No. 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

REPLY BRIEF

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This case presents a deep and mature circuit split on the issue of how much factual specificity must be pled in intentional discrimination cases on the element of discriminatory intent. Specifically, this case would permit the Court to address whether *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009), which require that a complaint set forth sufficient well-pled facts to state a plausible claim, overruled the holding of *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). If *Swierkiewicz* remains good law, as the Second, Sixth, Seventh, and District of Columbia Circuits have held, then Mr. Townes' habeas petition, in which he alleged that the Virginia Parole Board intentionally discriminated against him by declaring him parole ineligible, should not have been dismissed. If, on the other hand, *Swierkiewicz* has been overruled and a plaintiff must allege specific facts demonstrating discriminatory intent, then Mr. Townes' habeas petition would have been properly dismissed. In its Brief in Opposition ("Opp."), Respondent advances four reasons why this Court should deny Mr. Townes' petition for a writ of certiorari, none of which is persuasive nor should prevent this Court from granting Mr. Townes' petition in light of the clear circuit split and the importance of the question presented.

I. THIS CASE PRESENTS AN IDEAL VEHICLE TO REVIEW AN ISSUE ON WHICH THERE IS A SPLIT AMONG THE COURTS OF APPEALS.

Respondent argues that this case does not present an appropriate vehicle for reviewing the question presented – whether the holding of *Swierkiewicz* remains good law after this Court's decisions in *Twombly* and *Iqbal* – because this case involves a federal habeas corpus petition rather than a civil complaint. This argument should not dissuade this Court from granting a writ of certiorari for two reasons.

First, Federal Rule of Civil Procedure 12(b)(6) applies equally to civil complaints and habeas petitions. When a habeas petition is dismissed without an evidentiary hearing or discovery, a court "must evaluate the petition under the standards governing motions to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006); *see also Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002) (affirming dismissal of 42 U.S.C. § 1983 action that court construed as petition for permission to file successive habeas petition under Rule 12(b)(6)); *Hernandez v. Moore*, 326 F. App'x 878, 879 (5th Cir. June 18, 2009) (applying Rule 12(b)(6) to habeas petition); *Breeze v. Trickey*, 824 F.2d 653, 654 (8th Cir. 1987) (affirming dismissal of habeas petition under Rule 12(b)(6)); *Talbott v. Ferguson*, No. 97-8091, 1998 WL 123061, at *2 (10th Cir. Mar. 4, 1998) (same); *Knox v. Wyoming Dep't of Corr.*, 34 F.3d 964, 965, 968 (10th Cir.

1994) (same); *Adams v. Lankford*, 788 F.2d 1493, 1494, 1500 (11th Cir. 1986) (same). Indeed, the Fourth Circuit explicitly applied Rule 12(b)(6) in the decision below, (*see* App. 14a,) and Respondent does not dispute that this was proper.[1]

Second, the pleading standards under Federal Rule of Civil Procedure 8, as interpreted by *Twombly* and *Iqbal*, and Habeas Corpus Rule 2(c) are essentially identical. *See Wilson v. Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (en banc) (stating that the *Twombly* pleading standard "is no different in the habeas context"). Under both rules, a complaint/petition must state sufficient facts to state a "plausible" claim. *Compare Iqbal*, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " (quoting *Twombly*, 550 U.S. at 570)), *with Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996) ("[T]he courts require that [a habeas] petition cross some threshold of plausibility before they will require the state to answer."). Under both rules, a complaint/petition must provide more than fair notice of the grounds for relief. *Compare Twombly*, 550 U.S. at 555 n.3 (A complaint must provide more than "fair notice of the nature of the claim" by including "some factual

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[1] This Court has noted in *dicta* that a Rule 12(b)(6) motion to dismiss is inappropriate in a habeas corpus proceeding. *See Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 269 n.14 (1978). However, the overwhelming majority of courts have subsequently applied Rule 12(b)(6) when considering a motion to dismiss a habeas petition.

allegation[s]" that provide the "grounds on which the claim rests." (internal quotations omitted)), *with Mayle v. Felix*, 545 U.S. 644, 655 (2005) ("Notice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (quoting Advisory Committee's Notes on Habeas Corpus Rule 4, 28 U.S.C., p. 471) (internal quotations omitted)). Finally, under both rules, a complaint/petition must contain more than conclusions of law. *Compare Iqbal*, 129 S. Ct. at 1949 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555)), *with Felix*, 545 U.S. at 655 (A habeas petition must contain more than "'mere conclusions of law, unsupported by any facts.'" (quoting Advisory Committee's Notes on Habeas Corpus Rule 2, 28 U.S.C., p. 469)). Because the pleading standards under Civil Rule 8 and Habeas Corpus Rule 2(c) are the same, this case indeed presents an ideal vehicle for reviewing the important circuit split identified in the petition for a writ of certiorari.

Respondent's assertion that Habeas Corpus Rule 2(c) requires a pleading standard higher than that required by Federal Rule of Civil Procedure 8 is erroneously based on a comparison between Habeas Corpus Rule 2(c) and the former Federal Rule of Civil Procedure 8 pleading standard as interpreted in *Conley v. Gibson*, 355 U.S. 41 (1957), which this Court explicitly overruled in *Twombly*. *See Twombly*, 550 U.S. at 561-63. Although it is true that this Court once stated that "Habeas

Corpus Rule 2(c) is more demanding" than Civil Rule 8, this Court was comparing Rule 2(c) to the requirement from *Conley* that "a complaint need only provide 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Felix*, 545 U.S. at 655 (quoting *Conley*, 355 U.S. at 47). Any past difference between the two standards has been erased by *Twombly* and *Iqbal* and should not impede this Court from granting Mr. Townes' petition for a writ of certiorari in this case.

Respondent also suggests that permitting a habeas petitioner to allege intentional discrimination under the pleading requirements of *Swierkiewicz* would inappropriately open the door to "automatic discovery" for habeas petitioners. (*See* Opp. 9.) First, this is a merits issue, which should not sway this Court with respect to the grant of a writ of certiorari. Second, this Court's precedents still would require a petitioner to state a plausible claim, which is no easy task. *See Iqbal*, 129 S. Ct. at 1950. Indeed, in *Swierkiewicz*, this Court noted that the plaintiff's complaint alleging employment discrimination "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." 534 U.S. at 514. Thus, a vague equal protection claim without supporting facts would fail to state a claim. By contrast, a petition that includes sufficient factual allegations of the non-intent elements of a discrimination claim would be permitted to go forward. This is exactly the case here, where Mr. Townes alleged that he is a black male; he was denied parole eligibility based on the

state's three-strikes law; a white, female prisoner was granted parole eligibility around the same time; and both cases involved three or four virtually identical robberies within a short time period. (*See* Supp. App. SA1-SA14.)

Because the pleading and dismissal standards under the civil and habeas rules are the same, the question of whether *Swierkiewicz* is still good law controls the outcome of this case, and, accordingly, a writ of certiorari is warranted. In *Swierkiewicz*, this Court held that, with respect to the intent element of a discrimination claim, a plaintiff need only allege that he or she was discriminated against on the basis of the plaintiff's membership in a protected class rather than allege specific facts supporting an intent to discriminate. *See Swierkiewicz*, 534 U.S. at 514. If *Swierkiewicz* remains good law after *Iqbal* and *Twombly*, the Fourth Circuit erred by affirming the dismissal of Mr. Townes' petition. If, on the other hand, *Iqbal* and *Twombly* require – contrary to *Swierkiewicz* – that a victim of discrimination plead facts demonstrating discriminatory intent, the Fourth Circuit's decision would have been proper. As previously discussed, the *Swierkiewicz* pleading standard is necessary to permit discrimination and equal protection claims to go forward because victims of discrimination rarely posses evidence of discriminatory intent beyond the facts of what actually happened. (*See* Pet. 23.) It is likewise significant for habeas petitioners, particularly those filing petitions *pro se*, to be permitted to allege discrimination without detailing specific facts regarding discriminatory intent.

II. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE PLEADING STANDARDS FOR INTENTIONAL DISCRIMINATION CASES.

Next, Respondent contends that the division in the circuits Petitioner has advanced is "purely abstract in character." (Opp. 13.) This is not a fair characterization of the state of decision in the courts of appeals. The Fourth Circuit's decision in this case is unmistakably in conflict with the decisions of at least four other circuit courts. (*See* Pet. 19-22.) Had Mr. Townes been able to file his habeas petition within the Second, Sixth, Seventh, or District of Columbia Circuits, the reviewing court would not have required that Mr. Townes allege additional evidence of discriminatory intent. *See 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). For example, the Second Circuit in *Boykin* held that a discrimination complaint that "identified the particular events giving rise to [Boykin's] claim and alleged that [Boykin] was treated less favorably than other loan applicants because of her race [and] gender," without including any additional facts that would demonstrate discriminatory intent, should not be dismissed. *See Boykin*, 521 F.3d at 214-15. By holding that specific factual allegations of discriminatory intent are not required to survive a motion to dismiss, the Second Circuit's decision in

Boykin is clearly contrary to that of the Fourth Circuit below, which affirmed the dismissal of Mr. Townes' petition for exactly that deficiency.[2]

III. THIS CASE IS NOT MOOT.

The panel majority correctly held that this case is not moot. (*See* App. 4a-10a.) The majority carefully analyzed each of the requirements of Article III standing – (1) injury-in-fact, (2) causation, and (3) redressability – and explained that Mr. Townes had demonstrated that his action satisfied each of them. (*See id.*) First, the majority held that Mr. Townes asserted an injury-in-fact because he "could receive a shorter period of parole if he receives a discretionary parole hearing." (App. 5a.) Second, the majority held that Mr. Townes demonstrated causation because "the [Parole] Board's parole ineligibility finding precludes Townes from an opportunity to obtain a shortened period of parole." (App. 6a.) Finally, the majority held that Mr. Townes "alleged an injury that still satisfies the redressability prong." (App. 6a.)

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[2] Respondent also argues that the Third Circuit's express statement that *Swierkiewicz* has been "repudiated by both *Twombly* and *Iqbal*," *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009), is *dicta*. (Opp. 12-13.) Regardless of how the Third Circuit's clear denouncement of *Swierkiewicz* is characterized, Respondent cannot legitimately contend that the Fourth Circuit's decision below is not in conflict with the Second Circuit's decision in *Boykin* or the other circuit court decisions cited in the Petition. (*See* Pet. 19-22.) Accordingly, this case presents a concrete split among the circuits that this Court should address.

Rejecting the majority's conclusion, Respondent contends that this Court should not review a moot case. (Opp. 13-14.) Specifically, Respondent argues that Mr. Townes cannot satisfy the redressability prong because he cannot show that it is "likely" that a favorable decision in federal court will prompt the Virginia Parole Board to reduce his time on parole. (*Id.*) Respondent's argument mischaracterizes the law. As the majority explained, a party is not required to show that a favorable decision in federal court "likely would provide him the ultimate, discretionary relief sought from the agency." (App. 7a.) Instead, as this Court held in *FEC v. Akins*, " '[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action . . . even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason.' " (App. 7a (quoting *Akins*, 524 U.S. 11, 25 (1998)).) In such a case, the party challenging the agency action has standing unless the reviewing court " 'know[s]' " that the "agency will not grant the ultimate relief." (App. 8a (quoting *Akins*, 524 U.S. at 25).)

In this case, a favorable decision in federal court has the potential to provide Mr. Townes with the immediate relief he seeks: "a judgment that the state's parole-ineligibility determination was unconstitutional, necessitating a remand to the district court to order the Parole Board to rescind that determination." (*See* App. 9a-10a.) Respondent cites a passage from the Virginia Parole Board Policy Manual in an apparent effort to show that the Board will not consider Mr.

Townes' parole eligibility when deciding whether to grant relief. (Opp. 14.) But this argument lacks merit in light of Respondent's admission that "'[u]nder Virginia law, the Virginia Parole Board has absolute discretion in matters of parole.'" (*See* App. 10a (quoting Supp. Br. of Appellees at 9).) The Fourth Circuit correctly concluded that this discretion "belies any suggestion that the Board lacks power to provide Townes relief." (*See* App. 10a.) Therefore, this Court should not deny review based on Respondent's attempt to revive the argument that this case is moot.[3]

IV. THE STATE COURT DID NOT PROPERLY DISMISS MR. TOWNES' PETITION.

Mr. Townes alleged that he was similarly-situated to a white, female prisoner (Ms. Kennon) who, unlike Mr. Townes, was granted parole eligibility despite the state's three-strikes statute. (*See* Pet. 6-8.) Mr. Townes' habeas petition thus presented a classic equal protection claim. He specifically alleged that a white woman who was convicted of the same crimes over approximately the same time period was treated differently than himself, a black man, by the same governmental

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[3] As Mr. Townes and Respondent both recognize, there is a split in the circuits over whether a prisoner's release on parole moots a challenge to the legality of detention when the prisoner seeks a reduction of his term of supervised probation. *Compare Burkey v. Marberry*, 556 F.3d 142, 149-50 (3d Cir.), *cert. denied*, 130 S. Ct. 458 (2009), *with Levine v. Apker*, 455 F.3d 71, 76-77 (2d Cir. 2006), *and Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005).

body. The facts of the two cases are simply striking in their similarity. Not only did Mr. Townes allege these facts, he included with his petition a newspaper article providing evidence of this disparate treatment. (*See* Supp. App. SA13-SA14.) This is thus a unique case, and if Mr. Townes' habeas petition does not state an equal protection claim, then many other plaintiffs and petitioners with potentially meritorious claims will see their complaints and petitions dismissed as well before they ever had any opportunity to explore intent, as is required by *Swierkiewicz*. Accordingly, it is critically important that this Court grant Mr. Townes' petition for a writ of certiorari to review this important split among the courts of appeals.

Respondent presents two arguments for why Mr. Townes' habeas petition was properly dismissed as "frivolous." (*See* Opp. 15-16.) First, Respondent improperly contests Mr. Townes' factual allegations by noting that Ms. Kennon used " 'a broken or a toy pistol' " during the robberies she committed whereas Mr. Townes used a real firearm. (*See* Opp. 15 (quoting Supp. App. SA14).) This argument, however, is irrelevant because it goes to the merits of the case and does not rebut the legal argument that Mr. Townes has alleged sufficient factual matter to state plausibly that he was similarly-situated to Ms. Kennon.

Second, Respondent inappropriately faults Mr. Townes, a *pro se* prisoner, for alleging that his treatment vis-à-vis Ms. Kennon "can be seen" as discrimination rather than alleging that the Parole Board "actually discriminated" against him. (*See*

Opp. 15-16.) As Petitioner has previously noted, this argument is flawed. (*See* Pet. 22 n.14.) "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.' " *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Mr. Townes alleged that the Parole Board's treatment of two prisoners – a black male and a white female – "can be seen as deliberate discrimination" and "violates the equal protection of law as guaranteed by the 14th Amendment of the United States Constitution." (Supp. App. SA11.) Mr. Townes plainly was alleging — perhaps inartfully — that the Parole Board discriminated against him. Especially in light of the liberal pleading rules afforded to *pro se* petitioners, Mr. Townes' allegations were sufficient.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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