not done so in a case that squarely addresses the confusion lingering in the lower courts. For instance, in *Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289 (2011), the Court cited to *Swierkiewicz* rather than *Iqbal* or *Twombly* when it described the federal pleading standard. *Id.* at __, 131 S. Ct. at 1296 ("Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was 'not whether [Skinner] will ultimately prevail' on his procedural due process claim, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), but whether his complaint was sufficient to cross the federal court's threshold."). But *Skinner* did not principally concern application of the federal pleading standard; rather it raised the question whether a convicted prisoner seeking access to biological evidence for DNA testing could assert that claim via 42 U.S.C. § 1983, or was required to file a petition for writ of habeas corpus. It therefore did not provide a full opportunity for the Court to clarify

pleading standards. And this Term, the Court in *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014), reaffirmed *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), a *Conley*-era pleading case that confirmed that there is no heightened pleading requirement for civil rights claims against municipalities. *Johnson*, 135 S. Ct. at 347 (*citing Leatherman*). But the critical issue in *Johnson* concerned whether a plaintiff had to *specifically identify* the statute under which a claim is brought in order to state a plausible claim. *Id.* *Johnson* did not address in detail the factual sufficiency of the complaint at issue, other than to say that it "stated simply, concisely, and directly events that [plaintiffs] alleged entitled them to damages from the city," thereby accomplishing the purpose of "inform[ing] the city of the factual basis for their complaint." *Id.* In contrast to *Johnson* and *Skinner*, this case presents an ideal vehicle to resolve the confusion that has arisen in the lower courts as to when a complaint's allegations are factually sufficient. The outcome in the Ninth Circuit rose and fell on the question of the sufficiency of Petitioner's factual allegations, not on the legal sufficiency of the pleadings that was central to both *Skinner* and *Johnson*.

Because of the confusion that persists in the lower courts, *amici curiae* respectfully urge the Court to grant the petition for writ of certiorari to clarify the applicable pleading standard with respect to factual sufficiency. Substantial risks stem from ignoring these concerns and allowing lower courts to continue to misinterpret *Twombly* and *Iqbal*. One appeals court judge recently engaged in the "thought experiment" of subjecting the allegations of injury

made by the plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), to an "aggressive[]" plausibility analysis. *McCauley v. City of Chicago*, 671 F.3d 611, 626-27 (7th Cir. 2011) (Hamilton, J., dissenting in part). He began with the following critical allegation from the plaintiffs' complaint in *Brown*:

> The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The respects in which these opportunities are inferior include the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors, tangible and intangible, offered to school children in Topeka. Apart from all other factors, the racial segregation herein practiced in and of itself constitutes an inferiority in educational opportunity offered to Negroes, when compared to educational opportunity offered to whites.
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> Amendment to Paragraph Eight of the Amended Complaint, *Brown v. Board of Education,* 98 F. Supp. 797 (D. Kan. 1951), available at http://www.clearinghouse.net/detail.php?id= 5479 (last visited March 10, 2015).

As Judge Hamilton suggested, a strong argument could be made that the first and third sentences are bare legal conclusions that should be disregarded under *Iqbal*. 671 F.3d at 627. This leaves the middle sentence, which contains some facts but—under a misguided reading of *Iqbal* such as the Ninth Circuit's in the decision below—might be insufficient because there is no detail as to "how the listed items are inferior." *Id.* It should go without saying that if there is uncertainty about whether a case like *Brown* will be dismissed at the Rule 12(b)(6) stage before discovery and a merits determination, this Court should intervene to articulate clearly the federal pleading standard. This case presents the Court with that opportunity.

II. The Petition Should Be Granted Because the Ninth Circuit's Decision Is Not Faithful to this Court's Decision in *Iqbal* and *Twombly*.

The petition for certiorari should also be granted because the Ninth Circuit's opinion is in conflict with both the letter and spirit of *Iqbal* and *Twombly*. First, and most critically, in both decisions this Court disclaimed any intent to adopt a pleading standard requiring the allegation of specific facts. In *Twombly*, for instance, responding to the concern that its approach is in conflict with *Swierkiewicz*, this Court stated that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. And in *Iqbal*, the Court was concerned about a plaintiff pleading "the bare elements of his cause of action" and nothing more. 556 U.S. at 687. Second, this

Court emphasized in *Iqbal* that the plausibility inquiry is context-specific, and must take into account the underlying substantive law. *Id.* at 679. Finally, courts must bear in mind that a complaint is not meant to prove a claim; it simply must allege facts that—when accepted as true—"raise a reasonable expectation that discovery will reveal evidence" satisfying the elements of the legal claim. *Twombly*, 550 U.S. at 556; *see also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) (quoting *Twombly*).

With this guidance in mind, the errors of the Ninth Circuit's opinion are clear. First, the court below faulted Petitioner's complaint for failing to identify the "given" week in which overtime violations occurred, App. 16a,[4] and did not "estimate the length of [his] average workweek during the applicable period and the average rate at which [he] was paid, the amount of overtime wages [he] believes [he] is owed,

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[4] The panel opinion originally found the complaint insufficient because it did not identify the "specific" week in which overtime violations occurred. App. 38a, 40a. The panel then sua sponte issued a new opinion, replacing the word "specific" with "given." App. 3a-4a. That the Ninth Circuit considered this change significant is indicative of the panel's hypertechnical application of *Iqbal* and *Twombly*. The dictionary definition of "given," when used as an adjective as it is in the Ninth Circuit's opinion, is "specified." *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 539 (11th ed. 2003). Although one hesitates to ascribe a motive to an unexplained sua sponte modification of the decision below, one conceivable explanation is that the panel was conscious that this Court had disclaimed any intent in requiring the pleading of "specific" facts. *See Twombly*, 550 U.S. at 570. But engaging in wordplay by replacing "specific" with "given" does not resolve the tension between the decision below and this Court's precedent.

or any other facts that will permit the court to find plausibility," App. 17a. The lower court did not explain how the addition of these facts would enable it to better evaluate the plausibility of the plaintiff's complaint. Certainly, Form 11's negligence complaint, held up as an example of sufficient pleading in *Twombly*, 550 U.S. at 565 n.10, provides no detail as to how the defendant was driving, how damages were calculated, or any number of other facts that might be relevant to a liability and damages assessment. *See* Form 11, Complaint for Negligence, Forms App., Fed. R. Civ. P. Nor did the complaint found sufficient by this Court in *Johnson*. *See* Complaint, *Johnson v. City of Shelby*, No. 10 Civ. 36 (N.D. Miss. March 10, 2010). The Ninth Circuit's approach to plausibility insisted on evidence of liability and appears to be premised on the assumption that a plaintiff must allege all facts that he might reasonably have access to, when that is not the role of the pleading. *Twombly*, 550 U.S. at 556 (a complaint must allege facts that "raise a reasonable expectation that discovery will reveal evidence" satisfying the elements of the legal claim); *Swierkiewicz*, 534 U.S. at 511 ("[I]t is not appropriate to require a plaintiff to plead facts establishing a prima facie case.")

Moreover, in the context of an FLSA case, requiring plaintiffs to identify the specific week in which they were not paid overtime, the amount they are owed, or similar details, runs afoul of the remedial purpose of the statute and is precisely the kind of gamesmanship that the Rules were meant to do away with. If this case were to proceed to trial, and were Petitioner to demonstrate the inaccuracy of the

Respondents' records, Petitioner would satisfy his burden of proof by introducing enough evidence to support a reasonable inference of hours worked. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (when an employer fails to keep accurate time records reflecting hours of work, a plaintiff may "show the amount and extent of that work as a matter of just and reasonable inference"). As many courts have held, this burden can be satisfied by an FLSA plaintiff's estimate of hours worked, whether adduced through testimony or other record evidence. *See Monterossa v. Martinez Rest. Corp.*, No. 11 CIV. 3689 JMF, 2012 WL 3890212, at *5 (S.D.N.Y. Sept. 7, 2012); *Rodriguez v. Almighty Cleaning, Inc.*, 784 F. Supp. 2d 114, 126 (E.D.N.Y. 2011); *Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 13 (D.D.C. 2010). The burden would then shift to the Respondents to come forward with evidence to negate "the inference to be drawn from the employee's evidence." *Anderson*, 328 U.S. at 687–88. The reason for this burden-shifting scheme is that, although an FLSA plaintiff bears the burden of proving "that he performed work for which he was not properly compensated," the "remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee." *Id.* at 687.

The Ninth Circuit's rule would impose an extremely difficult hurdle for FLSA plaintiffs to overcome at the *pleading* stage, when a plaintiff's burden should be lower than the one he would bear at the *proof* stage. FLSA claims may be instituted up to three years after an alleged violation, 29 U.S.C. § 255(a). The Ninth Circuit's decision puts the onus

on a plaintiff, several years removed from the violation in question, to identify the specific week in which overtime was not paid. Moreover, such a rule serves to undermine Rule 8(a)'s purpose, which as this Court held this Term requires only that plaintiffs "state[] simply, concisely, and directly events that [plaintiffs] allege[] entitle[] them to damages." *Johnson*, 135 S. Ct. at 347. The information required by the Ninth Circuit does not provide any additional relevant notice to the defendant of the factual basis for the plaintiff's claim. Moreover, defendants have at least as much access, if not more, to precisely this evidence. And as discussed above, if the defendants do not have adequate employment records, the FLSA establishes a presumption in favor of the correctness of the plaintiff's evidence as to underpayment. *See Anderson*, 328 U.S. at 687. In short, the Ninth Circuit's holding provides a technical ground for securing a dismissal and shielding a defendant from liability that might easily be imposed were the case to proceed to discovery and trial.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for certiorari and vacate the Ninth Circuit's decision.

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MARCH 2015

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