No. 2024-1696

The Supreme Court of Ohio

BETHEL OIL AND GAS, LLC, *et al.*,

Plaintiffs-Appellees,

v.

REDBIRD DEVELOPMENT, LLC, *et al.*,

Defendants-Appellants.

Jurisdictional Appeal from the
Fourth Appellate District,
Washington County, Ohio
Case No. 23-CA-5

BRIEF OF *AMICUS CURIAE* CITY OF MASSILLON, OHIO URGING AFFIRMANCE IN SUPPORT OF PLAINTIFFS-APPELLEES BETHEL OIL & GAS, LLC, ROBERT E. LANE, AND SANDRA K. LANE

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THE *AMICUS* INTEREST OF CITY OF MASSILLON, OHIO

The City of Massillon is a non-chartered municipal corporation empowered by the Ohio Constitution to "exercise all powers of local self-government." Ohio Const. Art. XVIII, § 3. Located in Stark County, Massillon is home to approximately 32,000 residents and employs over 400 public servants. It is responsible for enforcing laws that protect public health, safety, the environment, and the integrity of public contracts.

Access to the courts is not merely an interest of Massillon's residents and taxpayers—it is often a legal and practical necessity. Unlike private litigants, Massillon is regularly obligated by law to initiate enforcement actions to protect the public welfare. The Clean Water Act and Ohio Revised Code impose specific duties on municipalities to bring suit in response to violations of law, including through mechanisms such as R.C. 733.56–733.58, which require city law directors to prosecute and enforce claims on behalf of the city.

The City's affirmative enforcement responsibilities encompass a wide array of subject matter areas, including:

- **Stormwater and wastewater regulation.** Massillon must comply with the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) as part of its wastewater and stormwater programs. These mandates require proactive identification and abatement of illicit discharges and pollutants—tasks often involving evolving facts not fully known at the pleading stage.
- **Public health protection.** Under the Ohio Sanitary Code and related regulations, Massillon is required to address unsafe food handling, unsanitary housing, drinking water contamination, and environmental hazards, frequently through actions requiring urgent judicial relief.
- **Building code compliance.** The City pursues Ohio Building Code enforcement actions against absentee owners and structurally unsafe properties, often necessitating preliminary injunctions or emergency demolitions before discovery.
- **Nuisance abatement.** Massillon targets chronic nuisance properties such as dilapidated drug houses and derelict commercial sites that jeopardize community safety.
- **Public contract enforcement.** The City litigates procurement and construction-related disputes involving fragmented evidence, shifting obligations, undelivered work, and secretly rigged bids and over incomplete documentation.

In each of these contexts, Massillon must act under legal mandate, not discretion. It cannot defer enforcement until every detail is documented. It must proceed in good faith with the facts available.

The adoption of the *Twombly/Iqbal* plausibility standard threatens this model. As the U.S. Chamber Institute for Legal Reform has candidly acknowledged, one strategic goal of heightened pleading is to "reduce the incidence of municipal litigation" by increasing the burdens faced by cities at the motion to dismiss stage.[1] The federal plausibility standard imposes a *de facto* evidentiary threshold in the pleadings, privileging well-resourced defendants and chilling public enforcement.

Municipalities like Massillon do not bring enforcement actions to leverage settlements for private enrichment or to extract personal concessions. They do so under statutory obligation, often in defense of vulnerable populations and deteriorating infrastructure. A standard that bars these suits at inception—not for want of legal merit, but due to the evolving and fragmented nature of public (and private) records—is both doctrinally unsound and civically dangerous.

The City of Massillon therefore has a substantial interest in the Court's disposition of this case. This Court should preserve Ohio's traditional notice pleading framework and reject the adoption of the *Twombly/Iqbal* standard.

[1] Cox & Lin, *ILR Briefly: Municipality Litigation—A Continuing Threat*, U.S. Chamber of Commerce Institute for Legal Reform (June 2021), https://instituteforlegalreform.com/research/ilr-briefly-municipality-litigation-a-continuing-threat/.

ARGUMENT

A. Most States Have Rejected *Twombly* and *Iqbal*

Despite widespread recognition of *Twombly* and *Iqbal* in federal jurisprudence, a clear majority of state courts have declined to follow their lead. Since the U.S. Supreme Court announced a heightened "plausibility" standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and reaffirmed it in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), most state high courts have chosen to preserve more liberal, notice-based pleading rules grounded in their own constitutions, statutes, or traditions.

States as diverse as Arizona,[2] Delaware,[3] Iowa,[4] Minnesota,[5] Montana,[6] Rhode Island,[7] Tennessee,[8] Vermont,[9] West Virginia,[10] Washington[11], and Wyoming[12] have explicitly declined to adopt the plausibility framework. Even though their civil rules are modeled upon the Federal Rules

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[2] *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420 (2008).

[3] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011); *Winshall v. Viacom Int'l Inc*., 76 A.3d 808, 813 n.12 (Del. 2013).

[4] *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp*., 812 N.W.2d 600, 608 (Iowa 2012).

[5] *Walsh v. U.S. Bank, N.A*., 851 N.W.2d 598 (Minn. 2014); *Demskie v. U.S. Bank Natl. Assn*., 7 N.W.3d 382, 387 (Minn. 2024).

[6] *McKinnon v. W. Sugar Co-Op. Corp.*, 355 Mont. 120, 225 P.3d 1221 (2010); *Brilz v. Metro. Gen. Ins. Co.*, 366 Mont. 78, 285 P.3d 494 (2012).

[7] *Chhun v. Mtge. Elec. Registration Systems, Inc*., 84 A.3d 419 (R.I. 2014); *DiLibero v. Mtge. Electronic Registration Systems, Inc*., 108 A.3d 1013 (R.I. 2015).

[8] *Webb v. Nashville Area Habitat for Humanity, Inc*., 346 S.W.3d 422 (Tenn. 2011).

[9] *Colby v. Umbrella, Inc.*, 2008 VT 20, 955 A.2d 1082; *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co*., 2022 VT 45, 287 A.3d 515.

[10] *Roth v. DeFeliceCare, Inc*., 226 W.Va. 214 (2010); *Goldstein v. Peacemaker Properties, LLC*, 241 W.Va. 720 (2019); *Mountaineer Fire & Rescue Equip., LLC v. City Natl. Bank of W. Virginia*, 244 W.Va. 508 (2020).

[11] *McCurry v. Chevy Chase Bank*, 169 Wash.2d 96 (2010).

[12] *McNair v. Beck*, 2024 WY 85, 553 P.3d 771.

of Civil Procedure (like Ohio[13]), these "replica" jurisdictions nevertheless recognized that heightened pleading standards unduly restrict access to the courts and shift substantive burdens onto plaintiffs at the earliest procedural stage. For example:

- The Tennessee Supreme Court, in *Webb v. Nashville Area Habitat for Humanity, Inc*., 346 S.W.3d 422 (Tenn. 2011), refused to adopt the federal standard, reaffirming that Tennessee remains a notice-pleading state committed to resolving cases on their merits.

- In *Walsh v. U.S. Bank, N.A*., 851 N.W.2d 598 (Minn. 2014), the Minnesota Supreme Court held that the state's civil rules contained no basis for a "plausibility" test, emphasizing the constitutional interest in ensuring meaningful access to justice.

- Similarly, the Supreme Court of Washington in *McCurry v. Chevy Chase Bank*, 169 Wash.2d 96 (2010), reaffirmed that dismissal is improper unless it is beyond doubt that no set of facts could support the claim.

- In *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, 521, 854 S.E.2d 870 (2020), the West Virginia Supreme Court noted the "blizzard" of criticism and the "slew of cases that are 'wildly inconsistent'" applying the federal plausibility standard, and reaffirmed that West Virginia's more generous notice pleading rules favor resolving cases on their merits—unlike the stricter approach in federal court.

These decisions reflect a broader trend. A 2022 national survey found that more than two-thirds of state appellate courts interpreting state rules of civil procedure after *Twombly* declined to follow it.[14] Most emphasized that their procedural regimes, unlike the Federal Rules, had not been

[13] *But see* Jochum, *Pleading in Ohio after Bell Atlantic v. Twombly and Ashcroft v. Iqbal: Why Ohio Shouldn't "Notice" a Change*, 58 Clev. St. L. Rev. 495, 521–22 (2010) ("in 1986, Ohio was a federal 'replica' that mirrored the Federal Rules in all important aspects. Since that time, Ohio has varied from the Federal Rules in at least nine instances, not including the current difference in pleading standards for Rule 8.")

[14] *See* Gadson, *Fed. Pleading Standards in State Court*, 121 Mich. L. Rev. 409, 455 (2022) ("it is appropriate for states to go their own way on pleading standards, even if their versions of Rule 8 read the same as the federal rule does. Under our system of dual sovereignty, states have the final say over how to interpret state law. Indeed, they are supposed to be laboratories of democracy that have the opportunity to try different policies. Instead of blindly following federal law, they should consciously consider whether they should. Given that states will have different policy concerns and needs than the federal government, it only makes sense that they will apply different pleading standards than federal courts do.")

interpreted to include heightened factual specificity at the pleading stage. In preserving notice pleading, these states have chosen access, judicial discretion, and equitable adjudication over gatekeeping by pleading technicality. Ohio should do the same.

Should this Court adopt the *Twombly/Iqbal* federal pleading standard, Ohio would be among a distinct minority—joining four other states.[15] The choice before this Court is not between doctrinal uniformity and chaos. It is between a state constitutional vision of open courts and a federal procedural retrenchment designed to shield institutional defendants. Ohio's existing standard is not broken. Most other states agree—and have chosen not to fix what isn't broken.

B. There Is No Ohio-Specific Basis for Abandoning Longstanding Precedent

Ohio's current notice pleading standard—anchored in decisions such *as O'Brien v. University Community Tenants Union, Inc*., 42 Ohio St.2d 242 (1975) and *York v. Ohio State Highway Patrol,* 60 Ohio St.3d 143 (1991)—has been repeatedly reaffirmed by this Court and consistently applied in Ohio trial courts for nearly half a century.[16] There is no doctrinal instability, policy-driven necessity, or empirical crisis in Ohio's legal system that would warrant a departure from this well-settled framework.

The rationale for heightened pleading articulated in *Twombly* and *Iqbal* is not native to Ohio law or practice. Those cases were rooted in the perceived dysfunctions of federal litigation—

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[15] *See Warne v. Hall*, 373 P.3d 588, 595 (Col. 2016); *Iannacchino v. Ford Motor Co*., 451 Mass. 623, 635 (Mass. 2008); *Sisney v. Best Inc*., 754 N.W.2d 804, 809 (S. Dakota 2008); *Doe v. Bd. of Regents*, 788 N.W.2d 264, 278 (Neb. 2010). Wisconsin previously endorsed the heightened federal standard, *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, but appears to have changed course and reembraced notice pleading and "no set of facts" *Conley* standard. *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46; *Hubbard v. Neuman*, 2025 WI 15.

[16] *See e.g. Bank Tr., Natl. Assn. v. Cuyahoga Cnty.,* 2023-Ohio-1063 ("The lower courts properly dismissed the complaints only if it appears beyond doubt from the complaints that US Bank can prove no set of facts entitling it to relief." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.")

particularly the burdens of costly discovery in sprawling antitrust and 42 U.S.C. § 1983-type constitutional cases. The U.S. Supreme Court justified plausibility pleading as a mechanism to insulate defendants from the expenses of meritless discovery. *See Twombly*, 550 U.S. at 558. But as the Tennessee Supreme Court observed in *Webb v. Nashville Area Habitat for Humanity*, the record in most states does not support this justification:

> "Neither Habitat nor *amici curiae* in the present case have presented evidence showing that the policy concerns cited by the Court in *Twombly* and *Iqbal* are present in Tennessee to the extent they exist in the federal judicial system, much less that they warrant 'such a drastic change in court procedure.'"

Webb, 346 S.W.3d at 436.

Similarly, *in McCurry v. Chevy Chase Bank*, the Washington Supreme Court declined to follow *Twombly* because:

> "The Supreme Court's plausibility standard is predicated on policy determinations specific to the federal trial courts... Neither party has shown these policy determinations hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure."

McCurry, 169 Wash.2d at 102–03.

The briefing urging reversal in this case is similarly lacking. Unsubstantiated claims of rampant frivolous litigation and "shotgun pleadings" do not establish any genuine policy concern within Ohio's state courts. Nor do they justify the fundamental change in Ohio that acceptance of their proposition of law would entail.

C. The Federal Plausibility Standard Is Antithetical to Ohio's Notice Pleading Standard

The Court has long relied on Rule 8(A)'s "short and plain statement" requirement to ensure that courts are accessible and that claims are not prematurely dismissed before discovery reveals their evidentiary contours. This is not a bug—it is a feature of Ohio civil procedure. *See e.g. State ex rel. Mobley v. Chambers-Smith*, 2024-Ohio-1910, ¶¶ 3-10 (DeWine, J., concurring).

Moreover, Ohio already has adequate safeguards against frivolous litigation. Notably, Ohio Revised Code § 2323.51(B)(1) authorizes courts to award reasonable attorney fees to a party adversely affected by frivolous conduct—an enforcement mechanism that has no direct federal analogue. *See First Bank of Marietta v. Hartford Underwriters Ins. Co*., 307 F.3d 501, 529 (6th Cir. 2002) (holding that § 2323.51 is a procedural rule without a federal counterpart, and that under *Erie*, Rule 11 governs sanctions in federal court). Trial courts possess the authority to dismiss patently meritless claims under Civ.R. 12(B)(6), to sanction parties under Civ.R. 11 and R.C. 2323.51, and to manage discovery through Civ.R. 26. There is no demonstrated need to adopt a new rule that would place additional procedural burdens on plaintiffs—particularly public entities and private citizens without early access to the full evidentiary record.

Although some prior Ohio decisions contain language superficially similar to *Twombly and Iqbal*—specifically, statements that "unsupported conclusions are not entitled to a presumption of truth"—such as in *Schulman v. Cleveland*, 30 Ohio St.2d 196 (1972)[17]; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190 (1988)[18]; and *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324 (1989)[19]

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[17] *Schulman* was decided before Ohio adopted notice pleading under Civ.R. 8 and held: "While it is true that a demurrer (now motion to dismiss) technically admits certain allegations in a petition (now complaint), it is also well established that unsupported conclusions of the complainant are not so admitted." *Schulman v. City of Cleveland*, 30 Ohio St.2d 196, 198 (1972).

[18] When evaluating a complaint for an employer intentional tort, the Court in *Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 192 (1988), acknowledged that it "must presume that all factual allegations of the complaint are true," but—citing Schulman—held that "[u]nsupported conclusions that appellant committed an intentional tort are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion." Three years later, the Court in *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991), reconciled *Mitchell* with the notice pleading standard of Civ.R. 8. *York* limited *Mitchell*'s reach, clarifying that only "a few circumscribed types of cases"—such as workplace intentional torts or negligent hiring claims—require operative facts to be pleaded with particularity.

[19] Likewise, *Hickman* and other extraordinary writ cases fall outside Ohio's traditional notice pleading regime. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324 (1989). Mandamus and

—these cases arise in specific contexts that require pleading with specificity. They do not support the notion that federal plausibility pleading principles preexist coextensively with Ohio's notice pleading law. As the Court more recently explained in *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416 (2002), Ohio law "does not ordinarily require a plaintiff to plead operative facts with particularity," and the requirement is limited to "a few circumscribed types of cases."

The Court emphasized that Ohio Rule 8 does not require every fact necessary to prevail to be pled at the outset, and that a plaintiff need not allege with crystalline specificity the factual basis for each claim. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 549 (1992). In other words, "this court's opinions do not require a complaint to contain anything more than brief and sketchy allegations of fact to survive a motion to dismiss under the notice pleading rule." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145–48 (1991) (Moyer, J., concurring). "Ohio has embraced notice pleading through adoption of the Ohio Rules of Civil Procedure, and no longer must a complaint set forth specific factual allegations." *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 179–80 (1984) (cleaned up). All that Civ.R. 8(A) requires is (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." *Id.* A pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs*., 65 Ohio St.3d 545, 549 (1992).

Ohio pleading jurisprudence cannot be reconciled with the federal standard created by *Twombly* and *Iqbal*. Sifting through a complaint to separate "well-pled" factual allegations from "legal conclusions," then measuring what remains against undefined notions of "plausibility"

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similar original actions are governed by specific procedural rules—most notably Sup.Ct.Prac.R. 12.02 and Civ.R. 9(B)—that expressly require heightened factual specificity.

informed by a judge's "experience and common sense," bears no resemblance to the notice pleading contemplated by Civ.R. 8 or this Court's precedent. Yet that is precisely the exercise *Twombly* and *Iqbal* impose. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).[20]

D. *Twombly* and *Iqbal* Are Unworkable and Widely Criticized

Even in the federal courts, where *Twombly* and *Iqbal* have been binding law for more than a decade, their practical effects have been subject to widespread academic and judicial criticism. These decisions have introduced a vague, unpredictable standard that invites inconsistency, increases the cost and complexity of pleading, and disproportionately burdens claimants with limited access to facts.

First, the plausibility standard is not susceptible to consistent application. As one empirical study observed, federal courts differ substantially in what they consider "plausible" depending on the type of case, the judge, and the perceived equities. *See Scheindlin, Twombly & Iqbal: The Introduction of A Heightened Pleading Std*., 27 Touro L. Rev. 233 (2011). Judicial decisions routinely exhibit subjective filtering based on judicial attitudes toward the claim type rather than any clear doctrinal test. *See* Shand, *Institutional Facts: Responding to Twombly & Iqbal in the Dist. Courts*, 98 N.Y.U.L. Rev. 1446 (2023) ("The plausibility analysis's reliance on 'judicial experience and common sense' has faced criticism for its subjectivity and for impermissibly aggrandizing the power of trial court judges.")

Second, the heightened pleading regime disproportionately harms civil rights plaintiffs, whistleblowers, and others asserting public-interest claims. These parties often rely on discovery

[20] *See* Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 Vill. L. Rev. 857 (2012).

to access internal records, witness testimony, or evidence of intent. By requiring factual "enhancement" at the pleading stage, *Iqbal* has become a gatekeeper that blocks meritorious suits before the facts can be developed. *See* Cook, Cook, & Nicholson, *The Real World: Iqbal/Twombly – The Plausibility Pleading Standard's Effect on Federal Court Civil Practice*, 75 Mercer L. Rev. 861 (2024); Finn, *The Harsh Reality of Rule 8(a)(2): Keeping the Twiqbal Pleading Std. Plausible, Not Pliable*, 49 Sw. L. Rev. 309 (2020).

Third, the standard has caused a procedural arms race in federal litigation. Litigants now file longer, more detailed complaints—often in excess of 50 pages—in an effort to satisfy plausibility pleading. Motions to dismiss have become more frequent, more complex, and more expensive. The predictable result has been increased motion practice, delayed case resolution, and higher costs for plaintiffs and defendants alike. *See* Owen & Mock, *The Plausibility of Pleadings After Twombly and Iqbal*, 11 Sedona Conf. J. 181 (2010) ("the uncertainties of the plausibility standard are likely to increase the amount of litigation at the pleading stage, something that notice pleading was intended to avoid.")

Fourth, *Twombly* and *Iqbal* have disrupted the basic architecture of Rule 8. The Federal Rules were deliberately designed to separate pleading from proof. By requiring a plaintiff to plead facts that make liability plausible—not just possible—these decisions collapse that distinction and reassign a portion of the evidentiary burden to the pleading stage. This development is widely seen as inconsistent with the intent of the original drafters and the structure of the Rules. *See* Owen & Mock, *The Plausibility of Pleadings After Twombly and Iqbal*, 11 Sedona Conf. J. 181 (2010) ("some discovery will be eliminated when complaints that fail to meet the plausibility standard are dismissed. As commentators have noted, however, this benefit comes at a cost. As an initial matter,

the plausibility standard will create a roadblock for at least some meritorious claims, particularly those claims containing an element of conspiracy or scienter.")

Finally, procedural retrenchment through judicial rulemaking circumvents the legislative and rulemaking safeguards built into the civil rules system. Many scholars and jurists have warned that the plausibility standard reflects a substantive policy shift masquerading as procedural reform—a shift better suited for legislative debate than judicial fiat. *See* Steinman, *The Rise & Fall of Plausibility Pleading?*, 69 Vand. L. Rev. 333 (2016); Miller, *From Conley to Twombly to Iqbal: A Double Play on the Fed. Rules of Civ. Procedure*, 60 Duke L.J. 1, 85–86 (2010).

As further documented in Cook, Cook, & Nicholson*, The Real World: Iqbal/Twombly – The Plausibility Pleading Standard's Effect on Federal Court Civil Practice*, 75 Mercer L. Rev. 861 (2024), the practical failures of the plausibility standard are manifest. The authors explain that federal district courts have increasingly misapplied Iqbal/Twombly to bar claims before discovery, particularly where information is in the exclusive control of the defendant. This traps plaintiffs in an impossible position: guess the facts correctly in the complaint or lose the claim, even when evidence later supports it.

They recount numerous case studies, including, *Bass v. Duke Energy Business Services, LLC*, No. 21-cv-02587, 2021 WL 12355340 (N.D. Ga. Dec. 20, 2021), where a district court dismissed claims for negligent hiring before the plaintiff could access the driver's employment records—information solely in the defendant's possession. When that evidence was later discovered through open records, the court still denied amendment as untimely. 2022 WL 22953790 (N.D. Ga. Apr. 20, 2022).

The authors also document that the plausibility standard has created inconsistencies across federal circuits, with courts applying different levels of scrutiny and inventing distinctions between

"inferences" and "speculative" allegations. They show that subjective judicial interpretations have led to unpredictable and inequitable outcomes, particularly in cases alleging discrimination, civil rights violations, and misconduct by institutions. The authors explain:

> In the wake of the *Iqbal* and *Twombly* decisions, the standard for "plausible" pleadings has been far from a bright-line test. On the contrary, both the district and the circuit courts have struggled to consistently apply this test. A look into each of the circuit courts highlights the issues that come with attempting to follow the *Iqbal* framework. ... [J]ust a brief passing glimpse into select post-*Iqbal* opinions in each circuit demonstrates the sometimes inconsistent and incoherent results flowing from the malleable plausibility standard.[21]

As they argue, the result is a procedural regime that subverts Rule 8's goals and emboldens a return to the very formalism that modern procedural reform sought to eliminate. The authors conclude that plausibility pleading "is only as good as the judge applying it"—a recipe for inconsistency, docket-clearing bias, and denial of justice before the facts are even uncovered. This criticism is echoed in the analytical work of many others.[22]

E. The Chamber of Commerce's Claimed Data Does Not Justify a Radical Shift

Amici Curiae Ohio Chamber of Commerce and the Ohio Business Roundtable urge this Court to adopt the federal plausibility standard, citing a mix of national litigation cost studies, RAND data on electronic discovery, and generalized claims about economic harm. But their

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[21] Cook, Cook, & Nicholson, *The Real World: Iqbal/Twombly – The Plausibility Pleading Standard's Effect on Federal Court Civil Practice*, 75 Mercer L. Rev. 861, 891 (2024).

[22] Owen & Mock, *The Plausibility of Pleadings After Twombly and Iqbal*, 11 Sedona Conf. J. 181 (2010) ("The Supreme Court's pleadings standards decisions have ignited a firestorm of judicial and academic analysis. ... But this abundance of analysis has so far failed to coalesce around a concrete and workable interpretation of the 'plausibility standard' introduced by these two important decisions. ... The circuit courts have largely taken Twombly and Iqbal in stride, but there are significant and problematic differences of interpretation over several key questions. ... The commentary surrounding Twombly and Iqbal has been as varied as the judicial interpretation.")

submission contains no Ohio-specific empirical analysis showing that Ohio's trial courts are plagued by abusive discovery, flooded by meritless complaints, or incapable of managing litigation under existing rules.

First, the centerpiece of their argument—the RAND study on e-discovery costs—relies on data from Fortune 200 companies litigating in federal court.[23] The dataset consisted of 57 cases, with a mean e-discovery production cost of $1.8 million. This limited sample has no relevance to typical civil actions in Ohio's trial courts, where discovery is local, narrow in scope, and personally supervised by elected judges or appointed magistrates with broad discretion to prevent the threat of disproportionate costs. The suggestion that local governments or small-business defendants in Ohio are spending millions on discovery in the average civil suit is unfounded.

Even then, the RAND study does not advocate for heightened pleading standards as a solution. Instead, it concludes that—"computer categorized document review applications offer the most immediate promise for significantly reducing costs in large-scale productions." From this perspective, the Court is already doing exactly what the RAND study recommends—through its efforts to educate the bar on the responsible and ethical use of AI and its cautious appreciation for the ways in which advanced technology, when carefully deployed, can be an efficiency multiplier in civil litigation.[24]

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[23] Pace, RAND Corp., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012), https://www.rand.org/pubs/monographs/MG1208.html.

[24] Supreme Court of Ohio, *Artificial Intelligence Resource Library* (July 12, 2025), https://www.supremecourt.ohio.gov/courts/services-to-courts/artificial-intelligence-resource-library/.

Second, the Chamber invokes a *Wall Street Journal* editorial estimating that "tort costs" in the United States total $443 billion annually, equating to $3,600 per household.[25] The editorial is a summary of a report authorized by the Chamber itself.[26] But this figure aggregates all tort-related insurance costs, settlements, and legal fees nationwide, across all jurisdictions and case types. It does not isolate costs attributable to pleading standards, nor does it demonstrate any causal connection between Ohio's current Civ.R. 8 and the state's economic performance. Relying on aggregated national tort data to justify procedural retrenchment in Ohio is both speculative and analytically unsound. And the state-by-state conclusions reported by the Chamber states these costs in Ohio are only $2,267 per household—which is the sixth *lowest* among all states and the District of Columbia.[27]

Third, the Chamber offers no evidence that Ohio courts are systemically misapplying Civ.R. 12(B)(6) or are overwhelmed by meritless litigation. Ohio judges are fully empowered to dismiss facially deficient complaints, and they regularly do so. The Chamber's suggestion that trial courts are helpless in the face of baseless litigation is belied by the actual operation of Ohio's judicial system, which includes multiple layers of appellate review, discretionary sanctions, and active case management.

Fourth, the cited cost burdens of discovery ignore existing tools available under Ohio law. Civ.R. 26(B)(1) already permits proportionality-based limitations on discovery. Parties may seek

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[25] Wall Street Journal Editorial Board, *How Lawsuits Cost You $3,600 a Year*, Wall St. J. (Dec. 7, 2022), https://www.wsj.com/articles/how-lawsuits-cost-you-3-600-a-year-tort-system-chamber-of-commerce-institute-for-legal-reform-report-11670460820.

[26] McKnight & Hinton, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort* System, U.S. Chamber of Commerce Institute for Legal Reform (Nov. 2022), https://instituteforlegalreform.com/research/tort-costs-in-america-an-empirical-analysis-of-costs-and-compensation-of-the-u-s-tort-system/.

[27] *Id.* at pp. 17-18.

protective orders, stage discovery, or object to irrelevant or burdensome requests. These costs are further decreasing with the widespread adoption of AI-assisted tools. There is no need to overhaul the pleading rules to address discovery issues that are, by rule, already within judicial control.

Finally, the Chamber's own brief concedes that the plausibility standard may increase the up-front costs of drafting complaints. That cost will fall disproportionately on municipalities, pro se litigants, and those without pre-discovery access to relevant records. Raising the pleading bar shifts cost and risk to the very parties least able to bear it—without any showing that it will meaningfully reduce overall litigation expenditures.

In sum, the Chamber has failed to provide Ohio-specific evidence justifying a doctrinal upheaval. National cost surveys, editorial headlines, and abstract references to business efficiency do not overcome the settled principle that courts should not restrict access to justice based on generalized fears or anecdotal assertions. The Chamber's submission confirms the wisdom of restraint: Ohio should not abandon half a century of precedent on the basis of a speculative record.

F. The Federal Judicial Center's Survey Does Not Support Reversal

Amicus Curiae Ohio Chamber of Commerce cites the Federal Judicial Center's 2009 Civil Rules Survey as part of its justification for importing the *Twombly/Iqbal* standard into Ohio law.[28] But this reliance is misplaced. The actual findings of the FJC survey undermine—rather than support—the Chamber's narrative of rampant litigation abuse and runaway discovery costs.

First, the survey data reveal that most federal cases involve modest discovery. The median number of discovery methods used was just five. Discovery was typically completed in six months, with courts adopting discovery plans in over 70% of cases and managing them actively. There is

[28] Lee & Thomas, *National, Case-Based Civil Rules Survey—Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center (Oct. 2009), https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf.

no suggestion in the report that this process is unworkable, burdensome, or in need of a heightened pleading threshold.

Second, attorney evaluations of the discovery process were overwhelmingly positive. More than 60% of attorneys—and two-thirds of defense counsel—said discovery yielded the "right amount" of information. Over half reported that discovery costs were proportionate to the stakes involved. The majority found that discovery costs had no effect on the likelihood of settlement.

Third, even in cases involving electronic discovery (ESI)—which the Chamber frequently portrays as prohibitively expensive—the median cost of discovery was relatively modest. Median total litigation costs were $15,000 for plaintiffs and $20,000 for defendants. Discovery expenditures represented just 1.6% of stakes for plaintiffs and 3.3% for defendants. ESI costs were an even smaller fraction, typically only 5–10% of discovery expenses.

Fourth, when asked directly whether federal civil rules should be revised to raise pleading standards, the survey revealed stark divisions. Predictably, defense-oriented attorneys were more favorable. But plaintiff-side and balanced-practice attorneys strongly opposed raising the pleading bar. Overall, there was no consensus that a plausibility standard was necessary or beneficial.

Finally, the FJC report itself warns that the data should not be read as supporting major procedural upheaval. The study was commissioned to inform discussion—not to dictate a doctrinal shift—and expressly disclaimed policy recommendations. Indeed, the Center emphasized that "the costs of discovery, while not negligible, were not generally viewed by attorneys as excessive or disproportionate to case value."

In short, to the extent a fifteen-year-old survey remains instructive, the very source cited by the Chamber shows that most civil cases—federal or otherwise—are managed effectively under existing notice pleading rules. Ohio's courts are not overwhelmed by discovery costs. And the

record does not support abandoning *O'Brien*, *Mitchell*, and *York* in favor of an untested import based on a mischaracterized dataset.

G. The Court Should Follow the Proper Rulemaking Process

The adoption of the *Twombly/Iqbal* standard would effect a sweeping change in Ohio's civil pleading regime—one that cannot be constitutionally implemented through judicial interpretation alone. The proper forum for such a transformation is the Civil Rules Committee established under Article IV, Section 5(B) of the Ohio Constitution, which vests rulemaking authority in the Supreme Court only through a structured, transparent process involving public notice and legislative review.

As multiple scholars have emphasized, *Twombly* and *Iqbal* do not merely reinterpret Rule 8—they engrafted new specific requirements into both Rules 8 and 12. *See* Olson, *If It (Ain't) Broke, Don't Fix It: Twombly, Iqbal, Rule 84, & the Forms*, 39 Seattle U.L. Rev. 1375 (2016) ("The statement that the United States Supreme Court substantially changed the pleading requirements under the Rules outside of the Rules Enabling Act process is neither controversial nor excessive. Many legal scholars, academics, practitioners, and district court judges have openly acknowledged this reality"). On this point, one oversight that resulted from this process is particularly illustrative: Federal Rule of Civil Procedure 84, in effect at the time of *Twombly* and *Iqbal*, included sample forms designed to show what sufficed under notice pleading. Fed.Civ.R. Appx. Form 11, for example, permitted a plaintiff to simply allege, "On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff." Such a pleading would not survive under the plausibility standard, which requires factual content sufficient to demonstrate entitlement to relief beyond the speculative level.

In response to this tension, the federal judiciary eventually repealed Rule 84 and the forms—after public comment, committee deliberation, and years of confusion. But Ohio has not taken such steps. To the contrary, the Ohio Rules of Civil Procedure still recognize an analogue to Form 11, and twelve others, which contain no heightened pleading requirement. Ohio Civ.R. 84, Appx. Forms 2-13. Rather, Ohio Civ.R. 84 expressly states:

> "The forms contained in the Appendix of Forms which the Supreme Court from time to time may approve are sufficient under these rules and shall be accepted for filing by courts of this state. ... The forms in the Appendix of Forms are intended to indicate the simplicity and brevity of statement which these rules contemplate."

Ohio Civ.R. 84. The Staff Notes continue, "the forms contained in the Appendix of Forms provide a 'safe haven' for litigants. The forms must be accepted by local courts as sufficient under the rules." Ohio Civ.R. 84, July 1, 2011 Staff Note. Until these rules are amended through the constitutionally mandated process, the courts will remain bound by the current standard articulated in *O'Brien* and *York* and the many cases from this Court that followed.

Any adoption of the *Twombly* and *Iqbal* standard under the gloss of a mere restatement of already-existing pleading requirements of Rule 8 is foreclosed under the whole of the Ohio Civil Rules just as it was under the Federal Rules. It is especially inappropriate to urge this Court to bypass formal rulemaking in light of Ohio's active and engaged Commission on the Rules of Practice and Procedure, which regularly reviews, proposes, and circulates changes for public comment. Ohio Const. Art. IV, § 5(B). There has been no proposal from the Commission to abrogate *O'Brien*, and no basis for the Court to undertake such a substantial revision unilaterally.

Fundamentally, this is not merely a procedural question—it is a structural one. The rulemaking process exists to ensure that significant changes to civil litigation are informed by public input, careful empirical study, and legislative oversight. Any shift toward plausibility pleading must travel that path. Ohio law—and Ohio litigants—deserve no less.

H. State Courts Have Good Reason to Reject *Twombly* and *Iqbal*

As detailed in this brief, Ohio has no cause—legal, empirical, or constitutional—to abandon its traditional notice pleading standard. Federal pleading doctrine is not binding on state courts and was not adopted with state systems in mind.[29] In fact, the federal courts themselves are sharply divided over the utility and coherence of the plausibility standard.

More importantly, state courts serve fundamentally different purposes.[30] They handle the vast majority of civil claims in the United States and are guided by state constitutional guarantees of open courts, jury access, and procedural fairness.[31] As Professor Marcus Gadson has explained, many state constitutions—such as Ohio's[32]—enshrine rights to a jury trial and a remedy that are

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[29] *See* Schantz, *Access to Justice: Impact of Twombly & Iqbal on State Court Systems*, 51 Akron L.Rev. 951, 972 (2017) ("The fact that Ohio was really no longer a replica jurisdiction, even before the changes made by the *Twiqbal* decisions, cuts against the argument that Ohio should adopt plausibility pleading in order to maintain a no longer existing uniformity with the FRCP. Not only the text, but also the interpretation of numerous ORCP, would need to change in order to attain this uniformity once again.")

[30] *See* Gadson, *Federal Pleading Standards in State Court*, 121 Mich. L. Rev. 409, 455–56 (2022) ("State courts come to the debate over pleading standards with a different mission than federal courts. After all, it is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction while state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy .... In line with this distinction, most states have much less onerous restrictions on the right to a jury trial than the federal court system has. While a litigant cannot even get into federal court on a state law claim worth less than $75,000.01, ... states allow litigants to receive a jury trial for significantly smaller state law claims than they could receive in federal courts. Simply put, state court systems are more accessible to the average litigant than federal courts.")

[31] Id. ("Forty state constitutions, but not the federal Constitution, provide some version of the following: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Although state courts have taken a bewildering array of approaches to the provisions, those provisions still give state courts a different mission than federal courts have.")

[32] Ohio Const. Art. I, §§ 5, 16, 19a.

violated by plausibility pleading, which allows judges to weigh factual content at the motion to dismiss stage.

Additionally, states operate under policy conditions that make heightened pleading inappropriate. State courts see a broader array of plaintiffs, including pro se litigants, small businesses, and municipal enforcers who lack the informational access and litigation resources of federal plaintiffs. Raising the pleading bar disproportionately harms these groups without meaningfully screening out frivolous claims.

Finally, state courts have their own institutional legitimacy to consider. Many state judges are elected and accountable to the public. The risk of politicized gatekeeping—where a judge's personal views on claim validity affect whether a plaintiff can proceed—is magnified under a plausibility regime that grants judicial discretion to dismiss cases before discovery.

For all of these reasons, this Court should reaffirm Ohio's commitment to its existing, well-settled pleading jurisprudence. The doctrinal, institutional, and democratic stakes of adopting *Twombly/Iqbal* are too high—and the benefits too illusory—to justify such a departure from settled law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

DATED: July 14, 2025

Respectfully submitted,

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