Number _____

In the Supreme Court of the United States

KENDALE L. ADAMS, *et al.*,

Petitioners,

v.

CITY OF INDIANAPOLIS (INDIANA),

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This appeal respectfully challenges the Seventh Circuit's novel declaration of pleading standards that the Petitioners believe are clearly outside of the metes and bounds established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 540 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), especially when a circuit court, as here, undertakes a voluntary review of a plaintiff's pleadings regarding issues neither raised nor or suggested by the defendant or the district court below.

By way of brief background, the Petitioners are minority police officers and firefighters for the City of Indianapolis, Indiana, the thirteenth largest city (via population) in the United States. Having filed two, separate lawsuits that form the basis of this Appeal, the Petitioners challenged as discriminatory, decades-old merit rank promotion processes. In the first case the U.S. District Court for the Southern District of Indiana granted a motion for judgment on the pleadings. In the second case the District Court granted a motion to dismiss under *res judicata* and collateral estoppel. The U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") fully rejected the rationale of the District Court, but declared new reasons, *sua sponte* for affirming the judgment. The Seventh Circuit also affirmed the District Court's dismissal in the second case.

This case presents four (4) important questions for review.

1. A **first question** is whether a lower court has correctly interpreted the U.S. Supreme Court cases of *Bell Atlantic Corp. v. Twombly*, 540 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Swierkiewicz v. Sorema*, N.A., 534 U.S. 506 (2002), when it declares for the very first time, without citing any supportive case law, supportive legislative intent, rule construction or even persuasive legal opinion, that a pre-discovery disparate impact discrimination claim must include recited statistics in the complaint in order to be "plausible."

2. A **second question** is whether a lower court contravenes the law and underlying policy established in the U.S. Supreme Court case of *Lewis v. City of Chicago*, 560 U.S. 205 (2010), when that court uses claim and issue preclusion doctrines to dismiss the second of two disparate impact lawsuits where the first lawsuit is dismissed on declared technical pleading deficiencies, no factual or legal determinations about whether the promotion processes in question were free of disparate impact discrimination were ever made, and the second lawsuit's claims are based on a new, separate round of public safety merit rank promotions.

3. A **third question** is whether a disparate treatment discrimination claim may be supported where the defendant had shown knowing, callous and continued disregard for the presence of disparate impact discrimination, as was declared by the U.S. District Court for the Eastern District of New York

in the case of *United States v. City of New York*, 683 F.Supp.2d 225 (E.D.N.Y. 2010).

4. A **fourth question** is whether, when a Circuit Court declares *sua sponte* new pleading requirements under FRCP 8 for the very first time in a decision, without being raised by or asked to do so by the parties or the trial court below, without citing any case law or legislative intent, fundamental due process notice requirements demand that the plaintiff be allowed at least one opportunity to amend the complaint to meet the newly-declared standard if it is possible, and whether in the absence of such opportunity, a plaintiff is denied procedural due process.

LIST OF ALL PARTIES

In addition to the first named petitioner, Kendale, L. Adams, the other petitioners, who were also the initiators of the present suit are: Danny C. Anderson; Marta E. Bell; Russell Burns; Vincent C. Burke; LeEtta Davenport; Anthony W. Finnell; John T. Green; Derrick Harris; Michael Jefferson; Timothy A. Knight; Yolanda R. Maddrey-Patterson; Ron Mills; Kendall J. Moore, Sr.; Arthur Rowley, Jr.; Matthew Steward; Ida Williams; Kimberly Young; Ron Anderson; Mario Garza; Eric Grissom; Dei Passon; Eric L. Simmons; Larry Tracy; Brian White; Chris Womock; Brownie Coleman; Jeffrey Taylor; John Walton; and Curtis Hanks.

The Respondent, the City of Indianapolis (Indiana), is as listed on the cover page of this Petition.

CORPORATE DISCLOSURE STATEMENT

The Petitioners in this lawsuit, who have been listed above in the "List of All Parties" Section, are individuals and not corporate entities. The following law firm represents the Petitioners and has appeared exclusively on their behalf in all phases of the present litigation, including this appeal: Lee, Cossell, Kuehn & Love, LLP, which later became known as Lee, Cossell, Kuehn, Crowley & Turner, LLP, and which is now known as Lee & Fairman, LLP, which firm is principally located at 127 East Michigan Street, Indianapolis, IN 46204.

Lee & Fairman (and its predecessor entities) also previously represented the National Association for the Advancement of Colored People ("NAACP") in the current lawsuit. The District Court dismissed the NAACP from the lawsuit, citing a lack of standing. The individual attorneys who have appeared in the litigation to represent the Petitioners are: Cherry Malichi in the Marion County (Indiana) Superior Court ("Marion Super. Ct."), and the U.S. District Court for the Southern District of Indiana ("S.D. Ind."); Gregory P. Gadson in the Marion Super. Ct., the S.D. Ind., and the U.S. Court of Appeals for the Seventh Circuit; Nathaniel Lee in the Marion Super. Ct., and the S.D. Ind.; and Jamison J. Allen in the Marion Super. Ct., and the SD. Ind.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners hereby respectfully petition this Honorable Court for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion for which a writ of certiorari is sought is the United States Court of Appeals for the

Seventh Circuit ("Seventh Circuit") Panel Decision of *Adams v. City of Indianapolis*, 742 F.3d 720, 121 Fair Empl.Prac.Cas. (BNA) 948 (7th Cir. 2014), which consolidated and affirmed appeals from two U.S. District Court decisions from the Southern District of Indiana, which were 1) *Greater Indianapolis Chapter of the National Association for the Advancement of Colored People v. Ballard*, 741 F.Supp.2d 925 (S.D. Ind. 2010), and 2) *Adams v. City of Indianapolis*, ___ F.Supp.2d ___, 2013 WL 5487897 (S.D. Ind. 2013), decided September 30, 2013 with Case Number 1:12-cv-SEB-DML. *See* Appendices A, B, and C, respectively. Judgment has been rendered in favor of the Defendants at both the District Court level and the Circuit Court level, granting partial judgment on the pleadings and summary judgment (in the first case), and partial motion to dismiss (in the second case). After the Petitioners timely filed a Petition for both *en banc* and panel rehearings, the Seventh Circuit denied rehearing on March 12, 2014. *See* Appendix D for the Seventh Circuit's Order Denying Rehearing.

STATEMENT OF JURISDICTIONAL BASES

The Petitioners seek to invoke this Court's jurisdiction, and respectfully aver that jurisdiction in this matter is proper generally pursuant to Article III of the United States Constitution, and specifically pursuant to 28 U.S.C. § 1254(1).

The Seventh Circuit's panel decision was rendered on February 4, 2014. The Petitioners timely sought both panel and *en banc* rehearings, which were denied on March 12, 2014.[1]

The Petitioners applied for an Extension of Time to file the current Petition for a Writ of Certiorari. That Application was granted on May 29, 2014 by the Hon. Justice Elena Kagan, and extended the deadline for filing this Petition to August 9, 2014.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves important statutory and constitutional considerations that specifically impact the Petitioners and generally impact many federal civil litigants.

As to one of the issues presented for review, the Due Process Clause of the Fifth Amendment to the U.S. Constitution (with respect to procedural due process) should be considered, which states in its relevant part: "…No person shall be…deprived of life, liberty, or property, without due process of law…..," and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, which states in its relevant part: "…nor shall any State deprive any person of life, liberty, or property, without due process of law…."

[1] See Appendix D.

This case also presents for review, important construction issues with respect to Rule 8(a), Rule 8(d)(1), Rule 12(b)(6), Rule 12(c), Rule 12(d), and Rule 12(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Fed. R. Civ. P. 8(a) states:

> Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(d)(1) states: "Pleading to Be Concise and Direct; Alternative Statements; Inconsistency. (1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required."

Fed. R. Civ. P. 12(b)(6) states in its relevant part: "…a party may assert the following defenses by motion: (6) failure to state a claim upon which relief can be granted…."

Fed. R. Civ. P. 12(c) through 12(e) states:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Lastly, the present case involves the interpretation of pleading standards applicable to 42 U.S.C. § 2000e-2(a), which states:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer—
>
> > **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE AND NOMENCLATURE

A. General

This matter involves two lawsuits that were co-pending on appeal before the Seventh Circuit,

and for which the Seventh Circuit issued a panel decision that consolidated and resolved both appeals unfavorably for the Petitioners. The procedural history is rather tedious, and the Petitioners beg the Court's indulgence of a condensed but important summary of the case. For convenience, an approximate one page summary of the Statement of the Case appears in Section B, *infra*.

The Petitioners are the plaintiffs in both lawsuits, and are several minority police officers and firefighters employed by the Respondent City of Indianapolis, Indiana, the thirteenth largest city (via population) in the United States. By their lawsuits, the Petitioners are challenging as discriminatory, the City's public safety merit rank promotion processes.[2]

The City of Indianapolis, through its public safety arms, the Indianapolis Metropolitan Police Department ("IMPD"), and the Indianapolis Fire Department ("IFD"), uses an elaborate system to numerically rank candidates for promotion that has historically resulted in a striking underrepresentation of minority police officers and firefighters receiving merit rank promotions (i.e., from patrolman to sergeant, from sergeant to lieutenant, from lieutenant to captain, among police officers, and from private to lieutenant, from lieutenant to captain, and from captain to battalion chief, among firefighters).

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[2] Two other defendants, the Hon. Gregory A. Ballard, Mayor of the City of Indianapolis, and Michael T. Spears, Chief of the Indianapolis Metropolitan Police Department at the time, were later dismissed by the District Court.

The evaluations of candidates for promotion have included: taking and receiving a score for an oral examination component; taking and receiving a score for a written examination component; receiving a score for a candidate profile in which attributes of a candidate's background are converted into numbers and said numbers are combined; and combining the scores of the aforementioned components into a composite score for each candidate. The oral examination component has included an oral interview, in which a candidate is personally interviewed, an oral assessment, in which a candidate orally responds to scenarios presented, and a writing exercise, requiring the candidate to create written correspondence. The written examination component includes providing answers to written questions.

Maximum point totals are assigned to the oral examination component, the written examination component, and the candidate profile. The points and maximum points serve as weightings, causing components and sub-components of the promotion processes to have relative weights. Meanwhile, the job descriptions for each level of promotion in the IMPD and IFD have not changed in more than a decade.

In each promotion process, including the 2008 process from which candidates were promoted, and which sparked the present litigation, a large number of candidates wind up having similar composite scores (many literally within fractions of a point) which are used to rank them on a list, with higher-ranked candidates being promoted before lower-ranked candidates. As a result, some candi-

dates with marginally-higher composite scores are promoted while other candidates with marginally-lower scores are not.

Some aspects of the composite score assigned to the candidates depend solely on the candidates' backgrounds and are out of their control. In this highly competitive environment, the City's award of extra points for certain factors (such as, in the case of IMPD for example, participation in Field Training Officer programs for which African-Americans have rarely been allowed to participate in the past) places African-Americans at an unfair disadvantage and unjustifiably denies them promotions. The adding of extra points to some candidates and not for others has continued to have a disparate impact on African-Americans.

Other aspects of the promotion processes have a discriminatory impact against African-American officers, and the City has long known this fact but has refused to remedy the problems.

The City has continually allowed manipulation of the promotion processes when points and weightings of the various components are arbitrarily changed with each new process, and no reasons are ever provided for the changes. Contrary to standard national practices for public safety departments, the City had never performed validation studies covering the periods for the current dispute in order to verify any correlation whatsoever between candidates' composite scores and their ultimate job performance after receiving promotions, nor had the City ever demonstrated that the promotion processes are related in any way to any busi-

ness necessity or reflect the job duties of the officers.

IMPD and IFD merit rank promotion processes typically occur every two years.

The Petitioners timely-filed Equal Employment Opportunity Commission ("EEOC") charges based on merit rank promotions made from the 2008 merit rank processes. The EEOC charges allege, *inter alia*, unlawful disparate impact and unlawful disparate treatment in failing to promote them on account of their race (African American and Latino in one instance). They thereafter filed suit on January 30, 2009 in the Marion County (Indiana) Superior Court. The Petitioners' claims in the first lawsuit included: discrimination under 1) disparate impact (42 U.S.C. §1983 and Title VII) and 2) disparate treatment (Title VII) theories; 3) violation of provisions of the Indiana Constitution (Sections 12 and 23); 4) violation of 42 U.S.C. §1981; 5) hostile work environment under title VII (one plaintiff); 6) discrimination in pension benefits; and 7) violation of the Age Discrimination in Employment Act (one plaintiff). The Respondent City of Indianapolis removed the case to the Federal District Court for the Southern District of Indiana. The first lawsuit will hereafter be referred to as "Adams I," recognizing the surname of the first named plaintiff.

The Respondent City filed a Motion to Dismiss for Failure to State a Claim under FRCP 12(b)(6),[3] alleging only the following "problems": 1)

[3] See Adams I Case Documents 14 and 15.

the Plaintiffs' 42 U.S.C. §1981 could not be brought against the Defendant City; 2) the Plaintiffs' claims of discrimination against the City should have been directed against the Marion County Sheriff's Office; and 3) the Plaintiffs' State Law claims were barred for failure to timely file tort claim notices. The Respondent did not at that time raise or identify any other deficiency issues with respect to the Petitioners' other claims. The Petitioners sought and received leave to address the alleged problems, ultimately filing an Amended Complaint. The District Court thereafter denied the Motion to Dismiss as moot.[4]

In the Adams I District Court, the Respondent filed a Motion for Partial Judgment on the Pleadings on October 1, 2009. According to the case management order, the deadline for seeking leave to amend pleadings was March 3, 2010. The District Court did not rule on the aforementioned motion (granting it in substantial part, including dismissing all of the Petitioners' disparate impact claims and others, and dismissing some individual plaintiffs and the individual defendants) until September 16, 2010—approximately one year later. Five months between the aforementioned motion filing date and the deadline for leave to amend existed when the motion was filed.

The Petitioners sought leave to amend the complaint on October 12, 2010, and proffered a new 48-page complaint. In denying the motion for leave, the District Court essentially adopted the Respondent's arguments that because the deadline for

[4] See Adams I Case Document 44.

amending the pleadings had passed, the Petitioners needed to demonstrate (and allegedly did not) excusable neglect and good cause, and further that the proposed amendments would be futile anyway, given the related legal theories involved in the case.

The Respondents filed a Motion for Summary Judgment on the remaining claims, which included the disparate treatment claims. After the Petitioners duly opposed the motion, the District Court granted the motion in favor of the Respondent on all of the remaining claims. The District Judge in the Adams I Case was the Hon. Sarah Evans Barker.

The Petitioners timely appealed to the Seventh Circuit. The District Court had granted partial judgment on the pleadings in the Respondent's favor, denied motion for leave to amend the complaint, denied the Petitioners' motion to alter or amend judgment and granted summary judgment entirely in favor of the Respondent. The jurisdiction of the Seventh Circuit arose under 28 U.S.C. § 1291.[5]

While the Adams I Case was still pending before the District Court, the Respondent City made new rounds of IMPD merit rank promotions in 2011 using the same list established from the 2008 promotion process. Thereafter, most of the police officer plaintiffs in the Adam I Case timely filed new EEOC charges to exhaust their administrative remedies, and those claims formed much of the basis for a second lawsuit (hereafter identified as

[5] The appeal docket number for the Adams I Case is 12-1874.

"Adams II") which began in the Marion County Superior Court, and was removed by the Respondent to the U.S. District Court. The Adams II Case claims could not be joined with the claims to the Adams I Case because the Adams II claims were unripe at the time.[6]

The Adams II claims for relief are: Title VII disparate impact claims; Title VII disparate treatment claims; Fourteenth Amendment Equal protection claims; Municipal Code antidiscrimination violation claims; and an Unlawful Retaliation claim by one of the Plaintiffs.

The Respondent filed a motion to dismiss all the claims except the unlawful retaliation claim, arguing that the claims in question are barred under the doctrines of *res judicata* and collateral estoppel.[7] The District Court agreed with the City's rationale and granted the Respondent's Partial Motion to Dismiss.[8]

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[6] The EEOC had not yet investigated the charges, nor had it provided the claimants with "right-to-sue" letters.

[7] The District Judge in the Adams II Case was initially the Hon. Larry J. McKinney. However, after the motion to dismiss was fully briefed but before a decision was rendered on the motion, the Adams II Case was inexplicably reassigned to the Hon. Sarah Evans Barker. As a brief reminder, Judge Barker also adjudicated the Adams I District Court case.

[8] Subsequent to the Seventh Circuit's panel decision and remand to the District Court for adjudication of the sole remaining claim of unlawful retaliation, the Plaintiff John Green voluntarily dismissed his retaliation claim, and it is no longer pending.

The Petitioners appealed the Adams II District Court decision to the Seventh Circuit.[9] The jurisdiction of the Seventh Circuit again arose under 28 U.S.C. § 1291. Oral arguments for the Adams I appeal were held on October 1, 2012 before the panel of the Hon. Richard A. Posner, the Hon. Ann Claire Williams, and the Hon. Diane S. Sykes.

On February 4, 2014, the Panel Decision (see Appendix A), authored by Judge Sykes, combined the Adams I appeal and the Adams II appeal (without having allowed oral argument for the latter case), and clearly rejected the Adams I District I Court's rationale for granting the motion for partial judgment on the pleadings (i.e., the Defendants' adopted view that with respect to the disparate impact claims, the Complaint was insufficient because it failed to identify specifically that the employment practices were facially neutral, and further Defendants argued the Complaint was fatally defective since the associated EEOC charges also had failed specifically to articulate facial neutrality of the employment practices). However, the Panel Decision still affirmed the District Court decision nonetheless, declaring new deficiencies in the Adams I Complaints *sua sponte,* without the issues being previously raised at any point by the Respondent or the District Court in any document or oral argument in the litigation or appeal. Undertaking a review of the Adams I Complaints (in the nature of an apparent quality control review), the Panel Decision states "Having said that, we agree that the amended complaint fails to state plausible claims

[9] The appeal docket number for the Adams II Case is 13-3422.

for disparate impact, though we've identified a different set of flaws and gaps in the allegations than the district court did."[10]

Among the Panel Decision's conclusions was that it might have expected numerical statistics in support of the disparate impact claims, and that greater specificity of the aspects of the particular promotion processes alleged to be discriminatory might also have been provided. These conclusions are embodied in the following statements of the Panel Decision:

> In a complex disparate-impact case like this one, we would expect to see some factual content in the complaint tending to show that the City's testing process, or some particular part of it, caused a relevant and statistically significant disparity between black and white applicants for promotion. The amended complaint contains no factual allegations of this sort. We are told that the promotion-testing process during this period had several component parts, but the plaintiffs do not identify which part they are attacking. Perhaps they could try to demonstrate that the different elements of the testing process are not capable of separation for analysis, *see* 42 U.S.C. § 2000e-2(k)(1)(B)(i); this flaw alone might not be fatal. The far more seri-

[10] Adams v. City of Indianapolis, 742 F.3d 720, 733 (7th Cir. 2014).

ous problem is the complete lack of factual content directed at disparate-impact liability. There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole. There are no allegations about the racial makeup of the relevant workforce in the Indianapolis metropolitan area or the supervisory ranks in the police and fire departments. There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance in the ranks of sergeant, lieutenant, or captain in the police department or battalion chief, lieutenant, or captain in the fire department.

Disparate-impact plaintiffs are permitted to rely on a variety of statistical methods and comparisons to support their claims. At the pleading stage, some basic allegations of this sort will suffice. But the amended complaint contains no allegations of the kind, nor any other factual material to move the disparate-impact claims over the plausibility threshold. Accordingly,

these claims were properly dismissed on the pleadings.[11]

As an important note, the Seventh Circuit Panel held that that disparate impact claims need not be limited to facially neutral policies, but any employment policy may serve as a basis.[12] The Petitioners do not challenge this aspect of the Panel Decision.

The Panel Decision appears to offer no binding or persuasive authority (in the form of case citations either from the Seventh Circuit or any other Circuit, or from the U.S. Supreme Court outside of general citation to the *Twombly* and *Iqbal* cases, or scholarly work) supporting its new standards for disparate impact discrimination claims.

The Panel Decision also affirmed the District Court's grant of summary judgment on the Petitioners' disparate treatment discrimination claims. With respect to the disparate treatment claims, neither the District Court nor the Seventh Circuit addressed the Petitioners' contentions and proffer of evidence supporting the notion that the City of Indianapolis had long been aware that aspects of the promotion processes had a disparate impact on African-Americans, and that the City's continued use of the processes under those circumstances amounted to a callous disregard rising to the level of disparate treatment discrimination. This approach, the Petitioners had pointed out to both the

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[11] Adams v. City of Indianapolis, 742 F.3d 720, 733 (7th Cir. 2014).
[12] Id. at 731.

District Court and the Seventh Circuit, had been adopted by the Southern District of New York in the case of *United States v. City of New York*, 683 F.Supp.2d 225 (E.D.N.Y. 2010). During the Adams I Case summary judgment proceedings, the Petitioners proffered deposition testimony from the head[13] of the longstanding vendor responsible for developing and implementing the merit rank promotion processes in question (and for several previous promotion processes through the years), that a written portion of the promotion processes had a disparate impact against African-Americans, and that the City had been informed of this.

The Panel Decision further rejected the Adams II claims under general claim and issue preclusion theories. Neither the District Court nor the Seventh Circuit Panel ever made factual or legal determinations regarding whether or not the promotion processes in question caused disparate impact against the Petitioners or others. Along those lines, the Panel Decision states:

> Here, the second lawsuit meets all the elements of claim preclusion. The parties are the same and the first lawsuit was resolved in a final judgment. Whether the causes of action in the two suits arise from the same core of operative facts is a closer question, but

[13] Jeffrey Savitsky, Ph.D., a psychologist as well as attorney, who is the director of the Institute for Public Safety Personnel, Inc., which the City of Indianapolis employed to design and revise its public safety merit rank promotion processes for the years in question, and many previous years.

we conclude that they do. The second suit concerns decisions made in later promotion cycles — in 2010 and 2011 — but in every other material respect, the complaint is almost identical to the amended complaint in the first suit. The promotions were made based on the 2008 promotion-eligibility list, and the plaintiffs allege that the 2008 testing process was biased and had a disparate impact on black candidates. So although the challenged promotion decisions occurred at different times, the second suit raises the same core of factual allegations as the first.

Even if claim preclusion does not apply, *issue preclusion* certainly does, and that's enough to sustain the dismissal of the second suit. The 2007 and 2008 testing protocols were the central subject matter of the earlier suit.[8] Whether the tests were intentionally discriminatory or had a disparate impact was actually litigated and essential to the final judgment. The plaintiffs in the second suit were fully represented in the first-and by the same attorney who appears for them in the second round of litigation. They cannot now relitigate issues that were decided against them in the earlier litigation. The second suit was

properly dismissed on preclusion grounds.[14]

On the key issue of whether the disparate impact claims and issues were actually litigated in the Adams I Case, allowing the court to bar or merge the Adams II Case into the first one, the Panel Decision equates dismissal of those claims under Fed. R. Civ. P. 12(c) as actual litigation under the preclusion doctrines—even though the District Court dismissed the claims under pleading deficiency findings held to be incorrect in the Panel Decision.

The Petitioners now appeal to this Court with the hope that it will grant their Petition for a Writ of Certiorari to review impediments placed in the path of their Seventh Amendment right to a trial by jury.

B. Statement of the Case Summary

Due to the complexity of the procedural history of the Adams I and Adams II litigation, the Petitioners believe a practical focus of this Court should be the following aspects of the Seventh Circuit's Decision: (1) the new requirement that disparate impact complaints should include numerical statistics to be plausible; (2) the rejection of the Adams II claims even though the City made new promotions (and therefore created new injuries)

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[14] Adams v. City of Indianapolis, 742 F.3d 720, 736 (7th Cir. 2014).

from a previously-constructed list, and no findings as to disparate impact, *vel non*, were ever made; (3) the failure to address whether the presence and knowledge of disparate impact coupled with failure to remediate can support a disparate treatment discrimination claim; and (4) the perfunctory manner in which *res judicata* and collateral estoppel determinations were made when no factual or legal findings with respect to disparate impact were ever made and even the District Court's basis for dismissing the disparate impact claims was found to be in error; [15] and (5) the Circuit Court's identification of new deficiencies that did not comport with the Circuit Court's newly-declared standards for disparate impact claims (by a *sua sponte* review of the Adams I complaint, without the request of the Respondent) and the failure to order a remand to give the Petitioner at least one opportunity, consistent with procedural due process, to cure the newly-found deficiencies.

ARGUMENTS: WHY THE WRIT SHOULD BE GRANTED

A. A numerical data requirement in disparate impact pleadings is inconsistent with Rule 8, *Twombly*, *Iqbal*, and *Swierkiewicz*.

The Seventh Circuit affirmed the District Court's dismissal of the Petitioners' Complaint, declaring, as a result of its unrequested, *sua sponte* review of the Adams I complaints for adherence to

[15] This aspect will be discussed in the "Arguments" Section along with the second declared issue for review.

the *Twombly*[16] and *Iqbal*[17] pleading requirements, that it found new deficiencies in the Petitioners' pleadings. The Petitioners respectfully assert that this conclusion was in error. The rationale of the Seventh Circuit decision leaves little opportunity to "reverse-engineer," since it does not directly cite any case or other statutory authority to recreate a road map leading from the issue to its ultimate conclusion.

There can be no doubt, as will be explained later, that the Seventh Circuit held the Petitioners disparate impact discrimination pleadings to a summary judgment or trial standard, as opposed to the appropriate standard of pre-discovery pleadings, when it stated the following:

> In a complex disparate-impact case like this one, we would expect to see some *factual content* in the complaint *tending to show* that the City's testing process, or some particular part of it, caused a relevant and statistically significant disparity between black and white applicants for promotion. The amended complaint contains no factual allegations of this sort. We are told that the promotion-testing process during this period had several component parts, but *the plaintiffs do not identify which part they are attacking*. Perhaps they could try to demonstrate that the different elements of the test-

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[16] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
[17] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

> ing process are not capable of separation for analysis, *see* 42 U.S.C. § 2000e-2(k)(1)(B)(i); this flaw alone might not be fatal. The far more serious problem is the complete lack of factual content directed at disparate-impact liability. *There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole. There are no allegations about the racial makeup of the relevant workforce in the Indianapolis metropolitan area or the supervisory ranks in the police and fire departments. There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance in the ranks of sergeant, lieutenant, or captain in the police department or battalion chief, lieutenant, or captain in the fire department.*... (Italicization added).[18]

With respect to determining the adequacy of pre-discovery pleadings in general, the following are controlling authorities: Fed. R. Civ. P. 8, *Twombly*, and *Iqbal*, with the latter citations being interpretations of the Federal Rules of Civil Procedure. *Twombly* requires that to be sufficient under Rule 8, a claim in a complaint must be pleaded in a way

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[18] Adams v. City of Indianapolis, 742 F.3d 720, 733 (7th Cir. 2014).

that it is not merely speculative, but rises to the level of being plausible on its face.[19] *Iqbal* declared that the pleading sufficiency guidelines in *Twombly* were not limited to restraint-of-trade-agreement type antitrust claims, but extend to all federal cases.[20] However, the *Twombly* Court rejected the notion that claims for relief must make out a *prima facie* case, and substantially affirmed the holding in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), the latter making clear that Title VII employment discrimination cases are not subject to heightened pleading requirements that would otherwise differentiate them from other cases.[21]

Swierkiewicz is still good law, with one exception: the correct standard for pleading sufficiency examinations is no longer the "no set of facts" doctrine in *Conley v. Gibson*, 355 U.S. 41 (1957), but the "plausibility" standard in *Twombly*. That exception, however, does not change that fact that *prima facie* cases are not required to be pleaded at the pre-discovery stage of litigation, and that heightened pleadings are also not required, absent specific statutory requirements. The *Twombly* Court had a clear opportunity to modify *Swierkiewicz* in other respects to set employment discrimination claims apart, but the Court declined.

The unanimous *Swierkiewicz* opinion is clear in its elegance that Rule 8 pleading standards are the same for all cases unless heightened pleadings are required under Fed. R. Civ. P. 9 (using the

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[19] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).
[20] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[21] *See Twombly* at 570. *See also Swierkiewicz* at 515.

statutory construction maxim of *expressio unius est exclusio alterius*), and that employment discrimination claims are also not subject to higher pleading standards than other claims. A fair, modified holding in the *Swierkiewicz* opinion (taking *Twombly* into account) would be that so long as a Title VII discrimination claim is plausible on its face, it need not specifically make out a *prima facie* case or meet the necessary standards for surviving summary judgment or judgment as a matter of law under Fed. R. Civ. P. 50. Indeed, *Swierkiewicz*, as modified by *Twombly*, also stands for the proposition that once a common threshold of plausibility is met, should the Defendant desire more information before discovery, the proper vehicle is a motion for more definite statement under Fed. R. Civ. P. 12(e), rather than a Rule 12 motion to dismiss.

The Seventh Circuit's *sua sponte* review of the Petitioners' amended complaint beyond the issues raised by the District Court and the Respondent, required that the Petitioners essentially meet the *prima facie* **burden of proof** requirements for disparate impact discrimination claims stated in 42 U.S.C. § 2000e-2(k)(1)(B)(i):

> (k) **Burden of proof in disparate impact cases**…the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analy-

> sis, the decisionmaking process may be analyzed as one employment practice.

The statutory heading of "burden of proof makes it clear that this is a requirement a plaintiff must eventually meet at either summary judgment or trial, and not at the pre-discovery pleading stage. The aforementioned statute contains—certainly at the pleading stage, but not even at the burden of proof stage—no requirement that disparate impact claimants meet the newly declared Seventh Circuit standard of containing:

> allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole…allegations about the racial makeup of the relevant workforce in the…metropolitan area or the supervisory ranks in the police and fire departments…allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance in the ranks of sergeant, lieutenant, or captain in the police department or battalion chief, lieutenant, or captain in the fire department…

While plausibility for a particular claim may not always be clear, something less than a *prima facie* case at the pre-discovery stage is required. The Seventh Circuit requirements are clear *prima facie* standards that neither employment

discrimination claimants nor other claimants are often able to meet at the pre-discovery stage. This will surely have an unjustified, chilling effect on federal court plaintiffs.

Also problematic is the Seventh Circuit's language, for it is not clear whether it objects to the Petitioners' alleged failure to measure up to subjective suggestions it might expect or like to see in a disparate impact claim complaint, or whether the Petitioners' complaint was truly objectively deficient as a matter of law. The Petitioners believe this Court should decide whether the Seventh Circuit's pronouncements are now actual pleading requirements for all disparate impact claims that must be followed nationally, setting disparate impact claims above normal pleading terrain (to the terrain governed by Fed. R. Civ. P. 9) or whether the Seventh Circuit opinion is more analogous to a beauty contest for which the Petitioners failed to meet subjective beauty standards.

B. The Circuit Decision contravenes *Lewis v. City of Chicago*.

In adopting the District Court's streamlined approach to adjudicating preclusion doctrine matters, the Seventh Circuit affirmed the Rule 12(b)(6) dismissal of the Adams II claims. The Petitioners respectfully aver that the Circuit Court erred in its non-applicability determination with respect to *Lewis v. City of Chicago*, 560 U.S. 205 (2010). *Lewis* holds that a plaintiff may file a charge and litigate a disparate impact discrimination claim for

later application of a previously adopted discriminatory practice, even though the practice was adopted outside of the limitation period, so long as the new claim is timely asserted and alleges the elements of a disparate impact claim. *Id.* at 211 and 217. The Seventh Circuit appears to agree in the very last footnote of the opinion (number 8 at the bottom of page 736) that the Adams II Plaintiffs could ordinarily have brought the Adams II lawsuit disparate impact claims, but the court states in the body of the opinion that those claims are barred under *res judicata* or collateral estoppel, or both doctrines. On a different specific issue, this Court has generally discussed the claim and issue preclusion doctrines in *Taylor v. Sturgell*, 553 U.S. 880, 891-92 (2008) (also citing *Richards* v. *Jefferson County*, 517 U. S. 793, 797 (1996) for the proposition that federal preclusion is subject to due process limitations).

The Seventh Circuit's reliance on its own jurisprudence (*Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago*, 649 F.3d 539 (7th Cir. 2011)) with respect to the claim preclusion doctrine is not in of itself problematic. It is, respectfully, the interpretation of *Matrix IV* and the lack of a consideration of *Lewis* that are. The Seventh Circuit states: "Here, the second lawsuit meets all the elements of claim preclusion. The parties are the same and the first lawsuit was resolved in a final judgment. Whether the causes of action in the two suits arise from the same core of operative facts is a closer question, but we conclude that they do." *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014). While the Adams II Plaintiffs are not identical to the Adams I Plaintiffs, they are in-

deed a subset, and this point is conceded. The causes of action are not the same, however, since, per *Lewis*, a new cause of action was created when the City made new promotions that created new injuries. The Petitioners also respectfully disagree that the District Court's granting of the motion for partial judgment on the pleadings on grounds the Seventh Circuit found to be erroneous could serve as a final judgment on the merits for the purposes of claim preclusion analysis. The question becomes, may an erroneous district court decision serve as the basis for claim preclusion, when the district court decision rests on an erroneous interpretation of law? Does "final judgment on the merits" mean something more than convenient labeling?

It is telling that the Seventh Circuit decision appears unsure about which preclusion doctrine applies by using issue preclusion as a fall-back doctrine, introducing doubt about whether the motions pertaining to the Petitioners' lawsuits were correctly construed in the non-movants' most favorable light. The Seventh Circuit makes the following pronouncements with respect to issue preclusion:

> Even if claim preclusion does not apply, *issue preclusion* certainly does, and that's enough to sustain the dismissal of the second suit. The 2007 and 2008 testing protocols were the central subject matter of the earlier suit. Whether the tests were intentionally discriminatory or had a disparate impact was actually litigated and essential to the final judgment. The plaintiffs in the second suit were fully

> represented in the first—and by the same attorney who appears for them in the second round of litigation. They cannot now relitigate issues that were decided against them in the earlier litigation. The second suit was properly dismissed on preclusion grounds.

A fair reading of the procedural history of the current litigation does not support the Seventh Circuit's conclusion that "[w]hether the tests were intentionally discriminatory or had a disparate impact was actually litigated and essential to the final judgment," with respect to the disparate impact claims. The latter claims were never allowed to proceed by the District Court, using a rationale that the Seventh Circuit found to be incorrect. If judicial review of the District Court decision had stopped its analysis there, as would normally be expected, the disparate impact claims would have been remanded to proceed at least to summary judgment proceedings. It is only because the Seventh Circuit undertook a separate pleading review outside of the issues on appeal that it even ruled that the Adams I complaint was deficient, and that the Adams II complaint was barred under preclusion doctrines. Thus, the critical issue becomes, if a complaint is dismissed purely on pleading deficiency grounds in a first lawsuit, and no findings of fact or conclusions of law were ever reached with respect to the alleged injury, are the plaintiff and all like plaintiffs forever barred from litigating brand new injuries of the same type?

The Petitioners argued throughout the Adams II Case and the appeal that "actually litigated" should not be construed to contain the amount of elasticity the Seventh Circuit has adopted, and that including such elasticity stretches the term past its just limits to permanent deformity that will result in absurd results. The Petitioners cited examples throughout including the following in their Petition for Rehearing:

> If an Irish-American employee in the Seventh Circuit sues after being denied promotion because her employer's policy actually states "no Irish employees need apply for promotion," but a district court dismisses the case due to some pleading deficiency, the employer would understandably prevail on that particular claim on that previous promotion, and absent special circumstances, the employee would not be able to sue a second time on that particular promotion. However, if the employer continues to operate with the same shocking policy in new promotions afterward and the employee sues again, the Panel decision now clearly allows the employer to discriminate against the Irish-American employee in each and every future promotion because the Panel Decision now specifically requires a district court to dismiss the Irish employee's second case on the basis of *res judicata* and issue preclusion. The Panel Decision

> mistakenly treated the Adams I Case dismissal as being final for all issues mentioned in the case and being actually decided on the merits of whether a policy is discriminatory.
>
> Left untouched, the Panel decision would sanction the use of the *res judicata* and collateral estoppel doctrines to bar litigation based on nothing more than the convenient labeling of a judgment on the pleadings or other dismissal of a case on pleading grounds as a "final" decision and being "essential" to the claim-- regardless of whether the actual claims and issues in question were actually adjudicated. The results would be dire for not only employment discrimination plaintiffs but every plaintiff who has a case dismissed for a pleading deficiency and finds herself harmed once again by a defendant in a new transaction or event.

With less exposition, the United States Supreme Court in *Lewis* also warns of unacceptable results when litigants are precluded from challenging a new injury, although admittedly in the circumstance where the statute of limitations has run on a claim the first time an employment practice was adopted by an employer, when it states:

> Under the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefi-

> nitely, with impunity, despite ongoing disparate impact. Equitable tolling or estoppel may allow some affected employees or applicants to sue, but many others will be left out in the cold. Moreover, the City's reading may induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact.
>
> In all events, it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. By enacting §2000e–2(k)(1)(A)(i), Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past. If that effect was unintended, it is a problem for Congress, not one that federal courts can fix. *Id.* at 216-17.

While justice delayed can be justice denied, justice hastily applied to preclude claims and issues is also justice denied.

C. The Circuit Decision erred by not considering whether disparate treatment can be demonstrated by an employer's continued use of a practice known by it to cause disparate impact.

Both before the District Court and the Seventh Circuit, the Petitioners argued that they should be allowed to present supporting evidence and arguments with respect to their disparate treatment discrimination claims that the Respondent City had knowledge that portions of the merit rank promotion processes had an historical disparate impact on African American promotion candidates, that the Respondent never addressed those problems, and that Respondent continued to use similar processes throughout the years, including the promotion processes that are the subject of the current litigation. The Petitioners cited as persuasive authority, the case of *United States v. City of New York*, 683 F.Supp.2d 225 (E.D.N.Y. 2010) for the proposition that a plaintiff may demonstrate disparate treatment where the defendant had shown knowing, callous and continued disregard for the presence of disparate impact discrimination. Given tort law regarding intentional and related torts, it is not a stretch to conclude that such behavior might at least involve reckless disregard sufficient to reach the animus required for intentional discrimination.

The Respondent attempted to distinguish the disparate treatment claims from the *City of New York* case by arguing that City of New York applied to "pattern and practice" cases only, and that the Petitioners had not pleaded a "pattern and practice" claim in their complaint. Neither the District Court nor the Seventh Circuit addressed the issue. The Petitioners respectfully aver that the *City of New York* doctrine that the callous use of employment practices that are known to cause disparate impact on protected classes can serve as a basis for a disparate treatment claim, and moreover, that employers' intentional use of a known policy with a disparate treatment is a matter of national employment law significance.

D. Due process entitles a non-movant to at least one opportunity to cure pleading deficiencies declared *sua sponte* by a circuit court when there is no fair warning of the newly-declared pleading standards.

The Court is again referred to Section B, *supra*., regarding the newly-declared pleading standards of the Seventh Circuit for Title VII disparate impact discrimination claims. After the Seventh Circuit declared new pleading standards for disparate impact disparate impact discrimination claims, it also foreclosed an opportunity for the Petitioners to respond to the newly-declared standards, relying on the fact that

the District Court had denied the Petitioners motion for leave to amend their complaint after the District Court erroneously (says the Seventh Circuit) dismissed the Petitioners' complaint for failing to state that the employment practice in question was facially neutral, and that the District Court had not abused its discretion because the Petitioners had not sought leave to amend prior to the case management deadline, even though the District Court did not rule on the motion for partial judgment on the pleadings for approximately one year (and not until months after the said deadline had passed).

The District Court only addressed the issue of whether facial neutrality language is required both in disparate impact EEOC charges and disparate impact lawsuit complaints. Once all of the District Court's rationale and all of the Respondent's rationale were rejected, the motion for partial judgment on the pleadings should have been reversed, and the Petitioners should have been allowed to move forward on the complaint in effect at the time the motion for partial judgment on the pleadings was filed.

The Seventh Circuit does not appear to cite any statutory or case authority for its new stringent pleading standard for disparate impact discrimination cases. Nonetheless, against its own previous jurisprudence, it did not remand the case to allow the Petitioners an opportunity to amend the complaint to meet the newly-declared standards if possible. The Seventh Circuit had previously ruled in the case of *Bausch v. Stryker Corp.*, 630 F.3d 546 (7th Cir. 2010), that when a defendant challenges

the adequacy of a complaint pursuant to the *Twombly-Iqbal* standard, a plaintiff is entitled to wait and see if the court declares that the complaint is deficient, and after the court identifies deficiencies, the plaintiff must be given at least one opportunity to correct the deficiencies if they can be corrected. The Panel Decision in question provides no rationale for the departure from *Bausch*, except an out-of-context statement that "That line of cases does not apply here. The plaintiffs had an opportunity to amend their complaint once. This was their second motion, and the deadline for further amendments had long since expired. The district court did not abuse its discretion in refusing to grant relief from the lapsed deadline." *Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014).

The Petitioners pointed out in their Petition for Rehearing what was summarized in the "Statement of the Case" Section, *supra*.: the Plaintiffs sought and received leave to amend their complaint a first time to respond to completely unrelated issues than those that were the subject of the later motion for partial judgment on the pleadings that the District Court and Seventh Circuit granted and affirmed, respectively. The District Court accepted the Plaintiffs' amended complaint and declared the motion to dismiss moot. Perhaps it is worth noting that the Adams I District Court case was first assigned to the Hon. David F. Hamilton of the Southern District of Indiana, who presided over the motion to dismiss proceedings. Upon Judge Hamilton's elevation to the U.S. Court of Appeals for the Seventh Circuit, the Adams I Case was reas-

signed to the Hon. Sarah Evans Barker, who presided over the case thereafter, including the motion for partial judgment on the pleadings.

Under the circumstances above, an important legal issue becomes, is a plaintiff required to anticipate and foresee all possible deficiency declarations that the district court and any later appeals courts might make—even where pleading standards for the type of claim in question are articulated for the first time by the appeals court—either by proactively correcting such "deficiencies" before hand, or seeking a vague, provisional leave to amend before the expiration of case management deadline for amending pleadings in order to avoid being forever barred from amending the complaint to correct the "deficiencies"? Further, is a plaintiff ordinarily entitled to at least one opportunity to amend his or her pleading after a court has declared deficiencies? Is a plaintiff entitled to wait and see if a defendant's "deficiency" allegations are adopted by a court before seeking to amend his or her pleadings each time a defendant makes a pleading argument? Alternatively, can the mere fact that a plaintiff amended his or her complaint once be used to bar any future amendments, even if new pleading deficiency issues are raised by a court *sua sponte* and regardless of the reasons for the first amended pleading?

Even more fundamentally, is the failure to order remand to allow a plaintiff at least one opportunity to amend his or her complaint after an appeals court declares interpretive new pleading standards consistent with procedural due process

under the Fifth and Fourteenth Amendments to the U.S. Constitution?

Moreover, if a litigant has his or her claim disposed of by a new interpretation of a pleading rule which interpretation is not obvious on its face, has the litigant been deprived of the necessary "notice" requirement underpinning procedural due process? This Court in *Taylor v. Sturgell*, 553 U.S. 880 (2008) held that "[t] he federal common law of preclusion is, of course, subject to due process limitations. *See Richards v. Jefferson County,* 517 U.S. 793, 797, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)." *Id.* at 891. It is also now axiomatic in American Jurisprudence that where property rights are involved, the appropriate level of procedural due process must be afforded a plaintiff. In the present dispute those property rights may be interpreted in multiple ways, including but not limited to the economic value in the form of lost opportunity costs (e.g., salary, wages, benefits, and the like) to the Petitioners as a result of the Respondent's failure to promote them as a result of disparate impact, among other theories of recovery.

More broadly speaking, this Court has at least strongly implied that civil claims for relief, especially involving the payment, *vel non*, of money from a legal duty, are a form of property right, and that related proceedings must meet due process requirements. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Surely, the notice and hearing requirements of procedural due process demand that litigants and their attorneys have constructive notice in the form of a fair opportunity to know how the proceedings will be conducted (such

as publishing the procedural rules) and what pleading standards must be met to maintain a claim for relief. Where new, dispositive pleading standards are established by a circuit court that could not have reasonably been foreseen in general, or where the circuit finds new pleading deficiencies that were never raised or argued prior to the circuit court's decision, due process should demand that a blindsided plaintiff have at least one opportunity in the form of remand and leave to amend, to amend his or her complaint to correct the "deficiencies" if he or she can.

CONCLUSION

The Petitioners turn to this Court to prevent a miscarriage of justice in the failure of the District and Circuit Courts to allow the Petitioners their day in court, resulting from, the Petitioners respectfully believe, a misapplication of federal pleading requirements, a departure from the letter and spirit of Supreme Court jurisprudence, and non-adherence to the notions of fundamental procedural fairness. For the reasons presented in this Petition, the Petitioners earnestly request, and believe they have amply demonstrated, that a writ of certiorari should be granted.

Respectfully submitted,

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