No. 09- 09-729

IN THE

Supreme Court of the United States

CARL MELVIN TOWNES,

Petitioner,

v.

LARRY W. JARVIS, Warden;
GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JUSTIN S. ANTONIPILLAI
Counsel of Record
JOHN A. RACKSON
ADAM J. REINHART
ROBERT A. STOLWORTHY, JR.
ARNOLD & PORTER, LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

227007

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Is the holding of *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), which clarified the pleading requirements for intentional discrimination cases, still good law after this Court's decision in *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937?

PARTIES TO THE PROCEEDINGS

Petitioner is Carl Melvin Townes, petitioner below.

Respondents are Larry W. Jarvis, Warden of the Bland Correctional Center, the correctional facility at which Mr. Townes was imprisoned; and Gene M. Johnson, the Director of the Virginia Department of Corrections; both of whom were respondents below.

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OTHER AUTHORITIES

Carl Melvin Townes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion on rehearing affirming the dismissal of Petitioner's 28 U.S.C. § 2254 petition is published and reported at 577 F.3d 543 (4th Cir. 2009), and is reproduced in the Petition Appendix ("App.") at App. 1a-32a. The opinion of the district court (Hilton, J.) dismissing Petitioner's 28 U.S.C. § 2254 petition is unpublished and is reproduced at App. 33a-47a.

JURISDICTION

The court of appeals issued its opinion on rehearing on August 19, 2009. The Chief Justice granted Petitioner's application for an extension of time to file a petition for a writ of certiorari, extending the due date until December 17, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions are relevant to this case:

28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

> adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Fed. R. Civ. P. 8(a)(2):

> A pleading that states a claim for relief must contain:
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 12(b)(6):

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (6) failure to state a claim upon which relief can be granted.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

INTRODUCTION

To survive a motion to dismiss, a complaint generally must set forth sufficient well-pled facts to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009). However, since at least 2002, it has been clear that in an intentional discrimination case, federal pleading requirements do not mandate that a plaintiff set forth — in the complaint — specific facts demonstrating that the discrimination was *intentional*. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514-15 (2002). *Swierkiewicz* implicitly recognized that those subject to discrimination will rarely, if ever, be able to allege in the complaint specific facts that would, if proven, establish the intent of others who have discriminated.

This case squarely presents an issue on which there currently is a deep and mature conflict among the courts of appeals: in an intentional discrimination case, in light of this Court's decisions in *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544 (2007), and *Iqbal*, what is the pleading standard with respect to intent?[1] On the one hand, some circuits have held that even after this Court's decision in *Twombly*, *Swierkiewicz* remains good law; thus, provided a complaint provides notice of the claim and the grounds upon which it rests, it can allege the intent element in conclusory fashion, including on information and belief.[2] By contrast, other circuits have held that *Swierkiewicz* is no longer good law in light of *Twombly* and *Iqbal*, holding that a complaint alleging intentional discrimination must allege specific facts supporting a plausible inference that the discrimination was, in fact, intentional.[3]

This case presents an ideal vehicle to resolve the deep split among the circuits on this issue. Carl Melvin Townes was denied parole eligibility by the Commonwealth of Virginia, apparently based on that state's "three-strikes" law. Mr. Townes, proceeding *pro se*, filed a habeas corpus petition under

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1. The conflict has developed as a result of this Court's decisions in a quartet of cases. *See Iqbal*, 129 S. Ct. 1937 (2009); *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam); *Twombly*, 550 U.S. 544 (2007); *Swierkiewicz*, 534 U.S. 506 (2002).

2. *Boykin v. KeyCorp*, 521 F.3d 202, 212-16 (2d Cir. 2008); *Ruffin v. Nicely*, 183 F. App'x 505, 513 (6th Cir. May 18, 2006); *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082-85 (7th Cir. 2008); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008).

3. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009); *Townes v. Jarvis*, 577 F.3d 543, 551-52 (4th Cir. 2009) (also reproduced at App. 16a-18a).

28 U.S.C. § 2254, in which he alleged, with a supporting newspaper article, that (1) he is a black male; (2) he was denied parole eligibility based on the state's three-strikes law; (3) at around the same time, another prisoner — a white woman — was granted parole eligibility; (4) the two cases were virtually indistinguishable insofar as they both involved three or four similar robberies within a very short period of time; and (5) the denial of Mr. Townes' parole eligibility "can be seen as deliberate discrimination." (Supplemental Appendix ("Supp. App.") SA1-SA14.) The Fourth Circuit, applying Federal Rule of Civil Procedure 12(b)(6), affirmed dismissal of his petition, holding that with respect to the element of intent, in order to survive a motion to dismiss, Mr. Townes was required to plead specific facts that, if proven, "would demonstrate that the Board *intentionally* discriminated against him." (App. 17a (emphasis in original).) This holding is precisely the opposite of, for example, a recent holding from the Second Circuit — after *Twombly* — that a complaint has sufficiently alleged the intent element if it states "that plaintiffs are African-Americans, described defendants' actions in detail, and alleged that defendants selected plaintiffs for maltreatment solely because of their color." *Boykin*, 521 F.3d at 215 (internal quotations and alterations omitted).[4]

4. Similarly, in the Seventh Circuit, a complaint need only contain "an allegation as simple as 'I was turned down a job because of my race' . . . to plead sufficiently race discrimination in violation of the Equal Protection clause." *Brown v. Budz*, 398 F.3d 904, 916 n.1 (7th Cir. 2005) (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (internal quotations omitted)). This standard has been reaffirmed in decisions subsequent to this Court's opinion in *Twombly*. *See, e.g.*, *Tamayo*, 526 F.3d at 1084.

This is a critically important issue on which there is a deep division among the courts of appeals. This Court should grant a writ of certiorari in this case to resolve this split among the circuits.

STATEMENT OF THE CASE

On May 11, 2004, Mr. Townes, who was proceeding *pro se*, filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia.[5] (Supp. App. SA1.) The *pro se* petition alleges that the Virginia Parole Board violated Mr. Townes' equal protection and due process rights when it found him to be ineligible for parole under Virginia's three-strikes statute. (Supp. App. SA2-SA3.)[6]

Among other things, Mr. Townes' *pro se* petition alleges:

- Mr. Townes is a "black male from the projects of Richmond." (Supp. App. SA4.)

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5. His case was subsequently transferred to the United States District Court for the Eastern District of Virginia.

6. Virginia Code section 53.1-151(B1) provides that "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole." Va. Code Ann. § 53.1-151(B1). Mr. Townes was convicted on two counts of robbery by the presenting of firearms, and one count of simple robbery — thus he was ineligible for treatment under the three-strikes statute.

- Between October of 1991 and February of 1992, Mr. Townes was convicted of, and was sentenced on, two counts of robbery by the presenting of a firearm and one count of simple robbery, arising from three crimes committed over a 10-day span. (Supp. App. SA1, SA9-SA11.)

- After he began serving his sentence, the Virginia Department of Corrections ("VDOC") determined that he was not eligible for parole under the state's three-strikes statute, even though only two of his convictions qualified for consideration under that law. (Supp. App. SA9-SA10.)

- On March 5, 2002, Mr. Townes appealed this determination to the Virginia Parole Board, which affirmed the VDOC's parole ineligibility determination based on the Virginia three-strikes statute. (Supp. App. SA9.)

- He was not convicted of three qualifying offenses, and all three of his offenses were part of a "common scheme." (Supp. App. SA10.)

- Another prisoner who was in the custody of VDOC, Sue Kennon, was a "white, middle class female." (Supp. App. SA10.)

- Ms. Kennon had been convicted of four robberies by the presenting of firearms that took place over a period of eight days. (Supp. App. SA10, SA13-SA14.)

- The Virginia Parole Board determined Ms. Kennon to be parole eligible based on its finding that Ms. Kennon's four qualifying offenses should be considered as a common scheme. (Supp. App. SA10.)

- The facts of Ms. Kennon's case were similar to his own, but Ms. Kennon received more favorable treatment from the Virginia Parole Board. (Supp. App. SA4, SA11.)

- The "refusal of the [Virginia Parole] Board to grant Petitioner the same form of consideration can be seen as deliberate discrimination." (Supp. App. SA11.)

- Because he had been treated less favorably on account of his race and gender, the Virginia Parole Board had violated his equal protection rights. (Supp. App. SA11.)

On October 4, 2004, the Commonwealth filed a motion to dismiss Mr. Townes' habeas petition. On February 17, 2005, the United States District Court for the Eastern District of Virginia granted the motion and dismissed Mr. Townes' petition. (App. 37a.) In its memorandum opinion, the court acknowledged Mr. Townes' allegation that he had been treated differently than Ms. Kennon, but held that Mr. Townes had "not asserted that he was similarly situated to any other prisoner for the purposes of determining parole eligibility." (App. 43a.)

Still proceeding *pro se*, Mr. Townes appealed the district court's dismissal, and the court of appeals appointed the undersigned counsel of record to represent Mr. Townes on appeal. The court of appeals twice heard oral argument, and on July 22, 2009, issued an opinion affirming the district court's ruling.[7] On August 5, 2009, Mr. Townes petitioned the court of appeals for rehearing and rehearing *en banc*. On August 19, 2009, the court of appeals granted Mr. Townes' petition for rehearing and issued a revised opinion affirming the district court's dismissal of Mr. Townes' habeas petition.[8]

In its revised opinion, the court of appeals acknowledged that Mr. Townes alleged facts tending to show that he was similarly situated to a white, upper middle-class, female inmate with similar convictions, but who nonetheless was determined to be eligible for parole notwithstanding the Commonwealth's three-strikes statute. (App. 16a.) The court held, however, that Mr. Townes had failed to allege facts sufficient to satisfy the element of intentional discrimination. (App. 16a-18a.) Specifically, the court of appeals held that Mr. Townes' allegation "that his case *can be seen* as deliberate discrimination" was insufficient to satisfy the pleading

7. After the first oral argument, but while his appeal was still pending, Mr. Townes was placed on mandatory parole by the Commonwealth. At the second oral argument, the parties addressed, among other things, whether release on mandatory parole mooted Mr. Townes' claims. The panel majority, over the dissent of one judge, held that it did not. (App. 10a.)

8. The court of appeals neither granted nor denied Mr. Townes' petition for rehearing *en banc*, and instead issued its mandate on September 10, 2009.

standard required for the element of intentional discrimination, (App. 17a-18a (internal quotations omitted) (emphasis in original)), and held that he must also allege "*facts* . . . supporting the contention that the Board intentionally discriminated against him because of his race," (App. 18a (emphasis in original).)[9]

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9. The court of appeals also held, without explanation, that Mr. Townes had not

> identified any clearly established *federal* law that prohibits the Board from considering conduct unnecessary to a conviction as part of its three-strikes determination. Nor has he demonstrated that the state unreasonably determined any facts in applying the governing legal principles to his case. This claim cannot, therefore, provide a basis for habeas relief.

(App. 13a (emphasis in original).) In so holding, the court of appeals did not even acknowledge the overwhelming authority holding that an unreasonable application of state law may, in and of itself, give rise to a *federal* due process violation if it infringes on a protected liberty interest. *See, e.g., Douglas v. Buder*, 412 U.S. 430, 431-32 (1973) (per curiam) (holding that state's determination purporting to support its revocation of parole was "so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"); *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) ("[T]he federal, constitutional question is whether [a state law error] is 'so arbitrary or capricious as to constitute an independent due process . . . violation.' " (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990))); *Cummings v. Sirmons*, 506 F.3d 1211, 1237 (10th Cir. 2007) ("[T]he United States Supreme Court has suggested that, in rare circumstances, a determination of state law can be so arbitrary or capricious as to constitute an independent due process violation." (internal quotations and alterations omitted)); *Sanna v. Dipaolo*, 265 F.3d 1, 11-12 (1st Cir. 2001) ("[A] state law or practice that betrays a fundamental principle of justice offends the Due Process Clause. . . . Thus, a state court's error in

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Mr. Townes now seeks review of the judgment of the court of appeals.

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Mature Circuit Split On The Pleading Standard Applicable To Intentional Discrimination Claims.

As discussed below, there is a deep conflict among the courts of appeals on the current pleading standard for intentional discrimination claims, and a brief discussion of this Court's recent jurisprudence on pleading standards provides helpful context to how the split has arisen and deepened.

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applying a state rule sometimes can have constitutional implications.... That in turn, may afford a basis for federal habeas relief." (internal citations omitted)); *Smith v. Horn*, 120 F.3d 400, 414-15 (3d Cir. 1997) (holding that a state may generally define the elements of a state criminal offense as it sees fit, but the Fourteenth Amendment's Due Process Clause prohibits the state from disregarding these elements when convicting a person of that offense); *Mack v. Caspari*, 92 F.3d 637, 640 (8th Cir. 1996) ("[A] contention that a state court has applied a procedural rule arbitrarily to a defendant's prejudice may state a federal constitutional due process violation...."); *Ballard v. Estelle*, 937 F.2d 453, 456 (9th Cir. 1991) ("Mr. Ballard's claim that his sentence violated California sentencing laws because a different definition of 'personal use' of a firearm was used than California has adopted in other cases sets forth a cognizable federal habeas corpus claim based on the due process clause of the Fourteenth Amendment."). Mr. Townes alleged that the Virginia Parole Board's application of the state's three-strikes law was objectively unreasonable, arbitrary, and capricious, in violation of his federal due process rights. Such an allegation does indeed state a federal claim capable of review in a Section 2254 petition.

A. This Court Has Issued Several Recent Decisions Concerning Pleading Requirements.

Recent years have seen a flurry of decisions from this Court concerning pleading standards in civil cases. In 2002, this Court held that a plaintiff alleging intentional discrimination need only comply with the "simplified notice pleading standard" under the Federal Rules of Civil Procedure. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002). There, a court of appeals had affirmed dismissal of a complaint alleging employment discrimination under Title VII because the complaint did not allege facts supporting an inference that the employer had acted intentionally. *Id.* at 509. This Court reversed, holding that the complaint only had to provide fair notice of the claim and that plaintiff had done so by alleging that he was terminated on the basis of his national origin and age and providing some details of the surrounding events. *Id.* at 514. The opinion for the Court criticized the pleading standard imposed by the court of appeals:

> Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Id. at 511-12.

Five years later, in *Bell Atlantic Corp. v. Twombly*, this Court held, in the context of an antitrust case, that the factual allegations in a complaint must be sufficient to state a claim that is "plausible on its face," not merely "conceivable." 550 U.S. 544, 570 (2007). *Twombly* expressly rejected an earlier standard, established in *Conley v. Gibson*, under which " 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 561 (quoting *Conley*, 355 U.S. 41, 45-46 (1957)). The opinion for the Court in *Twombly*, in *dicta*, reaffirmed *Swierkiewicz*'s continued vitality in a passage the courts of appeals have struggled to apply since its publication:

> *Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements. Even though *Swierkiewicz*'s pleadings detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination, the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting

> that Swierkiewicz allege specific facts beyond those necessary to state his claim and the grounds showing entitlement to relief. Here, in contrast, 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.

Id. at 570 (internal quotations and citations omitted). Days later, in *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), this Court held, in the context of a *pro se* complaint, that "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.' " 551 U.S. at 93. This Court explained that a *pro se* plaintiff need not allege "[s]pecific facts" and "need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.' " *Id.* (quoting *Twombly*, 550 U.S. at 555 (internal quotations to *Conley* omitted)).

Twombly and *Erickson* resulted in extensive discussion by a number of courts of appeals on whether the holding of *Swierkiewicz* was still good law. *See* discussion in Section I.B., *infra*. Then, most recently, in *Ashcroft v. Iqbal*, this Court expanded and elaborated on *Twombly*, outlining a "two-pronged" approach under which, first, a court should identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and, second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." __ U.S. __, 129 S. Ct. 1937, 1950 (2009). In *Iqbal*, the respondent alleged that high-level government

officials "adopt[ed] a policy approving restrictive conditions of confinement for post-September-11 detainees until they were cleared by the FBI." *Id.* at 1952 (internal quotations to complaint omitted). The respondent alleged this action was taken "on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution." *Id.* at 1944. Critically, in *Iqbal*, the respondent's "complaint [did] not show, or even intimate, that petitioners purposefully [detained individuals] due to their race, religion, or national origin." *Id.* at 1952; *see also Al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009) ("In reviewing the complaint in *Iqbal*, the Court noted that the complaint did not contain any factual allegations claiming that Mueller or Ashcroft may have intentionally discriminated on the basis of race or religion."). Instead, the respondent alleged only that the Government had enacted a policy that resulted in disparate treatment. *Iqbal*, 129 S. Ct. at 1951-52. This Court emphasized that "petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic." *Id.*

Because the respondent in *Iqbal* did not allege intentional discrimination, *Iqbal* did not present or resolve whether *Swierkiewicz* was still good law. Indeed, the opinion for the Court in *Iqbal* does not discuss, criticize, overrule, cite, or even mention *Swierkiewicz*. As discussed below, the result has been a deep conflict in the courts of appeals on whether *Swierkiewicz* is still good law after *Twombly*.

B. There Is Disagreement Among The Circuits On Whether *Swierkiewicz* Remains Good Law.

A writ of certiorari is warranted because there is a concrete split among the circuits regarding whether this Court's decision in *Swierkiewicz* remains good law in light of the Court's recent pleading standards decisions. Specifically, as discussed below, the Third and Fourth Circuits have held, either explicitly or implicitly, that *Swierkiewicz* is no longer good law, but the Second, Sixth, Seventh, and District of Columbia Circuits have all affirmed *Swierkiewicz*'s continued vitality. It is thus not clear whether a plaintiff must allege specific facts supporting a plausible inference of intent in an intentional discrimination case, or whether a plaintiff may instead allege intent in a conclusory manner provided that other details — like protected status and the discriminatory act — are supported by well-pled facts.

This case squarely presents the issue. In *Townes*, the Fourth Circuit held that a plaintiff must do more than conclusorily allege intentional discrimination in order to satisfy the element of intent. In the opinion below, the court of appeals affirmed dismissal of Mr. Townes' equal protection claim, concluding that Mr. Townes "failed to allege facts sufficient to satisfy the second element of [a race- or sex-based equal protection] claim — intentional discrimination." (App. 16a.) Although the court acknowledged Mr. Townes' allegation that the Board treated him differently from a similarly-situated white woman, and his allegation that this " '[could] be seen as deliberate discrimination,' " (App. 15a, 17a-18a (quoting complaint)),

the court of appeals held that these allegations were insufficient to state an equal protection claim because Mr. Townes failed to allege additional facts supporting an inference of discriminatory intent, such as "a 'consistent pattern' of intentional discrimination by the Parole Board" or " 'contemporary statements by decisionmakers' evidencing intentional discrimination by the Board," which this Court has noted *may prove* intentional discrimination. (*See* App. 18a (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977))).) By requiring additional factual allegations relating to intent beyond stating that one was intentionally discriminated against, the Fourth Circuit implicitly held that *Swierkiewicz* is no longer the controlling standard for plaintiffs alleging civil rights violations.[10]

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10. The Fourth Circuit, in *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 346 (4th Cir. 2006), *reh'g en banc denied*, 467 F.3d 378, *cert denied*, 127 S. Ct. 2036 (2007), similarly rejected application of *Swierkiewicz*. There, the plaintiff, a black man, alleged that another employee referred to black individuals as "monkeys" and "apes" in his presence, that he complained to his supervisors about this, and that he was soon thereafter discharged. *Id.* at 336-37. The plaintiff claimed that "his race was a motivating factor in being fired" and, accordingly, that he was discriminated against in violation of 42 U.S.C. § 1981. *Id.* at 344 (internal quotations omitted). The panel majority affirmed the district court's dismissal of the plaintiff's claim because the plaintiff had failed to allege that he was discharged "*because of his race*," notwithstanding his argument that his allegations raised the inference that his managers tolerated or condoned racist remarks, constituting evidence of racial bias. *Id.* at 345. The Honorable Robert B. King dissented, noting that the majority's holding "brought [the Fourth Circuit's]

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In the same vein, the Third Circuit has also held that *Swierkiewicz* is no longer good law. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). In *Fowler*, the court was faced with a district court's dismissal of an employer's complaint alleging disability discrimination. *Id.* at 205. The court had asked the parties "to comment on the continued viability of" *Swierkiewicz* in light of *Twombly* and *Iqbal*, and attempted to reconcile these three decisions. *See id.* at 209-11; *see also id.* at 211 (noting that *Swierkiewicz* and *Iqbal* "both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss"). The court concluded that *Swierkiewicz* had been "repudiated by both *Twombly* and *Iqbal* . . . as it concerns pleading requirements and relies on *Conley*," but further observed that "[t]he demise of *Swierkiewicz* . . . is not of significance" in the Third Circuit because that circuit already applied a

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jurisprudence into direct conflict with the Supreme Court's unanimous decision in *Swierkiewicz*." *Id.* at 357 (King, J., dissenting). Judge King concluded that the plaintiff's "allegation that he was fired for reporting the 'black monkeys' comment 'because he is African-American' cannot be distinguished from Swierkiewicz's allegations 'that he had been terminated on account of his national origin' and 'his age.' " *Id.* at 359. By a 5-5 vote, the Fourth Circuit denied *en banc* review and thereby upheld the panel majority's analysis. Dissenting from the denial of rehearing *en banc*, Judge King, writing for himself and four other members of the court, observed that the panel majority's ruling "contravenes controlling Supreme Court precedent in *Swierkiewicz*," and, "[t]o make matters worse, the majority based its Rule 12(b)(6) ruling on the very reason rejected by the Court in *Swierkiewicz*: that [the plaintiff's] complaint 'rested on his illogical conclusory statement that his race was a "motivating factor" for his firing.' " 467 F.3d at 382 (quoting 458 F.3d at 345).

heightened pleading standard for discrimination claims following *Twombly*. *See id.* at 211 (citing *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315 (3d Cir. 2008)).[11]

The Second, Sixth, Seventh, and District of Columbia Circuits, on the other hand, have continued to apply *Swierkiewicz* in intentional discrimination cases, even after *Twombly*. *See Boykin v. KeyCorp*, 521 F.3d 202, 212-16 (2d Cir. 2008) (applying *Swierkiewicz* and holding that complaint sufficiently stated a claim where plaintiff simply alleged that denial of loan was based on her race and sex); *Ruffin v. Nicely*, 183 F. App'x 505, 513 (6th Cir. May 18, 2006) (holding that plaintiff sufficiently stated race-discrimination claim by alleging that he was an African-American man who applied for, but was not selected to receive, a state contract because he "may be able to uncover direct or indirect evidence of racial animus"); *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (finding "no basis for concluding that *Swierkiewicz* is no longer good law" after *Twombly* "[b]ecause the Supreme Court majority [in *Twombly*] distinguished *Swierkiewicz* and nowhere expressed an intent to overturn it"); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1085 (7th Cir. 2008) (reversing district court's dismissal of Title VII complaint alleging that female plaintiff was paid less than similarly-situated males on account of her sex because the allegations "certainly provide[d] the defendants with sufficient notice to begin to investigate and defend against her claim"); *Aktieselskabet AF 21. November 2001 v. Fame Jeans*

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11. Ultimately, however, the Third Circuit held that Fowler's complaint "alleged sufficient facts to state a plausible" claim. 578 F.3d at 211.

Inc., 525 F.3d 8, 15 (D.C. Cir. 2008) (noting that "[m]any courts have disagreed about the import of *Twombly*" and holding that *Twombly* "leaves the long-standing fundamentals of notice pleading intact");[12] *see also Al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009) (concluding that the *Twombly* Court "reaffirmed the holding of *Swierkiewicz*" and "expressly disclaimed any intention to require general 'heightened fact pleading of specifics' " (quoting *Twombly*, 550 U.S. at 570)).

For example, in *Boykin*, the Second Circuit held that a conclusory allegation of discriminatory intent was sufficient to state a claim for housing discrimination, in violation of the Fair Housing Act. 521 F.3d at 214-15. There, an African-American woman alleged that she was denied a home equity loan, that this was done, in part, because of her race and sex, and that "similarly situated loan applicants who were not in the protected classes received loans and were treated more favorably throughout the loan application process." *Id.* at 214-15. The Second Circuit held that the complaint alleged nothing less than the complaint upheld in *Swierkiewicz*:

> In short, Boykin identified the particular events giving rise to her claim and alleged that she was treated less favorably than other loan

12. Reflecting the confusion among the circuits, another panel of the District of Columbia Circuit called into question *Aktieselskabet AF 21. November 2001. See Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) (stating that the court was failing to reject, although not otherwise addressing, an argument "that *Iqbal* extended *Twombly*, thus invalidating a construction of *Twombly* previously advanced by this court in *Aktieselskabet AF 21 November 2001 v. Fame Jeans*, 525 F.3d 8 (D.C. Cir. 2008)").

> applicants because of her race, her gender and location of her property, just as the complaint in *Swierkiewicz* provided the date and circumstances of the plaintiff's termination and alleged that employees of other nationalities were treated differently than the plaintiff.

Id. at 215. The court also concluded that the more liberal standard for construing *pro se* complaints, as discussed by this Court in *Erickson*, supported its holding that the plaintiff's complaint stated a claim. *Id.*

Similarly, in the Seventh Circuit, a complaint need only contain "an allegation as simple as 'I was turned down a job because of my race' . . . to plead sufficiently race discrimination in violation of the Equal Protection clause." *Brown v. Budz*, 398 F.3d 904, 916 n.1 (7th Cir. 2005) (citing *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). After *Twombly*, the Seventh Circuit "reaffirmed the minimal pleading standard for simple claims of race or sex discrimination." *Tamayo*, 526 F.3d at 1084 (citing *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 (7th Cir. 2007)). The Seventh Circuit appropriately recognizes that " 'once a plaintiff alleging illegal discrimination has clarified that it is on the basis of her race, there is no further information that is both easy to provide and of clear critical importance to the claim.' " *Tamayo*, 526 F.3d at 1084 (quoting *Concentra Health Servs., Inc.*, 496 F.3d at 781-82). Thus, where a female plaintiff alleges that she was paid less than similarly-situated male employees because of her sex, it is "difficult to see what more [plaintiff] could have alleged, without pleading evidence, to support her claim

that she was discriminated against based -- at least in part — on her sex." *Tamayo*, 526 F.3d at 1085. In fact, the Seventh Circuit has applied these principles to a situation nearly identical to Mr. Townes'. *See Pacheco v. Lappin*, 167 F. App'x 562 (7th Cir. Feb. 1, 2006). In *Pacheco*, the plaintiff alleged that the Bureau of Prisons refused to admit him into a substance-abuse program "on the ground that he lacked sufficient documentation, while it accepted white prisoners who had even less documentation." *Id.* at 564. The complaint also identified one such white prisoner who was admitted to the program with less documentation. *Id.* The Seventh Circuit held that, based on the plaintiff's allegations and in light of *Swierkiewicz*, the plaintiff had stated an equal protection claim. *Id.*

On this issue, the holdings of the Third and Fourth Circuits thus conflict with the holdings in the Second, Sixth, Seventh, and District of Columbia Circuits. In other words, in four circuits, Mr. Townes would have clearly stated an equal protection claim,[13] and in two circuits, he probably would not have.[14]

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13. Courts have consistently and routinely held that *Swierkiewicz* applies to equal protection claims. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); *Pacheco*, 167 F. App'x at 564-65; *Perry v. Oltmans*, 106 F. App'x 476, 479 (7th Cir. July 15, 2004); *Kwai Fun Wong v. United States*, 373 F.3d 952, 975 (9th Cir. 2004).

14. The Fourth Circuit also erred by failing to follow *Swierkiewicz*'s holding that a plaintiff need not plead the elements of an *evidentiary* standard to withstand a motion to dismiss. *Swierkiewicz*, 534 U.S. at 510 (holding that "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement"). The Fourth Circuit committed an analogous error by requiring Mr. Townes to allege

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The holding of the Fourth Circuit, if permitted to stand, will have a significant and far-reaching impact. Circumstantial evidence of discriminatory intent is frequently all that victims of discrimination may possess at the outset of litigation. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."). Without *Swierkiewicz*, many valid discrimination claims will never make it past a motion to dismiss. Moreover, Congress has created private rights of action for individuals who are the victims of discrimination in a number of contexts, including

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facts like those this Court described in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977), as sufficient (but not necessary) to demonstrate discriminatory intent. (*See* App. 18a (affirming the dismissal of Mr. Townes' complaint because he did not "allege[] any of the[se] factors").)

Moreover, the Fourth Circuit ignored the well-established rule that *pro se* pleadings must be liberally construed. *See Erickson*, 551 U.S. at 94 ("A document filed *pro se* is 'to be liberally construed,' . . . and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.' " (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))). In fact, the Fourth Circuit went so far as to criticize Mr. Townes for alleging that the Parole Board's action " '*can be seen as* deliberate discrimination' " rather than alleging that "the Board actually did intentionally discriminate against him," (App. 18a (quoting complaint) (emphasis added by Fourth Circuit)), allegations which, to the layperson, would appear identical.

employment (Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.), housing (Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.), voting (Section 2 of the Voting Rights Act of 1965), and state action (Civil Rights Act of 1871, 42 U.S.C. § 1983). In addition to these private rights of action, individuals in state custody frequently have good faith civil rights challenges to their detention deserving of judicial resolution and not merely summary dismissal on a motion to dismiss. Thus, the Fourth Circuit's decision, if allowed to stand, would not only frustrate Congress's purpose in enacting significant legislation to combat discrimination, but would also severely burden victims of discrimination and inevitably deter the filing of, and result in the dismissal of, potentially meritorious lawsuits.

II. This Case Presents An Ideal Vehicle For Review Of These Issues.

This case presents a perfect vehicle through which to resolve this division among the circuits. This Court has jurisdiction to review the decision of the court of appeals, and Mr. Townes' petition was timely, as were each of his prior prayers for relief. The equal protection issue raised by this petition is ripe for decision, Mr. Townes has raised this claim at every stage of the proceedings after the Parole Board's decision, and there are no problems regarding preservation.

In addition, Mr. Townes' appeal is not moot. In that regard, while Mr. Townes' appeal was pending in the Fourth Circuit, he was released on mandatory parole. During his term of supervised release, Mr. Townes must comply with the state-imposed conditions of his parole or risk being returned into custody. After his placement on

supervised release, Mr. Townes has continued to pursue his appeal because a favorable ruling could result in a new hearing before the Virginia Parole Board and a reduction in his term of supervised release. (App. 10a.) As the panel majority below recognized, Mr. Townes continues to suffer an injury in fact, even though he has been placed on supervised release, because the Parole Board's finding of ineligibility may affect the length of his supervised release. (App. 5a.) Furthermore, because the Parole Board "has absolute discretion in matters of parole," it is possible that a favorable ruling by the court would result in the Parole Board modifying Mr. Townes' sentence. (App. 10a (internal quotation omitted).) The panel majority held that this was enough to satisfy the redressibility requirement and concluded that Mr. Townes' appeal was therefore not mooted by his placement on supervised release. (App. 6a-10a.) One member of the panel dissented from the court's holding, and would have held that Mr. Townes' release on parole mooted his habeas challenge. (App. 19a-32a.)[15] Notwithstanding one panel member's dissent on this issue, it is clear that Mr. Townes' claims are not moot.

15. There appears to be a disagreement among the circuits as to whether a prisoner's release on parole moots a challenge to the legality of the prisoner's detention when the prisoner seeks a reduction in his term of supervised release. *Compare Burkey v. Marberry*, 556 F.3d 142, 149-50 (3d Cir.) (release from custody moots such a challenge), *cert. denied*, 130 S. Ct. 458 (2009), *with Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006) (not moot because ruling could ultimately result in the district court modifying the length of a habeas petitioner's supervised release), *and Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005) (same). The Fourth Circuit's decision in this case was entirely consistent with the approach taken by the majority of courts of appeals to have considered this issue, and the court was correct in holding that Mr. Townes' petition is not moot.

CONCLUSION

This Court should grant the petition for a writ of certiorari.[16]

Respectfully submitted,

JUSTIN S. ANTONIPILLAI
Counsel of Record
JOHN A. RACKSON
ADAM J. REINHART
ROBERT A. STOLWORTHY, JR.
ARNOLD & PORTER, LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

16. Alternatively, summary reversal is warranted.