No. 16-1065

In the Supreme Court of the United States

SAI, PETITIONER

v.

TRANSPORTATION SECURITY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
SHARON SWINGLE
DANIEL AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a district court order that denied a request for appointment of counsel is appealable on an interlocutory basis under the collateral-order doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 843 F.3d 33. The relevant orders of the district court (Pet. App. 11a; D. Ct. Doc. 7 (Sept. 23, 2015), and D. Ct. Doc. 9 (Oct. 15, 2015)) are not published.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2016. The petition for a writ of certiorari was filed on March 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal *in forma pauperis* statute, 28 U.S.C. 1915, "ensure[s] that indigent litigants have meaningful access to the federal courts." *Bruce* v. *Samuels*, 136 S. Ct. 627, 629 (2016) (citation omitted).

Section 1915(a)(1) "permits an individual to litigate a federal action *in forma pauperis*," and to proceed without paying otherwise-applicable court fees, "if the individual files an affidavit stating, among other things, that he or she is unable to prepay fees 'or give security therefor.'" *Coleman* v. *Tollefson*, 135 S. Ct. 1759, 1762 (2015) (citation omitted). Under Section 1915(e)(1), a court may also appoint "an attorney to represent any person unable to afford counsel." 28 U.S.C. 1915(e)(1).

Section 2000a-3(a) of Title 42 of the United States Code permits a court to appoint counsel and waive fees for plaintiffs proceeding under Title II of the Civil Rights Act of 1964, "in such circumstances as the court may deem just." 42 U.S.C. 2000a-3(a). That provision also applies to plaintiffs proceeding under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 12188.

2. Petitioner filed a complaint in the U.S. District Court for the District of Massachusetts against the Transportation Security Administration (TSA); the United States; the Department of Homeland Security; state and municipal entities; and federal and state employees in their official and individual capacities. D. Ct. Doc. 1 (Sept. 4, 2015). Petitioner alleged violations of the ADA, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and state tort law, all based on alleged conduct that occurred during airport security screenings. D. Ct. Doc. 1, at 2-3. Petitioner moved to proceed *in forma pauperis* and asked the district court for leave to file, *ex parte* and under seal, an affidavit demonstrating that he was indigent. D. Ct. Doc. 3, at 16 (Sept. 4, 2015); D. Ct. Doc. 3-1, at 1 (Sept.

4, 2015). Petitioner also requested that the court appoint him pro bono counsel under 28 U.S.C. 1915(e), which permits the court to appoint counsel for parties proceeding *in forma pauperis*. D. Ct. Doc. 3, at 6-7.

The district court denied petitioner's motion to proceed *in forma pauperis* "without prejudice to its renewal supported by the appropriate papers which may be filed under seal," and likewise denied his motion to appoint counsel. D. Ct. Doc. 7 (Sept. 23, 2015). Petitioner moved for clarification, asking whether the court had granted his motion to file an affidavit under seal and whether the court denied his motion for appointment of counsel with prejudice. D. Ct. Doc. 8, at 1-2 (Oct. 13, 2015). Petitioner intimated that he might ask the court to appoint counsel under 42 U.S.C. 2000a-3(a). D. Ct. Doc. 8, at 2. The court denied the motion for clarification in a minute order. D. Ct. Doc. 9 (Oct. 15, 2015).

Petitioner next filed a motion, D. Ct. Doc. 10 (Nov. 16, 2015), requesting the appointment of counsel under 42 U.S.C. 2000a-3(a); see 42 U.S.C. 12188(a)(1) (providing that "[t]he remedies and procedures set forth in [S]ection 2000a-3(a)" are available to plaintiffs proceeding under the ADA). The district court denied the motion in a minute order. Pet. App. 11a. Petitioner appealed each of the court's rulings "denying appointment of counsel and denying clarification." D. Ct. Doc. 14 (Dec. 11, 2015).

3. a. The court of appeals ordered petitioner to show cause why his appeal should not be dismissed for lack of jurisdiction. Pet. App. 9a-10a. The court stated that the September 23 order, which denied petitioner's motion to proceed *in forma pauperis* "without prejudice to its renewal supported by the appropriate

papers which may be filed under seal" and denied his motion to appoint counsel, D. Ct. Doc. 7, "does not appear" to be a "final judgment subject to immediate interlocutory review." Pet. App. 10a (citing 28 U.S.C. 1291 and 1292).

Petitioner requested an initial hearing en banc, arguing that the court of appeals should "allow the interlocutory appeal of [petitioner's] denial of appointment of counsel order under 28 U.S.C. § 1915(d)." Pet. for Initial Hr'g 2 (Feb. 17, 2016). Petitioner recognized that the court had rejected this argument in *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983) (per curiam), but he urged the court to overrule that decision in an en banc proceeding. Petitioner noted that the court of appeals had "not directly addressed whether orders denying counsel under 42 U.S.C. § 2000a-3(a) are immediately appealable," but he acknowledged that *Appleby*'s "reasoning would be applicable here." Pet. for Initial Hr'g 4.

The court of appeals held that the order to show cause had been satisfied, denied the petition for initial hearing en banc, and ordered merits briefing. Pet. App. 6a-8a.

b. In his opening brief, petitioner argued that the court of appeals had jurisdiction under the collateral-order doctrine to review the order denying appointment of counsel under 42 U.S.C. 2000a-3(a). Pet. C.A. Br. 1. Petitioner did not argue that the court had jurisdiction to review the orders denying appointment of counsel under Section 1915. Respondents did not file an answering brief because they had not been served in the district court action. Gov't C.A. Letter (Aug. 25, 2016).

The court of appeals dismissed the appeal for lack of jurisdiction. Pet. App. 1a-5a. The court noted that the courts of appeals had reached different conclusions on whether orders denying the appointment of counsel are immediately reviewable under the collateral-order doctrine, and that some courts had distinguished orders denying appointment under "federal anti-discrimination statutes" from denials under Section 1915. Pet. App. 2a-3a. The court concluded, however, that the factors it had identified in *Appleby* "for not categorizing the denial of appointed counsel under 28 U.S.C. § 1915(e) as a collateral order logically also apply to denial of appointed-counsel requests under" 42 U.S.C. 2000a-3(a). Pet. App. 3a.

The court of appeals explained that an order denying appointment of counsel is "inherently non-final because it is subject to revision as the case develops." Pet. App. 3a. The court reasoned that, as a case progresses, the district court may have a clearer sense of the merits and of a plaintiff's ability to litigate on his own, and could reevaluate its earlier "treatment of an appointment request." *Id.* at 4a. Moreover, as a practical matter, interlocutory review is not necessary because an order denying appointment of counsel would be reviewable in an appeal from a final judgment. *Id.* at 4a-5a.

ARGUMENT

The court of appeals correctly held that an order denying the appointment of counsel is not immediately appealable under the collateral-order doctrine. That decision is consistent with the view of the great majority of the courts of appeals. Although some courts of appeals have reached a contrary conclusion, intervening precedents of this Court may cause them to

reconsider—and one circuit has already signaled its willingness to do so. Finally, to the extent that any genuine disagreement on the issue persists, that conflict is best addressed through this Court's rulemaking authority.

This Court has repeatedly denied review on the question whether orders denying the appointment of counsel are immediately appealable, including a petition filed by petitioner earlier this Term. See *Sai* v. *TSA*, 137 S. Ct. 711 (2017) (No. 16-287); *Wilson* v. *Johnson*, 562 U.S. 828 (2010) (No. 09-1143); *Welch* v. *Smith*, 484 U.S. 903 (1987) (No. 86-6884); *Henry* v. *City of Detroit Manpower Dep't*, 474 U.S. 1036 (1985) (No. 85-237). The same result is warranted here.

1. Under 28 U.S.C. 1291, federal courts of appeals have jurisdiction over "final decisions of the district courts." This final judgment rule prevents litigants from engaging in "piecemeal, prejudgment appeals," conduct that "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)).

Notwithstanding the final judgment rule, this Court has permitted litigants to appeal a "small class" of collateral rulings that may be treated as final even though they do not end the proceedings in the district court. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). For a trial-court order to come within this narrow exception, referred to as the collateral-order doctrine, "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits

of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (brackets in original) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). This Court has repeatedly stressed that the collateral-order doctrine is a "'narrow' exception" and "should stay that way and never be allowed to swallow the general rule." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); see *Mohawk Indus.*, 558 U.S. at 113 ("[T]he class of collaterally appealable orders must remain 'narrow and selective in its membership.'") (quoting *Will* v. *Hallock*, 546 U.S. 345, 350 (2006)); *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) ("small category").

In this case, the court of appeals correctly determined that the district court's denial of petitioner's request for appointed counsel was not immediately appealable under the collateral-order doctrine. Petitioner can satisfy none of the three criteria necessary to successfully invoke that doctrine.

First, as explained in the precedent on which the decision below relied, "a denial of appointed counsel at the outset" of a case does not "necessarily 'conclusively determine[] the disputed question.'" *Appleby* v. *Meachum*, 696 F.2d 145, 147 (1st Cir. 1983) (per curiam) (quoting *Coopers & Lybrand*, 437 U.S. at 468). That is because the considerations used to determine whether counsel should be appointed—such as the merits of the case, the "litigant's additional efforts to obtain counsel," and the "litigant's pro se capabilities"—may all change as the case progresses and are thus subject to reevaluation. Pet. App. 4a; see *Appleby*, 696 F.2d at 147 ("We would expect the district court to

leave the order 'subject to revision.'") (citation omitted).

Petitioner does not address the district court's ability to reconsider its order denying appointment of counsel, or that orders denying appointment of counsel are generally issued without prejudice. See, *e.g.*, pp. 2-3, *supra*; see also Pet. App. 4a ("We note that omitting the words 'without prejudice' from an initial denial would not prevent reassessment at a later date."). And even if district courts rarely revisited their orders denying the appointment of counsel in practice, that would not satisfy the collateral-order test. Rather, to satisfy the test, an order must "*conclusively* determine the disputed question." *Coopers & Lybrand*, 437 U.S. at 468 (emphasis added); see *Firestone Tire & Rubber*, 449 U.S. at 376 ("[T]he challenged order must constitute 'a complete, formal, and, in the trial court, final rejection.'") (quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977)). An order denying appointment of counsel does not satisfy that criterion.

Second, the decision whether to appoint counsel is not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. Petitioner agrees (Pet. 17), stating that "the district court often considers the merits of a plaintiff's claim when deciding whether to grant a motion for appointed counsel." In evaluating a plaintiff's request for appointment of counsel, courts typically consider a number of factors, including "the merits of plaintiff's case." Pet. App. 3a (quoting *Cooper* v. *A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir. 1989) (per curiam)); *id.* at 4a (quoting *Castner* v. *Colorado Springs Cablevision*, 979 F.2d 1417, 1421 (10th Cir. 1992) (holding that "plaintiff must make

[an] affirmative showing[] of * * * meritorious allegations" before "counsel may be appointed"); see also *Castner*, 979 F.2d at 1420 (collecting cases that evaluate the merits of plaintiff's case when appointing counsel).

Moreover, when a litigant who was denied appointed counsel seeks to challenge that denial on appeal after final judgment, "[o]nly after assessing the effect of the ruling on the final judgment could an appellate court decide whether the [litigant's] rights had been prejudiced." *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 439 (1985). For those reasons, this Court has held that "orders disqualifying counsel in civil cases are not 'completely separate from the merits of the action.'" *Ibid.* (citation omitted); see *Flanagan* v. *United States*, 465 U.S. 259, 269 (1984) (order disqualifying criminal defense counsel "does not qualify as an immediately appealable collateral order in a straightforward application of the necessary conditions laid down in prior cases"). There is no reason for a different rule insofar as the denial of appointed counsel is concerned.

Third, a district court's order denying appointment of counsel is not "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. To satisfy that criterion, it is not enough to show that waiting to appeal the order would cause practical difficulties; rather, "denial of immediate review [must] render impossible any review whatsoever." *Firestone Tire & Rubber*, 449 U.S. at 376 (citation omitted). An order denying appointment of counsel does not meet that standard: If the district court abuses its discretion in denying counsel, the court of appeals can remedy that error by vacating the final

order and remanding the case for further proceedings. See, *e.g.*, *Pruitt* v. *Mote*, 503 F.3d 647, 660-661 (7th Cir. 2007) (en banc) (reversing jury verdict against plaintiff because the district court applied the wrong legal standard in denying plaintiff's request for counsel); *Abdullah* v. *Gunter*, 949 F.2d 1032, 1038 (8th Cir. 1991) (reversing jury verdict against plaintiff and remanding with instructions to appoint counsel), cert. denied, 504 U.S. 930 (1992). "That remedy [is] plainly adequate should petitioner's concerns of possible injury ultimately prove well founded." *Firestone Tire & Rubber*, 449 U.S. at 378.

Petitioner's only response (Pet. 17) is that forcing a litigant to proceed in the trial court without counsel, and then to seek on appeal to have the final judgment vacated, is "not an efficient use of either the plaintiff's or the court's resources." Yet that potential outcome "does not 'diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous.'" *Firestone Tire & Rubber*, 449 U.S. at 378 (brackets in original; citation omitted). "Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in [Section] 1291." *Ibid.* For that reason, this Court has held that "[a]n order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not." *Id.* at 377. The same reasoning applies to orders denying the appointment of counsel.

2. As petitioner concedes (Pet. 9-12), most courts of appeals have held that an order denying appointment of counsel is not immediately appealable as a final order. That is the rule in nine circuits. See *Appleby*, 696 F.2d at 146 (1st Cir.) (motion for appointment of counsel under Section 1915(d)); *Miller* v. *Pleasure*, 425 F.2d 1205, 1205-1206 (2d Cir.) (per curiam) (same), cert. denied, 400 U.S. 880 (1970); *Smith-Bey* v. *Petsock*, 741 F.2d 22, 26 (3d Cir. 1984) (same); *Miller* v. *Simmons*, 814 F.2d 962, 964 (4th Cir.) (motion for appointment of counsel under 28 U.S.C. 1915(d) and 18 U.S.C. 3006A(g)), cert. denied, 484 U.S. 903 (1987); *Henry* v. *City of Detroit Manpower Dep't*, 763 F.2d 757, 759 (6th Cir.) (en banc) (holding that order denying counsel under either 28 U.S.C. 1915(d) or 42 U.S.C. 2000e-5(f)(1)(B) would not be immediately appealable), cert. denied, 474 U.S. 1036 (1985); *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064, 1066-1067 (7th Cir. 1981) (per curiam) (motion for appointment of counsel under Section 1915(d); expressly overruling *Jones* v. *WFYR Radio/RKO Gen.*, 626 F.2d 576 (7th Cir. 1980) (per curiam), which held that an order denying appointment of counsel under 42 U.S.C. 2000e-5(f)(1) was immediately appealable); *Cotner* v. *Mason*, 657 F.2d 1390, 1391-1392 (10th Cir. 1981) (per curiam) (motion for appointment of counsel under Section 1915(d)); *Hodges* v. *Department of Corr.*, 895 F.2d 1360, 1361 n.1 (11th Cir. 1990) (per curiam) (motion for appointment of counsel under Section 2000e-5(f)(1)); *Holt* v. *Ford*, 862 F.2d 850, 853-854 (11th Cir. 1989) (en banc) (same); *Ficken* v. *Alvarez*, 146 F.3d 978, 980 (D.C. Cir. 1998) (same).

Petitioner counts the Third Circuit as adopting his position (Pet. 5), but that is incorrect. In *Spanos* v.

Penn Central Transportation Co., 470 F.2d 806, 807 n.3 (1972) (per curiam), the Third Circuit held, without briefing by the parties, that orders denying appointment of counsel under 42 U.S.C. 2000e-5 were immediately appealable. The Third Circuit later relied on *Spanos* to hold that orders denying appointment of counsel under Section 1915 were immediately appealable as well. *Ray* v. *Robinson*, 640 F.2d 474, 477 (1981). But the Third Circuit reversed course three years later, concluding that this Court's decision in *Flanagan* had "effectively overruled" its earlier conclusions. *Smith-Bey*, 741 F.2d at 26 (concluding that *Ray* "has been effectively overruled by the Supreme Court in *Flanagan*"). Although petitioner claims (Pet. 8) that the Third Circuit "did not explicitly overturn its prior holding in *Spanos*," he offers no grounds to distinguish the Third Circuit's holding in *Ray* (which was explicitly overruled) from *Spanos*, and cites no cases in which the Third Circuit has relied in *Spanos* to grant interlocutory review of an order denying the appointment of counsel.

Petitioner is correct that the Ninth Circuit has permitted immediate appeals from orders denying the appointment of counsel under Title VII. See Pet. 7-8 (citing *Bradshaw* v. *Zoological Soc'y*, 662 F.2d 1301 (1981)). The Fifth Circuit has likewise permitted an immediate appeal from an order denying counsel in a civil rights case under Title VII, *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (1977), and under 42 U.S.C. 1983, *Robbins* v. *Maggio*, 750 F.2d 405, 412-413 (1985). Since those decisions, the Fifth Circuit has recognized that it is an outlier among the courts of appeals. See *Marler* v. *Adonis Health Prods.*, 997 F.2d 1141, 1142 nn.1-3 (1993). To our knowledge, no

litigant has yet asked the Fifth Circuit or the Ninth Circuit to reconsider its holdings en banc, and there is no sign that those courts would be unwilling to reconsider their holdings in light of this Court's more recent guidance concerning the collateral-order doctrine in *Digital Equipment*, *Swint*, *Will*, and *Mohawk Industries*, *supra*, which have emphasized the doctrine's modest and narrow application.

While the Eighth Circuit has held that orders denying appointment of counsel are immediately appealable, *Hudak* v. *Curators of Univ. of Mo.*, 586 F.2d 105, 106 (1978) (per curiam), cert. denied, 440 U.S. 985 (1979), it has recently exhibited a willingness to reconsider that holding. In 2007, the Eighth Circuit affirmed, on an interlocutory basis, a district court order denying appointment of counsel under 42 U.S.C. 1983, but it did so without discussing appellate jurisdiction. See *Nelson* v. *Shuffman*, 476 F.3d 635, 636 (2007) (per curiam); see *id.* at 637 (Colloton, J., dissenting) (arguing that jurisdiction should be declined under the rule that "a panel of the court of appeals may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent"). The Eighth Circuit has since recognized that approach is out of step with the great majority of the courts of appeals, and it has invited an en banc petition to allow the full court to consider the issue. See *Ward* v. *Smith*, 721 F.3d 940, 942 (2013) (per curiam) ("A majority of this panel would revisit *Nelson*, but only the court en banc may overrule panel precedents.") (emphasis omitted). Because the Eighth Circuit is not only aware of its conflicting holding, but has also stated that it is open to reconsidering its

position, that court should be permitted to correct its own precedent through its en banc procedures.

Finally, the Federal Circuit long ago issued a decision holding that an order denying appointment of counsel under Section 1915 is immediately appealable as a collateral order. *Lariscey* v. *United States*, 861 F.2d 1267, 1270 (1988). But we are unaware of any published or unpublished decisions in the 28 years since *Lariscey* was decided in which the Federal Circuit has, under the collateral-order doctrine, considered an interlocutory appeal from an order denying the appointment of counsel. Should a case raising the issue arise in the Federal Circuit in the future, it is likely that the court would reconsider its position in light of intervening decisions of this Court and the overwhelming consensus of the other courts of appeals.

3. Even if a meaningful circuit conflict existed, that conflict should be resolved through rulemaking rather than adjudication. In 1990, Congress amended the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, to allow this Court to define, in its rulemaking capacity, which district court orders qualify as "final for the purposes of appeal under section 1291 of this title." Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 315, 104 Stat. 5115 (28 U.S.C. 2072(c)). In the collateral-order context, the Court has pointed to its rulemaking authority as "counsel[ing] resistance to expansion of appellate jurisdiction." *Swint*, 514 U.S. at 48; see *ibid.* ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect."); see also H.R.

Rep. No. 734, 101st Cong., 2d Sess. 18 (1990) (This Court's rulemaking authority is designed to "reduce[ ], if not eliminate[ ]" the "continuing spate of procedural litigation" regarding whether a trial-court order is final for purposes of appeal.).

Indeed, the Court has stated that "rulemaking, 'not expansion by court decision,' [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113 (citation omitted); see *Adler* v. *Elk Glenn, LLC*, 758 F.3d 737, 741 (6th Cir. 2014) (per curiam) (Sutton, J., concurring) ("[R]ulemaking [is] a more reliable vehicle than appellate decisionmaking for assessing the pros and cons."). Therefore, even if a substantial question existed regarding the appealability of district court orders denying the appointment of counsel, "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking." *Mohawk Indus.*, 558 U.S. at 114.[*]

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[*] Petitioner himself has been an active participant in the rulemaking process and has proposed rule alterations to the appropriate advisory committees. See Sai, *Proposed rule changes for fairness to pro se and IFP litigants* (Sept. 7, 2015), http://www.uscourts.gov/rules-policies/archives/suggestions/sai-15-cv-ee; Sai, *Proposed rules & forms change:* Iqbal/Twombly (Sept. 28, 2015), http://www.uscourts.gov/rules-policies/archives/suggestions/sai-15-cv-gg.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
SHARON SWINGLE
DANIEL AGUILAR
Attorneys

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