In the
Supreme Court of Ohio

BETHEL OIL AND GAS, LLC, et al.,	:	Case No. 2024-1696
	:	
Appellants,	:	On Appeal from the
	:	Washington County
v.	:	Court of Appeals,
	:	Fourth Appellate District
REDBIRD DEVELOPMENT, LLC, et al.,	:	
	:	Court of Appeals
Appellees.	:	Case No. 23CA5

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INTRODUCTION

This case presents the Court with a chance to modernize the pleading standard in civil litigation. Ohio has been a notice-pleading State. But Civil Rule 8, properly understood, requires pleadings of fact. Under that standard, to survive a motion to dismiss, the plaintiff must plead facts that plausibly support each element of a claim.

Members of this Court recently floated applying a "plausibility standard" to pleadings, but that case did not present the issue. *Maternal Grandmother v. Hamilton Cnty. Dep't of Job & Fam. Servs.*, 2021-Ohio-4096, ¶28 (DeWine, J., joined by Kennedy, J., concurring in judgment only). This one does, and the Court should adopt a pleading standard that requires fact allegations.

The labels "fact" pleading and "notice" pleading are of recent vintage. On a historical view, Ohio *always* required the plaintiff to allege facts that support a claim to legal relief. *See* Report of the Commissioners on Practice and Pleadings, Code of Civil Procedure §§82, 85(2) (1853) ("The pleadings are the written statements by the parties of the facts, constituting their respective claims and defences."), https://tinyurl.com/553sp6vd ("Code Report"). Civil Rule 8 took after that predecessor code—its promulgators envisioned the "simplified pleading originally intended by the drafters of the Field Codes." Civ.R.8, 1970 Staff Notes (available at Lexis's Annotations). But in 1975 this Court uncritically adopted terminology from a since-repudiated U.S. Supreme Court case that said facts ceased to be an essential component of a well-pleaded complaint. The federal case, *Conley*

v. Gibson, stated, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." 355 U.S. 41, 45–46 (1957). This Court adopted that statement of the pleading standard as its own. *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 42 Ohio St. 2d 242, 245 (1975). But the U.S. Supreme Court "retire[d]" that errant formulation of the "accepted pleading standard" in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). This Court should, too. *Maternal Grandmother*, 2021-Ohio-4096 at ¶26 (DeWine, J., concurring).

The Attorney General urges the Court to return Ohio to its original fact pleading standard. Indeed, one of this Court's foundational roles is to oversee the sound administration of this State's civil justice system. And, in the Attorney General's judgment, fact pleading—requiring "short and plain" factual allegations that make the claim for relief plausible—would better serve all litigants in Ohio. Civ.R.8(A); *see* Br. of *Amicus Curiae* Ohio Ass'n Civil Trial Att'ys 7–8.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law officer, and as such has a general interest in the sound administration of a civil justice system. R.C. 109.02. Here in particular, the Attorney General is uniquely situated to weigh in on the efficacy of fact pleading. As a repeat litigant himself and as counsel to his clients, the Attorney General routinely appears in court as both a civil plaintiff and defendant in both state and federal court. The

Attorney General brings to bear that experience in two court systems that, for now, use different pleading standards.

STATEMENT OF THE CASE AND FACTS

1. The Attorney General takes no position on the application of Civil Rule 8(A) to the complaint in this case. Accordingly, this brief does not recite the case's facts other than to note that the Proposition of Law is cleanly presented because the court of appeals held that the "complaint satisfies" the "notice-pleading standard." *Bethel Oil & Gas, LLC v. Redbird Dev., LLC*, 2024-Ohio-5285, ¶48 (4th Dist.) ("App.Op."). This Court accepted jurisdiction to reconsider if fact pleading is the proper standard in Ohio. *03/04/2025 Case Announcements*, 2025-Ohio-705.

2. Appellant's proposition invokes the federal pleading standard, so the federal experience with civil pleading is an important backdrop to this case. The federal judiciary's adoption of the rules of civil procedure in 1938 effected the merger of law and equity. The newly minted rules aimed to standardize and streamline pleading a civil case by replacing a variety of different legal actions with "one form of action to be known as 'civil action.'" Fed. R. Civ. P. 2 (1938); *see* Federal Judicial Center, *Civil Procedure before the FRCP*, https://perma.cc/TL69-RGAL ("Rule 2 recognized the merger of law and equity."); Aaron Friedberg, *The Merger of Law and Equity*, 12 St. John's L. Rev. 317, 318–19 (1938). The change was "a notable and generous departure from the hypertechnical, code-pleading regime of a prior era." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The text of the pleading rules adopted in 1938 remain substantively the same today. Plaintiffs commenced a civil case by filing a complaint. Fed. R. Civ. P. 3 (1938). To set forth a "claim for relief," the complaint needed "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a) (1938). The defendant could move to dismiss the case (or move for judgment on the pleadings) if the complaint "fail[ed] to state a claim upon which" the court could grant relief. Fed. R. Civ. P. 12(b)(6), (c) (1938). The pleading rules eliminated "technicalities" and "created a system that relied on plain language and minimized procedural traps." Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 4–5 (2010).

Applying those standards, the U.S. Supreme Court settled on a rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45–46. But that rule, as time went on, proved unworkable. Even the most conclusory pleadings left open *some possibility* of "undisclosed facts to support recovery." *Twombly*, 550 U.S. at 561 (alterations and internal quotation marks deleted).

Conley's "factual impossibility" standard allowed "a wholly conclusory statement of claim," "even though the complaint does not set forth a single fact" as to that claim. *Twombly*, 550 U.S. at 561–62. Many lower courts "balked at" applying *Conley*'s "literal

terms." *Id.* at 562; *see, e.g.*, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984). Ultimately, the U.S. Supreme Court "retire[d]" *Conley*'s "no set of facts" formulation "as an incomplete, negative gloss on an accepted pleading standard." *Twombly*, 550 U.S. at 562–63.

The U.S. Supreme Court thus reformulated the federal pleading standard. Instead of basic "labels and conclusions, and a formulaic recitation of the elements of a cause of action," a well-pleaded complaint must allege *facts* that "provide the grounds" for "entitlement to relief." *Id*. at 555 (alterations and internal quotation marks deleted); *Ashcroft*, 556 U.S. at 678. The fact allegations must be nonspeculative such that, if credited, they would be "enough to raise a right to relief." *Twombly*, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–236 (3d ed. 2004)). The "plaintiff's factual allegations simply may be asserted rather than evidenced. But … if the facts presented do not present a plausible picture of liability, then the claims will not survive." A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 486 (2008). Courts at the pleading stage do not assess the *probability* that the fact allegations will prove true through discovery—alleging "plausible grounds to infer" all the elements is "enough fact" pleading. *Twombly*, 550 U.S. at 556. When testing the sufficiency of the pleadings, courts can disregard "legal conclusions." *Ashcroft*, 556 U.S. at 678. That is, a complaint that alleges "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" will "survive a motion to dismiss." *Id.* (quotations omitted).

ARGUMENT

Appellants' Proposition of Law: *Ohio's pleading standard under Civil Rule 8 includes the plausibility requirement outlined by the United States Supreme Court in* Iqbal *and* Twombly.

Ohio Civil Rule 8(A) provides that a well-pleaded complaint must present "a short and plain statement of the claim showing that the party is entitled to relief." Consistent with the modern federal model, the Court should hold that Rule 8(A) requires plaintiffs to plead facts that make the asserted claim plausible. At present, borrowing from abandoned federal court precedent, this Court uses a less informative, "notice" standard at the pleading stage. That ahistorical standard requires no factual allegations at all, rendering the pleading requirement a nullity. Text, history, and workability all counsel a fact-based pleading standard, as most other States require.

I. Fact pleading is the appropriate standard in Ohio.

Ohio calls itself "a notice-pleading state." *Maternal Grandmother*, 2021-Ohio-4096 at ¶10; *O'Brien*, 42 Ohio St. 2d at 245. That label is unimportant. If it merely meant applying Civil Rule 8(A) as written, notice pleading would be unproblematic. But this Court has associated the notice-pleading label with *Conley*'s standard of "no set of facts" that could support the claim. *O'Brien*, 42 Ohio St. 2d at 245; *Maternal Grandmother*, 2021-Ohio-4096 at ¶13; *York v. Ohio State Highway Patrol*, 60 Ohio St. 3d 143, 144 (1991). The Court should now retreat from that "factual impossibility" standard and clarify the showing that the text of Rule 8(A) requires. *Twombly*, 550 U.S. at 561. Using the fact-pleading label associated with *Twombly* and *Iqbal* is the clearest way to do so.

A. Ohio Civil Rule 8(A) requires a showing of facts.

The no-set-of-facts standard is incompatible with what the civil rules say. A well-pleaded complaint contains "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R.8(A). On its face, the rule requires a "showing." Generally, a showing is "proof" or, said differently, "an instance of establishing through evidence and argument." *Showing*, Black's Law Dictionary 1664 (12 ed. 2025). Although plaintiffs need not plead evidence in the complaint to make a showing, *York*, 60 Ohio St. 3d at 145, a "blanket assertion[] of entitlement to relief" does not a "showing" make, *Twombly*, 550 U.S. at 555 n.3.

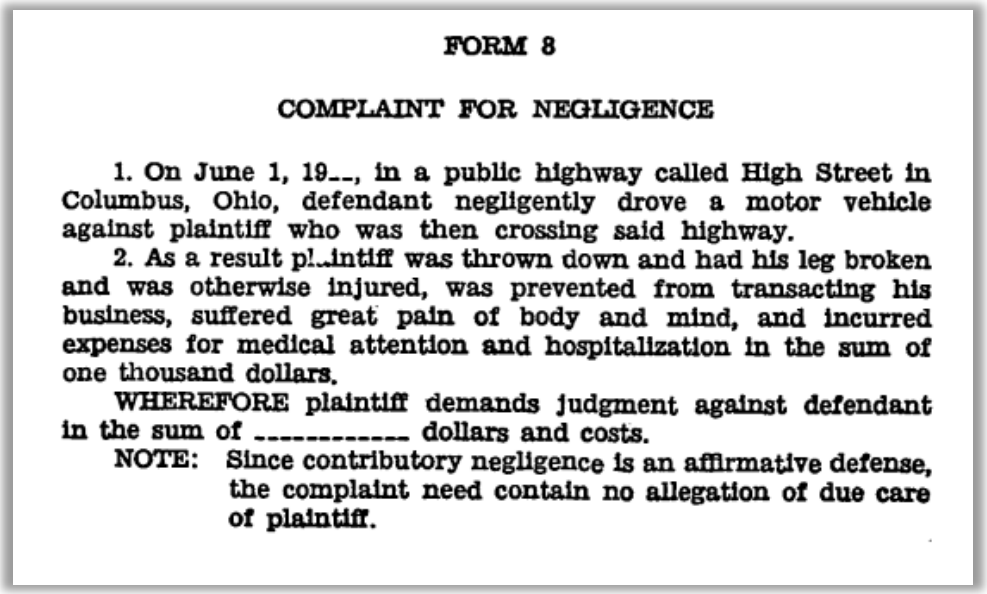
Rather, as the rules make quite clear, an "averment" that is "simple, concise, and direct" makes a proper pleading. Civ.R.8(E)(1). One does not aver legal conclusions. An "averment" is a "positive declaration or affirmation of fact"; in particular, an "allegation in a pleading." *Averment*, Black's Law Dictionary 167 (12 ed. 2025). At the pleading stage, the plaintiff needs to aver facts that, if proven through discovery of evidence, show entitlement to relief. It is enough to aver facts upon information and belief, and without solid evidence, before discovery; "the obligations set forth in Rule 11" prevent reckless or baseless allegations. Civ.R.8(E)(2), 11. Also, plaintiffs receive "all reasonable inferences to be drawn from th[e] allegations" in the complaint. *Maternal Grandmother*, 2021-Ohio-4096 at ¶13. But ultimately, like its federal analogue, Rule 8(A) requires a "statement of circumstances, occurrences, and events in support of the claim presented," not a "bare averment

that he wants relief and is entitled to it." 5 C. Wright & A. Miller, Federal Practice and Procedure §1201 n.18 (4th ed. 2025 update) (quotations omitted).

Other civil rules contextualize fact pleading. A Rule 12(E) motion for a "definite statement" to cure "vague or ambiguous" pleadings presupposes factual allegations. Were fact-free pleadings permissible, vagaries and ambiguities would not be a flaw for Rule 12(E) motions to remedy. Likewise, Rule 15, dealing with amended and supplemental pleadings, provides when unpleaded issues "are tried," the pleadings may be amended "to conform to the evidence and to raise these issues," and the court may liberally allow amended pleadings in response to an objection at "trial on the ground that [evidence] is not within the issues made by the pleadings." Civ.R.15(B). Such trial issues are questions of fact. This rule contemplates factual allegations in the pleadings materializing into fact issues resolved at trial. *See also* Civ.R.56(C). If pleadings could omit fact allegations, there would be no need to pause trial to amend the pleadings so that they conform to the evidence presented at trial. Rule 15's next provision discusses "the conduct, transaction, or occurrence set forth … in the original pleading," which again presupposes the complaint contains factual allegations. Civ.R.15(C). Similarly, the rule allows "a supplemental pleading setting forth transactions or occurrences or events" that transpired after the plaintiff filed the complaint. Civ.R.15(E). Also showing that complaints consist of facts, Rule 10 requires claims based on a "written instrument"—like breach of contract—to attach the document to the complaint and claims based on medical malpractice to include

expert affidavits that aver a standard of care breach. Civ.R.10(D). These attachment requirements make sense only in a fact pleading system.

Finally, the forms that Civil Rule 84 ratifies provide probative information. Such forms indicate the appropriate "simplicity and brevity of statement" the rules require. Civ.R.84. Form 8 exemplifies a properly pleaded complaint for negligence. In addition, the 1970 rules committee expressly endorsed the forms in *Swan's Pleadings and Precedents*. Ohio Civ.R.8, 1970 Staff Notes; *cf. In re T.A.*, 2022-Ohio-4173, ¶13 (relying on staff notes to interpret rules). These forms—reproduced below—show the way to plead "simple, concise, and direct" fact averments. Civ.R.8(E)(1).



FORM 8

COMPLAINT FOR NEGLIGENCE

1. On June 1, 19--, in a public highway called High Street in Columbus, Ohio, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

WHEREFORE plaintiff demands judgment against defendant in the sum of ---------- dollars and costs.

NOTE: Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

Appendix of Forms to the Ohio Rules of Civil Procedure, 43 Ohio St. Bar Ass'n 753, 759 (1970); *see also* Civ.R. Form 8.

144. FOR CARELESSLY KINDLING A FIRE ON DEFENDANT'S LAND, WHEREBY PLAINTIFF'S PROPERTY WAS BURNED.

A. B., Plaintiff,
against
C. D., Defendant.

Court of Common Pleas,——County.
Petition.

The plaintiff says:

1. On [*etc.*], at [*etc.*], he was, and still is, possessed of about fifty acres of land, situate in said county, on which there was a barn, with sixty tons of hay in it; and a fruitful orchard was also on said land; of all which the defendant was well knowing.

2. The defendant, on [*etc.*], intentionally kindled a fire on his land next adjoining to the plaintiff's, and at the distance of sixteen rods from the plaintiff's said land, and so negligently watched and tended the said fire, that it came into the plaintiff's said land, consumed said barn, and the hay of the plaintiff therein of the value of —— dollars, and also forty-five rods of post and rail fence, of the value of —— dollars, and killed forty fruit-bearing apple trees in said orchard, and consumed and destroyed the plaintiff's grass growing on said land. To the damage, [*etc.*]

Joseph R. Swan, *Commentaries on Pleading Under the Ohio Code* 417–18 (1860), https://tinyurl.com/tm38x5jm.

These forms plead plausible claims. Form 8 contains all the relevant facts to establish negligence liability—the time, location, circumstances, and nature of the claim are all averred in ¶1. And the injury, its cause, and damages are all averred (though not proven) in ¶2. That suffices. Swan's form pleads the farmer-plaintiff's factual circumstances in ¶1 (a farm with a barn and fruit trees) and the neighbor-defendant's negligent acts in ¶2

(lighting a fire; allowing it to spread; lighting his barn aflame; ruining his hay, fence, grass, and trees; causing damage). Neither form included evidence, but both asserted facts that would establish negligence if proven.

The no-set-of-facts standard permits far less. It would be enough for the pedestrian to plead: The defendant negligently drove his car, injuring me. And the farmer could plead: The defendant negligently started a fire, causing my property to burn. Some set of facts supports those conclusions, but Rule 8 requires a "showing" from "averment[s]."

Contrary to the plain terms of the civil rules, current precedent does not require complaints to allege facts. From *O'Brien* in 1975 through today, this Court has said a pleading is inadequate only if "the plaintiff can prove no set of facts that would entitle him or her to relief." *Maternal Grandmother*, 2021-Ohio-4096 at ¶13 (quotation omitted); *O'Brien*, 42 Ohio St. 2d at 245; App.Op.¶¶37–38. Otherwise put, if *any* set of facts could possibly be discovered to support a claim, then dismissal on the pleadings is improper. This is "in tension with [Rule] 8's [showing] requirement." *Maternal Grandmother*, 2021-Ohio-4096 at ¶23 (DeWine, J., concurring); *cf. id.* at ¶24 (explaining that pleading "Jones committed a tort against plaintiff" would pass muster).

Indeed, a "factual impossibility" standard flouts Rule 8. *Twombly*, 550 U.S. at 561. A pleader can satisfy the any-set-of-facts standard by pleading no set of facts. A "wholly conclusory statement of claim" suffices to "survive a motion to dismiss" under a factual impossibility standard. *Id.* Saying less in the complaint leaves open more imaginable

possibilities to meet the standard. Taking the standard literally, shrewd plaintiffs could plead legal conclusions only—for example, "Defendant is negligent"—because saying more only reduces the range of possible facts. It would be unwise to plead a time specific because that fact can expose the plaintiff to a pleading-stage statute of limitations defense. Rule 8 calls for more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," but the current pleading standard settles for just that. *Iqbal*, 556 U.S. at 678.

It is no answer that many civil plaintiffs in Ohio file complaints that go further than necessary. Some plaintiffs cut it close. *See Maternal Grandmother*, 2021-Ohio-4096 at ¶15. For example, in *Tuleta v. Med. Mut. of Ohio*, the plaintiff pleaded "scant factual allegations" to support his malicious prosecution claim. 2014-Ohio-396, ¶37 (8th Dist.). But he did "set forth the elements" of his claim, putting the defendant on notice. *Id*. at ¶36. The court dismissed the claim for failure to allege enough "operative facts," but only because the court misapplied the *O'Brien* standard. *Id.* at ¶38. Under a fact-pleading standard, the plaintiff would have known to allege more detail to support his claims.

There is always *some* set of facts to support a legal conclusion. It is incumbent on plaintiffs, under Rule 8, to affirmatively allege their version of the facts in the complaint. And judges must read the allegations charitably on a motion to dismiss, assuming their truth and drawing reasonable inferences, leaving depositions, other discovery devices, and trials to prove (or disprove) the allegations. As the forms display, this showing of

fact is not onerous and should be made with "simple, concise, and direct" allegations. Civ.R.8(E)(1). But a plaintiff can satisfy the any-set-of-facts standard without making a "showing" or "averment" by pleading mere legal conclusions. *See* Civ.R.8(A), (E)(1). Thus, that standard is irreconcilable with the civil rules.

B. The no-set-of-facts rule contradicts Ohio's historical pleading standard.

The historical longview of Ohio's pleading standard confirms that plaintiffs must allege facts. That history shows two recurring ailments that afflict civil pleading and repeated efforts to combat the two extremes. At one extreme, special pleading was needlessly scrupulous, causing too many dismissals for non-merits reasons. That system required extensive detail in particularized form and drew arbitrary distinctions between pleadings of fact, evidence, and conclusions. At the other extreme, general pleading lacked any substance, so pleadings were useless. Civil Rule 8 strikes a balance by requiring a "showing" of entitlement to relief through "averment" of facts, but in "simple, concise, and direct" terms without "technical forms of pleading." Civ.R.8(A), (E)(1). The rule requires facts (contra general pleadings) and simplicity (contra special pleading).

Today's civil rules, adopted in 1970, derive from two sources: Ohio's Field Code of 1853 and the federal civil rules of 1938. The Field Code marked a reform from cumbersome common law pleading, but after over a century of code practice, it too devolved into needless complexities. The Ohio Civil Rules of 1970 attempted to revert to the

simplified fact pleading of the original Field Code. Thus, the life of Ohio's Field Code from 1853 to 1970 bookends the etymology of Civil Rule 8's pleading standard.

1853 Field Code. After the constitutional convention in 1851, the Ohio Constitution charged a commission to "revise, reform, simplify, and abridge the practice, pleadings, forms, and proceedings of the courts of record of this state," abolish the "distinct forms of action at law in use," and eliminate "any distinction between law and equity." Art. XIV, §2 (1851). On its face, that constitutional text mandates a simpler legal practice. *See Richards v. Farm-Orama Assocs., Inc.*, 3 Ohio Misc. 13, 14–16 (Clinton C. P. 1965) (discussing history). As one delegate explained at the 1851 convention, the "public voice" called to "dispense with the distinctions in the mere forms and technicalities which at present exist" in Ohio's courts of law and equity. 1 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850–51, 315–16 (1851), https://tinyurl.com/tu4pjrne. And in 1853 the appointed commission delivered a Code of Civil Procedure, modeled after the New York Code of Pleading and Practice of 1848 architected by David Dudley Field. Code Report at iv; *Richards*, 3 Ohio Misc. at 15.

Ohio's code "abolished" the old "rules of pleading" and re-defined pleadings as "the written statements by the parties of the facts, constituting their respective claims and defences." Code Report §§82–83, at 49. The code required petitions (precursor to complaints) to include a "statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition," and it was grounds to dismiss if "the

petition does not state facts sufficient to constitute a cause of action." *Id*., §§85(2), 87(6) at 58–59. In fashioning these pleading rules, the commission explained that the central purpose of pleading is "to present the facts on which the court is to pronounce the law," and to do so "in such a manner, as that the points in dispute, to which the proof is to be directed, shall be perceived." Code Report at 50.

Civil Rule 8(A) emulates this 19th century practice, so the commission's Report is instructive. Ohio Civ.R.8, 1970 Staff Notes. The commission rejected both "special" and "general" pleading, seeking a middle ground. Code Report at 50. Special pleading often obscured the facts with its "arbitrary and technical rules" that "abound[ed] in verbiage [and] formality." *Id.* "[P]leading generally," in contrast, "discloses nothing … to the parties"; the petition "does not state [facts] at all." *Id*. at 51. So, to avoid the pitfalls of special pleading, the commission abolished all the forms and rules of special pleading, preferring instead "ordinary and concise language"; and to avoid the pointlessness of general pleading, the commission required a "statement of facts." *Id*. at 53, 55. But a statement of facts, the commission clarified, is not "a detailed statement of the evidence, by which the facts are to be proved." *Id.* at 56.

The treatise writer Pomeroy explained that under the code practice, "facts, and not law, must be alleged, and that the averments of legal conclusions without the facts from which they have arisen form no issues, state no causes of action, admit no evidence." John N. Pomeroy, *Code Remedies: Remedies and Remedial Rights by the Civil Action According*

to the Reformed American Procedure §425 at 564–65 & n.5 (4th ed. 1904), https://tinyurl.com/3t8xahpn. "Facts should be alleged as they actually existed or occurred, not their Legal Effect," Pomeroy elaborated; "the allegations must be of dry, naked, actual facts, while the rules of law applicable thereto … must be left entirely to the courts." *Id.*, §423 at 560–61; *see also* §444 at 604–05; *accord* Swan, *Commentaries*, Chapter VIII, §1 at 127.

Ohio Field Code practice lasted over a century. Eventually, the General Assembly codified the pleading rules in Chapter 2903 of the Revised Code. In substance, the code was not meaningfully different than the present-day civil rules. The Field Code required a petition to contain a "statement of facts constituting a cause of action in ordinary and concise language." R.C. 2309.04(A) (1965); *compare id.*, *with* Civ.R.8(A). Failure to plead facts was grounds for a demurrer (precursor to dismissal). R.C. 2309.08(J) (1965); *compare id.*, *with* Civ.R.12(B)(6).

Initially, Ohio courts followed the "general rule of the Code" that "*facts*, not *legal conclusions*, shall be pleaded." *Evans v. Cricket*, 2 Western Law Monthly 603, 604 (Marion C. P. 1860), available at https://tinyurl.com/3s75hzyf (reported by George E. Seney, *The Code of Civil Procedure of the State of Ohio* 114, 119 (2d ed. 1874), https://tinyurl.com/3359c2kf); *Sturges v. Burton*, 8 Ohio St. 215, 218 (1858) (Swan, J.). The Field Code used "simplified 'fact' pleading as distinguished from complicated issue pleading … in order that form would not triumph over substance." Stanley Harper, *Ohio Rules of Civil Procedure: A Symposium*, 39 U. Cin. L. Rev. 465, 465–66 (1970).

1970 Ohio civil rules. In time, through drifts in practice and judicial decisions in Ohio, form overtook substance. The Field Code grew "outdated in the twentieth century," when "endless attention was paid to the form of the pleadings." Harper, 39 U. Cin. L. Rev. at 466. Despite the 1853 commission's best efforts, by 1965 civil practice was "overly complicated and disorganized." William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 Ohio St. L.J. 811, 829 (1968). A technocratic pleading system reeked of a past time "when the fundamental principles of right and justice" were relegated "compared to the quibbles, refinements, and technicalities of special pleading." *Stauffer v. Isaly Dairy Co.*, 4 Ohio App. 2d 15, 23 (7th Dist. 1965) (quoting *McDonald v. Nebraska*, 101 F. 171, 182 (8th Cir. 1900)).

Federal courts experienced the same "hypertechnical" aspects of code practice, which led to the federal civil rules' adoption in 1938. *Ashcroft*, 556 U.S. at 678; *see Twombly*, 550 U.S. at 574–75 (Stevens, J., dissenting) (discussing difficulty under Field Code). When the Rules Enabling Act passed, Chief Justice Hughes delivered a speech that rejected special pleading, offering his vision of "a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances." Federal Judicial Center, *Civil Procedure before the FRCP*. The solution was Rule 8, requiring a "short and plain statement of the claim showing that the pleader is entitled to relief" language. Fed. R. Civ. P. 8(a) (1938).

Following suit, Ohioans, through the Modern Courts Amendment in 1968, Ohio Const. art. IV, §5(B), delegated rule-making authority to this Court in hopes "to provide faster and less complicated court procedures." Milligan & Pohlman, 29 Ohio St. L.J. at 829; *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, ¶¶62–64 (Kennedy, J., concurring in judgment only). Judge John Corrigan, the chairman of the committee that produced the Ohio civil rules, wrote that the revisions would "remove the old formalities of the pleadings and quickly zero in on the basic issues of lawsuits." Hon. John V. Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 Ohio St. Bar Ass'n 727, 727 (1970); *see* 133 H.B. 1201 (1970) (repealing Field Code).

The rules sought to "eliminate the disposition of cases on technical grounds, without consideration of the merits." Corrigan, 43 Ohio St. Bar Ass'n at 728. To that end, for example, the rules abolished archaic forms of pleading like demurrers and insisted that "[n]o technical forms of pleading or motions are required." *See* Civ.R.7(c), 8(e)(1) (1970). As to pleadings, Rule 8's principal development was to eliminate the "the pointless argument as to whether the pleader is pleading facts or conclusions of law or evidence." Harper, 39 U. Cin. L. Rev. at 471; Charles E. Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259, 259–60 (1926) (under the code, "*evidential* facts should be omitted, the *ultimate* facts, rather than the legal conclusions, should be stated"). When a plaintiff improperly pleaded a legal conclusion as "a general averment" that "shows no fact," courts would "strike out the words." *N.Y., Chi. & St. Louis R.R. Co. v. Kistler*, 66 Ohio St. 326, 333–34

(1902). Ohio Civil Rule 8's promulgators regarded *Kistler* as an unwelcomed departure from the "original codes" and saw Rule 8 as a course correction. Ohio Civ.R.8(A), 1970 Staff Notes. Rule 8(A) aimed to "minimize[]" "distinctions between 'facts,' 'conclusions of law,' and 'evidence' … so long as the operative grounds underlying the claim are set forth." *Id*.

The takeaway from this history is that the civil rules repudiated the technicalities of special pleading but renewed the longstanding substantive requirement to plead facts. Before and after Civil Rule 8 supplanted former R.C. 2309.04 in 1970, plaintiffs needed to allege *facts* in their case-initiating pleading. But Rule 8(A), modeled after federal civil rule 8, placed "much less emphasis … on the form of the language in the complaint," provided it gave "adequate notice of the nature of the action." Ohio Civ.R.8, 1970 Staff Notes. In doing so, "simplified pleading under Rule 8(A) merely carrie[d] the pleader back more than a hundred years to the simplified pleading originally intended by the drafters of the Field Codes" in 1853. *Id*. Thus, as to substance, the best reading of Rule 8—which uses language comparable to its forebearers—is that it carried forward the old soil.

Rule 8 channels a historical pleading standard that rejects special and general approaches. As the forms show (above at 9–10), pleadings should be neither riddled with "formality and complexity" nor devoid of facts. Code Report at 50–51. This Court's current any-set-of-facts standard under which the complaint needs "not state [facts] at all"

is a general pleading standard irreconcilable with the original Field Code. *Id.* at 51. Contrary to *Conley* and current Ohio precedent, complaints needed to consist of "*facts*, not *legal conclusions*." *Evans*, 2 Western Law Monthly at 604. As Justice Swan said in his *Commentaries*, which informed the civil rules commission, a pleading "is good[] if it states all the facts which … the plaintiff would be bound to prove on the trial[] in order to maintain the action." Swan, *Commentaries*, Chapter VIII, §7 at 148; *see also id.* at 321–23 (form pleadings 50 & 51 discussing "carriage" accidents). Civil Rule 8 "carries the pleader back" to Ohio's Field Code of 1853, which unequivocally required pleadings of fact. Civ.R.8, 1970 Staff Notes.

C. Fact pleading works better than notice pleading.

Pleading sufficient facts to plausibly state a claim for relief is uncomplicated, as the short forms produced above (at 9–10) show. It is not too much "for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). Or else a plaintiff, at next to no expense and "with only a faint hope that the discovery process might lead eventually to some plausible cause of action," could progress past the pleadings to expansive, expensive discovery. *Id.* (brackets and quotation omitted). A toothless pleading standard enables fishing-expedition lawsuits.

The no-set-of-facts standard is a recipe for discovery abuse and meritless litigation (perhaps in a quest for an undeserved settlement). That is because, "in modern civil

litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery." *Cunningham v. Cornell Univ.*, 145 S. Ct. 1020, 1033 (2025) (Alito, J., concurring). Rational defendants will prefer settlement to litigating to final judgment cases that they are overwhelmingly likely to win. Private litigants are seldom interested in a Pyrrhic victory; they are better off paying the plaintiff to settle before discovery. And, compounding the problem, the vaguer the complaint, the broader the range of "relevant," discoverable material. *See* Civ.R.26(B). Fact-based pleading is courts' best way of "checking discovery abuse." *Twombly*, 550 U.S. at 559 (citing Hon. Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989)).

Empirical study has revealed *Twombly*'s changed pleading standard did not inhibit meritorious lawsuits. Law and economics professor William Hubbard found that the move from *Conley* to *Twombly* actually did not meaningfully change "dismissal rates, settlement rates, or filings." William H. J. Hubbard, *The Empirical Effects of* Twombly *and* Iqbal, U. Chi. Pub. Law & Legal Theory Working Paper Series, No. 591, at 34 (2016). Instead, *Twombly* caused "an increase in attention to pleading by both plaintiffs and defendants." *Id.* In other words, the plausibility standard caused federal practitioners to produce more thorough complaints—that explains why Hubbard found "statistically significant effects on case outcomes" in pro se cases, but not counseled ones. *Id*. Hubbard's conclusion: "empirical findings" bely "that *Twombly* and *Iqbal* touched off anything like a revolution in legal practice." *Id. Twombly*'s main impact was forcing lawyers to make

complaints more useful documents with the predictable benefit of "sharpen[ing] the issues going forward in a way that reduces costs later in the process." *Id*. at 35. While fact pleading may dissuade plaintiffs from filing meritless lawsuits, it would not impair access to justice. *Id*.

This Court's version of notice pleading is also unworkable. That standard is at odds with this Court's traditional refusal to consider "the averment of mere legal conclusions." *U.S. Rolling Stock Co. v. Atl. & G.W.R. Co.*, 34 Ohio St. 450, 467 (1878); *Winzeler v. Knox*, 109 Ohio St. 503, 508 (1924). Even in the early years of the civil rules, "unsupported conclusions of the complainant" went uncredited. *Schulman v. Cleveland*, 30 Ohio St.2d 196, 198 (1972). Still today, this Court holds that "an unsupported legal conclusion" in the complaint is "not entitled to a presumption of truth." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 2016-Ohio-478, ¶39; *accord Twombly*, 550 U.S. at 564. But there is no way to reconcile the well-settled rule that legal conclusions do not constitute a claim for relief with the no-set-of-facts standard.

Two last thoughts. *First*, no party has reliance interests in retaining the fuzzier pleading standard. In unfiled cases, as always, the parties must conform to this Court's explication of the law. In newly filed cases, the plaintiff can amend the complaint as a matter of right or else with party "consent or the court's leave," which the court "shall freely give." Civ.R.15(A). And in cases past the pleading stage, the defendant likely forfeited challenging the complaint's sufficiency. This Court can hold and remand or accept,

vacate, and remand other active cases that implicate the pleading standard. *Second*, this is not a case like *In re T.A.*, 2022-Ohio-4173 at ¶23, or *State v. Murnahan*, 63 Ohio St.3d 60, 66 n.6 (1992), that requires amending the civil rules to fix a problem. Rather, the pleading standard is a problem of this Court's own making, beginning in 1975 with *O'Brien*, 42 Ohio St.2d at 245. This Court should interpret Rule 8(A)'s pleading requirement consistent with its text and history and finally "consign" the no-set-of-facts standard to a belated "retirement." *Maternal Grandmother*, 2021-Ohio-4096 at ¶¶26–27 (DeWine, J., concurring) (quotation omitted).

II. Most other States require fact pleading.

Other state supreme courts often inform this Court's decisions. *See TWISM Enters., LLC v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 2022-Ohio-4677, ¶48. Ohio would not be "alone in recalibrating [its] approach to" fact pleading. *Id.*

Roughly half of States model their civil rules on the federal civil rules, including Ohio. After *Twombly* and *Iqbal*, a minority of States, like Arizona, Vermont, and Washington, quickly rejected fact pleading. *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 345, 347 (Ariz. 2008); *Colby v. Umbrella, Inc.*, 184 Vt. 1, 6 n.1 (2008); *McCurry v. Chevy Chase Bank, FSB*, 169 Wash. 2d 96, 102 (2010). But others progressed with the federal standard to fact pleading. For example, the Massachusetts Supreme Judicial Court "agree[d] with the Supreme Court's analysis of the *Conley* language" and adopted the plausibility standard. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). As did the South Dakota Supreme

Court, reasoning that the "showing" requirement in its pleading rule required facts to support a plausible claim. *Sisney v. Best Inc.*, 754 N.W.2d 804, 808–09 (S.D. 2008); *see* John P. Sullivan, *Do the New Pleading Standards Set Out in* Twombly *&* Iqbal *Meet the Needs of the Replica Jurisdictions?*, 47 Suffolk U. L. Rev. 53, 64–70 (2014) (tabulating state court decisions).

Fact pleading predominates in States that do not replicate the federal rules. *See* Sullivan, 47 Suffolk U. L. Rev. at 62 n.55 (listing 21 fact-pleading States). Arkansas Civil Rule 8, for example, "requires that a complaint state facts, not mere conclusions." *Worden v. Kirchner*, 431 S.W.3d 243, 247 (Ark. 2013); *see also Grimsley v. S.C. L. Enf't Div.*, 396 S.C. 276, 281 (2012) (South Carolina); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) (Delaware). Fact pleading is the standard in many of the most commercial and litigious States, "including California, New York, Pennsylvania, Florida, Texas, Missouri, Virginia, Illinois, New Jersey, Connecticut and Louisiana." Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., *Fact-Based Pleading: A Solution Hidden in Plain Sight* 1 (2010), https://tinyurl.com/5xezxnh3.

Ohio would join good company in restoring its pre-*O'Brien* standard.

CONCLUSION

For these reasons, the Court should reverse the Fourth District's decision.

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