16-1395

No. ____

Supreme Court, U.S.
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In the Supreme Court of the United States

TINA ALEXANDER; CHEYANNE JONES;
KENDRA WILLIAMS; KYSHIA WOODS;
ZACHARY BAYLOR; AND TRACEY KENNERLY,
Petitioners,

v.

AMERIPRO FUNDING, INC. AND
WELLS FARGO BANK, N.A.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit improperly required Petitioners Baylor and Kennerly to provide direct evidence of discrimination under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, in order to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. Whether the Fifth Circuit's narrow interpretation of what constitutes a "creditor" under ECOA improperly allows for circumvention of the statute by creditors who wish to discriminate against Section 8 housing aid recipients.

RULE 29.6 STATEMENT

This petition is filed on behalf of the following natural persons, who were plaintiffs/appellants below:

Tina Alexander
Cheyanne Jones
Kendra Williams
Kyshia Woods
Zachary Baylor
Tracey Kennerly

The respondents, who were defendants/appellees below, are:

Ameripro Funding, Inc.
Wells Fargo Bank, N.A.

Additional plaintiffs/appellants who were parties to the proceeding in the court whose judgment is sought to be reviewed are:

Sheila Alexis
Evelyn Baines
Shauntay Bennings
Nyo Haygood
Tabitha Henry
Roslyn Jones

An additional defendant who has since settled the claims against it and is no longer involved in the case was:

Amegy Bank National Association

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tina Alexander, Cheyanne Jones, Kendra Williams, Kyshia Woods, Zachary Baylor, and Tracey Kennerly respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-26) is reported at 848 F.3d 698. The memorandum and order of the district court granting the Respondents' motion to dismiss (App. 29-47) is unreported but is available at 2015 WL 4545625.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 2017. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 and 15 U.S.C. § 1691a (ECOA), are reproduced in the Appendix. App. 48-50.

STATEMENT

The Fifth Circuit adequately described the procedural history. Petitioners Tina Alexander, Cheyanne Jones, Kendra Williams, Kyshia Woods, Zachary Baylor, and Tracey Kennerly[1] brought this suit against Respondents Ameripro Funding, Incorporated and Wells Fargo Bank, N.A.[2] for violation of ECOA in the United States District Court for the Southern District of Texas, Houston Division on September 15, 2014. On July 28, 2015, the District Court granted a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on behalf of Respondents, Ameripro Funding, Incorporated and Wells Fargo Bank, N.A. On February 16, 2017, the Fifth Circuit Court of Appeals affirmed in part and reversed and remanded in part. Specifically, the Fifth Circuit affirmed a dismissal of all Petitioners' claims against Wells Fargo and all but four Petitioners' claims against Ameripro.

In doing so, the Fifth Circuit rendered a holding in violation of the plain statutory language of ECOA, and improperly required specific direct evidence of discrimination at the pleadings stage in violation of this Court's holding in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

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[1] The following plaintiffs/appellants below are not petitioning this court: Sheila Alexis, Evelyn Baines, Shauntay Bennings, Nyo Haygood, Tabitha Henry, and Roslyn Jones.

[2] Additional defendant Amegy Bank National Association settled the claims against it and is no longer involved in the case.

Petitioners have made specific allegations of violations of ECOA, 15 U.S.C. § 1691 *et seq*. and Regulation B, 12 C.F.R. Pt. 1002. The Consumer Financial Protection Bureau (CFPB or Bureau) is the federal agency charged with administering ECOA and promulgating regulations to carry out its purposes. *See* 15 U.S.C. § 1691b(a).

ECOA states:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> (2) because all or part of the applicant's income derives from any public assistance program....

15 U.S.C. § 1691a.

Petitioners have specifically alleged that they were discriminated against by Respondents' refusal to consider their public assistance income in extending credit, in violation of ECOA. Petitioners also specifically alleged that Respondents told Petitioners that public assistance income would not be considered. Petitioners have further specifically alleged that Wells Fargo had a written discriminatory policy, that Respondents applied (and communicated to Petitioners) to discriminate against Petitioners under ECOA, and even provided a specific citation to the precise paragraph of the policy. The policy is a per se violation of ECOA, and it plainly resulted in Petitioners not receiving credit for their public assistance income in violation of ECOA.

As the Court of Appeals described it, a group of two petitioners—Baylor and Kennerly—were "Wells Fargo

Applicants." They specifically pleaded that they applied for credit to Wells Fargo in its capacity as a mortgage originator:

> 81. In addition Zachary Baylor and Tracey Kennerly, who applied for mortgage loans with Wells Fargo, were discriminated against by Wells Fargo's refusal to consider Section 8 income or other public assistance for consideration in its mortgage loan decisions on the same basis as non-public assistance income...
>
> 94. Plaintiff Zachary Baylor applied for a mortgage loan in approximately 2011 with Defendant Wells Fargo Bank...
>
> 96. Plaintiff Zachary Baylor's Section 8 and other public assistance income was not considered by Wells Fargo on the same basis as non-public assistance income for his mortgage application...
>
> 102. [Petitioner] Tracey Kennerly applied for a mortgage loan in approximately early 2012 with Defendant Wells Fargo Bank...
>
> 105. [Petitioner] Tracey Kennerly's down payment housing voucher was not included for consideration of her mortgage application.
>
> 106. Wells Fargo required two appraisals be done on Tracey Kennerly's application.
>
> 107. Wells Fargo denied Tracey Kennerly's application.

108. Wells Fargo told Tracey Kennerly that her mortgage loan would only be granted if she increased the amount of her down payment.

109. As a result of her Section 8 income not being considered on the same basis as public assistance income for the purpose of her mortgage application, Tracey Kennerly obtained less favorable mortgage terms and qualified for a mortgage at a lesser amount than if her Section 8 income had been considered equally as non-public assistance income.

Appendix E at App. 64, 66, 67, and 69.

The Court then noted that while Baylor and Kennerly were "applicants" and that Wells Fargo was a "creditor" under the law, Baylor and Kennerly did not plausibly state a claim of discrimination under ECOA. Noting that both Petitioners pleaded specific evidence of a Wells Fargo policy with respect to correspondent loans that plainly violated the nondiscrimination portion of ECOA, the Court refused to rely on such evidence to plausibly support an allegation of discrimination against Baylor and Kennerly. The Court stated

> [T]he question of Wells Fargo's purchasing on the secondary mortgage market is distinct from its practices as an originating lender. Indeed, the ECOA does not prohibit discrimination with respect to mortgages purchased on the secondary market; the Act only applies to originating lenders in the primary market. Thus

> the facts alleged by Wells Fargo applicants have no plausible relation to the statutory inquiry they assert.

(Appendix A at App. 16)

And while Kennerly and Baylor specifically pleaded that they themselves were discriminated against by Wells Fargo's refusal to consider their public assistance, in violation of ECOA, the Court dismissed these allegations as "no more than 'formulaic recitation[s] of the elements of a cause of action.'" *Ashcroft v. Iqbal,* 556 U.S. 678-79 (2009). Appendix A at App. 16.

In doing so, the Fifth Circuit provided a far more stringent standard on a review of the pleadings on the review of a motion to dismiss than has any other Court of Appeals or this Court. In fact, this Court stated the opposite in *Swierkiewicz,* 534 U.S. at 506.

REASONS FOR GRANTING THE PETITION

Issue One: The Fifth Circuit improperly required Petitioners Baylor and Kennerly to provide direct evidence of discrimination to support their claim under the Equal Credit Opportunity Act in order to survive the Respondents' Motion to Dismiss.

1. Petitioners more than met the "plausibility" standard of *Iqbal / Twombly.*

Petitioners more than met the "plausibility" test required by *Twombly* under Federal Rule of Civil Procedure 8.

Rule 8 provides:

> (a) Claim for Relief. 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. 8(a)(2).

This Court has stated repeatedly that under Rule 8, "Fair notice to the Defendant" is all that is required. *Bell Atlantic, Inc. v. Twombly,* 550 U.S. 544, 555 (2007). Rule 8 provides a "liberal pleading standard" that does not require a petitioner to plead "specific facts" explaining precisely how the respondent's conduct was unlawful. *Erickson v. Pardus,* 551 U.S. 89, 93-94 (2007); *Twombly,* 550 U.S. at 555. Under the Fifth Circuit's standards, even the most obvious inferences are denied; and a court need not draw all reasonable inferences in the petitioner's favor

Certainly, a Petitioner must do more than raise "a sheer possibility that a respondent has acted unlawfully." *Iqbal,* 556 U.S. at 662, 678. But all that means is that petitioner must only allege sufficient factual content to "'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* at 683 (quoting *Twombly,* 550 U.S. at 570).

This Court has reiterated that Rule 8(a)(2) sets forth a "liberal pleading standard," one which does not contemplate the pleading of "specific facts." *Erickson,* 551 U.S. at 89, 94. The ultimate test is "fair notice to the defendant." *Id.* at 93 (internal quotation marks and citations omitted). As the Court in *Erickson* reemphasized, the short and plain statement required under Rule 8(a)(2) "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).

Yet we also know that "[t]he plausibility standard is not akin to a 'probability requirement.'" *Twombly,* 556 U.S. at 678. In other words, it need not appear from the complaint that the plaintiff's claims are likely to succeed. As this Court recently recognized, "[a]lthough the factual allegations in a complaint must make entitlement to relief plausible and not merely possible, what Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Id.* at 556 (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). Further, plausibility will not look the same in every case; assessing plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

2. The Fifth Circuit's opinion departs from the holding in *Swierkiewicz v. Sorema.*

The Fifth Circuit's opinion comes in glaring contrast to this Court's pronouncements in *Swierkiewicz*, 534 U.S. 506, a case specifically involving the sufficiency of pleadings in a discrimination case. In *Swierkiewicz*, the Court held that a complaint in an employment discrimination lawsuit need not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas*. *Swierkiewicz*, 534 U.S. at 511-13. As the Court held in *Swiekiewicz*,

> In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the

> *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.

Id. at 511.

Moreover, requiring specificity in discrimination claims could prevent meritorious claims from prevailing. This Court has explained, "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case." *Swierkiewicz*, 534 U.S. at 512.

The allegations here provide far more than fair notice and plausibility as required by *Twombly* and *Iqbal*. This Court unanimously upheld the sufficiency of the complaint in *Swierkiewicz*, even though the factual allegations were by no means extensive. Later in *Twombly*, this court confirmed the holding in *Swierkiewicz*, specifically referencing the factual allegations that the *Swierkiewicz* Court deemed sufficient to state "grounds showing entitlement to relief." *Twombly*, 550 U.S. at 569–70.

3. <u>The Fifth Circuit's opinion departs from virtually every circuit court's requirements for reviewing discrimination complaints</u>.

The Fifth Circuit opinion below also departs the standard set by other circuit courts, which have specifically followed *Swierkiewicz*. *See United States v. Union Auto Sales*, 490 Fed.Appx. 847, 2012 WL 2870333 (9th Cir. 2012) (holding that under ECOA, a plaintiff need only allege that defendant "simply treats

some people less favorably than others" and noting that the "district court confused the standard for stating a claim of discrimination at the pleading stage and the evidentiary standards that must be met to prove that [ECOA] claim") (citing *Swierkiewicz*). *See also Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir.2010). In *Swanson*, the Seventh Circuit held that a:

> plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an entirely plausible scenario, whether or not it describes what "really" went on in this plaintiff's case.

Id. at 404-05.

The Court went on to apply that standard to Swanson's claim of discrimination under the Fair Housing Act, and despite the lack of allegations of any specific discriminatory intent, reversed the district court dismissal of her claim:

> Swanson accuses the appraisal defendants of skewing their assessment of her home because of her race. It is unclear whether she believes that they did so as part of a conspiracy with Citibank, or if she thinks that they deliberately undervalued her property on their own initiative. Once again, we find that she has pleaded enough to survive a motion under Rule 12(b)(6). The appraisal defendants knew her race, and she accuses them of discriminating against her in the specific business transaction

> that they had with her. When it comes to proving her case, she will need to come up with more evidence than the mere fact that PCI (through Lanier) placed a far lower value on her house than Midwest Valuations did. *See* Latimore, 151 F.3d at 715 (need more at the summary judgment stage than evidence of a discrepancy between appraisals). All we hold now is that she is entitled to take the next step in this litigation.

Id. at 406-07.

Other circuits have similarly reversed grants of dismissal despite limited factual allegations. See *Littlejohn v. City of N.Y.*, 795 F.3d 297, 311 (2d Cir. 2015) ("The facts required by *Iqbal* to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation"); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 88–89 (2d Cir. 2015) (Plaintiff "plausibly alleged that the adverse action was taken 'because of' his Hispanic ethnicity" when the Complaint averred that "he was assigned a large percentage of Spanish speaking students ... while his similarly-situated coworkers were not assigned additional work.") (emphasis added); *Craddock v. Lincoln Nat. Life Ins. Co.*, 533 F. App'x 333, 337 (4th Cir. 2013) ("Craddock alleges that all non-disabled employees in her department received a form of training (i.e., regarding scanning) that she did not, that she could have performed scanning work, and that scanning positions were available. She also alleges that

Lincoln refused to consider rehiring her. These allegations render plausible Craddock's claim that she was discharged on the basis of disability, and that Lincoln failed to reasonably accommodate her disability."); *Miller v. Carolinas Healthcare Sys.*, 561 F. App'x 239, 241 (4th Cir. 2014) ("In his amended complaint, Miller stated that CHS discriminated against him when it failed to promote him to a supervisor's position. Miller offered no other details with respect to the position. We conclude Miller provided CHS 'fair notice of what the ... claim is and the grounds upon which it rests.'"); *Keys v. Humana, Inc.*, 684 F.3d 605, 609–10 (6th Cir. 2012) ("Recently, [w]e again recognized the applicability of *Swierkiewicz*'s holding and further noted that it would be 'inaccurate to read *Twombly* and *Iqbal* so narrowly as to be the death of notice pleading and we recognize the continuing viability of the "short and plain" language of Federal Rule of Civil Procedure 8 ...' [I]t was error for the district court to require Keys to plead a prima facie case under *McDonnell Douglas* in order to survive a motion to dismiss.").

While the pronouncement of *Iqbal* and *Twombly* have triggered a variety of responses, none seem as extreme as the Fifth Circuit's opinion in this case. Here, the allegations were extremely specific, even citing in detail and quoting the specific policy that violates, on its face, ECOA's prohibition of discrimination against those receiving public assistance. A review of the Petitioners' entire Third Amended Complaint shows that a violation of ECOA is not merely plausible; it is indeed highly likely, as pointed out by the Consumer Finance Protection Bureau in the amicus brief it submitted in support of

Petitioners' appeal. Respondents' arguments would require that the allegations be scrutinized narrowly and legally cabined. Moreover, they would require this Court to suspend common sense and experience, something this Court has specifically disallowed. As the Court in *Iqbal* noted, assessing plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 679.

Petitioner Zachary Baylor alleges that Wells Fargo denied his mortgage application after failing to consider his public assistance income, and that he subsequently obtained a mortgage loan through another lender. TAC ¶ 96-98, Appendix at App. 67. Baylor and Kennerly pleaded that Wells Fargo had a policy in place under which it would not "accept transactions" that involved Section 8 loans, and it is more than plausible that such discriminatory intent would apply outside of the correspondent lending model. Appendix A at App. 11-12. The fact that an entity has voiced a discriminatory intent, even if it is in a different context, has provided sufficient evidence for purposes of summary judgment. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151-153 (2000); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2005). Certainly, under the less burdensome Rule 8 standard, such a discriminatory policy at least makes plausible that Well Fargo operated under same bias when it originated a loan. In fact, to conclude, as the Fifth Circuit did, that Wells Fargo's discriminatory policy provided no such evidence of bias seems to be a judicial weighing of the evidence, at the pleadings stage.

Issue Two: The Fifth Circuit's narrow interpretation of what constitutes a "creditor" improperly allows for circumvention of ECOA by creditors who wish to discriminate against Section 8 housing aid recipients.

As noted by the CFPB in its amicus brief below, ECOA prohibits creditors from discriminating against any applicant in "any aspect of a credit transaction . . . because all or part of the applicant's income derives from any public assistance program." (Appendix F at App. 72) 15 U.S.C. § 1691(a)(2); see also 12 C.F.R. §§ 1002.2(z), 1002.4(a), (b). If a creditor violates ECOA or Regulation B, an "aggrieved applicant" may bring a suit seeking actual damages, punitive damages, and equitable or declaratory relief. See 15 U.S.C. §§ 1691e(a)-(c),1691a(g). The CFPB has made clear that ECOA and Regulation B broadly define the term "creditor" to mean "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e); see also 12 C.F.R. § 1002.2(l) (defining creditor to mean "a person, who, in the ordinary course of business, regularly participates in a credit decision. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates."); 12 C.F.R. Pt. 1002, Supp. I ¶ 1002.2(l)-1 ("The term creditor includes all persons participating in the credit decision. This may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated.").

Wells Fargo is a creditor within the meaning of ECOA and Regulation B with respect to loans it would have acquired from Ameripro, see TAC ¶ 79 (ROA 508), and petitioners have pleaded allegations that render that conclusion at least plausible, if not obvious. Likewise, the CFPB has taken the position that Wells Fargo was a creditor even for loans originated by Ameripro, or at least that there is a fact issue at this point as to whether it is a "creditor" as defined by the statute and the CFPB's regulations. Appendix F at App. 85-86.

Moreover, even if there were no application at all, it is still a violation of ECOA for a creditor to merely "discourage" one from applying because of their status in deriving their income from public assistance. (12 C.F.R. § 202.4(b)). As the Court noted in *Page v. Midland Federal Savings and Loan Assn.*, 2013 WL 5211747 (N.D. III. 2013):

> Respondent also argues that Petitioners' ECOA claim in Count IV fails to state a claim because petitioner never submitted an application. Citing *Dumas v. Sentinel Mortgage Corp.*, 2003 WL 22859807 * 3 (N.D. III. 2003), which held that "to establish a claim under the Equal Credit Opportunity Act, petitioner must have actually submitted a completed application as defined by C.F.R. § 202.2(f)," defendant argues that by pleading that she never went to defendant and even attempted to complete an application, petitioner has pled herself out of a claim.
>
> As petitioner correctly counters, however, the ECOA applies to all stages of a credit transaction, including the pre-application stage.

Reg. B. 12 C.F.R. § 202.4(b) entitled "Discouragement" provides:

> A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibitive basis a reasonable person from making or pursuing an application.

Thus, petitioner is correct that if Johnson discouraged her from applying for a loan with or through respondent because of her race and/or any other prohibitive basis, the complaint states a claim. Accordingly, the motion to dismiss Count IV is denied.

See also Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971, 975 (7th Cir. 2008) (noting that 12 C.F.R. § 202.4(b) applies to statements by a creditor to applicants or to prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursing an application under ECOA).

The Fifth Circuit also affirmed the dismissal of claims by the "Ameripro Applicants" against Wells Fargo, holding that for purposes of the Ameripro Applicants, Wells Fargo was not a creditor as defined by ECOA, 42 U.S.C. § 1691(e). In doing so, the Court held that the Ameripro Applicants had not sufficiently alleged that Wells Fargo participated in the refusal to consider their public assistance (a per se violation of ECOA) despite their specific allegation that a Wells Fargo policy was communicated and relied upon by Ameripro in making its decision to refuse credit based upon the receipt of public assistance.

If Wells Fargo participated or influenced the credit decision, it is a creditor. It is hard to imagine what more could be alleged to render that participation more "plausible." Certainly, without the benefit of any discovery from Wells Fargo, petitioners have adequately and plausibly alleged Wells Fargo to be a creditor under any reasonable interpretation of that term under ECOA.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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