ACCESS TO JUSTICE DENIED: ASHCROFT v. IQBAL

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

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ACCESS TO JUSTICE DENIED: ASHCROFT v. IQBAL

TUESDAY, OCTOBER 27, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:37 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Delahunt, Johnson, Chu, Sensenbrenner, Franks, and King.

Staff present: (Majority) Kanya Bennett, Counsel; David Lachmann, Subcommittee Chief of Staff; and (Minority) Paul Taylor, Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will now come to order, and I will first recognize myself for a statement.

Today's hearing looks at the implications of the Supreme Court's recent ruling in the case of *Ashcroft v. Iqbal* and its predecessor, *Bell Atlantic Corporation v. Twombly*. Although the case deals with the liability of Federal officials for the post-September 11th round-up of the "usual suspects," the *Iqbal* decision has had a far-reaching effect on the rights of litigants in a broad range of cases. Its implications are only now becoming clear, at least to most of us, and the fallout is deeply disturbing.

Javaid Iqbal is a Pakistani national that was picked up in the wake of the September 11th attacks. He was deemed to be an individual of high interest with regard to the investigation of the attacks and was placed in the special housing unit in the Brooklyn—in the Federal detention center in Brooklyn, New York, which happens to be in my district. He subsequently alleged that he was beaten and denied medical care and that his designation and mistreatment was the result of an unconstitutional determination based on his religion, race, and national origin.

The distinguished Ranking Member, the gentleman from Wisconsin, who was the Chairman of the full Committee at the time, visited the Brooklyn facility at the time as part of his oversight function, and I joined him in that visit.

The allegations were serious then, and with what we all know now, are even more disturbing. When the Supreme Court considered Mr. Iqbal's claim, however, it did not reach the merits of the

claim; it did something truly extraordinary. Rather than questioning, as required under rule 8(a)(2) of the Rules of Civil Procedure, whether the plaintiff had included a "short and plain statement of the claim showing that the pleader is entitled to relief," which is what rule 8(a)(2) says a claim should contain, it dismissed the case not on the merits or on the law, but on the broad assertion that the claim, as stated in the pleading, was not "plausible."

In the past the rule had been, as the Supreme Court stated in *Conley v. Gibson* 50 years ago, that the pleading rules exist to "give the defendant fair notice of what the claim is and the grounds upon which it rests," assuming provable facts. Now the Court has required that prior to discovery, courts must somehow assess the plausibility of the claim.

This rule will reward any defendant who succeeds in concealing evidence of wrongdoing, whether it is government officials who violate people's rights, polluters who poison the drinking water, employers who engage in blatant discrimination, or anyone else who violates the law. Often evidence of wrongdoing is in the hands of the defendants, of the wrongdoers, and the facts necessary to prove a valid claim can only be ascertained through discovery.

The *Iqbal* decision will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's take on the plausibility of a claim rather than on the actual evidence, which has not been put into court yet, or even discovered yet. This is another wholly inventive new rule overturning 50 years of precedent designed to close the courthouse doors. This, combined with tightened standing rules and cramped readings of existing remedies, implement this conservative Court's apparent agenda to deny access to the courts to people victimized by corporate or government misconduct.

This is judicial activism at its worst, judicial usurpation of the procedures set forth for amending the Federal Rules of Civil Procedure. I plan to introduce legislation, with the distinguished gentleman from Georgia, Mr. Johnson, and the distinguished Chairman of the full Committee to correct this misreading of the rules and to restore the standard followed for the last 50 years since the Supreme Court's decision in *Conley*.

Rights without remedies are no rights at all. There is an ancient maxim of the law that says there is no right without a remedy. Americans must have access to the courts to vindicate their rights, and the concerted attempt by this Supreme Court to narrow the ability of plaintiffs to go into courts to vindicate their rights is something that must be reversed.

I look forward to the testimony of our distinguished panel of witnessed. I yield back the balance of my time.

The Chair now recognizes the distinguished Ranking Member for 5 minutes for an opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

The Supreme Court decided a case called *Ashcroft v. Iqbal* and dismissed the lawsuit on the grounds that a detainee's complaint failed to plead sufficient facts, to state an intentional discrimination claim against government officials, including the director of the FBI and the attorney general. The person bringing that lawsuit was arrested in the U.S. on criminal charges and detained by Federal officials in the wake of the September 11th terrorist attacks.

He pleaded guilty to the criminal charges, served a term in prison, and was removed to his native Pakistan. But he indiscriminately sued high level government officials anyway, arguing that they were somehow responsible for the allegedly harsh treatment he received at a maximum security prison.

The issue in the case was simple: Did he allege claims against the Federal officials that were reasonably specific enough to allow the case to proceed? Here is what the Supreme Court said, "The pleading standard in Federal Rule 8 announces does not require detailed factual allegations but demands more than an unadorned 'The defendant unlawfully harmed me' accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of the cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement."

Iqbal's pleadings were simply so conclusory in nature and so lacking in any specific allegations that to have allowed the case to proceed would have been a travesty of justice. Again, as the Supreme Court itself stated in the case, "The September 11th attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al-Qaeda, an Islamic fundamentalist group. Al-Qaeda was headed by another Arab Muslim, Osama bin Laden, and composed in large part of his Arab Muslim disciples.

It should come as no surprise that the legitimate policy directing law enforcement to arrest and detain individuals because of their suspected links to the attacks would produce a disparate incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.

All the complaint plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until a suspect could be cleared of terrorist activity."

The Court then went on to describe the threats to national security that would result from allowing baseless claims such as Iqbal's to proceed, saying, "Litigations, though necessary to ensure that officials comply with the law, exact heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the government. The costs of diversion are only magnified when government officials are charged with responding to a national and international security emergency unprecedented in the history of the American Republic."

Further, there is no justifiable justification for congressional intervention in this case. First, the *Iqbal* decision merely reiterated law and Federal pleading principles. Dozens of lower court decisions have applied the same standard since the 1950's, refusing to credit a complaint's bald assertions and unsupported conclusions or the like when deciding a motion to dismiss for failure to stay the claim.

Finally, even if the lower courts conclude that some lawsuits can't proceed under those standards, the courts continue to have the power under the Federal Rules of Civil Procedure to allow plaintiffs to amend their complaints, make them sufficient if pos-

sible, and to refile them. The license to practice law is all too often the license to file frivolous and baseless lawsuits at great costs and expense to innocent parties.

If the *Iqbal* decision is overridden by statute, lawyers of course would save money because their complaints would simply have to list the names of the people sued with no supporting facts. But it would be immensely costly to the cause of justice, the innocent, and to our national security.

And I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

In the interest of proceeding to our witnesses and mindful of our busy schedules I ask that other Members submit their statements for the record. Without objection all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection the Chair will be authorized to declare a recess of the hearing, which we will do only if there are votes on the floor.

We will now turn to our witnesses, as we—oh, I am told that Mr. Johnson has asked if we would allow him an opening statement, so I will recognize the gentleman from Georgia for an opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this important oversight hearing.

Access to the courts and the ability for claims to be heard by a judge or jury are fundamental to our system of justice. For over 50 years courts have used the *Conley* standard to ensure that plaintiffs had the opportunity to present their case to Federal judge even when they did not yet have the full set of facts.

As Chairman of the Subcommittee on Courts and Competition Policy, I believe that it is extremely important that a defendant be given wide latitude for pleading, and plaintiffs need to have this latitude as well.

It seems that this measure penalizes plaintiffs as opposed to defendants, particularly in discrimination cases where you cannot uncover the wrongdoing without doing some basic discovery, and this decision would do away with that possibility because judges would be in a position to use their subjective wisdom, if you will, or perhaps even their desire to get a high-paying job in the future in the public—I mean, in the private sector, could be jeopardized if—or it could be enhanced, I will put it like that, by their ruling on a motion to dismiss based on inadequacy of the pleadings.

With the *Twombly* and *Iqbal* decisions, pleading standards are set so high that plaintiffs are now frequently denied access to the courts. In fact, since the *Iqbal* decision earlier this year over 1,600 district and appellate court cases have been thrown out due to insufficient pleadings, and that is just totally unacceptable to the notions of fair play and substantial justice that was imbedded into my memory during law school.

Another problem with the *Iqbal* decision is that the Supreme Court bypassed the Federal judiciary by amending the Federal Rules of Civil Procedure without going through the process laid out in the Rules Enabling Act. This is the epitome of judicial activism, as they like to call it, in changing the law through judicial fiat, as opposed to legislative fiat.

It is the role of the judiciary conference of the United States to change the Federal rules through a deliberative procedure, and bypassing the Judicial Conference's process the Supreme Court may very well have, in the words of Justice Ginsburg, "messed up the Federal rules." I am still as frustrated as she was when she made that comment.

I look forward to joining Chairman Nadler as an original cosponsor of his noted pleading legislation, and I plan to hold a legislative hearing and mark up this important bill in the Courts Subcommittee once the bill is introduced. Thank you.

Mr. NADLER. I thank the gentleman.

We will now turn to our witnesses. As we ask questions of our witnesses after their statements, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I will now introduce the witnesses. Arthur Miller was appointed as university professor to the faculty of the New York University School of Law and the School of Continuing and Professional Studies in 2007. Previously, Professor Miller had served as the Bruce Bromley Professor of Law, at Harvard Law School, since 1971. For many years Professor Miller was the legal editor of ABC's Good Morning America and hosted a program on the Courtroom Television Network.

Gregory Katsas—I hope I pronounced that right—Katsas—Gregory Katsas served as the assistant attorney general for the Civil Division of the Department of Justice under the Bush Administration in 2008. Prior to his confirmation Mr. Katsas served as deputy assistant attorney general, principal deputy associate attorney general, and acting associate attorney general for the Civil Division.

In these various capacities Mr. Katsas argued or supervised many of the leading civil appeals brought by or against the United States government for almost 8 years, including the noted case of *Ashcroft v. Iqbal.* Prior to his government service Mr. Katsas was a partner in the Washington office of the law firm Jones Day, and he will return to that firm in November.

John Vail is an original member of the Center for Constitutional Litigation, where he is vice president and senior litigation counsel. He represents clients in constitutional litigation in state and Federal appellate courts, including the Supreme Court of the United States.

Mr. Vail spent 17 years doing legal-aid work, concentrating in major litigation to advance rights. Mr. Vail teaches public interest lawyering at the George Washington University School of Law.

Debo Adegbile is the director of litigation at the NAACP Legal Defense and Educational Fund, or LDF. We are pleased to welcome him back to the Committee, as he recently appeared before us at our last hearing, in fact. As the director of litigation for LDF, Mr. Adegbile advances civil rights interests before the Federal courts.

Before taking his current position, Mr. Adegbile served as the associate director of litigation and director of the political participation group for LDF. He was a litigation associate at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison prior to joining the LDF.

I am pleased to welcome all of you. Your written statements, in their entirety, will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less.

To help you stay within that time there is a timing light at your table. When 1 minute remains the light will switch from green to yellow, and then to red when the 5 minutes are up.

Before we begin it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hand to take the oath?

[Witnesses sworn.]

Mr. NADLER. Thank you. Let the record reflect that the witnesses answered in the affirmative. You may be seated.

I now recognize Professor Miller.

TESTIMONY OF ARTHUR R. MILLER, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. MILLER. Thank you, Mr. Chairman, Members of the Subcommittee.

I have spent my entire life with the Federal Rules of Civil Procedure, and I firmly believe that these two cases by the Supreme Court represent a philosophical sea change in American civil litigation. When the rule-makers formulated these rules they had centuries of prior procedural history to reflect on, but they decided to do something very American.

They decided that all citizens should have access—that wonderful word access that you have used—American citizens should have access to the Federal courts. They should all have a day in court, a meaningful day in court, a day in court that some would argue was guaranteed by the due process clause of the United States Constitution, that they should not be derailed by procedural booby traps and tricks and technicalities, and that the gold standard was that day in court to be followed by a jury trial, as guaranteed to them by the Seventh Amendment to the United States Constitution.

The rules reflected those values. The rules provided, after centuries of experience, that pleadings are traps, that pleadings are access barriers.

The notion was, simplify pleadings and get to the facts, get to the relevant information through the discovery process. That system worked for many, many, many years. *Conley* and *Gibson* is a reflection of that. All the Supreme Court decisions between *Conley* and *Twombly* reflected a commitment to that system. *Twombly* and *Iqbal* deviate.

We are blessed in this country by having been given an enormous array of rights and protections, largely through the good work of this Congress. We now have effective legislation on discrimination based on race, gender, disability, and my personal favorite, age. We now have an enormous consumer protection, safety protection, environmental protection, financial protection. Those

rights are meaningless unless citizens can go to court and enforce those rights.

But here is the rub: As we have learned over the last decade, life is complex. The best forms of misconduct are insidious, silent, unseen. This is about Global Crossing, Enron, Madoff, credit default swaps, derivatives, auction rate securities.

There is no way the average American, even if armed with effective counsel, can plead to satisfy *Twombly* and *Iqbal.* That is why, as Mr. Johnson has said, hundreds of cases are being dismissed daily since these two decisions.

Everything today is characterized as formulaic, conclusory, cryptic, generalized, or bare. Unless citizens can move past the pleadings to get to the discovery regime, that day in court is absolutely meaningless and the private rights provided by this Congress to citizens are useless.

It is said that *Twombly* and *Iqbal* are justified because it costs a lot, because there is abuse or frivolous litigation. Those were assumptions by the Supreme Court starting in *Twombly* based on little or nothing.

We have no empiric evidence on abuse or frivolousness, and ironically, recent study, preliminary, by the Federal Judicial Center, says the costs of litigation are far less than what we thought they were and that the true heavy costs are really in a small band of cases. Yet *Twombly* and *Iqbal* speak to every case on the Federal docket, be it a one-person civil rights action or a mega-antitrust action.

Legislation is needed to bring us back to where we were, and as Mr. Johnson said, let the rule-making process, based on thorough evaluation and study, move forward. But right now we have a sense of urgency. Things are happening.

[The prepared statement of Mr. Miller follows:]

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PREPARED STATEMENT OF ARTHUR R. MILLER

STATEMENT OF

ARTHUR R. MILLER

University Professor
New York University School of Law

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties of the
Committee on the Judiciary

United States House of Representatives

Hearing on:

Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*

Tuesday, October 27, 2009

Good afternoon, Mr. Chairman and Members of the Subcommittee. It is an honor to appear today and assist in this important discussion about our federal courts.

By way of introduction, I am a University Professor at New York University, and I was the Bruce Bromley Professor of Law at Harvard Law School for many years. I have taught the civil procedure course and advanced courses in complex litigation for almost fifty years. Beginning in the late 1970s, I served as the Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States and then as a member of the Committee and as the Reporter for the American Law Institute's Project on Complex Litigation. I have argued cases involving issues of federal procedure in every United States Court of Appeals and in the United States Supreme Court and I am the co-author of the multivolume treatise *Federal Practice and Procedure*.

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] should be seen as the latest steps in a long-term judicial trend that has favored increasingly early case disposition in the name of efficiency, economy, and the avoidance of abusive and frivolous lawsuits. In my judgment, insufficient attention has been paid during this period to the important policy objectives and societal benefits of federal civil litigation. Given the significance of the procedural changes that have occurred in recent times and the public policy implications of *Twombly* and *Iqbal*, in effect today's hearing explores the character of access to civil justice in our national courts.

History matters. So let me offer some context for these two cases. When adopted in 1938, The Federal Rules of Civil Procedure represented a major break from the common law and code systems that preceded them. Although the drafters retained many of the prior procedural conventions, the Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and merit adjudications based on the full disclosure of relevant information.[3] The structure of the Rules sharply reduced the prior emphasis on the pleading stage, aiming to minimize the pleadings and motion practice, which experience showed served more to delay proceedings and less to expose the facts, ventilate the competing positions, or further adjudication on the merits.[4] According to the Supreme Court in *Conley v. Gibson*,[5] pleadings only needed to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" to survive a motion to dismiss. Fact revelation and issue formulation were to occur later in the pretrial process.

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[1] 550 U.S. 544 (2007).
[2] ___ U.S. ___, 129 S. Ct. 1937 (2009).
[3] Charles E. Clark, *Pleading under the Federal Rules*, WYO. L.J. 177 (1958).
[4] AM. BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed.) (1938).
[5] 355 U.S. 41, 47 (1957).

Moreover, rather than eliminating claims based on technicalities, the Federal Rules created a system that minimized procedural traps, with trial by jury as the gold standard for determining a case's merits. Generalized pleadings, broad discovery, and limited summary judgment became integral, interdependent elements of pretrial.[6] Although so-called notice pleading allowed a wide swath of cases into the system, discovery and summary judgment operated to expose and separate the meritorious from the meritless; cases that survived the motion to dismiss narrowed in scope as they approached trial on their merits.[7]

Beneath the surface of these broad procedural concepts lay several significant social objectives. The Rules were designed to support a central philosophical principle—the courts' procedural system should be premised on citizen access and equality of treatment. This certainly was a baseline democratic principle of the 1930s and post-war America with regard to social relations, the distribution of power, marketplace status, and equality of opportunity.

As significant new areas of federal substantive law emerged—e.g., civil rights, environment, consumerism—and existing ones were augmented, the importance of private enforcement of many national policies came to the fore. The openness of the Rules enabled people to enforce Congressional and constitutional policies through private civil litigation. The federal courts increasingly were seen as an alternative or an adjunct to centralized or administrative governmental oversight in fields such as competition, capital markets, product safety, and discrimination.[8] Even though private lawsuits sometimes are seen as an inefficient method of enforcing public policy, their availability has dispersed regulatory authority, achieved

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[6] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Clark, *supra* note 4, at 185.
[7] *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1220.
[8] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

greater transparency, provided a source of oversight and governance, and led to leaner government involvement.

Much, of course, has changed in the litigation world in the more than seventy years since the Rules were promulgated. The culture of the law and the legal profession itself are far different. Long gone are the days of a fairly homogenous community of lawyers litigating relatively small numbers of what today would be regarded as modest disputes involving a limited number of parties. The federal courts have become a world unimagined in 1938: a battleground for titans of industry to dispute complex claims involving enormous stakes; a forum in which contending ideological forces contest some of the great public policy issues of the day; and the situs for aggregate litigation on behalf of large numbers of people and entities pursuing legal theories and invoking statutes unknown in the 1930s. Opposing counsel compete on a national and even a global scale, and attorneys on both sides employ an array of litigation tactics often intended to wear out or deter opponents. Litigation costs have risen and many cases seem interminable.[9] The pretrial process has become so elaborated with time-consuming motions and hearings that it seems to have fallen into the hands of some systemic Sorcerer's Apprentice. Yet trials are strikingly infrequent, and, in the unlikely event of a jury trial, only six or eight citizens are empanelled. In short, the world of those who drafted the original Federal Rules largely has disappeared. Today, civil litigation often is neither civil nor litigation as we used to know it.

Along with these changes in litigation have come corresponding judicial shifts in interpreting the Rules and other barriers to the meaningful day in court Americans deserve. A few illustrations: Two decades before the recent pleading decisions, a 1986 trilogy of Supreme

[9] Although a sharp increase in criminal matters coupled with the federalization of such matters as securities litigation and class actions has outstripped the growth in the federal judiciary, I do not believe the data supports the notion that we have been struck by a "litigation explosion." *See generally* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 459 (2004).

Court summary judgment cases[10] broke with prior jurisprudence restricting the motion's application to determining whether a genuine issue of material fact was present and sent a clear signal that Rule 56 provided a mechanism for disposing of cases short of trial when the district judge felt the plaintiff's case was not deemed "plausible." In 1995, Congress enacted the Private Securities Litigation Reform Act,[11] which created a super-heightened pleading standard for certain aspects of securities claims and deferred access to discovery with the aim of reducing "frivolous suits." Despite the well established position of notice pleading under *Conley* and absent any revision of Rule 8 by the rulemaking process, lower federal courts repeatedly applied heightened pleading standards in many types of cases, effectively restricting access to our courts.[12] For more than a quarter of a century, amendments to the Federal Rules (along with various judicial practices) have had the effect of containing or controlling discovery, restricting class actions, limiting scientific testimony, and enhancing the power of judges to manage cases throughout the pretrial process.[13]

Yet, until *Twombly* in 2007, the Supreme Court stood firm in its commitment to the access principle at the pleading stage.[14] With the advent of "plausibility" pleading the Rule 12(b)(6) motion to dismiss seems to have stolen center stage as the vehicle of choice for disposing of allegedly insufficient claims and for protecting defendants from supposedly excessive discovery costs and resource expenditures—objectives previously thought to be achievable under other rules and judicial practices.

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[10] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
[11] Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of Title 15 of the United States Code).
[12] *See generally* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).
[13] FED. R. CIV. P. 16, 26. Rule 16 was amended in 1983 and 1993, and Rule 26 was amended in 1993 and 2000. There have been other constraints imposed on discovery. *See, e.g.*, FED. R. CIV. P. 30(d)(2), 33(a).
[14] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

These procedural developments have come at the expense of the values of access to the federal courts and the ability of citizens to secure an adjudication of the merits of their claims. What has been done is not a neutral solution to an important litigation problem, but rather it is the use of procedure to achieve substantive goals that undermine important national policies by limiting private enforcement of Congressional enactments through various changes that benefit certain economic interests. To paraphrase a friend and an accomplished proceduralist, what we have seen is the "subversion of statutory protections to benefit Wall Street at the expense of Main Street."

Twombly and *Iqbal* have brought a long-simmering debate over these procedural movements to a feverish pitch. The defense bar, along with the large private and public entities it typically represents, asserts that a heightened pleading standard is necessary to keep litigation costs down, weed out abusive lawsuits, and protect American business interests at home and abroad. The plaintiffs' bar, supported by various civil rights, consumer, and environmental protection groups, argue that heightened pleading is a blunt instrument that will bar meritorious claims and undermine national policies. *Twombly-Iqbal* will weigh heavily on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths, often in cases in which critical information is largely in the hands of defendants that is unobtainable without access to discovery.

I believe that democratic participation in the civil litigation process has an important role to play in our society. Effective governance and the enforcement of national policies are impaired if claims are consistently thrown out on the complaint alone. If we truly value fairness and justice, plaintiffs need the access to information the discovery Rules provide to ensure that

Congressional policies are vindicated and equal access to the courts is not eroded. Given these stakes, legislative oversight seems appropriate.

The changes the Court made to the underlying pleading standard in *Twombly* and *Iqbal* are striking. Under *Conley*'s notice pleading standard, courts were authorized to grant motions to dismiss only when "it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[15] Judges were to accept all factual allegations as true and draw all inferences in favor of the pleader. Despite the vagueness of the *Conley* standard, judges employing it on a motion to dismiss had years of precedent aiding them to achieve some consistency and continuity. Moreover, they understood that the motion should be denied except in clear cases. In recent decades, unfortunately, lower courts frequently ignored the standard without rulemaking authority and applied a heightened or inconsistent fact pleading standard in certain types of cases setting the stage for *Twombly* and *Iqbal*.[16]

The assertion by some that these two cases are not a dramatic shift has credibility only if they are compared to the earlier decisions by lower federal courts that deviated from *Conley*. Plausibility pleading now officially has transformed the complaint's function from *Conley*'s limited role of providing notice of the claim into a more demanding standard that requires a more extensive factual presentation.[17] It is now common for federal courts to characterize formerly

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[15] *Conley*, 355 U.S. at 45–46.

[16] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)"); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules.").

[17] For a glimpse at the initial application of the enhanced factual pleading established by *Twombly* and *Iqbal* in a variety of substantive contexts, *see e.g.*, Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, (6th Cir. 2009)(consumer confusion regarding trademark and fair use); Farash v. Continental Airlines, Inc., 2009 WL 1940653 (2d Cir. 2009) (negligence and assault claims under New York law); Sheehy v. Brown, 2009 WL 1762856 (2d Cir. 2009) (slip op.) (§§ 1983 and 1985 claims); St. Clair v. Citizens Financial Group, 2009 WL 2186515 (3d Cir. 2009) (slip op.) (RICO claim); Lopez v. Beard, 2009 WL 1705674 (3d Cir. 2009) (slip op.) (First, Eighth, Fourteenth Amendments, and Age Discrimination Act claims); Morgan v. Hubert, 2009 WL 1884605 (5th Cir. 2009) (slip op.) (Eighth Amendment deliberate indifference claim); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (Alien

acceptable allegations as "formulaic," "conclusionary," "cryptic," "generalized," or "bare."[18] Indeed, it is striking to note that the *Iqbal* majority opinion did not once use the word "notice." The Supreme Court's change in policy seems to suggest a movement backward in time toward code and common law procedure, with their heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint. The past practice of reading the complaint in the light most favorable to the plaintiff seems to have been replaced by the long-rejected practice of construing a pleading against the pleader.

Twombly and *Iqbal*, in fact, have altered Rule 12(b)(6) procedure even more dramatically in some respects. The decisions have unmoored our long-held understanding of the motion to dismiss as a test of a pleading's legal sufficiency. The drafters of the Federal Rules replaced the demurrer with the Rule 12(b)(6) motion in hopes of reducing adjudications based on "procedural booby traps."[19] The common law demurrer, the code motion to dismiss, and our prior understanding of Rule 12(b)(6) all focused only on the complaint's legal sufficiency, not on a judicial assessment of the case's facts or actual merits. Now, *Twombly* and *Iqbal* may have transformed the well-understood purpose of the motion to dismiss into a potentially Draconian method of foreclosing access based solely on an evaluation of the challenged pleading's factual presentation, filtered through the extra-pleading "judicial experience and common sense" factors announced by the Court. The transmogrification of this threshold procedure has pushed the motion to dismiss far from its historical function and, in my view, beyond its permissible scope of inquiry.

Tort Statute and Torture Victims Protection Act claims); Moss v. U.S. Secret Service, 572 F.3d 962 (9th Cir. 2009) (First Amendment viewpoint discrimination claim); Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (employment standards); Logan v. Sectek, Inc., 632 F.Supp. 179, (D. Conn. 2009) (Age Discrimination Act claim); Spencer v. DHI Mortg. Co., Ltd., ___ F.Supp.2d ___, 2009 WL 1930161 (E.D. Cal. 2009) (negligent breach of duty); Vallejo v. City of Tucson, 2009 WL 1835115 (D. Ariz. 2009) (slip op.) (Voting Rights Act claim).

[18] *See e.g.*, Maldonado v. Fontanes, 508 F.3d 263 (1st Cir. 2009); Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC, ___ F.Supp.2d ___, 2009 WL 2191318 (S.D.N.Y. 2009).

[19] Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

Not only has plausibility pleading undone the simplicity and legal basis of the Rule 8 pleading regime and the limited function of the motion to dismiss, but it also grants virtually unbridled discretion to district judges. Under the new standard, the Court has vested trial judges with the authority to evaluate the strength of the factual "showing" of each claim for relief and thus determine whether or not it should proceed.[20] In conducting this analysis, judges are first to distinguish factual allegations from legal conclusions, since only the former need be accepted as true.[21] Some post-*Iqbal* decisions suggest that the conclusion category is being applied quite expansively, embracing allegations that one might well consider to be factual and therefore historically jury triable.[22] By transforming factual allegations into legal conclusions and drawing inferences from them, judges are performing functions previously left to juries at trial, and doing so based only on the complaint.[23]

Once trial judges have identified the factual allegations, they then must decide whether a plausible claim for relief has been shown by relying on their "judicial experience and common sense,"[24] highly subjective concepts largely devoid of accepted—let alone universal—meaning. Further, the plausibility of factual allegations appears to depend on the judge's opinion of the relative likelihood of wrongdoing as measured against a hypothesized innocent explanation. As is true of the division between fact and legal conclusion, the Court has provided little direction on how to measure the palpably nebulous factors of "judicial experience," "common sense," and "more likely" alternative explanation it has inserted into the threshold Rule 12(b)(6) dynamic.

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[20] *Twombly*, 550 U.S. at 556 n. 3.
[21] *Iqbal*, 129 S. Ct. at 1940.
[22] *See* cases cited *supra* note 17.
[23] This thesis and the ramifications of it are strikingly demonstrated in Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). *See also* Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 BOS. COLL. L. REV. 759 (2009) (asserting that judges dismiss case based on their own views of the facts).
[24] *Iqbal*, 129 S.Ct. at 1950.

Once again, a citizen's due process right to a day in court before a jury of his or her peers is threatened.

The subjectivity at the heart of *Twombly-Iqbal* raises the concern that rulings on motions to dismiss may turn on individual ideology regarding the underlying substantive law, attitudes toward private enforcement of federal statutes, and resort to extra-pleading matters hitherto far beyond the scope of a Rule 12(b)(6) motion to dismiss. As a result, inconsistent rulings on virtually identical complaints may well be based on judges' disparate subjective views of what allegations are plausible.[25] Courts already have differed on issues that were once settled. For instance, the Third Circuit has ruled that the 2002 Supreme Court decision in *Swierkiewicz v. Sorema, N.A.*,[26] which upheld notice pleading in employment discrimination actions, no longer was valid law after *Twombly-Iqbal*.[27] Courts in other circuits disagree.[28]

Twombly and *Iqbal* have swung the pendulum away from the prior emphasis on access for potentially meritorious claims;[29] it probably will affect litigants bringing complex claims the hardest. Those cases -- many involving Constitutional and statutory rights that seek the enforcement of important national policies and often affecting large numbers of people -- include

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[25] *Cf.* Lonny S. Hoffman, *Burn Up The Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1259–60 (2008) (noting that summary judgment filings and grant rates vary widely by case type and court).

[26] 534 U.S. 506 (2002).

[27] Guirguis v. Movers Specialty Services, Inc., 2009 WL 3041992 (3d Cir. 2009) (slip op.); Fowler v. UPMC Shadyside, --- F.3d ---, 2009 WL 2501662 (3d Cir. 2009).

[28] Gillman v. Inner City Broadcasting Corp. 2009 WL 3003244, at *3 (S.D.N.Y. 2009) ("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*."); *but see* Argeropoulos v. Exide Tech., 2009 WL 2132442, at *6 (E.D.N.Y. 2009) ("[T]his kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard for assessing motions to dismiss, . . . [b]ut it does not survive the Supreme Court's 'plausibility standard,' as most recently clarified in *Iqbal*.").

[29] *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) ("Such a fluid, form-shifting standard is troubling . . . it is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like, *creating a class of disfavored actions* in which plaintiffs will face more hurdles to obtaining a resolution of their claims on the merits." (emphasis added)).

claims in which factual sufficiency is most difficult to achieve at the pleading stage and tend to be resource consumptive. Already, recent decisions suggest that complex cases, such as those involving claims of discrimination, conspiracy, and antitrust violations, have been treated as if they were disfavored actions.[30] Perhaps the propensity to dismiss these claims should come as no surprise: *Twombly* and *Iqbal* arose in two such contexts, and lower courts may find it easier to apply the Supreme Court's reasoning to complaints with seemingly similar facts. Yet ambiguity abounds. Where is the plausibility line and what must be pled to survive a motion to dismiss? How will each judge's personal experience and common sense affect his or her determination of plausibility? As a result of these and other uncertainties, the value of prior case law and predictability are obscured, and plaintiffs will be left guessing as to what each individual judge will consider sufficient. Throughout, the defendant basically gets a pass.

Moreover, how can plaintiffs with potentially meritorious claims plead with factual sufficiency without discovery, especially when they are limited in terms of time, lack resources for pre-institution investigations, and critical information is held by the defendants? Some courts have acknowledged that demands for plausibility pleading may shut "the doors of discovery"[31] on the very litigants who most need the information gathering resources the Federal Rules have made available in the past.[32] Indeed, *Twombly-Iqbal* can be seen the latest element of the long-running trend in the lower courts toward constricting the private enforcement of important

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[30] *See, e.g.*, Cooney v. Rossiter, --- F.3d ---, 2009 WL 3103998 (7th Cir. 2009) (dismissing conspiracy claim); In re Travel Agent Comm'n Antitrust Litigation, --- F.3d ---, 2009 WL 3151315 (6th Cir. 2009) (dismissing antitrust collusion claim); Ibrahim v. Dep't of Homeland Sec., 2009 WL 2246194 (N.D.Cal. 2009) (dismissing discrimination complaint).

[31] *Iqbal*, 129 S. Ct. at 1950.

[32] Ibrahim v. Dep't of Homeland Sec., 2009 WL 2246194, at *10 (N.D. Cal. 2009) ("A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will not often have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court.").

statutory and Constitutional rights in many contexts[33] — a far cry from Congress's intent when it created some of them.

It also remains to be seen how courts will apply the demands of plausibility pleading to relatively uncomplicated civil actions.[34] By deciding to extend plausibility pleading to the entire universe of federal civil cases, it will be applied in many cases that are light years away from the complex claims before them in *Twombly* and *Iqbal*. The difficulties of antitrust and conspiracy claims are far beyond those in most negligence and contract actions, in terms of the complexity of issues, facts, as well as the extent and cost of discovery.

Plausibility pleading extends the Supreme Court's 1986 trilogy of summary judgment cases[35] in which the Court introduced a new "plausibility standard" in that context and transformed Rule 56 motions into a potent weapon for terminating cases short of trial. "Plausibility"—apparently the Court's word *du jour*—now applies both to summary judgment and to pleadings, although the difference between these two utilizations of the word is murky at best. Some even have argued that under *Twombly* the motion to dismiss has become a disguised

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[33] *See, e.g.*, Goutam U. Jois, Pearson, Iqbal, and Procedural Judicial Activism (Sept. 12, 2009), *available at* http://ssrn.com/abstract=1472485 (the *Twombly-Iqbal* developments have threatened plaintiffs' ability to recover for Constitutional violations).

[34] The *Twombly* Court asserted the continuing validity of Official Form 11 (formerly Form 9), the paradigm negligence complaint. 550 U.S. at 565 n.10. Yet it also stated that factual allegations, rather than mere conclusions, would be required in order to survive the plausibility hurdle. However, a word like "negligently," which appears in Form 11, may be viewed as either a factual allegation or a legal conclusion. If considered a fact, courts should accept it as true, confirming that Form 11 remains an adequate model for such actions. But if courts begin interpreting "negligently" as a legal conclusion, plaintiffs may have to specify more factual elements, perhaps by requiring the plaintiff to recite the precise actions taken by a defendant motorist that made his or her driving negligent. *See* Farash v. Continental Airlines, Inc., 2009 WL 1940653 (2d Cir. 2009) (requiring specific allegations of nature of defendant's negligence); Doe ex rel. Gonzales v. Butte Valley Unified School Dist., 2009 WL 2424608, at *8 (E.D. Cal. 2009) (declaring sufficiency of Official Forms in doubt). These are precisely the pleading burdens the Federal Rules were designed to avoid.

[35] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

summary judgment motion, attacking not only the legal sufficiency of the pleading, but striving for a resolution by appraising the facts and then characterizing the complaint as conclusory.[36]

However characterized, what we have now is a far different model of civil procedure than the original design: the Federal Rules once advanced trials on the merits, but cases now turn on Rule 12(b)(6) and Rule 56 motions; jurors once were trusted with deciding issues of fact and applying their findings to the law following the presentation of evidence, but now judges are authorized to make these determinations using nothing but a single complaint and their own discretion.

Just as the 1986 trilogy was concerned with restraining the so-called "litigation explosion" through the "powerful tool" of summary judgment,[37] so too the Court in both *Twombly* and *Iqbal* was concerned with developing a stronger "judicial gatekeeping role" for Rule 12(b)(6) motions.[38] Plausibility pleading may well become the courts' primary vehicle for achieving pretrial disposition, moving the gatekeeping function to the very beginning of the case. This is a significant change. Whereas summary judgment typically follows discovery and prevents cases lacking genuine issues of material fact from proceeding to trial, the plausibility pleading standard employs this function at a case's genesis, withdrawing the opportunity to "unlock the doors of discovery." This particularly is true if the district judge stays all proceedings pending the often lengthy period between the dismissal motion and its determination;[39] for many plaintiffs, this effectively denies them any hope of investigating and properly developing their claims.

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[36] Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 66, 98 (2007).
[37] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1056 (2003).
[38] Hoffman, *supra* note 25, at 1220.
[39] *Iqbal*, 129 S. Ct. at 1950.

This new reliance on the motion to dismiss as gatekeeper comes at the expense of the democratic values inherent in trials in open court and the jury system, as well as the utility of private enforcement of important national policies.[40] Although judicial discretion— with its newly declared subjectivity and potential for inconsistency—is hardly a novel aspect of Rule 12(b)(6) practice, *Twombly* and *Iqbal* has escalated it and may have made it the determinative factor in deciding whether plaintiffs will be allowed to proceed to discovery.

The Court's move to plausibility pleading was motivated in significant part by a desire to filter out a hypothesized excess of frivolous litigation, to deter abusive practices, and to contain costs. Indeed, assumptions about the prevalence of these phenomena have led to other dramatic changes in pretrial litigation procedure in the past few decades—an increase in judicial case management, a more demanding summary judgment motion, and constraints on discovery. Yet focusing solely on the complaint, with the attendant risk of dismissing, potentially meritorious cases without permitting discovery, or even requiring an answer, in order to reduce cost and delay is a bit like fitting a square peg in a round hole. Pleading should remain limited to its established function—determining whether the plaintiff has stated a legally cognizable claim—and the Court's concerns about containing cost and minimizing abuse should be dealt with through enhanced case management and other procedural tools. *Twombly* and *Iqbal* terminated cases on the basis of unproven assumptions about litigation abuse, costs, and case management; this, in my judgment, is not a responsible way to make fundamental changes in federal practice that implicate important public policies. A "time-out" may be useful to allow for further study that can illuminate our understanding of these matters and allow us to determine what procedural changes, if any, are warranted. At this juncture legislation may be the way to achieve that.

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[40] See the concerns along these lines expressed by Judge Merritt dissenting in *In re Travel Agent Commission Antitrust Litigation*, --- F.3d ---, 2009 WL 3151315 (6th Cir. 2009).

The increase in the complexity, magnitude, and number of cases on federal court dockets in the past few decades have caused many to lament the "twin scourges" of the adjudicatory system—namely, cost and delay. Reacting to complaints about those negatives, increased judicial control over the pretrial process has been provided through rulemaking, Supreme Court decisions, and less formal means, most notably the *Manual for Complex Litigation*. For example, during my tour as Reporter to the Advisory Committee on Civil Rules, the Rules were amended in 1983 in the hope of reducing cost and delay by giving district judges the tools to prevent excessive discovery and to take a more active role in moving cases through pretrial and encouraging settlement. Judicial management has continued to develop in the years since.

Until *Twombly*, the Supreme Court consistently sanctioned the efficacy of case management as a way of containing costs and identifying unmeritorious cases.[41] Unexpectedly, in that case, the Court radically shifted its attitude. Based largely on an outdated and largely theoretical 1989 journal article by Judge Frank Easterbrook,[42] Justice Souter concluded that case management has not been a success[43]—the first time the Court had questioned the ability of district judges to control pretrial procedures in a way that might limit costs and delays.[44] This conclusion served as an important justification for establishing the plausibility pleading standard, with Justice Souter citing the potential for imposing large discovery costs on defendants as a reason to dispose of weaker cases at the very beginning of the litigation process.[45] The *Iqbal* majority extended this line of thinking to government defendants.[46] Justice Breyer, however,

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[41] *See, e.g.*, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993); Swierkiewicz v. Sorema N.A, 534 U.S. 506, 512–13 (2002).
[42] *Twombly*, 550 U.S. at 559 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U.L. REV. 635, 638 (1989)).
[43] *Id.*
[44] Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 898–99 (2009) (noting that *Twombly* is first case in which Supreme Court questioned effectiveness of case management).
[45] *Twombly*, 550 U.S. at 558.
[46] *Iqbal*, 129 S. Ct. at 1953.

offered a dissenting view, endorsing "alternative case-management tools" designed "to prevent unwarranted litigation."[47]

Twombly-Iqbal has set up a somewhat illogical dichotomy because the Court entrusted district judges with the freedom to use "judicial experience and common sense" to dismiss a claim at genesis for noncompliance with a heightened pleading requirement, but disparaged their ability to manage cases in an efficient and economic manner to reach a merit determination. Moreover, it has been noted that it is odd that the Justices—none of whom having been trial judges—so easily dismissed case management across the board when some federal district judges actively endorse it, most utilize it, and a number of post-1989 Rule amendments have established constraints on discovery.

This sudden change in viewpoint is especially questionable given the dearth of meaningful information about the nature and scope of cost and delay. Although some of the criticisms of today's civil justice system certainly have merit, the picture generally portrayed is incomplete and distorted. Despite the lack of definition and empirical data, there is an abundance of rhetoric that often reflects ideology or economic self-interest. As a result, reliance on these assertions may well impair our ability to reach dispassionate, reasoned conclusions as to what changes may be needed. If assumptions about frivolous and abusive use of the system are driving pretrial process changes, we must strive to understand these phenomena fully and appraise what is real and what is illusion before they shape our process any further. Fortunately, some efforts in that direction are underway.

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[47] Justice Breyer argued that "[t]he law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. . . . [W]here a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case . . . can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." *Id.* at 1962 (Breyer, J., dissenting).

The Federal Judicial Center (FJC) recently completed a preliminary study regarding attorneys' experiences with discovery and related matters.[48] The results are sobering: overall satisfaction with the pretrial process is higher and discovery costs appear more reasonable than the apocalyptic rhetoric has suggested. A majority of survey respondents believed that the costs of discovery had no effect on the likelihood of settlement and disagreed with the idea that "discovery is abused in almost every case in federal court." Respondents largely were satisfied with the current levels of case management, and over half reported that the costs and amount of discovery were the "right amount" in proportion to the stakes involved in their cases. Expenditures for discovery, including attorneys' fees, amounted to between 1.6 and 3.3% of the total value at stake. Although the significance of these numbers may be debated, it certainly is not the litigant-crushing figures *Twombly* indicated it might be. Real estate brokers charge an even higher percentage for their services. Certainly, some cases genuinely require considerable discovery, and no one doubts that it can be enormously expensive in a small percentage of situations. But, *Twombly-Iqbal* have stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them. For the great body of federal litigation, *Twombly-Iqbal's* medicinal cure may be far worse than the supposed disease. As the FJC study makes clear, anecdotal evidence of cost, delay, and abuse can depart widely from the reality experienced by most litigants.

As to abuse, we have nothing but anecdotes; there is no common agreement, or definition as to what it is or how to distinguish it from legitimate advocacy by one's opponent. By leaving the notions of abusive discovery and frivolous litigation undefined in *Twombly* and *Iqbal* while simultaneously encouraging judges to factor concerns about them when deciding the sufficiency

[48] EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

of complaints, the Court has authorized judges to let their subjective views and attitudes regarding these phenomena and their frequency influence their decision-making. When exercised at the threshold, this broad discretion may undermine historic access norms and debilitate the private enforcement of important substantive policies, as well as Constitutional due process and jury trial rights. It also may lead to greater inconsistencies in the application of federal law, diminish the predictability of outcome that is critical to an effective civil dispute resolution system, and increase forum and judge shopping.

Not only did the Court fail to demonstrate any real proof for its conclusions, it also limited its concerns over costs to those borne by the defendant. If litigation costs are to be used as a justification for revising the existing pleading and motion rules, all costs should be taken into account, including those borne by plaintiffs. The costs to defendants—typically particular large corporate and government entities—in time, money, and reputation are decried frequently. The costs incurred by and imposed on plaintiffs are not discussed anywhere in *Twombly* or *Iqbal*—but they are no less important. Yet, the defense bar and their clients are not always innocent victims of frivolous litigation or abusive conduct or the only bearer of costs; indeed, it is fairly common for attorneys for defendants, who usually are compensated by the hour and paid relatively contemporaneously, to file dubious motions, make unnecessary discovery demands, and stonewall discovery requests to protract cases, enhance their fees, avoid reaching trial and the possibility of facing a jury, and coerce contingent-fee lawyers into settlement. Even more elusive and rarely adverted to, let alone quantified, are the benefits to society that discovery enhances by enabling the enforcement of public policies, promoting deterrence, increasing oversight, providing transparency, and avoiding the expenditures that otherwise might be needed to support government bureaucracies. Because of increased pre-litigation costs, motion practice,

and appeals may follow *Twombly-Iqbal* and the procedural changes that preceded it, erecting access barriers and promoting earlier case disposition may not lead to a meaningful reduction in overall cost.

In sum, significant changes to the Federal Rules have been made in an information vacuum that obscures the true costs of litigation and the net gain (or loss) elevated pleading and pretrial motion practice will produce. It admittedly is difficult to capture this data and even harder to measure the soft, qualitative values of access and merit adjudication, or the other social benefits of private enforcement of constitutional and statutory policies which often are ignored. A sophisticated, wide angle evaluation of the pretrial process is necessary to develop workable solutions. *Twombly* and *Iqbal* did not contribute to that thoughtful, dispassionate process; resetting pleading to the earlier standard by legislation if necessary, provides the rulemakers an opportunity to study the situation, while avoiding the confusion and uncertainties those cases have generated.

The Supreme Court's legislative decisions in *Twombly-Iqbal* have caused many to question the continuing role of the rulemaking process and its current statutory structure. The Rules Enabling Act[49] long has been understood to mean: first, only the rulemaking machinery or an act of Congress can change a properly promulgated Federal Rule; [50] second, the Federal Rules must be "general" and transsubstantive—they must apply in the same way to all types of actions. *Twombly* and *Iqbal* cast doubt on both of these foundational assumptions; yet changes of that magnitude should not be made without more thoughtful deliberation.

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[49] 28 U.S.C. § 2072 (1934).
[50] *See* Stephen B. Burbank, *Pleading and the Dilemmas of General Rules*, 2009 WIS. L. REV. 535, 536 (2009).

The Supreme Court has expressed its faith in rulemaking in several cases.[51] Less than a decade prior to *Twombly*, the Court noted that "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."[52] Indeed, forty years ago the Court said: "We have no power to rewrite the Rules by Judicial interpretations."[53] With *Twombly* and *Iqbal*, the Court may have forsaken this commitment by reformulating the Rules' pleading and motion to dismiss standards by judicial fiat.

Amendment by judicial dictate lacks the democratic accountability provided by the legislative and rulemaking processes. The Court's revision of the Rules effectively grants five Justices the power to legislate on important procedural matters, often in ways that determine whether litigants ultimately will be able to have a meaningful day in court and whether important Constitutional and Congressional mandates are enforced. In addition to its poor democratic pedigree, the Supreme Court is "ill equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings."[54] In light of the continuing trend toward increasingly early case disposition, rulemaking by judicial mandate seems inconsistent with many of the historic objectives of our federal civil justice system.

On the second point, the Rules Enabling Act's provision for "prescrib[ing] general rules of practice and procedure"[55] has been understood to mean that the Federal Rules should be

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[51] Swierkiewicz *v.* Sorema *N.A.*, 534 U.S. 506 (2002); Crawford-El v. Britton, 523 U.S. 574 (1998); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993).
[52] *Crawford-El*, 523 U.S. at 595.
[53] Harris v. Nelson, 394 U.S. 286, 298 (1969).
[54] Burbank, *supra* note 50, at 537.
[55] 28 U.S.C. § 2072 (1934).

"uniformly applicable in all federal district courts [and] uniformly applicable in all types of cases."[56] —the application of Rule 8's pleading standard and the motion Rules should not vary with the substantive law governing a particular claim. Under *Twombly* and *Iqbal*, it is quite possible that, as a practical matter, the Court has abandoned (or compromised) its devotion to the Rules' transsubstantive character. Although the Court claims that the enhanced pleading standard will be applied uniformly in all civil actions, as discussed above it is unclear how the standard will be applied in practice, or whether it makes sense. If the standard is applied stringently in complex cases but leniently in simpler cases in keeping with the Official Forms, plausibility may be transsubstantive in name only. This would violate the Rules Enabling Act's command of "general rules." What might be done about this is a policy decision of enormous magnitude that requires far more study and discussion than is reflected in the Court's assumptions and some aspects may require Congressional consideration. Legislation reinstating the pre-*Twombly-Iqbal* practice would provide time for the rulemaking process to explore many things, including the possibility of moving toward a differential pleading system that could be more appropriate for handling the variegated cases in the federal courts.

Admittedly, today's litigation realities are strikingly different from the world that generated the Federal Rules. Strong forces have moved case disposition earlier and earlier in an attempt to counteract the perceived problems of discovery abuse, frivolous lawsuits, and litigation expense. Some changes in the pretrial Rules may be in order, or course. Perhaps new restrictions and variations on discovery may be appropriate: limited pre-institution or pre-dismissal discovery, increased automatic disclosures, or broader authority for judges to authorize custom-tailored and phased discovery. Enhanced Rule 11 or Rule 37 sanctions might discourage improper behavior. Disciplines such as information science and business management may have

[56] Burbank, *supra* note 50, at 536.

something to offer in the way of identifying the best—or, at least, more effective—practices for minimizing litigation costs and delays. In any case, it is clear that the blunt instrument of plausibility pleading with the pro-dismissal signals it sends to Bench and Bar is not the appropriate answer to the complex problems inherent in today's litigation.

The dramatic procedural changes of the past quarter century clearly present serious questions for the Federal Rules: How many potentially meritorious claims are we willing to sacrifice in order to achieve the benefits of a greater level of filtration? Have we abandoned our gold standard—adjudication on the merits, with a jury trial, if appropriate—and replaced it with threshold judicial judgments based on limited information, discarding all suits that the district court believes are not worth pursuing? And, has litigation changed so much that the ethos of access, equalization, private enforcement of public policies, and merits-adjudication no longer can be served?[57] Although we must live in the present and plan for the future, it is important not to forget the important values and objectives at the heart of the 1938 Federal Rules. Although I am a firm believer in the rulemaking process, a legislative restoration and moratorium may be what is needed to encourage a full exploration of the values of civil litigation and to shed some much needed light on the cavalier assumptions being bandied about concerning costs, abuse, and lawyer behavior. The pretrial disposition drift I have described should be abated pending a thoughtful and extensive evaluation of where we are and what we want our courts to be doing. Sensitive oversight by Congress today might strengthen the rulemaking process for tomorrow.

I urge this Committee to think seriously about whether we are achieving the goals of Federal Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding." After all, embedded in Rule 1 always has been a sense that the Rules and their

[57] *See* Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46 (1957) ("I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleading . . . .").

application should achieve balance and proportionality among the three objectives it identifies. "Speedy" and "inexpensive" should not be sought at the expense of what is "just." The latter is a short word, but it embraces values and objectives of Constitutional and democratic significance. As Justice O'Connor said in *Hamdi v. Rumsfield*[58] "we must preserve our commitment at home to the principles for which we fight abroad."

[58] 542 U.S. 507, 532 (2004).

Mr. NADLER. Thank you, sir.
Mr. Katsas is recognized for 5 minutes.

TESTIMONY OF GREGORY C. KATSAS, FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. KATSAS. Thank you.

Chairman Nadler, Ranking Member Sensenbrenner, Members of the Subcommittee, thank you for the opportunity to testify about *Twombly* and *Iqbal*. As explained in my written testimony, I believe that those cases are correctly decided and are consistent with decades of prior precedent.

In essence, *Twombly* and *Iqbal* hold that a proper pleading requires some minimal factual allegations that support at least a reasonable inference of liability. In that respect, *Twombly* and *Iqbal* simply follow and apply settled propositions of black-letter law that courts, even on a motion to dismiss, are not bound to accept conclusory allegations or to draw unwarranted or unreasonable inferences from the allegations actually made, and that discovery is not appropriate for fishing expeditions. Dozens, if not hundreds, of cases support those basic propositions.

In damages lawsuits against government officials, pleading rules must also take account of qualified immunity. The Supreme Court has held that qualified immunity protects government officials from the burdens of pre-trial discovery, which, it has said, can be peculiarly disruptive of effective government. Such disruption is most apparent where, as in *Iqbal* itself, the litigation is conducted against high-ranking officials and involves conduct undertaken during a war or other national security emergency.

Imagine the paralyzing effect if any of the thousands of detainees currently held by our military could seek damages and discovery from the Secretary of Defense merely by alleging in a complaint that their detention was motivated by religious animus in which the secretary was complicit. That astounding result is precisely what *Iqbal* forecloses, so overruling that decision would vastly increase the personal legal exposure of those called upon to prosecute two ongoing wars abroad and to defend the Nation at home.

In less dramatic contexts as well, *Twombly* and *Iqbal* protect defendants from being unfairly subjected to the burdens of discovery in cases likely devoid of merit. That is no small consideration. Electronic discovery costs typically run into the millions of dollars and often into the tens of millions of dollars in antitrust and other complex cases.

Defendants subjected to these costs cannot recover their expenses even if the plaintiff's case turns out to be meritless. So if weak cases are routinely allowed to proceed to discovery, defendants would have no choice but to settle rather than incur the substantial and non-reimbursable costs of discovery.

Finally, *Twombly* and *Iqbal* have not resulted in the wholesale dismissal of meritorious cases. Judge Mark Kravitz, who chairs the Civil Rules Committee responsible for proposing amendments to the Federal Rules of Civil Procedure has explained that his committee is actively following litigation of motions to dismiss after *Twombly* and *Iqbal*, that judges have taken a nuanced view of those decisions, and that neither decision has proven to be a blockbuster in its practical impact. Consistent with that conclusion, courts have characterized pleading burdens, even after *Iqbal*, as

minimal, and they still routinely deny motions to dismiss, including in cases involving alleged unlawful discrimination.

Let me close just by correcting one misstatement of fact that is floating in the record in this case. Mr. Johnson, you stated that *Iqbal* has resulted in the dismissal of over 1,600 cases. That statement is an incorrect conclusion cited from a September article in the National Law Journal. What that National Law Journal actually states is that *Iqbal* has been cited by courts 1,600 times.

Thank you very much.

[The prepared statement of Mr. Katsas follows:]

PREPARED STATEMENT OF GREGORY G. KATSAS

Statement of Gregory G. Katsas

Partner, Jones Day

Former Assistant Attorney General, Civil Division, Department of Justice

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties

House Judiciary Committee

Federal Pleading Standards Under *Twombly* and *Iqbal*

Presented on October 27, 2009

Chairman Nadler, Ranking Member Sensenbrenner, Members of the Subcommittee: Thank you for the opportunity to testify about the Supreme Court's recent decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), which follows and applies its prior decision in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 244 (2007). For the reasons explained below, I believe that these decisions faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants. Moreover, overruling these decisions would threaten to upset pleading rules that have been well-settled for decades, and thereby open the floodgates for what lawyers call "fishing expeditions" – intrusive and expensive discovery into implausible and insubstantial claims. In the context of complex litigation such as antitrust, such discovery would impose massive costs on defendants who have engaged in no wrongdoing. Even worse, in the context of litigation against government officials sued in their

individual capacity, such discovery would vitiate an important component of the officials' qualified immunity, even for claims seeking to impose personal liability on Cabinet-level officials for actions undertaken to prosecute wars abroad or to respond to national-security emergencies at home. Such a result would be paralyzing if not deadly. For all of these reasons, I urge the Committee to reject the proposed Notice Pleading Restoration Act of 2009.

Let me begin with a few words about my background. Between 1992 and 2001, I practiced at the law firm of Jones Day, to which I will return next month. During that time, I focused primarily on complex civil litigation, in the trial courts and the courts of appeals. I represented both plaintiffs and defendants, and I was involved in many large antitrust and other matters. Between 2001 and 2009, I was privileged to hold many senior positions in the Civil Division of the Justice Department, which handles most of the federal government's civil litigation, and in the Office of the Associate Attorney General, which supervises five of the Department's seven litigating divisions, including the Civil Division. As Assistant Attorney General for the Civil Division, I supervised all of the Division's enforcement and defensive litigation – including litigation against federal officials sued in their individual capacities. I was personally involved in the defense of Attorney General John Ashcroft and FBI Director Robert Mueller in the *Iqbal* litigation, and in the defense of Attorney General Janet Reno and then-Deputy Attorney General Eric Holder in litigation brought against them for actions taken to seize Elian Gonzalez from his Miami relatives in order to remove him to Cuba.

In my testimony below, I will first summarize the Supreme Court's decisions in *Twombly* and *Iqbal*. Next, I will explain why those decisions are correct and consistent with decades of prior law. Finally, I will address the unsettling, expensive, and potentially dangerous consequences of overruling those decisions.

A. The *Twombly* and *Iqbal* Decisions

1. In *Twombly*, the Supreme Court addressed federal pleading standards in the context of antitrust conspiracy claims. The Court held that, under Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief," a complaint must satisfy minimal requirements of specificity and plausibility. As to specificity, the Court explained that proper pleading "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. As to plausibility, the Court explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*; see also *id.* (complaint "'must contain something more * * * than * * * a statement of facts that merely creates a suspicion [of] a legally cognizable right of action'" (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure Section 1216, at 235-36 (3d ed. 2004) (alterations by the Court in *Twombly*))).

The Court stressed the modest nature of both requirements. A plaintiff need not "'set out *in detail* the facts upon which he bases his claim," 550 U.S. at 555 n.3 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added in *Twombly*)), but need only make some minimal "'showing,' rather than a blanket assertion, of entitlement to relief," *id.* (quoting Fed. R. Civ. P. 8(a)(2)). Moreover, "[a]sking for

plausible grounds to infer an agreement does not impose a *probability* requirement at the pleading stage; it simply calls for enough fact to raise a *reasonable expectation* that discovery will reveal evidence of illegal agreement." *Id.* at 556 (emphases added).

In *Twombly,* the Court also limited some broad language from its prior opinion in *Conley* v. *Gibson.* In *Conley,* the Court had stated 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." 355 U.S. at 45-46 (emphasis added). The *Twombly* Court explained that "[t]his 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." 550 U.S. at 561. The Court rejected such a "focused and literal reading" of the "no set of facts" phrase, *id.*, and it concluded that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: *once a claim has been stated adequately,* it may be supported by any set of facts consistent with the allegations in the complaint." *Id.* at 563 (emphasis added).

The Court in *Twombly* applied these principles to order dismissal of the antitrust claims before it. The *Twombly* plaintiffs had alleged that the defendants "engaged in a 'contract, combination, or conspiracy' and agreed not to compete." See 550 U.S. at 564 n.9 (quoting complaint). That allegation merely restated the elements of Section 1 of the Sherman Act, and the Court accordingly held the allegation insufficient to state a claim. See *id.* at 564. Moreover, because parallel

conduct is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," as it is with conspiracy, see *id.* at 554, the Court declined to infer an adequately-pleaded conspiracy from subsidiary allegations of parallel conduct: "In identifying facts that are suggestive enough to render a [Section] 1 conspiracy plausible, we have the benefit of prior rulings and considered views of leading commentators * * * that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* at 556. Finally, the Court concluded that the defendants' alleged failure to compete did not render the conspiracy allegation sufficiently plausible to state a claim, given an "obvious alternative explanation" rooted in the defendants' prior experience as lawful monopolies in a regulated industry. See *id.* at 567-68.

The *Twombly* decision garnered support from judges across the jurisprudential spectrum. The case was decided by a seven-to-two margin. The majority opinion was written by Justice Souter and joined by Justice Breyer. Moreover, that opinion upheld the decision of then-District Judge Gerald Lynch, whom President Obama later nominated, and the Senate recently and overwhelmingly confirmed, to the Court of Appeals for the Second Circuit.

2. In *Iqbal*, the Supreme Court applied the same pleading principles in a constitutional tort action filed against former Attorney General John Ashcroft and sitting FBI Director Robert Mueller. The case arose from the detention of suspected terrorists in the wake of the devastating attacks of September 11, 2001. After those

attacks, the FBI embarked on a vast investigation to identify the perpetrators and to prevent further attacks on our homeland. During its investigation, the FBI questioned more than 1000 individuals with suspected links to terrorism; the government detained some 762 of those individuals on immigration charges; and it held about 184 of those immigration detainees, deemed to be of "high interest" to the terrorism investigation, in restrictive conditions. See 129 S. Ct. at 1943. Javaid Iqbal, a citizen of Pakistan and convicted felon, was one of those "high interest" detainees. He alleged that Attorney General Ashcroft and Director Mueller selected him for restrictive detention solely on account of his race, religion, and national origin.

The Court in *Iqbal* began by restating the modest specificity and plausibility requirements identified in *Twombly*. It reiterated that Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." See *id.* at 1949. Moreover, the Court explained that a claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged. *Ibid.* (emphasis added). It further explained that "[d]etermining whether a complaint states a plausible claim for relief" will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. The Court also confirmed that this approach does not require a reviewing court to assess the truth of specific factual allegations made in the complaint; rather, "[w]hen there are well-pleaded factual

allegations, a court should simply assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ibid.*

Applying these principles, the Court ordered dismissal of the claims against Attorney General Ashcroft and Director Mueller. First, it identified allegations too "conclusory" to be "entitled to the assumption of truth": that Attorney General Ashcroft and Director Mueller willfully subjected Iqbal to harsh conditions solely on account of his race, religion, or national origin, as a matter of official government policy; that Attorney General Ashcroft was a "principal architect" of this asserted invidious policy; and that Director Mueller was "instrumental" in adopting and executing it. See *id.* at 1951. The Court reasoned that "[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements'" of the relevant claim. *Ibid.* Next, the Court considered whether the remaining, more specific factual allegations – to the effect that Attorney General Ashcroft and Director Mueller approved the detention of "thousands of Arab Muslim men" – plausibly suggested an entitlement to relief. The Court answered no: because "[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group, * * * [i]t "should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce such a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 1951. Accordingly, the facts alleged did not plausibly support an inference of unconstitutional intentional discrimination. See *id.*

Finally, the Court addressed three other important points. First, it noted that *Twombly* rested on an interpretation and application of the Federal Rules of Civil Procedure, and thus could not be arbitrarily confined to antitrust cases. See *id.* at 1953. Second, it explained that the theoretical possibility of managed discovery does not justify lax pleading rules; indeed, the court stressed, its "rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity," which operates "to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ibid.* (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). Third, the Court explained that its holding in no way imposes a heightened pleading requirement under Rule 9 of the Federal Rules of Civil Procedure, which requires "fraud or mistake" to be pleaded "with particularity," but which provides that "intent" and "other conditions of a person's mind" may be alleged "generally." As the Court explained, "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8." See 129 S. Ct. at 1954.

B. *Twombly* and *Iqbal* Were Correctly Decided

Twombly and *Iqbal* properly construe the governing provisions of the Federal Rules of Civil Procedure, and they are consistent with decades of prior precedent.

The directly controlling provision at issue is Federal Rules of Civil Procedure Rule 8(a)(2), which requires the plaintiff to plead "a short and plain statement of the claim *showing* that the pleader is entitled to relief" (emphasis added). As the

Supreme Court explained, neither a barebones allegation that merely parrots the legal elements of a claim, nor a more detailed pleading in which the facts alleged do not plausibly support the claim, can fairly be described as "showing" that the pleader is entitled to relief. See *Iqbal*, 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 557.

Twombly and *Iqbal* also are consistent with settled and longstanding prior precedent. In the context of claims for securities fraud, the Supreme Court, speaking through Justice Breyer, has held an unadorned allegation of loss causation to be insufficient, because such barebones pleading "would permit a plaintiff 'with a largely groundless claim to simply take up the time of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (alteration by the Court in *Dura*)). In the antitrust context, the Court, speaking this time through Justice Stevens, has held that, despite the "no set of facts" statement from *Conley*, "it is not proper * * * to assume that the [plaintiff] can prove facts that it has not alleged," *Associated General Contractors* v. *Carpenters*, 459 U.S. 519, 526 (1983), and that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," *id.* at 528 n.17. In the civil rights context, the Court has confirmed that, on a motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986). And in the specific

context of motive-based constitutional claims against federal officials sued in their individual capacity, it repeatedly has insisted on a "firm application of the Federal Rules of Civil Procedure," see, *e.g.*, *Crawford–El* v. *Britton*, 523 U.S. 574, 597 (1998); *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), under which the district court "may insist that the plaintiff 'put forth specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal." *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)).

Twombly and *Iqbal* are also consistent with decades of settled lower-court precedent. Indeed, within each of the federal courts of appeals, one could generate long string-cites for each of the critical propositions confirmed in those cases: that conclusory pleading is insufficient to state a claim; that implausible inferences from pleaded facts are inappropriate; that an unadorned allegation of conspiracy is insufficient to state an antitrust claim; that motive-based constitutional claims against government officials raise special concerns warranting a firm application of Rule 8; and even that the "no set of facts" language from Conley cannot be literally construed. See, *e.g.*, *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003) (court is not bound to credit "'bald assertions'" or "'unsupportable conclusions'" (citation omitted)); *DM Research* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) (despite *Conley*, "courts 'do not accept conclusory allegations on the legal effect of the events plaintiff has set out if

these allegations do not reasonably follow from his description of what happened'" (quoting Wright & Miller, Federal Practice and Procedure: Civil, Section 1357)); *George Haug Co.* v. *Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (*Conley* qualified by *Associated General Contractors*); *Heart Disease Research Foundation* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal"); *City of Pittsburgh* v. *West Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998) (courts need not accept "'unsupported conclusions and unwarranted inferences'" (citation omitted)); *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002) ("'allegations must be stated in terms that are neither vague nor conclusory'" (citation omitted)); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (despite *Conley*, "'conclusory allegations or legal conclusions masquerading as factual assertions will not suffice to prevent a motion to dismiss'" (citation omitted)); *Columbia Natural Resources, Inc.*. v. *Tatum*, 58 F.3d 101, 1109 (6th Cir. 1995) ("liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences"); *Kyle* v. *Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) ("no set of facts" language from *Conley* "'has never been taken literally'" (citation omitted); *Sneed* v. *Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998) (despite *Conley*, courts are "not obliged to accept as true conclusory statements of law or unsupported conclusions of fact"); *Wiles* v. *Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002) (courts may ignore "unsupported conclusions" and "unwarranted inferences"); *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) ("no set of facts" language limited by *Associated*

General Contractors, qualified immunity doctrine, and standing requirements; "'conclusory allegations without more are insufficient to defeat a motion to dismiss'" (citation omitted)); *Cayman Exploration Corp.* v. *United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 & n.2 (10th Cir. 1989) (despite *Conley*, "courts may require some minimal and reasonable particularity in pleading before they allow an antitrust action to proceed" (citing *Associated General Contractors*)); *Oxford Asset Management, Ltd.* v. *Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal"). An exhaustive discussion of this caselaw is beyond the scope of my testimony, so let me briefly elaborate on only two lower-court decisions applying these principles before *Twombly* and *Iqbal* were decided.

Like *Twombly*, *Eastern Food Services* v. *Pontifical Catholic University*, 357 F.3d 1 (1st Cir. 2004), involved dismissal of an antitrust claim for lack of plausibility. The district court ordered dismissal on the ground that the alleged geographic market was, "as a matter of common experience," highly "improbable." See *id.* at 7. In affirming, the First Circuit agreed "it is not a plausible antitrust case, however tempting may be the lure of treble damages and attorney's fees." *Id.* at 3. The court stressed the importance of dismissing weak cases prior to discovery: "[t]he time of judges and lawyers is a scarce resource; the sooner a hopeless claim is sent on its way, the more time is available for plausible cases." *Id.* at 7. The First Circuit acknowledged the "no set of facts" statement derived from *Conley*, but explained: "the cases also say that it is not enough merely to allege a violation in conclusory terms, that the complaint must make out the rudiments of a valid claim, and that

discovery is not for fishing expeditions." See *id.* at 9. And in the case at hand, "nothing * * * suggests that discovery would be remotely productive, apart from the random (and insufficient) possibility that rummaging through [the defendant's] files would produce evidence of some wholly unknown violation." *Ibid.*

Like *Iqbal*, *Gonzalez* v. *Reno*, 325 F.3d 1228 (11th Cir. 2003), and *Dalrymple* v. *Reno*, 334 F.3d 991 (11th Cir. 2003), involved damages litigation against high-ranking government officials for conduct arising from a controversial and high-profile law-enforcement operation. Specifically, these cases arose from the raid in which agents of the former Immigration and Naturalization Service ("INS") seized Elian Gonzalez from his Miami relatives in order to remove the boy to Cuba. During that raid, INS agents sprayed tear gas inside and outside the Gonzalez residence, used a battering ram to break down the door to the residence, and pointed weapons at family members inside and protesters outside the residence. The *Gonzalez* plaintiffs included family members inside the house, and the *Dalrymple* plaintiffs consisted of supporters of the family protesting outside. Plaintiffs alleged, and the Eleventh Circuit assumed, that INS agents onsite violated the First and Fourth Amendments in executing the seizure. The plaintiffs further alleged that former Attorney General Janet Reno, former Deputy Attorney General Eric Holder, and former INS Commissioner Doris Meissner should be held liable as supervisors for these alleged constitutional violations.

The Eleventh Circuit disagreed and affirmed the dismissal of claims against those three defendants. In so doing, it recognized that the qualified immunity of government officials includes "'an entitlement not to stand trial or face the other

burdens of litigation,'" including specifically discovery. *Gonzalez*, 325 F.3d at 1233 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)); see also *Dalrymple*, 334 F.3d at 994. Accordingly, the court demanded "'specific, non-conclusory allegations of fact'" establishing that Reno, Holder, and Meissner were personally involved in the violation of clearly established constitutional rights. *Gonzalez*, 325 F.3d at 1235 (citation omitted); see also *Dalrymple*, 334 F.3d at 996. The *Gonzalez* plaintiffs had alleged that Reno, Holder, and Meissner "personally directed and caused a paramilitary raid" upon their residence; that they "agreed to, and approved of" the raid in violation of the Constitution; and that agents on the scene "acted under the personal direction of" Reno, Holder, and Meissner. See 325 F.3d at 1235. The court held these allegations insufficient to state a claim, because plaintiffs did not "allege any facts to suggest that the defendants did anything more than personally direct and cause the execution of valid search and arrest warrants" and, in particular, plaintiffs did not specifically allege that Attorney General Reno, Deputy Attorney General Holder, or INS Commissioner Meissner "directed the agents on the scene to spray the house with gas, break down the door with a battering ram, point guns at the occupants, or damage property." *Id.* at 1235. Under similar reasoning, the court found similar allegations likewise insufficient to state a claim in *Dalrymple*. See 334 F.3d at 996-97.

C. *Twombly* and *Iqbal* Prevent Costly and Illegitimate Discovery "Fishing Expeditions"

The pleading rules confirmed in *Twombly* and *Iqbal* protect defendants from the large and rapidly increasing burdens of civil discovery in cases where it is inappropriate. Imposing such burdens is permissible where the plaintiff has

pleaded a sufficiently specific and plausible claim, but cannot otherwise be justified. As one court has explained: "Occasionally, an implausible conclusory assertion may turn out to be true. * * * But the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." *D.M. Research*, 170 F.3d at 56.

Discovery burdens are particularly high in complex civil litigation. Courts have recognized this point most often in the context of antitrust and patent litigation. See, *e.g.*, *Car Carriers Inc.* v. *Ford Motor Company*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery where there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); *Asahi Glass Co.* v. *Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("some threshold of plausibility must be crossed at the outset before a patent or antitrust case should be permitted to go into its inevitably costly and protracted discovery phase"). However, the same observation could be made with respect to securities litigation, putative class actions, and many other kinds of cases.

Several considerations exacerbate this problem. To begin with, federal discovery is exceedingly broad: in general, a party make take discovery, through depositions or document requests, of *any* nonprivileged information that is "relevant to any party's claim or defense" and is either admissible at trial or

"appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Moreover, discovery burdens usually fall disproportionately on defendants. In typical complex litigation, defendants are often large entities with vast amounts of potentially discoverable information, whereas plaintiffs are often individuals or small entities with few if any relevant documents. And defendants almost never can recover the cost of discovery when a plaintiff fails to prove its claim. Even in cases where shifting of costs or fees is authorized, the shift is readily available from unsuccessful defendants to prevailing plaintiffs, but only rarely available from unsuccessful plaintiffs to prevailing defendants. Compare *Ferrar* v. *Hobby*, 506 U.S. 103 (1992) (prevailing plaintiff) with *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978) (prevailing defendant).

Finally – and most importantly – discovery costs have grown exponentially because of the expanding use of electronic data storage. At present, more than 90 percent of discoverable information is generated and stored electronically. See Association of Trial Lawyers of America, Ethics in the Era of Electronic Evidence (Oct. 1, 2005). Such storage has vastly increased the volume of information that is either itself discoverable, or that must be searched in order to find discoverable information. Large organizations receive, on average, some 250 to 300 million e-mail messages monthly, and they typically store information in terabytes, each of which represents the equivalent of 500 million typed pages. See Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure (Sept. 2005). Searching such systems for discoverable information is enormously

expensive, as is producing such information and reviewing it document-by-document for privilege. In my experience, so-called "e-discovery" costs can easily run in the tens of millions of dollars of out-of-pocket costs for even a single complex case. One recent study found an average of $3.5 million of e-discovery litigation costs for a typical lawsuit. See Institute for the Advancement of the American Legal System, Electronic Discovery: A View from the Front Lines 25 (2008). And even those out-of-pocket costs do not measure the further opportunity costs to a defendant of having its computer systems and key personnel bogged down for months if not years in unproductive discovery.

To permit a plaintiff to impose such costs on a defendant, based on nothing more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," or allegations so implausible that they cannot even support a "reasonable inference that the defendant is liable for the misconduct allleged" (*Iqbal*, 129 S. Ct. at 1949), seems to me profoundly unwise and unfair. Doing so would burden defendants with massive litigation costs for no good reason, would flood the system with meritless or highly dubious litigation, and would and compel "cost-conscious defendants to settle even anemic cases" (*Twombly*, 550 U.S. at 559), just to avoid the considerable time and expense of protracted discovery. Such results would flout Rule 1 of the Federal Rules of Civil Procedure, which provides that all of the civil rules – including Rule 8 – "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

D. *Twombly* and *Iqbal* Protect Government Officials From Burdensome and Paralyzing Exposure To Discovery

In its qualified-immunity caselaw, the Supreme Court has recognized that government officials may be chilled from the vigorous performance of their duties not only by the prospect of individual damages liability, but also by the "'the costs of trial'" and "'the burdens of broad-ranging discovery" in cases filed against them individually. See *Mitchell*, 472 U.S. at 526 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982)). Thus, "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow*, 457 U.S. at 817); see also *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) ("avoidance of disruptive discovery is one of the very purposes of the official immunity doctrine"). Accordingly, the Court has stressed "the importance of resolving immunity questions at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam), including through "firm application of the Federal Rules of Civil Procedure," *Butz*, 438 U.S. at 507. Moreover, it has recognized that "high officials require greater protection than those with less complex discretionary responsibilities," *Harlow*, 457 U.S. at 807, particularly in the areas of national security and foreign policy, see *Mitchell*, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment) ("there is surely a national interest in enabling Cabinet officers with responsibilities in this area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation").

The Court has specifically invoked the requirement of specific and plausible pleading as the only possible means to enforce the immunity-from-discovery

component of qualified immunity. Thus, where unconstitutional motive is an element of the claim, it has instructed district courts to "insist that the plaintiff 'put forth specific, non-conclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion to dismiss." *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)); see also *Nuclear Transport & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) ("If a mere assertion that a former cabinet officer and two other officials 'acted to implement, approve, carry out, and otherwise facilitate' alleged unlawful policies were sufficient to state a claim, any suit under a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial." (citation omitted)).

The facts of *Iqbal* graphically illustrate these concerns. As explained above, the *Iqbal* plaintiffs sought to impose individual damages liability on the Attorney General and FBI Director for what Judge Cabranes aptly described as their "trying to cope with a national and international security emergency unprecedented in the history of the American Republic." *Iqbal* v. *Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (concurring opinion), *rev'd sub nom. Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). For his efforts, Attorney General Ashcroft has been sued in his individual capacity for the detention of suspected terrorists under the immigration statutes and under the material witness statute, and for the removal of a suspected terrorist to a foreign country where he allegedly was mistreated. Similarly, in prosecuting the wars that ensued from the unprecedented emergency after September 11, 2001, former

Secretary of Defense Donald Rumsfeld has been sued in his individual capacity for the domestic detention and interrogation of a United States citizen as an enemy combatant, for the brief detention of American citizens in Iraq, and for the detention of aliens as enemy combatants in Iraq and at Guantanamo Bay, Cuba. And former Director of Central Intelligence George Tenet was sued in his individual capacity for treatment of detainees in covert operations allegedly conducted abroad by the CIA.

These concerns transcend the interests or activities of any particular Administration. For example, Attorney General Edward Levi, who served with distinction during the Ford Administration, was faced upon leaving office with over 30 suits filed against him personally for actions undertaken as Attorney General. Not a single one of them had merit, and no judgment against him was ever entered. Nonetheless, all of these cases "needed attention," and "[i]t took about eight more years before the last of them was cleaned up." Bennett Boskey, ed., Some Joys of Lawyering 114 (2007) (describing "this long aggravation so undeserved"). As explained above, the controversial removal of Elian Gonzalez to Cuba produced meritless and politically-driven damages litigation against Attorney General Janet Reno and her then-Deputy Eric Holder. And the Obama Administration continues wartime operations in Iraq and Afghanistan, and detention operations at Guantanamo Bay, thus making present Executive-Branch officials a likely target for yet further damages litigation.

In sum, top American officials charged with prosecuting two ongoing wars and defending our homeland from further catastrophic attacks in the past have faced – and in the future predictably will face – an onslaught of litigation for their

decisions and the decisions of their subordinates. Whatever the merits of individual cases, it simply cannot be right that these officials would face exposure to discovery, if not trial and personal liability, every time an individual harmed by the wartime activities or homeland defense is willing to make an unadorned allegation that the Attorney General or the Secretary of Defense was personally involved in the specific action at issue, and that the action was undertaken with an unconstitutional motive. *Iqbal*'s rejection of that absurd consequence is supported by the text and precedent of Rule 8, by settled principles of qualified immunity, and by commonsense.

E. *Twombly* and *Iqbal* Do Not Prevent Litigation of Legitimate Claims

Given the consistency of *Twombly* and *Iqbal* with prior precedent, these decisions have not worked a sea-change in the adjudication of motions to dismiss. Nor have they prevented legitimate claims from moving forward to discovery.

This is not just my assessment. It is also the assessment of Judge Mark Kravitz of the District of Connecticut, the Chairman of the Judicial Conference's Advisory Committee on Civil Rules, which monitors and proposes amendments to the Federal Rules of Civil Procedure pursuant to delegated authority. Judge Kravitz reports that his Committee has been monitoring the impact of *Twombly* and *Iqbal*, that judges are "'taking a fairly nuanced view of *Iqbal*,'" and that *Iqbal* thus has *not* proven to be "'a blockbuster that gets rid of any case that is filed." See National Law Journal, Plaintiffs' Groups Mount Effort to Undo *Iqbal* (Sept. 21, 2009) (quoting Judge Kravitz).

Caselaw bears out this assessment. Even in the most problematic category of cases – damages actions against high-ranking government officials for actions

undertaken in the wartime defense of this country – plaintiffs have survived motions to dismiss under *Iqbal*. See *Al-Kidd* v. *Ashcroft*, 2009 WL 2836448 (9th Cir. Sept. 4, 2009); *Padilla* v. *Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009). One district judge, in denying a motion to dismiss in another context, characterized pleading standards under *Iqbal* as "minimal." *Xstrata Canada Corp.* v. *Advanced Recycling Technology*, 2009 WL 2163475, *3 (N.D.N.Y. July 20, 2009). Another, in denying a motion to dismiss, stated that "a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible." *Chao* v. *Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass, 2009). A third reportedly stated, during oral argument in an employment discrimination case, that *Twombly* and *Iqbal* "don't operate as a kind of universal 'get out of jail free' card." See National Law Journal, Plaintiffs' Groups Mount Effort to Undo *Iqbal* (Sept. 21, 2009) (quoting Judge Milton Shadur).

Courts routinely have denied motions to dismiss after *Twombly* and *Iqbal* in other contexts as well, including in antitrust cases and cases raising motive-based constitutional claims. See, *e.g.*, *Hollis* v. *Mason*, 2009 WL 2365691 (E.D. Cal. July 31, 2009) (constitutional claim for retaliation); *Executive Risk Indemnity, Inc.* v. *Charleston Area Medical Center*, 2009 WL 2357114 (S.D. W.Va. July 30, 2009) (breach of contract); *Consumer Protection Corp.* v. *Neo-Tech News*, 2009 WL 2132694 (D. Ariz. July 16, 2009) (claim under Telephone Consumer Protection Act); *Intellectual Capital Partner* v. *Institutional Credit Partners LLC*, 2009 WL 1974392 (S.D.N.Y. July 8, 2009) (breach of contract); *Lange* v. *Miller*, 2009 WL 1841591 (D. Colo. June 25, 2009) (conspiracy to violate Fourth Amendment); *Oshop* v. *Tennessee*

Department of Children's Services, 2009 WL 1651479 (M.D. Tenn. June 10, 2009) (bad-faith denial of substantive due process); *In re Rail Freight Fuel Surcharge*, 597 F. Supp. 2d 27 (D.D.C. 2008) (antitrust conspiracy); *In re Static Random Access Memory*, 580 F. Supp. 2d 896 (N.D. Cal. 2008) (same).

Some critics have asserted that *Iqbal* makes it effectively impossible for plaintiffs to litigate claims of illegal discrimination. That is incorrect. *Iqbal* does nothing to disturb the holding of *Swierkiewicz* v. *Sorema*, 534 U.S. 506 (2002), that the pleading burdens for claims of employment discrimination are modest. For example, a plaintiff may (but need not) plead a case by alleging a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and its progeny; may plead a case by alleging facts that would amount to "direct evidence" of discrimination (if any), as that term is used in employment law; or may, as in *Swierkiewicz* itself, plead a case with a complaint that "detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." See 534 U.S. at 514. Such a complaint is obviously not conclusory. Nor is it implausible, at least absent any "more likely explanations" for the adverse employment action besides unlawful discrimination. See *Iqbal*, 129 S. Ct. at 1951. By contrast, the *Iqbal* complaint was implausible because the only allegation to support an inference of discrimination was the fact that most of the detainees were Arab and Muslim – a fact that "should come as no surprise," as the Court explained, given the racial and religious makeup of the hijackers and their known confederates.

See *id.* That driving consideration of *Iqbal* will simply have no application at all in a run-of-the-mill case of unlawful discrimination.

Indeed, numerous complaints alleging claims of discrimination have survived motions to dismiss after *Iqbal.* See, *e.g.*, *Kelly* v. *7-Eleven Inc.*, 2009 WL 3388379 (S.D. Cal. Oct. 20, 2009) (disability discrimination); *Montano-Perez* v. *Durrett Cheese Sales, Inc.*, 2009 WL 3295021 (M.D. Tenn. Oct. 13, 2009) (racial discrimination); *Glover* v. *Catholic Charities, Inc.*, 2009 WL 3295021 (D. Md. Oct. 8, 2009) (sex discrimination); *Garth* v. *City of Chicago*, 2009 WL 3229627 (N.D. Ill. Oct. 2, 2009) (racial discrimination); *Weston* v. *Optima Communications Systems, Inc.*, 2009 WL 3200653 (Oct. 7, 2009).

F. The Proposed Notice Pleading Restoration Act Should Be Rejected

If the Committee should consider legislation along the lines of the proposed Notice Pleading Restoration Act, of 2009, introduced in the Senate as S.1504, I strongly urge rejection that approach.

If enacted, the Act would provide that "a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court in *Conley* v. *Gibson*." The Act seems intended to overrule *Twombly* and *Iqbal.* For the reasons set forth above, I believe that those cases were both rightly decided, and I would urge rejection of the Act on that ground alone. Even apart from those points, however, the Act seems to me independently objectionable for several additional reasons.

To begin with, the Act would create considerable uncertainty in the litigation of motions to dismiss. What exactly does it mean to provide that such motions are

governed solely by "the standards set forth * * * in *Conley*"? One possibility is that *Twombly* and *Iqbal* themselves would be unaffected by the Act, because *Twombly* sought to explain *Conley* rather than overrule it. See 550 U.S. at 562-63. That interpretation seems highly unlikely, because the Act then would have no discernible purpose.

Another possibility is that the Act intends to codify the "no set of facts" phrase from *Conley*. But literally applied, the "no set of facts" test is absurd: a complaint identifying some source of law (say, the Fifth Amendment), and alleging only that the sky is blue, *would* state a claim because there are many sets of possible facts, consistent with the sky's being blue, that could establish Fifth Amendment liability. Moreover, courts for decades have recognized that the "no set of facts" phrase therefore cannot be literally applied. See, *e.g.*, *Kyle*, 144 F.3d at 455, *Ascon Properties*, 866 F.2d at 1155. And if the Act were construed to codify a literal interpretation of the "no set of facts" phrase, its effect would be nothing short of revolutionary: *No* case would be subject to dismissal based on the conclusory nature of a complaint; courts reviewing motions to dismiss would be compelled to accept even unwarranted and unreasonable inferences from any facts specifically pled; and decades of settled law would be overruled.

A third possibility is that the Act seeks to overrule some aspects of *Twombly* and *Iqbal* other than *Twombly*'s rejection of the "no set of facts" phrase from *Conley*. But in that case, it remains a complete mystery which of aspects of *Twombly* and *Iqbal* survive (if any) – and, therefore, which of the earlier lines of cases applied in *Twombly* and *Iqbal* remain good law. Could the courts still rely on *Dura*

Pharmaceuticals (544 U.S. at 347) for the proposition that naked allegations of loss causation are insufficient to plead a claim for securities fraud? Could they still rely on *Associated General Contractors* (459 U.S. at 528 n.17) for the proposition that a district court may insist on "some specificity in pleading" before allowing a complex case to proceed to discovery? Could they still rely on *Crawford-El* (523 U.S. at 598) for the proposition that a plaintiff must "put forth specific, non-conclusory factual allegations" to overcome a qualified-immunity defense at the pleading stage? Which of the lower-court decisions discussed above would remain good law? And so on.

In short, the Act would do nothing less than create a cloud of uncertainty over five decades of pleading jurisprudence, as developed between *Conley* in 1957 and *Twombly* in 2007. That is a recipe for a vast increase in litigation, which would impose huge costs on parties as well as on the already-overburdened federal courts.

Moreover, there is no reason for Congress to act now. As I have already explained, early post-*Iqbal* decisions do not suggest any significant changes in the adjudication of motions to dismiss. And in any event, there is already a mechanism in place – the judicial rulemaking process – to address any adverse consequences of these decisions, and to do so in a way that will reduce uncertainty rather than increasing it.

Thank you, Mr. Chairman. I look forward to answering the Subcommittee's questions.

Mr. NADLER. Thank you.
Mr. Vail?

TESTIMONY OF JOHN VAIL, CENTER FOR CONSTITUTIONAL LITIGATION

Mr. VAIL. I am John Vail, of Washington. I thank you, Mr. Chair, for inviting me today, and Members of the Subcommittee. I am happy to be here.

Let me pick up on exactly that point, because as of last week the number of citations to *Iqbal* was actually 2,700, as of last Friday. And indeed, not all of those cases would have survived under old pleading standards—you have to understand the Federal caseload a little bit to understand that—but we are talking about significant cases that are getting dismissed because of *Iqbal* and *Twombly*, and you have judges noting that.

I think one of the examples there is the Ocasio Hernandez case from Puerto Rico, and that is a case of political discrimination. That is a fundamental kind of case that we want people to be able to bring. This democracy does not function in the face of that kind of discrimination. And the judge in that case noted that not only was that case being dismissed, but he noted that it would be very difficult from here on out even for experienced counsel to meet some of the pleading requirements under *Iqbal* in that kind of case.

Antitrust cases—I cited in my testimony Tam Travel and Judge Merritt's dissent in that case. Now, Judge Merritt shares the view that *Iqbal* and *Twombly* might not be sea change standards. Again, I disagree with that, as does Professor Miller.

But look at what—the kinds of cases you have there. I have cited you an antitrust case where it has been dismissed for want of pleading about conspiracy when the defendant in the case was already in the amnesty program of the Department of Justice and had admitted to conspiracy.

I think employment discrimination—I have cited you *Fletcher v. Phillip Morris USA,* where in that cases there was an African American male who had worked for 17 years for Phillip Morris as a middle manager, and all of a sudden something happened. He pleaded eight specific instances of discrimination in that case and he pleaded that there was something unique about his exit interview in that case, and the judge said that that—and therefore there was something different. The judge said that that was a conclusory allegation; a conclusory allegation that there was disparate treatment against an African American male.

You know, that doesn't wash. That doesn't wash with me at all.

I cited you *McTernan v. City of York.* This is a fundamental civil right; this is about abortion protestors who are—want to demonstrate in the City of York, Pennsylvania, and there the court says—now this case had some other problems, but I want to focus on this one piece where he said that the plaintiffs had said that they were freely exercising their religious beliefs and that their religion required them to take these actions. And the court said—and they said—the court faulted them for not saying that they were treated differently than others.

Well, now, I don't know who else in York would have been looking to protest at the Planned Parenthood Clinic other than people

with a certain set of religious beliefs. So what do you do? Do you get off scot-free for the first instance of discrimination in each case?

A case you are all familiar with—this is about, you know, what standards do you need to get into at least some discovery? And one of the evils—one of the biggest of evils of *Iqbal* is that it completely rejects case management of discovery. Something that judges are good at—they are very good at cabining discovery.

The Lily Ledbetter case—I think you are all familiar with the Lily Ledbetter case. Lily Ledbetter was told by people that other people were being paid differently from her. Could she allege—did she know that the company was doing that? Did she really know that?

There is a question of what she could allege and whether her complaint would survive under the *Iqbal* standard. But clearly she knew what she wanted to look for in that case, and in that case with just the minimal discovery—targeted discovery—you could answer the key question that was out there without depriving someone of their right of access to court.

[The prepared statement of Mr. Vail follows:]

PREPARED STATEMENT OF JOHN VAIL

Statement of

JOHN VAIL

Vice-President and Senior Litigation Counsel
Center for Constitutional Litigation, P.C.

Before the
Subcommittee on the Constitution, Civil Rights,
and Civil Liberties Committee on the Judiciary

United States House of Representatives

Tuesday, 27 October 2009

Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*

Good afternoon, Mr. Chair and Members of the Subcommittee. I thank you for inviting me to appear before you today and I applaud your efforts to ascertain the effects this case is having on access to justice.

I am John Vail of Washington, D.C. I have a broad perspective on the federal courts. I practiced for many years in rural America, representing primarily low-income persons. Currently I work for a traditional law firm, the Center for Constitutional Litigation, and have a national practice focused on cases dealing with the right of access to courts and the right to jury trial. Among my clients is Jamie Leigh Jones, whose horrific story of gang-rape in Baghdad at the hands of Halliburton employees has led to proposed changes in the law of mandatory arbitration. Also among my clients is the American Association for Justice (AAJ) on whose behalf I regularly appear before the rulemaking committees of the Judicial Conference of the United States. My firm filed an *amicus curiae* brief on behalf of AAJ in the *Iqbal* case.

I want to emphasize three points in my testimony today:

- You should not view *Iqbal* in isolation. It is not just another incremental limitation on access to courts. It puts improperly broad and additional power into the hands of judges while adversely affecting the authority the Constitution reposes in juries.
- *Iqbal* undermines the idea that no person is above the law. It insulates persons with power from scrutiny they justly should undergo.
- *Iqbal* flouts the rulemaking process that Congress created to deal carefully with questions about federal civil procedure. Reversing *Iqbal* legislatively merely returns to the status quo of fifty years of practice and allows that process to function.

***Iqbal*: The Context**

In 1938, the Federal Rules of Civil Procedure were adopted and the era of litigation by gamesmanship was supposed to end. Pleading, in particular, was supposed to become simple, as illustrated by form pleadings that are appended to the Rules.[1] In earlier practice, pleading had been a nightmare.[2] Lawyers did great battle over the sufficiency of particular statements, filed multiple pleadings to assure that facts ultimately proved conformed to some pleading in the record, wasting large amounts of time and effort. The new rules had and ostensibly have one end: "to secure the just, speedy, and inexpensive determination" of cases. Fed. R. Civ. P. 1.

To secure that end, the rules require little to commence a lawsuit, the primary requirement being "a short, plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2). The rules were designed to implement a fundamental American value: that everyone is entitled to their day in court.[3] To commence a lawsuit, it was enough for a person to say, without much gussying up: this person wronged me in the following ways . . . ; it

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[1] Rule 84 states, "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." It is not at all clear that the forms suffice under *Iqbal*.

[2] *See generally* Charles E. Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259 (1926). Yale Law School Professor Clark, later a Judge of the Second Circuit, is widely viewed as the guiding force behind adoption of the Federal Rules of Civil Procedure.

[3] The concept of open and accessible courts is an article of American faith, finding expression in the nation's seminal constitutional law decision: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The Court soon added:

> As to the words from Magna Charta, . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 17 (4 Wheat.) U.S. 235, 244 (1819).

is within your power to redress that wrong; I want redress.[4] It was intentionally easy for an aggrieved person to open the courthouse door. Notice pleading, as the U.S. Supreme Court explained in 1947, "restrict[s] the pleadings to the task of general notice - giving and *invest[s] the deposition - discovery process with a vital role in the preparation for trial*." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (emphasis added). Without the compulsory process that discovery represents, a plaintiff is without means to assert certain facts upon which a lawsuit may turn and must extrapolate or speculate about those facts based on the evidence thus far available. The framers of the 1938 federal rules understood this and did not want the inability to obtain all the facts pre-suit to bar the courthouse door.

Under the 1938 Rules, the courthouse door opened easily, but that didn't mean anyone could hang around the courthouse for long. The rules offered summary disposition if, after a chance for investigation with the benefit of subpoena power, an aggrieved person could not marshal enough facts to warrant summoning a jury.

Iqbal changes that paradigm in an unwarranted way. No longer does a complainant who can say that something wrong occurred have the authority to confront the wrongdoer, with the confrontation carefully controlled by a judge.[5] *Iqbal* clearly condemns *any* use of discovery absent a showing that a claim is "plausible."[6] *Iqbal* follows *Bell Atlantic Corp. v. Twombly*,[7] in this regard. Read together, the two cases leave no doubt that the Supreme Court intended a sea

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[4] *See* Form Complaints.

[5] *Iqbal* explicitly rejects "the careful-case-management approach." *Twombly* similarly rejected a case management approach, but was not wholly clear whether the rejection was for all cases or was specific to the context of antitrust law. *Iqbal* left no doubt.

[6] *Ashcroft v. Iqbal*, 129 S.Ct 1937, 1953-54 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

[7] 550 U.S. 544 (2007).

change in pleading law, even though the author of *Twombly*, now-retired Justice Souter, dissented in *Iqbal*, rebelling against the further pleading restrictions *Iqbal* effected. A person is now barred even from entering the courthouse, once more hanging around, absent being able to drum up facts that convince a federal judge – someone who breathes fairly rarified air – that her claim is subjectively "plausible."

This tightening of standards for access to courts, and particularly for access to juries, is part of a trend that countermands a more long-term, historical trend in favor of access. For at least twenty years power has been transferred from juries to judges. The "trilogy" of summary judgment opinions in 1986[8] took certain factual questions away from juries[9] and probably is responsible for a quadrupling of the rate of cases disposed of at this stage of litigation.[10] Extensive use of this procedure has had particularly troubling consequences for plaintiffs in civil rights cases.[11]

The Supreme Court has granted greater power to judges to decide what expert evidence jurors might hear,[12] which has further curtailed access to juries.[13]

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[8] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electrical Industries Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[9] *See, e.g.*, Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 Emory L.J. 171, 215 (1988); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy*, 63 Wash. & Lee L. Rev. 81, 82, 86-88, 143-44 (2006). *See also Poller v. Columbia Broadcasting Service, Inc.*, 368 U.S. 464, 473 (1962) ("Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'").

[10] Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 592, 617-18 (Nov. 2004).

[11] Stewart J. Schwab & Kevin J. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103 (Winter 2009).

[12] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

The rate of jury trials has declined and continues to decline.[14] Today, federal judges, on average, try only three civil cases per year.[15] This decline has constitutional dimensions. The First Amendment's Petition Clause grants persons the right to have courts resolve their disputes, and the Seventh Amendment requires that juries, not judges, weigh facts and make inferences about what is "plausible."

The plausibility standard the Court has propounded is highly subjective: "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."[16] Here is how the then-chair of the ABA Litigation Section assessed the plausibility standard:

> ... *Iqbal* has the potential to shortcircuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success. This is so notwithstanding a complaint containing well-pled factual allegations that, if allowed to proceed to discovery and proved true at trial, would authorize a jury to return a verdict in the plaintiff's favor.

Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35 Litigation 1, 2 (Spring 2009). The Constitution, specifically the Seventh Amendment, preserves the common-law authority of juries because juries represent the common sense and experience of the community. We do not rely on judges for that for a reason: judges are generally drawn from the highest reaches of legal

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[13] *See* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 104 (2000).

[14] *See* Judge William G. Young, *An Open Letter to U.S. District Judges*, 50 Federal Lawyer 30 (July 2003).

[15] Based on *2006 Report of the Director: Judicial Business of the United States Courts*, http://www.uscourts.gov/judbus2006/contents.html, Table C-7 (12,612 trials, 2,097 civil jury trials), Table X-1A (674 judgeships).

[16] *Iqbal*, 129 S.Ct. at 1940.

experience, one that is apart and different from that of the community.[17] Preferring jurors to judges for this purpose is not merely a reflection of American historical experience. It is also a recognition that the jury is the most diverse public decisionmaking body in America. Juries' decisions are more apt to engender the trust of the populace than decisions made by judges.[18]

The idea that it matters that the public trusts the courts goes to my second major point. The better someone is at keeping their misdeeds private, the more *Iqbal* insulates them from liability: purveyors of secrecy remain above the law. *Twombly* itself, many civil rights cases, and many products liability cases attack actions that the defendants are trying to hide from scrutiny. Ask what facts from the public domain the pleader in *Twombly* reasonably could have been expected to plead: that the conspirators rented a banquet room at a resort for the "How We Can Conspire to Reduce Competition" conference? People don't conspire in public. There was nothing in the public domain about the bad design of Ford Pinto gas tanks. The tobacco industry was not exactly forthright in disclosing its knowledge about the effects of smoking.

The corporate defendants in these kinds of cases have received many benefits from the state: limited liability for investors; perpetual life; the opportunity to grow to gargantuan size. Human plaintiffs need the assistance of the state to keep the playing field level. Subpoena power helps them uncover the facts hidden within the labyrinthine bureaucracies that exist as a result of state indulgence.

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[17] *See, e.g.*, Stephan Landsman, *The Civil Jury In America: Scenes From An Unappreciated History*, 44 Hastings L.J. 579 (1993); Young, *Open Letter*, supra n. 14

[18] *See* Young, *Open Letter*, supra n. 14, at 31 ("The acceptability and moral authority of the justice provided in our courts rests in large part on the presence of the jury. It is through this process, where rules formulated in light of common experience are applied by the jury itself to the facts of each case, that we deliver the very best justice we, as a society, know how to provide.").

The public is not apt to trust a judicial system that rewards opacity and provides only weak tools to make things transparent. If representatives of the public – a jury – could find after being instructed in the law that alleged conduct is condemnable, our courts must accommodate an effort to bring to light the facts that support the claim. That was the standard under *Conley v. Gibson*,[19] that is the standard that the Supreme Court has erased, and that is the standard that Congress should restore, subject to the processes of the Judicial Conference.

Iqbal and *Twombly* are both premised on an idea – not established empirically in either case – that costs of discovery are a troublesome drag on certain litigants and a drag on the economy. That premise has been widely propounded on behalf of organizations that are not only too big to fail, but seem to be too big to be disbelieved.[20] Available empirical information belies the premise,[21] at least for the great bulk of cases. There remain cases, small in number but large in stakes, in which discovery can, indeed, become protracted and costly. But those costs can be and are controlled through case management and do not justify disposing of cases before they even begin. *Iqbal* and *Twombly* are causing such dispositions.

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[19] 355 U.S. 41 (1957).

[20] *See, e.g.*, University of Denver, *Final Report on the Joint Project of the American College of Trial Lawyers (ACTL) Task Force on Discovery and the Institute for the Advancement of the American Legal System* (2009), *available at* http://www.du.edu/legalinstitute/publications2009.html. *See generally* Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. Sch. L. Rev. 323 (2006-07).

[21] Emery G. Lee, III & Thomas Willging, Federal Judicial Center, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Oct. 2009).

Empirical evidence supports that assertion with regard to *Twombly*.[22] The evidence regarding the more recently decided *Iqbal* is necessarily anecdotal. Despite the large number of cases that cite *Iqbal* – as of last week, 2,692 – discerning how it is affecting cases requires reading each case. I have not read all those cases. But I have at least perused a couple of hundred. I am concerned, and that concern is shared by others. As one district court judge put it, "even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a [civil rights] political discrimination suit without 'smoking gun' evidence."[23] Let me illustrate some problems *Iqbal* is causing.

Antitrust is an area of particular concern, as we rely heavily on private parties to police competition. In *Tam Travel, Inc. v. Delta Airlines, Inc.* (*In re Travel Agent Comm'n Antitrust Litig.*),[24] the Sixth Circuit dismissed an antitrust claim of conscious parallelism. In dissent, Judge Merritt suggested that *Iqbal* and *Twombly* did not actually change pleading standards radically – an assertion with which I do not concur – but made clear that the cases were changing results: "district court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings[,] misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act." *Id.* (Merritt, J., dissenting).[25]

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[22] Joseph A. Seiner, *The Trouble With* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1013-14 (2009) (finding Title VII cases dismissed at a higher rate under *Twombly*); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study On the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811, 1815 (2008) (same).

[23] *Ocasio-Hernandez v. Fortuno-Burset*, No. 09-1299, 2009 WL 2393457, *6, n.4 (D. Puerto Rico 2009).

[24] --- F.3d ----, No. 07-4464, 2009 WL 3151315 (6th Cir. Oct. 2, 2009).

[25] As examples, Judge Merritt cited *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. Aug. 18, 2009) (dismissing antitrust conspiracy claim, despite four individual guilty pleas to conspiracy, because the pleas involved a different trade lane and "plaintiffs offer no particulars concerning the locations or dates of any meetings"); *Bailey Lumber &*

Civil rights cases have been impacted by *Iqbal*. *Ocasio-Hernandez v. Fortuno-Burset*, is a good example.[26] We should pause at a pleading standard that makes it difficult, even with experienced counsel, to get into court to complain of discrimination based on political affiliation. The same is true of cases of racial discrimination. In *Fletcher v. Phillip Morris USA, Inc.*,[27] an African American middle manager who had worked for Phillip Morris for 17 years had his complaint dismissed without leave to amend. His allegations of discrimination were detailed, including "eight incidents of alleged discrimination or disparate treatment by employees at Philip Morris."[28] He alleged that never in seventeen years had there been another instance like his, when a Vice-President was involved in an evaluation.[29] These allegations supported factually his assertion that "'similarly situated whites, females and non-black males' were treated differently than Plaintiff," an allegation the court dubbed, fatally, "conclusive."[30] The court said, "this is precisely the type of inference – one drawn from conclusory allegations unsupported by

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Supply Co. v. Ga.-Pac. Corp., No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009) (finding an alleged conspiracy among competitors to share pricing information freely with one another at any time to be implausible because pricing information also was published twice weekly); and *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009) (rejecting a plaintiffs' argument that *Twombly* and *Iqbal* permit a complaint to survive when it appears from the pleading that unlawful conduct is "just as likely" as lawful conduct). *See also*, e.g., *Hinds County, Mississippi v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499 (S.D.N.Y. 2009) (dismissing claims against Bank of America's competitors for failure to allege specifics of their involvement in conspiracy even though Bank of America had entered the Department of Justice amnesty program and had admitted to conspiracy with competitors).

[26] See also *Argeropoulos v. Exide Technologies*, in which the court posited that the hostile work environment claim before it might have survived under old standards, but did not under *Iqbal*. No. 08-cv-3760, 2009 WL 2132443, *6 (E.D.N.Y. 2009).

[27] No. 3:09CV284, 2009 WL 2067807 (E.D. Va. July 14, 2009).

[28] *Id.* at *6.

[29] *Id.*

[30] *Id.*

any facts – prohibited by *Twombly* and *Iqbal*."[31] It is hard to see how a factual allegation that the treatment of one black male was unique does not support an inference that the treatment was different from that accorded whites, females, and non-black males.

The factual assertions were thinner in *McTernan v. City of York*,[32] but *Iqbal* still played a role in throwing the plaintiff abortion protestors out of court. The plaintiffs, whose religious beliefs compelled their actions,[33] alleged that the defendants' precluded them from protesting on an access ramp that encroached on a public sidewalk and that defendants "'intended to chill, restrict, and inhibit" plaintiffs from freely exercising their religious beliefs. The court, applying *Iqbal*, faulted the plaintiffs for not alleging "that they are treated differently than others." Given the unlikelihood that non-religious protestors had demanded access to a ramp to a Planned Parenthood clinic for purposes of protesting, how were the plaintiffs to plead disparate treatment?

McTernan and *Fletcher* illustrate the difficulty *Iqbal* creates for pleading state of mind. In *Iqbal* the plaintiff had pleaded that defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"[34] The Court condemned these "bare assertions . . . [that] amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[35] Compare these "bare assertions" of state of mind with those contained in the form pleadings appended to

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[31] *Id.* at *7.

[32] 577 F.3d 521 (3d Cir. 2009).

[33] *Id.* at 524.

[34] *Iqbal* at 1951 (clisions in original).

[35] *Id.*

the Rules, and established by Rule 84 to suffice under the Rules. Here is the state of mind provision from Civil Form 21, Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b):

> 4. On <Date>, defendant <Name> conveyed all defendant's real and personal property <if less than all, describe it fully> to defendant <Name> *for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.*

That is not much different from the "conclusory" allegations in *McTernan*, *Fletcher*, or *Iqbal*.

One of the reasons we adopted the Federal Rules was to rid ourselves of endless and irresolvable debates about whether statements were properly classified as facts, ultimate facts, mixed assertions of law and fact, or legal conclusions. *Iqbal* returns us to the kind of legal practice Dickens condemned in *Bleak House* and we had the good sense to put to rest.

A final decision in *Tooley v. Napolitano*[36] may provide insights about how *Iqbal* has further changed old standards renounced in *Twombly*. The government's request to the D.C. Circuit to re-hear the case illustrates much of what we have to fear from *Iqbal*. The court granted the government's request, after *Iqbal* was decided, to re-hear the court's decision that the plaintiff's complaint sufficed under *Twombly*. The case was re-argued on October 8th, and a decision is pending.

Mr. Tooley's problems began when, after booking airline tickets for a family trip to Nebraska, he responded to an airline representative's request for comment. He urged that the airline rigorously screen all passengers to keep them safe from "the potential that those who wish to harm American citizens could put a bomb on a plane." The representative responded with

[36] 556 F.3d 836 (D.C. Cir. 2009), rehearing granted, judgment vacated, and rehearing en banc dismissed July 1, 2009, oral argument October 8, 2009, decision pending.

alarm, declaring, "you said the 'b' word, you said the 'b' word." Mr. Tooley tried to explain the representative's misapprehension, but she put him on hold and after twenty minutes he hung up.

Mr. Tooley asserts that, after his incident with the airline, he has been stopped for additional security screening each time he flies; he has noticed clicking noises in his telephone lines, consistent with wiretaps; he has found tracking devices on his car; and that for a two week period coinciding with a visit of the President to Mr. Tooley's home town, an officer in a Ford Crown Victoria sat outside Mr. Tooley's home for six hours a day.[37]

We do not know what the court, ultimately, will do with Mr. Tooley's complaint. It already noted that the timing of events made it difficult to infer that they were related to Mr. Tooley's phone conversation, but that the inference permissibly could be made by a jury. I want to focus on the government's response to Mr. Tooley's allegations, which illustrates the mischief that *Iqbal's* plausibility standard invites and the kind of problems plaintiffs will experience in trying to hold miscreants responsible for misdeeds.

The government notes that "an allegation of clicking sounds on a phone line, standing alone, is not a credible allegation of wiretapping."[38] It says that the court cannot accept the "conclusory allegation" that just because Mr. Tooley is stopped every time he flies, "those searches are extraordinary."[39] With regard to the individual in the Crown Victoria, it says that "nothing supports an inference that the unidentified individual was directed by" the federal

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[37] Facts as related in Supplemental Brief for the Appellees.

[38] *Id.* at 5.

[39] *Id.* at 8.

government.[40] With regard to tracking devices, it condemns Mr. Tooley for not pleading "information that plausibly ties defendants to the tracking devices."[41]

I have no idea whether Mr. Tooley can prove his claims. And I am no security expert. But I am pretty sure that Department of Homeland Security tracking devices do not have little tags attached that say, "Property of Department of Homeland Security; if found please return to . . . ." And I am pretty sure that if I got up the nerve to ask the guy in the Crown Victoria what he was doing in front of my house, he wouldn't tell me. And I am pretty sure that if I were stopped for additional security every time I flew, I would want to know why. And, while there could be things other than a wiretap that caused clicking on my phone line, if I started hearing clicking in these circumstances, I would figure that something was rotten in the state of Denmark, or at least in these United States. And I would expect the court system to allow me to ask a few questions of the people who might be causing the stink.

Applying *Twombly*, the D.C. Circuit, in its now-vacated decision, had held that Tooley's allegations, "when taken in combination," plausibly allege an injury in fact caused by the defendants.[42] *Iqbal*, however, invites judges to look at pleadings in isolation, not in combination. Under *Iqbal*, and particularly under an understanding of *Iqbal* advanced by the government in *Tooley*, a single pleading defect can be fatal. *Hamlet* has some defects, but the whole story remains compelling.

I believe there is a compelling need for Congress to reverse *Iqbal* and *Twombly* before they do more harm. It is changing results in at least some cases. It has introduced unwarranted

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[40] *Id.* at 7.

[41] *Id.*

[42] *Id.* at 840.

uncertainty into an area of law that has been well settled and understood. It again makes pleading a nightmare, and it does so across all cases when any legitimate concerns it might address arise in only a tiny fraction of the cases presented to the federal courts.

Congressional action could be subject to criticism for usurping the rulemaking role of the Judicial Conference of the United States under the Rules Enabling Act. I do not believe such criticism would be just. That process is too slow to grant necessary relief, and Congressional action would not usurp the role of the Conference.

Typically, it takes about three years from the time a rule is proposed in one of the advisory committees until it becomes effective. In the interim, text is carefully vetted by a large number of people who are very good at what they do and who take their work very seriously. To the extent new empirical information might inform the rulemaking process, the Federal Judicial Center is commissioned to generate and analyze it. This deliberate process helps avoid unintended consequences.

Twombly and *Iqbal* have usurped this process. The Supreme Court stood fifty years of well-understood pleading law on its head, motivated primarily by concerns about costs of discovery. The court did not establish that discovery is broadly abused, which the best evidence available strongly suggests is not true.[43] It did not establish that case management is an ineffective tool for managing potentially abusive discovery, but it *barred* use of that tool. It gave no hint why judges should be entitled to weigh evidence to determine "plausibility," when the

[43] FJC, *Preliminary Results, supra* n. 21, at 2. Reporting the preliminary results of a survey of closed federal civil cases, the FJC found that median costs, *including attorney fees*, were $15,000 for plaintiffs and $20,000 for defendants. In only 5 percent of cases do these costs reach about $300,000 per party, and in those cases the stakes were estimated at $4-5 million. Even in the highest value cases, total costs, including attorney fees, averaged well less than 10 percent of what was at stake.

Seventh Amendment assigns the role of weighing evidence to juries.[44] I concur with Justice Ginsburg, who told a conference of federal judges, "In my view, the Court's majority messed up the federal rules governing civil litigation."[45]

Congressional action to reverse *Twombly* and *Iqbal* would merely restore a fifty year status quo. If there is need to depart from the status quo, the processes of the Judicial Conference are well-adapted to make the slow, careful study of the need and to craft a careful solution to the problem identified. And, in the mean time, litigants would be free of uncertainty, the opportunity for plaintiffs to enter the courthouse would be undiminished, and defendants and judges would have undiminished access to existing tools for managing cases and making sure that undeserving plaintiffs don't hang around the courthouse too long.

I thank you for inviting me to speak to you and I am happy to respond to questions you might have.

[44] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986): "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

[45] *Reported in* Adam Liptak, *From Case About 9/11, Broad Shift on Civil Suits*, N.Y. Times, July 21, 2009, at A11.

Mr. NADLER. Thank you.
Mr. Adegbile, you are recognized for 5 minutes.

TESTIMONY OF DEBO P. ADEGBILE,
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

Mr. ADEGBILE. Good afternoon, Chairman Nadler, Ranking Member Sensenbrenner, other Members of the Committee. It is good to be with you again this afternoon.

Today I will touch briefly on three topics relative to the question at hand with respect to *Iqbal*. The first is to put the *Conley* decision that we have heard a bit about today in context, because I think it is important. The second is to note some of the substantial difficulties that *Iqbal* and *Twombly* are presenting for civil rights plaintiffs. And finally, I will conclude with some observations about why the heightened standard of pleading impairs the principles of justice and equality that are inherent in our Constitution and our civil rights laws.

We often hear about the fair notice aspect of the seminal *Conley* decision. Every lawyer learns about it in civil procedure. Often edited out of our civil procedure casebooks is the specific context in which that case arose.

Conley, of course, is a civil rights decision. It was a decision that arose in the context of African American railroad workers having been dismissed from their positions so that they could be replaced by White railroad workers, and the claim in that case was that the railroad workers wanted their union to represent them and advocate for them and the union refused.

I think it is important to put the case in that context, where the fair notice rule came to have some resonance, because in that case the defendants tried to suggest that somehow the pleading was fatal. They tried to insulate and inoculate invidious discrimination through pleading gymnastics, and the court rejected it and that is the rule that we have had for some 50 years. So let us start with that context.

Moving on to how *Iqbal* and *Twombly* are affecting civil rights plaintiffs today, I think we need to know something about the way in which discrimination is practiced today. We are all happy that most of the discrimination that we see—well, let me rephrase that; it was a little inartful—none of us are happy to have any discrimination, but the major discrimination that we see today typically, though not always, takes a different form than discrimination a generation or two ago.

In my testimony I cite a Third Circuit case that very accurately describes the different nature of discrimination today. Last week we heard about a justice of the peace in Louisiana who was engaged in some of the Jim Crow-era type of discrimination, not agreeing to marry people for an invidious racial reason. Most cases do not arise in that context.

The civil rights laws have educated would-be discriminators to conceal their conduct, to achieve their end through a surreptitious means, and that makes it very difficult for civil rights plaintiffs to begin, at the outset, with smoking guns and to have those types of allegations in their pleadings. That discovery makes the difference. It is the way we use to separate the legitimate cases from those that are unmeritorious.

And with the plausibility standard that we see under *Iqbal*, it allows judges to bring to bear their background and common experi-

ence. But as we know, the background and experience of our judges varies widely. Some judges may see the same facts and believe it to be plausible; others may look at a set of facts and believe it to be implausible based on their life experience.

The way we have addressed this issue in our justice system is to allow the facts to speak and not the preconceptions of judges. I think that is a much better rule and something that we should return to.

In my written testimony I point to a very important example in which a judge acknowledged that his initial preconception in a seminal desegregation case—his initial view was wrong and the facts changed his mind. Members of this Committee know the story of how Congressman Henry Hyde changed his mind when the 1982 reauthorization of the Voting Rights Act was in play by virtue of the facts and the testimony that he saw.

Finally, I will conclude by talking about the costs that are in play in the *Iqbal* decision. Any rule has costs on one side or another, but what the Supreme Court has done in *Iqbal* is to completely discount the costs of closing the door—closing off access to justice—in favor of concerns about litigation and discovery abuse.

Civil rights and litigation are a means of enforcing our highest promises. They are a policing mechanism that are important and vital to a democracy. If that door to justice is closed off in a way that is too blunt an instrument we lose something as a society, and it would be my advice to this Committee that they very carefully—that you all very carefully look at the cases that we have cited in our testimony to see the ways in which the door to justice is being closed even now, as we speak.

Thank you.

[The prepared statement of Mr. Adegbile follows:]

PREPARED STATEMENT OF DEBO P. ADEGBILE

Testimony of Debo P. Adegbile

Director of Litigation of the
NAACP Legal Defense and Educational Fund, Inc.

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties of the
Committee on the Judiciary

United States House of Representatives

Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*

Rayburn House Office Building
October 27, 2009

Introduction

Good morning Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee. I am Debo Adegbile, Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc. (LDF). I am grateful for the opportunity to testify before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties at this hearing, Access to Justice Denied: Hearing on *Ashcroft v. Iqbal,* regarding the state of the pleading standard following that recent Supreme Court decision.

LDF has been on the front lines of many of the great civil rights battles. LDF's hard-fought victories were possible largely because ordinary individuals had ready access to the courts to litigate vigorously their meritorious but often unpopular claims. Indeed, civil rights litigation has spurred much of our Nation's progress toward the fulfillment of the promises of our Constitution. Some of these courtroom victories were very significant in their own right; others catalyzed legislative change. In our democratic system, civil rights litigation has played a vital role in enforcing the law, ensuring equality, and protecting the powerless.

In *Iqbal,* as well as its predecessor *Bell Atlantic v. Twombly,* the Supreme Court has taken unwarranted and unwelcome steps toward limiting civil rights litigation by restricting ordinary individuals' access to courts. The judicially heightened pleading barriers erected by the Supreme Court in these two cases represent ill-crafted and overbroad encroachments on the role of Congress and other institutional actors. A decisive legislative response is necessary. Time and again, Congress has acted to encourage individuals to serve as private attorneys general and robustly enforce critical constitutional and federal statutory rights. Congressional action is needed now to ensure that *Twombly* and *Iqbal* neither severely undercut civil rights litigants' ability to root out discrimination where it exists, nor create a dangerous type of safe harbor where some may come to consider themselves beyond the reach of enforcement.

The Critical Importance of Liberal Pleading Standards

The Court's sharp break from precedent in *Twombly* and *Iqbal* threatens a dramatic shift away from the liberal pleading standards set forth in the Federal Rules of Civil Procedure. Liberal pleading standards were deliberately established to avoid failed earlier approaches which, in effect, treated pleading as a screen or trap for too many meritorious claims. Notably, under Rule 8(a)(2), a plaintiff's complaint is generally sufficient if it includes nothing but "a short and plain statement of the claim showing that the pleader is entitled to relief." Moreover, and this is key, Rule 8(e) emphasizes that "[p]leadings must be construed so as to do justice."

As United States District Court Judge Jack Weinstein recently explained: "Under the Federal Rule's 'short and plain' general pleading standards, the idea was not to keep litigants out of court but rather to keep them in."[1] Drawing on his experience as a member of the federal bench for over forty years and as a member of the team that assisted LDF's first Director Counsel Thurgood Marshall in litigating *Brown v. Board of Education*, Judge Weinstein distilled the purposes of liberal pleading standards:

> [T]hey were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to courts, and courts would render judgments based on facts not form. The courthouse door was opened to let the aggrieved take shelter.[2]

Almost two decades after the Federal Rules were adopted, the Supreme Court recognized in a case called *Conley v. Gibson* that liberal pleading standards were essential to the progress of the emerging civil rights movement.[3] *Conley* was part of a larger campaign by civil rights activists, assisted by LDF attorneys, to persuade unions throughout the country to defend equal rights for all workers, regardless of their race. In *Conley*, African American railway employees alleged that their union, the Brotherhood of Railway and Steamship Clerks, had violated its duty of fair representation under the

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[1] Judge Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 108 (2008).

[2] *Id.* (internal citations and quotation marks omitted).

[3] 355 U.S. 41 (1957).

Railway Labor Act. The union refused to intervene when the Texas and New Orleans Railroad purported to abolish 45 jobs held by the plaintiffs and other African American employees but instead filled the majority of those jobs with whites.[4]

In a 1957 opinion, the Court unanimously refused to dismiss the African American railroad employees' complaint. The Court affirmed that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim," rejecting the union's argument that the complaint was too "general."[5] "To the contrary," the Court held, "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[6] The Court emphasized 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."[7]

There is a particularly powerful lesson from *Conley* that deserves emphasis: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[8] *Conley* is a dramatic example of a case where the Court rebuffed efforts by a defendant and its counsel to inoculate themselves from a charge of stark racial discrimination through pleading gymnastics.

Overturning Well-Established Precedent: *Twombly* and *Iqbal*

For five decades, the Court repeatedly affirmed *Conley*'s "fair notice" approach that sought to prevent excessive wrangling and delay at the pleading stage in order to facilitate adjudication of civil rights claims and other litigation on the merits.[9] During

[4] *Id.* at 42-43.

[5] *Id.* at 47.

[6] *Id.* (quoting Fed. R. Civ. P. 8(a)(2)) (internal citation omitted).

[7] *Id.* at 45-46.

[8] *Id.* at 48.

[9] *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

those five decades, no "Member of this Court" ever "express[ed] *any* doubt" about the "adequacy" of *Conley*'s interpretation of Rule 8.[10]

The first cracks in the *Conley* framework emerged two years ago in *Twombly*. The 7-2 majority opinion, authored by now-retired Justice David Souter, insisted that *Conley*'s no-set-of-facts language should not apply to the antitrust claims raised by the plaintiff's complaint. Instead, *Twombly* promulgated a new and stricter standard, ruling that a plaintiff can survive a motion to dismiss only if he or she pleads "enough facts to state a claim to relief that is plausible on its face."[11]

Although the *Twombly* Court was clear that this new plausibility standard applied to the antitrust context, it left open whether it broadly applied to all civil cases. In *Ashcroft v. Iqbal*, the Court made clear that it did.[12] *Iqbal* also went much further than *Twombly* in its deviation from the *Conley* framework. Whereas *Twombly* endorsed *Conley*'s dictate that a complaint need do no more than give "fair notice" of the plaintiff's claims and grounds for relief,[13] *Iqbal* declined even to cite this well-established principle, and the decision substantially undermined it in practice.

In *Iqbal*, a Muslim Pakistani citizen—arrested days after September 11, 2001, and detained in federal custody—alleged that he was subjected to an unconstitutional policy of "harsh conditions of confinement" on account of his race, religion, and national origin.[14] The complaint named former United States Attorney General John Ashcroft as the "principal architect" of the policy and identified FBI Director Robert Mueller as "instrumental in [its] adoption, promulgation, and implementation."[15]

A sharply divided Court, with Justice Anthony Kennedy writing for the five-justice majority, held that Iqbal's claims against Ashcroft and Mueller should be

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[10] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., joined by Ginsburg, J., dissenting) (emphasis in original).

[11] *Id.* at 570.

[12] 129 S. Ct. 1937, 1953 (2009) (quotation marks omitted).

[13] *Twombly*, 550 U.S. at 555.

[14] *Iqbal*, 129 S. Ct. at 1942.

[15] *Id.* at 1944 (alteration in original).

dismissed because Iqbal's complaint did not plead facts "sufficient to plausibly suggest [their] discriminatory state of mind." The Court ruled that civil litigants must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that in making that determination a court is to "draw on its judicial experience and common sense." Applying this standard, the Court considered whether it was more plausible that lawful intent or discriminatory intent motivated Ashcroft and Mueller and found the former was more "likely."[16]

In a scathing dissent, Justice Souter, who was *Twombly*'s author, and three other dissenters, criticized the majority for "misapplying" *Twombly*'s pleading standard and insisted that "the complaint as a whole" complied with Rule 8 because it gave Ashcroft and Mueller "fair notice" of Iqbal's claims and the grounds upon which they rested.[17]

Documenting the Harm to Civil Rights

The historical frame described above provides critical context to understand the extent to which *Iqbal* and *Twombly* have changed the rules of the game for civil litigants. Returning again to Judge Weinstein's observations, he criticized the Supreme Court's new plausibility pleading rule for "deviat[ing] from the notice pleading standard of the Federal Rules and violat[ing] their spirit. A true 'government for the people' should ensure that 'the people' are able to freely access the courts and have a real opportunity to present their cases."[18]

Twombly and *Iqbal* have transformed the role that a complaint plays in litigation. In contrast to *Conley*'s "fair notice" requirement, the stricter plausibility pleading standard in *Iqbal* and *Twombly* compels plaintiffs to provide more of an evidentiary foundation to substantiate their claims in order to withstand a defendant's motion to dismiss. Yet, because plaintiffs typically can obtain discovery only if they survive a

[16] *Id.* at 1949-52.

[17] *Id.* at 1955, 1961 (Souter, J., dissenting).

[18] Weinstein, *supra* note 1, at 108.

motion to dismiss, many will be denied the very tools needed to support meritorious claims, and thus wrongdoers will escape accountability.

The result is a revival of precisely the sort of pleading gamesmanship that the Federal Rules were designed to avoid. As Professor Robert Bone explains in a forthcoming article:

> Strict pleading can produce screening benefits for some cases, but it does so in a relatively crude way and at an uncertain and potentially high cost. The most serious cost involves screening meritorious suits. In cases like *Iqbal*, where the defendant has critical private information, the plaintiff will not get past the pleading stage if she cannot ferret out enough facts before filing to get over the merits threshold for each of the elements of her claim. As a result, strict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery. [19]

These obstacles are particularly onerous for civil rights plaintiffs. Challenges to discriminatory policies and practices often turn on proof of subjective intent.[20] As Professor Bone further posits, it is difficult to establish intent based on information available to a plaintiff at the pleading stage before he or she can access evidence in the possession of the defendant through discovery:

> These problems are likely to be especially serious for civil rights cases, and particularly cases like *Iqbal* involving state-of-mind elements. Because of the difficulty obtaining specific information about mental states, many cases that would have a good chance of winning with evidence uncovered in discovery will be dismissed under a thick screening model that demands specific factual allegations at the pleading stage. Moreover, screening deserving civil rights cases is particularly troubling from a social point of view. If constitutional rights protect important moral interests, then the harm from failing to vindicate a valid constitutional claim must be measured in moral terms too. This means

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[19] Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. ___ (forthcoming 2010), draft of Sept. 3, 2009, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467799, at 33.

[20] Even disparate-impact claims turn upon the analysis of data and other information that are usually under the exclusive control of defendants.

> that the cost side of the policy balance includes moral harms, and moral harms must be accorded great weight.[21]

The danger that *Iqbal* and *Twombly* will frustrate efforts to redress civil rights violations is concerning insofar as discovery is a particularly valuable and necessary tool in uncovering the subtle and sophisticated forms of discrimination that have become more commonplace than the more overt examples that once permeated our society. As the Third Circuit has noted:

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. As one court has recognized, "[d]efendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it."[22]

Because these more subtle forms of discrimination are designed not to be immediately detectable, a stricter pleading standard risks depriving civil rights litigants of the ability to vindicate their rights.

These concerns are not merely hypothetical. Courts around the country are using *Iqbal* and *Twombly* to dismiss pending civil rights and other cases far more frequently than they had dismissed similar cases under *Conley*.[23] For example, in *Vallejo v. City of Tucson*, city officials conceded that they wrongfully denied a provisional ballot to Frank

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[21] *Id.*

[22] *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

[23] For empirical studies documenting these trends, see Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, draft of Oct. 12, 2009, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?_abstract_id=1487764; Joseph Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009).

Vallejo, a Mexican American disabled veteran. Nevertheless, a district court granted dismissal of Vallejo's claim under the Voting Rights Act. The court deemed the factual allegations in Vallejo's complaint insufficient to demonstrate that the city's electoral process was not equally open to participation by racial minorities. In so doing, the court summarily disregarded what appears to have been a contested factual issue at the pleading stage without the benefit of evidence: "The Court finds the failure to issue Mr. Vallejo a provisional ballot was an isolated incident and in no way affected the standard, practice, or procedure of the election."[24] Similarly, a district court in Georgia held that a plaintiff's allegation that his supervisor made "numerous" racially discriminatory remarks was insufficient to establish a hostile work environment claim under the Supreme Court's new stricter pleading standard because he "has not provided allegations about the frequency of the [racially discriminatory] remarks or even the content of the remarks."[25]

Courts have also expressly determined that *Iqbal* and *Twombly* require granting motions to dismiss in cases that would have proceeded to discovery under *Conley*'s more liberal pleading standards. For example, in *Ocasio-Hernandez v. Fortuno-Burset*, a district court dismissed a political discrimination claim under 42 U.S.C. § 1983. The plaintiffs, former maintenance and domestic employees at the Puerto Rico governor's mansion, alleged that they had been impermissibly fired less than sixty days after the governing party assumed office, and replaced by individuals belonging to the governing party.[26] Dismissing these claims as too "generic" and "conclusory," the court lamented the changed landscape for pleading discrimination claims in the aftermath of *Iqbal*:

> [E]ven highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment

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[24] No. CV 08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. June 26, 2009).

[25] *Dorsey v. Georgia Dep't of State Road and Tollway Auth.*, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at **6-7 (N.D. Ga. Aug. 10, 2009).

[26] No. 09-1299, 2009 WL 2393457 (D.P.R. Aug. 4, 2009).

> allegations. . . . Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.[27]

In another case, a Wisconsin district court initially permitted a prisoner to proceed on his claim alleging that officials in the Federal Bureau of Prisons were responsible for an unwritten policy requiring racially segregated prison living quarters. After *Iqbal*, however, the court reconsidered its holding and granted the officials' motion to dismiss, concluding that the Supreme Court had "implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion."[28] And in *Coleman v. Tulsa County Board of County Commissioners*, a district court in Oklahoma dismissed a plaintiff's claim that, as the sole female employee in a recreational department, she had to endure "offensive and insulting" comments about her gender, as well as retaliatory disciplinary action.[29] The court acknowledged that the plaintiff's complaint "may have survived under *Conley*," but under the new pleading standard, it did not.[30]

It is notable that federal courts' willingness to dismiss cases under the new pleading standard extends well beyond the civil rights context. For example, even in a straightforward slip-and-fall case, a district court recently dismissed a complaint as insufficient, holding that "the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred."[31] This is a fact pattern that, as any first-year law student well knows, calls for at least limited discovery because the plaintiff typically has no other means of uncovering most of this information. Nevertheless, such discovery was denied by the district court in reliance upon *Iqbal*.

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[27] *Id.* at *6, n.4.

[28] *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009).

[29] No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *1 (N.D. Okla. Aug. 11, 2009).

[30] *Id.* at *3.

[31] *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009).

In sum, the detrimental impact of *Twombly*, and especially *Iqbal*, is increasingly apparent both in civil rights cases and more generally. For five decades, when reviewing a complaint for sufficiency, courts had been directed to view allegations in the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in her favor. Under *Iqbal* and *Twombly*, the plausibility pleading standard undermines these presumptions and effectively gives the benefit of the doubt to the defendant.

Substantial Uncertainty About Access to Justice in *Iqbal*'s Wake

Iqbal and *Twombly* have also created significant uncertainty in the federal courts. First, lower courts are having difficulty reconciling *Iqbal* and *Twombly* with the Supreme Court's prior case law. The confusion has made it challenging for plaintiffs bringing routine civil rights claims to plead their cases and has created doctrinal inconsistency among the federal courts.

For example, some court decisions have evidenced confusion about the impact of *Iqbal* on *Swierkiewicz v. Sorema N.A.* In this 2002 decision, the Supreme Court unanimously and expressly rejected a heightened pleading standard in employment discrimination cases.[32] For several reasons, *Swierkiewicz* remains good law. *Iqbal* did not even cite *Swierkiewicz*, and the Supreme Court has repeatedly insisted that it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."[33] Moreover, *Iqbal* relied heavily on *Twombly*, in which the Court explicitly distinguished *Swierkiewicz* and affirmed its continuing vitality.[34] While some courts have adopted this position,[35] others—including the U.S. Court of Appeals for the Third Circuit—have held that *Twombly* and *Iqbal* have overruled *Swierkiewicz*.[36] This erroneous conclusion has resulted in unwarranted dismissals of employment discrimination claims at the pleading

[32] 534 U.S. 506, 512 (2002).

[33] *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

[34] *Twombly*, 550 U.S. at 569-70.

[35] *See, e.g., Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909 (LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009).

[36] *See, e.g., Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

stage thus denying plaintiffs the opportunity to obtain discovery to support their allegations.[37] For instance, a federal district court in Florida dismissed a Title VII claim on the ground that the plaintiff did not include in his complaint a description of the employer's alleged non-discriminatory reason for why he was fired—even though the requirement to come forth with such a non-discriminatory reason has always rested squarely on the shoulders of the employer.[38]

Second, *Iqbal* has provided little guidance as to what factors courts should use to determine "plausibility"—apart from a vague instruction to rely on "judicial experience and common sense."[39] For instance, in *Iqbal*, the Second Circuit and the four dissenting Justices concluded that the crisis triggered by the events of September 11, 2001 made it "plausible" that top government officials had condoned a discriminatory policy. By contrast, the same crisis, in the view of the Supreme Court majority, made legitimate law enforcement purposes for the policy more "likely," thus rendering purposeful discrimination implausible.

Because this new plausibility standard appears dangerously subjective, it could have a potentially devastating effect in civil rights cases that come before judges who may, based on the nature of their personal experiences, fail to recognize situations in which discrimination or other constitutional wrongs require redress. But these judgments are virtually unreviewable because *Iqbal* gives judges wide discretion to find a claim implausible. Moreover, it is often difficult to determine whether allegations in a complaint are plausible without the benefit of a full review of evidence that likely will not be available at the pleading stage before a plaintiff has the opportunity to obtain discovery.

The dangers of this plausibility standard are apparent when we recall that a deeper examination of the facts has often altered judges' initial preconceptions. For example, in

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[37] *See, e.g.*, *Wilson v. Pallman*, No. 09-0787, 2009 WL 2448577 (E.D. Pa. Aug. 7, 2009).

[38] *Ansley v. Florida, Dep't of Revenue*, No. 4:09cv161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. Jul. 8, 2009).

[39] 129 S. Ct. at 1950.

Swann v. Charlotte-Mecklenburg Board of Education, a landmark school desegregation case litigated by LDF, the district court judge recognized that it was only through litigation that he had come to appreciate fully the gravity of the discrimination that African American school children experienced:

> The case was difficult. The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no active segregation was being practiced in the Charlotte-Mecklenburg schools, that the aims of the suit were extreme and unreasonable, and that a little bit of push was all that the Constitution required of the court.

Yet, after the plaintiffs presented reams of evidence to support their claims, "they produced a reversal in the original attitude of the district court."[40]

Of course, the benefits of close scrutiny of the facts are not limited to the courthouse. In one well-documented legislative example, Representative Henry Hyde commented that his initial views changed during the 1982 reauthorization of the Voting Rights Act. In an opinion piece, he wrote:

> As the ranking Republican member of the House Judiciary Committee's subcommittee on civil and constitutional rights, I came to this issue with the expressed conviction that, indeed 17 years was enough . . . . Then came the hearings. Witness after witness testified to continuing and pervasive denials of the electoral process for blacks. As I listened to testimony before the subcommittee I was appalled by what I heard. . . . As long as the majestic pledge our nation made in 1870 by ratifying the 15th Amendment remains unredeemed, then its redemption must come first.[41]

Representative Hyde's candid comments attest to the powerful ways in which a full evidentiary record can challenge assumptions and change minds. Yet, *Twombly* and *Iqbal* place excessive emphasis on a form of pleading-stage proof and therefore deny plaintiffs—and by extension society as a whole—precisely this opportunity to focus on determining whether, in fact, discrimination and other civil rights violations persist. The point here is simple. While experience can inform a judge's assessment of a case, it is

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[40] 66 F.R.D. 483, 484-85 (W.D.N.C. 1975).

[41] Representative Henry J. Hyde, Op-Ed, *Why I Changed My Mind on the Voting Rights Act*, Wash. Post, July 26, 1981, at D7.

precisely because judges come to the bench with differing life experiences that rules promoting greater objectivity and reliance upon the introduction of facts are preferred.

LDF is also concerned about the portion of the Supreme Court's ruling in *Iqbal* that substantially limits the ability of plaintiffs to bring lawsuits against federal officials in their capacity as supervisors—an issue that was not even briefed by the parties. As Justice Souter pointedly noted in his dissent, the Court severely restricted liability against high-level government officials.[42] *Iqbal* effectively requires that plaintiffs plead with particularity that high-level government officials themselves acted with a discriminatory purpose. But the occasions will be extremely rare where a plaintiff can access information about a high-level official's intent prior to discovery. Moreover, judges may be particularly resistant, without such evidence, to assume that invidious discrimination on the part of their counterparts in the executive branch is plausible.

Conclusion

In light of the problems created by *Twombly* and *Iqbal*, LDF urges Congress to act decisively to restore access to the courts, a fundamental pillar of our democracy and a key reason why our nation has made so much progress in the civil rights arena. LDF does not discount concerns about discovery abuse that led the Supreme Court in *Twombly* and *Iqbal* to tighten the pleading standard for plaintiffs. Yet, as Justice John Paul Stevens correctly noted in his dissent in *Twombly*, "[t]he potential for 'sprawling, costly, and hugely time-consuming' discovery is no reason to throw the baby out with the bathwater."[43] But that is precisely what many courts have done in adopting the new plausibility pleading standard without limitation.

Simply put, the costs are too great if Congress does nothing. With each passing day, courts are turning away potentially meritorious claims—without the benefit of any fact-finding.

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[42] 129 S. Ct. at 1957 (Souter, J., dissenting).

[43] 550 U.S. at 595 n.13 (Stevens, J., dissenting) (quoting the majority opinion).

Mr. NADLER. And thank you.

And before I start the questioning, I want to make one comment on what Mr. Adegbile just said. We talked about judges, and even Mr. Hyde—I shouldn't say even—and Mr. Hyde changing his mind on the basis of facts or the basis of evidence. I once praised an official on the State of New York about 20 years ago by saying that—publicly—that he was the only high official in the executive branch of government that I had ever seen to change his mind on the basis of evidence. I hope that that is not the case with judges and with members of the legislative branch.

I thank the gentleman, and I will now recognize myself to begin the questioning for 5 minutes, but before I do that—before I begin the questioning of our witnesses I want to welcome a new Member of our Subcommittee to the Subcommittee, the gentlewoman from California, Judy Chu.

I will now recognize myself for 5 minutes.

First of all, Professor Miller, Mr. Katsas was—Katsas?

Mr. KATSAS. Katsas.

Mr. NADLER. Katsas. Mr. Katsas—excuse me—Mr. Katsas was saying that *Conley*—not *Conley*—that *Ashcroft* and *Iqbal,* rather, that *Iqbal* and *Twombly* were well in the tradition of prior case law, that this didn't really change all that much, didn't change the standards. When he said that I saw you were sort of shaking your head. Could you comment on that?

Mr. MILLER. In my judgment, Mr. Chairman, nothing could be further from the truth. In the formative years of *Conley*, the Federal rules, I would say, perhaps until the mid-1980's, there was what we used to call a "bend-over-backwards" rule. The court understood that the motion to dismiss should be granted rarely, that the court should bend over backwards to allow the plaintiff to move forward.

Sure there were cases that wouldn't even satisfy *Conley*, but everything in the complaint was read in the light most favorable to the plaintiff. All inferences were drawn in favor of the plaintiff.

My reading of the post-*Iqbal* cases is that is all gone. Complaints are now being read with the use of these epithets, like conclusory, against the plaintiff. The bend-over-backwards rule is gone.

In addition, when my great friend, Justice Ginsburg, said "*Iqbal* has messed up the Federal rules," she knows what she is talking about as a former procedure teacher. Not only is rule 8 messed up, but rule 12, dealing with the motion to dismiss, is messed up. That motion, tracing it back 400 years, Mr. Chairman, through common law pleading, was a legal sufficiency motion.

Chairman Nadler gave me a dirty look. I would be thrown out of court on a 12(b)(6) motion to dismiss because there is no such thing as a dirty-look tort.

But that is not what is happening now. Under *Iqbal*, the judge is appraising facts: Is it plausible? The judge is using common sense. It——

Mr. NADLER. Before any evidence is entered into——

Mr. MILLER. That is not in the complaint.

Mr. NADLER. Thank you. Let me ask you a further question. In your written testimony you say: The tightening of standards for access to courts, and particularly for access to juries, is part of a

trend that countermands more long-term historical trends in favor of access. For at least 20 years power has been transferred from juries to judges.

Could you briefly—and please briefly, because I have a few more questions—state how the *Iqbal* case helps transfer power from juries to judges?

Mr. MILLER. One of the things I try to get across in the written statement is that starting in 1986, when the Supreme Court empowered district judges to dismiss, via the summary judgment motion, again using that curious word "plausible," what we have seen is a constant movement of case disposition earlier and earlier and earlier in the life of the case, further and further away from trial, denying the jury trial right.

Now we are at Genesis. The motion to dismiss is at the courthouse door. The only thing left for, let us call them conservative forces or case disposition forces, to do is shoot plaintiffs before they come into the courthouse. I think this is a terrible trend.

Mr. NADLER. Thank you. Let me ask you one final question.

As may be evident, I agree with you, and we are looking at a legislative response. In July, Senator Specter introduced legislation in response to the *Iqbal* decision. We are, as you know—as I announced before—working on a House bill.

What do you think a proper response to *Iqbal* should look like—a legislative response?

Mr. MILLER. I think the Congress should voice the view that what has been happening is inconsistent with the notion of using civil litigation not simply for compensation but for the enforcement of public policy, all the statutes I referred to before. That should be the sense of Congress.

The sense of Congress also should be, there is a certain——

Mr. NADLER. Do you think it should be limited to a sense of Congress or an amendment to the Federal Rules?

Mr. MILLER. I think a direct amendment to the Federal Rules is within Congress' power. There is no question about that——

Mr. NADLER. That is what we are thinking of doing.

Mr. MILLER [continuing]. But having been a reporter to the civil committee, having been a member of the civil committee, I believe in the rule-making process. I think—not to suggest Congress should pass the buck—but as Mr. Johnson said, I think Congress should say, "Time out. Let us restore life as it was before 2007 and turn it over to the advisory."

Mr. NADLER. Thank you.

Let me just ask Mr. Vail and Mr. Adegbile quickly, do you think Congress should do as Professor Miller just said——

Mr. VAIL. Yes.*

Mr. NADLER [continuing]. Or should we simply try to legislate and restore the old rule by legislation by specifying it so the courts know what we mean and can't interpret it differently? Mr. Vail and Mr. Adegbile?

Mr. VAIL. I think you should follow Professor Miller's advice. I have a great respect for the rule-making policies—capability of the judicial conference, and one of the problems with *Iqbal* and

*See page 141 for letter clarifying this response.

Twombly is that they create a great deal of uncertainty. We are all out there looking at what these courts might do——

Mr. NADLER. Mr. Adegbile?

Mr. ADEGBILE. Yes. I agree.

Mr. NADLER. You agree with which?

Mr. ADEGBILE. Well, I understand them to be saying the same thing——

Mr. NADLER. Okay.

Mr. ADEGBILE [continuing]. That Congress should restore the law and then the rule-making committee——

Mr. NADLER. No, no, no. The question I am asking is, should Congress restore the law, and of course the rule-making committee can do everything else, you know, whatever it wants after that? Or should Congress say, "Gee, we don't like it. Rules Committee, see if you can restore the law"?

Mr. ADEGBILE. I think Congress should restore the law.

Mr. NADLER. Okay.

Mr. ADEGBILE. It is too urgent not to.

Mr. NADLER. I thank you.

My time is expired, and I now recognize the gentleman from Georgia for 5 minutes.

Mr. FRANKS. I guess I am now from Georgia. That is all right; it is a great state.

Mr. JOHNSON. No doubt about that.

Mr. NADLER. I am sorry, Mr. Franks.

First of all, the gentleman is not from Georgia. I recognize this gentleman from Georgia for 5 minutes. He wanted to pass for a while.

Mr. JOHNSON. All right. Thank you, Mr. Chairman.

As a result of the heightened pleading standard, we are now beginning to see fewer instances of wrongful conduct being addressed, and whether or not it is 1,600 or 2,700 cases or more, it has only been about 5 months and a week since the decision came down, and just one case being thrown out due to insufficiency of pleadings, I would suggest to you, is justice denied.

And the bottom line is that the Supreme Court knows what the impact of this decision is and what it will have in the future, and that is the reason why they changed 50 years of law. And even defense lawyers have called the *Iqbal* decision an unexpected gift for the business community.

Mr. Katsas, do you consider it fair to impose a standard that skips discover, evidentiary hearings, summary judgment, and trials altogether, be they bench or jury, and instead have judges deciding cases solely on which written presentation they determine is most persuasive to them?

Mr. KATSAS. I think it is fair to ask a plaintiff, before invoking the mechanisms of discovery, to allege facts that, if true, support a reasonable inference of liability. That is my reading of what those decisions do, and I think that is what prior law did. And I don't think that is unfair.

Mr. JOHNSON. Well, let me ask you this: Suppose a woman was fired due to illegal gender discrimination. Even if she has all the facts in her complaint, couldn't there still be a plausible alternative

explanation for why she was fired which could get her complaint dismissed? And shouldn't—I will ask you that question.

Mr. KATSAS. I think Judge Gertner had it right when she said the alternative—the complaint gets dismissed on plausibility only if the alternative explanation sort of overwhelms the inference of discrimination——

Mr. JOHNSON. But that is up to the judge, not a jury, and not during a trial, and also prior to discovery. Is that not correct?

Mr. KATSAS. Sure. The judge has to make a very limited threshold determination whether the facts alleged reasonably support an inference of liability. In the kind of case you posit, where that plaintiff puts the facts in the complaint, I think the complaint would very likely survive.

Let us talk about the——

Mr. JOHNSON. Well, I mean, since May 18th 1,600—2,700 cases have been dismissed——

Mr. KATSAS. No, sir.

Mr. JOHNSON [continuing]. Well, you know, you can argue about the findings of a hired gun group or not, it doesn't matter. And I am not alleging that this newsletter that you talked about is a hired gun, but I will say, the bottom line is, you know, how can we enable plaintiffs to be able to come into court and have their concerns addressed with all of the processes that have been in place for so long? And, you know, why did the Supreme Court need to change that?

I will throw it open to Mr. Vail.

Mr. VAIL. You know, Mr. Johnson, one of the things I wanted to address, if I may, is this discovery issue. There are a tiny number of cases in which it is a big issue, but the preliminary—it is in my testimony, but from the preliminary numbers we have the average costs—the median costs—in closed Federal cases are $15,000 for the plaintiff and $20,000 for the defendant, including attorneys' fees, according to the Federal Judicial Center.

The huge discovery costs are chimerical. They can be controlled in other ways that I am happy to talk about further, if anybody wants to hear.

Mr. NADLER. Thank you. The gentleman's time is expired.

The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank all of you for being here.

Mr. Katsas, you know, as I understand today, a lawsuit filed in Federal court is subject to a standard which the complaint, or the plaintiff, must plausibly give rise to an entitlement of relief, and I am just wondering, what is the support in prior law for that plausibility requirement? Can you explain that to us?

Mr. KATSAS. Sure. Many sources. Number one, as I said in my opening, it is black letter law that courts can read—adjudicating motions to dismiss are not bound to make unsupportable conclusions or unwarranted inferences from the facts alleged. Give the plaintiff a lot of leeway but not unlimited leeway with respect to facts alleged.

Second, in the context of antitrust litigation, which is a good example of complex litigation, I have cited many cases in my opening—in my written statement where courts apply that principle to

dismiss cases that they find implausible and they say, "Before we are going to turn this case into a multimillion-dollar discovery proceeding we are going to make sure that there is some reasonable reason to think the case has merit."

Third, in cases against government officials where qualified immunity comes into play, the Supreme Court, prior to *Twombly* and *Iqbal*, said a plaintiff, in order to overcome the immunity defense, must allege specific non-conclusory allegations that demonstrate a defendant violated clearly established law. It seems to me implicit in that is some plausibility requirement.

Mr. FRANKS. Yes.

Mr. KATSAS. Finally, Professor Miller's treatise has a statement in it that a complaint must do more than state facts that merely create a suspicion of liability. I think that is absolutely right; that is the very statement that *Twombly* quoted in support of the plausibility requirement.

Mr. FRANKS. Yes. Well, that makes sense. You have got to make a case a little bit, huh?

Well, it seems to me that relaxing the pleading standards could subject a lot of high-level government officials, you know, to really virtually thousands of meritless lawsuits, I mean, even from terrorists, that would be just out of handling their national security matters that they had a duty to do, and that these allegations could be based on nothing more than a—sort of a formulaic recitation of the elements. And—at least a constitutional claim—and I guess I am wondering what you think would have happened if the Court had not held as it did in *Iqbal*.

Mr. KATSAS. Look at the facts of *Iqbal* itself. The attorney general of the United States and the director of the FBI were responding to what one of the second circuit judges aptly described as a national security emergency, unprecedented in the history of this country. They acted to protect the country against further attacks, and part of that response involved detaining people suspected of connection to terrorism under the immigration laws.

If *Iqbal* had come out the other way, any one of those detainees could sue the attorney general of the United States and the director of the FBI merely by alleging that I, the detainee, was picked up because of my religion and the attorney general was involved in that decision. Judge Cabranes described that kind of argument as a template for litigation against the government, even as to high-level officials, even in national security emergencies.

Mr. FRANKS. Yes. Sounds like a recipe for total chaos.

I guess I would like to give you a chance to—you didn't get the opportunity to deal with the "1,600 subject cases," and if you could clear that up for us?

Mr. KATSAS. Yes. Whether it is 1,600 or 2,700, whatever the number is, that number is simply the number of times the *Iqbal* decision has been cited by any court in any context. It could be a decision that has nothing to do with the motion to dismiss that just cites *Iqbal* in passing; it could be decisions that apply *Iqbal* in order to deny motions to dismiss.

You have no idea from that statistic how many cases are being dismissed, and you have no—of that number of cases. Yyou have no idea how many would have been dismissed under pre-*Iqbal*

standards, even if you assume that *Iqbal* somehow ratcheted up the standard. So it doesn't seem to me probative of anything.

Mr. FRANKS. Yes. Well, thank you for your service, sir.

And thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I now recognize the gentlelady from California for 5 minutes.

Ms. CHU. Mr. Katsas, I understand you represented the government in *Ashcroft v. Iqbal,* and in that case the government essentially argued that the case should be dismissed because Mr. Iqbal had no proof that Attorney General Ashcroft and FBI Director Mueller were personally involved in the arrest or detention.

I want to ask whether you believe that we should be able to hold high-level officials responsible for the conduct of the men and women who work under them and in what circumstances?

Mr. KATSAS. I think that before a plaintiff can subject an attorney general to the burdens of discovery it is incumbent upon that plaintiff to allege facts supporting a plausible inference that the attorney general was involved in illegal conduct.

Let me talk for a minute about the Elian Gonzalez litigation against Attorney General Janet Reno. I was involved in that case as well. That is a great example of politically motivated litigation against a high-ranking and visible government official who makes a tough and controversial call to do something that some people don't like.

The plaintiffs in that case said there were Fourth Amendment violations in executing a search warrant. The court assumed that to be true. And the plaintiff said, "And the Attorney General supervised the raid." Well, the Eleventh Circuit said, "That is not good enough. You really need to allege that the attorney general was responsible for gassing people and breaking down doors and breaking furniture for no reason."

That seems to me a very sound principle to protect high-level government officials in any Administration from being called into court, subjected to discovery, and having their qualified immunity overridden on a whim.

Ms. CHU. Let me ask this: I think the issue of supervisoral liability is at the heart of this case. The government's brief conceded high-ranking officials can be held liable if they have actual knowledge of the assertedly discriminatory nature and they were deliberately indifferent to the discrimination. However, the Court took a different view by declaring that such officials can be held accountable if they themselves violate the law, regardless of the breadth of their knowledge of the depth of the indifference.

Does the Court's decision in this case change our ability to hold government officials responsible for the actions of their agency and employees? Doesn't it directly contradict the government's criteria on how it holds it and its officials accountable?

Mr. KATSAS. That part of the *Iqbal* ruling is, of course, separate from the pleading questions that we are focused on today. But to answer your question, no, it seems to me right.

It seems to me that where the underlying constitutional violation itself requires bad motive as an essential element, you shouldn't have a lesser standard of liability for the attorney general than you have for the line officer. So if the line officer can be held respon-

sible only based on bad motive, it seems to me the attorney general should have the same standard applied to him or her.

Ms. CHU. Well, then let me ask a different question, Mr. Katsas. It seems unfair to me to place such a significant burden on the plaintiff who often, in discrimination cases, are already at a significant disadvantage. The courts are now asking a party of unequal bargaining weight to know a lot about the other side before the game has even begun.

Can you describe how a plaintiff facing a case like this would realistically go about gathering this additional information outside of the discovery process?

Mr. KATSAS. Well, I think in the typical discrimination case I would point you to the Supreme Court's decision in Swierkiewicz, which ticks off many ways in which a discrimination plaintiff can plead a case of discrimination. The plaintiff can allege facts that support an inference of discrimination under a case called McDonnell Douglas. That is one option.

A plaintiff can allege facts that suggest direct evidence of discrimination. That is another option. Or a third option, which the court approved in Swierkiewicz, is the plaintiff simply gives a statement of the facts which support a reasonable allegation of discrimination.

That particular case, you had a 53-year-old person of, I believe it was Hungarian background, replaced by a much younger person of French background, alleged those facts, gave the time and place, alleged that the plaintiff was more qualified based on 25 years of experience, and alleged facts suggesting some animus on the part of the supervisor who said something to the effect of, "I need new blood in here."

And the Supreme Court said regardless of all the technicalities of employment discrimination law under McDonnell Douglas and so forth, that—those allegations are good enough. It is a short and plain statement; it alleges the specific facts; and it supports a reasonable inference of liability.

Now, to come back to the hypothetical about—or, the actual case of a detainee picked up in a national security emergency in response to terrorist attacks carried out by al-Qaeda saying, "Well, I am just being detained because of my religion and the attorney general is not trying to protect the country but to discriminate against Muslims," I think that would be and should be a hard case to allege for good reason.

Ms. CHU. Thank you.

I yield back.

Mr. NADLER. Thank you.

And I now recognize for 5 minutes the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony.

And as I listen to the testimony and review it this question comes to me, and I would direct it first, I think, to Professor Miller, and that is this question that hangs out here, and I think not very well elaborated on or examined, the question of profiling. And, you know, is it ever constitutionally or legally permissible to profile an individual in the course of law enforcement within the continental United States, Professor?

Mr. MILLER. I am not by any means knowledgeable about criminal law. That is a civil liberties issue that I generally leave to my criminal law colleagues. My understanding—and it is nothing more than an understanding—is that a certain level of profiling is allowed in certain circumstances.

Mr. KING. Thank you, Professor.

Mr. Katsas?

Mr. KATSAS. I would agree with that. The classic case is police are investigating someone—police are investigating a crime. The witness identifies the race or sex or age of the perpetrator and the police focus their efforts on people satisfying that description. I think the September 11th case fits that paradigm given the religion and religiously motivated animus of the people who attacked us.

Mr. KING. And would you broaden that response to include classes of people as well as individuals specifically?

Mr. KATSAS. Depending on the circumstances, yes.

Mr. KING. Okay. And then those circumstances, to explore this thought a little further with the case of *Iqbal*, his allegation that he was singled out or discriminated against because of race, religion, national origin, et cetera, those circumstances under his incarceration you would support as being constitutionally protected as far as the law enforcement would be on the constitutional side of it?

Mr. KATSAS. I think what I would say is if, as seems overwhelmingly likely to me, what the government was doing was trying to investigate the attacks and find people linked to the attacks, and that investigation had a disparate impact on Arab Muslims, that is constitutional.

And if someone in Iqbal's situation wants to say that, "No. Notwithstanding this overwhelming national emergency and notwithstanding the obvious reason for being concerned about people who fit the description of the attackers, I was discriminated against unfairly, unconstitutionally," it is incumbent on him to allege some facts that plausibly support that. I——

Mr. MILLER. But Mr. King, there is no way that someone in Iqbal's position could know the motivation of the A.G. or the FBI director. And the notion that the government—and we are now talking about thousands of cases not as dramatic as *Iqbal*—that the government can get a complete pass without ever rescinding with a simple affidavit or a simple deposition, pinpoint discovery is all that you need to determine the plausibility——

Mr. KING. But let me follow up, Professor, with that. And you have opened this up voluntarily. But I would press into this point, then, about, what about the costs of diversion? What about the consequences of this impending bill that may well be dropped here in the House side? Doesn't it open up the door for an endless series of litigation against government officials and doesn't that put a chilling effect on the activity of our government officials?

And doesn't it put not only the servants of the Department of Justice and the department, perhaps, beyond that at jeopardy, doesn't it also put the American people at jeopardy, potentially? Have you considered the implications of that?

Mr. MILLER. With respect, Congressman, those are assumptions.

Mr. KING. Working with some assumptions in this underlying case——

Mr. MILLER. I have great faith in the Federal judiciary. They know how to manage cases; they know how to skin-down cases; they know how to get to the nub of cases. But I don't think we want to live in a land in which every government official asserting that kind of national emergency or immediacy can get a pass——

Mr. KING. And I would point out, though, that I have not been aware of evidence on the assumptions on the part of Iqbal himself. I mean, there have been allegations, but not evidence of those allegations that he has made. So we are working with some assumptions, and I would like us to look at the legitimacy of real legitimate law enforcement profiling.

And I will just say in conclusion that I believe I have been profiled when I got on board on El Al Airlines, and they looked at me and asked me about three questions and concluded I didn't fit the profile of somebody they needed to be worried about and said, "Get on board." So I think it works in a plus and a minus.

I thank the witnesses, and I would yield back to the Chairman, and I thank you.

Mr. NADLER. I thank the gentleman.

And before we conclude, I just saw at the conclusion of Ms. Chu's question Professor Miller looked like he wanted to say something. Do you remember what that was?

Mr. MILLER. Excuse me? I didn't hear.

Mr. NADLER. I said at the conclusion of Ms. Chu's questioning you looked like you wanted to add something, but I recognized Mr. King.

Mr. MILLER. Oh, I was simply going to make mention that the reference to the Swierkiewicz case is perversely interesting because at least one United States court of appeals of the Third Circuit has said Swierkiewicz is dead as a result of *Iqbal*.

Mr. NADLER. Okay. Since we are not going to do the discussion of Swierkiewicz, I thank the witnesses. Without objection all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

For the edification of the Members we have 7 minutes remaining on the vote on the floor.

I thank the witnesses, I thank the Members, and with that this hearing is adjourned.

[Whereupon, at 3:48 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

In May of this year, the Supreme Court issued its decision in *Ashcroft v. Iqbal.* The ramifications of this case are enormous.

As a result of *Iqbal,* a plaintiff must overcome almost insurmountable obstacles to open the courthouse door, which explains the title of today's hearing.

The Court's decision to abandon more than half a century of established civil litigation practice has left thousands of individuals without the right to judicial redress in the federal court system.

Today's hearing provides an important opportunity to closely examine the implications of this decision. I am particularly interested in looking at three issues presented by *Iqbal.*

First, *Iqbal* is yet another example of the Supreme Court slowly, but strategically, chipping away at the rights and protections afforded by statute and under the Constitution.

As is the case with *Iqbal,* the Court has been rendering decisions that make it harder for people to enforce their rights in court. The progress that had been made to open the courthouse doors to everyone is slowly being undone.

As with many of the Court's decisions over the last few decades, the ruling in *Iqbal* at first blush appears to be narrow in scope and technical in application.

But *Iqbal* and the Court's other rulings have had broad implications by systematically and significantly changing our laws' guarantees. As the *New York Times* observed, *Iqbal* may be one of the most consequential decisions of the last term even though it got little attention.

This under the radar, but highly consequential, description of *Iqbal* brings me to my second point. The impact of this case has been enormous and cannot be understated. As a direct result of *Iqbal,* thousands of litigants have been denied access to justice.

In reliance on *Iqbal,* it is likely that more than 1,500 federal district cases and 100 federal appellate cases have been tossed out of court. By making it harder for a complaint to withstand a motion to dismiss, civil plaintiffs now find themselves without remedy in the federal courts.

For the past 50 years, it was rare that a motion to dismiss for failure to state a claim was granted. Unless it appeared "beyond doubt that the plaintiff [could] prove no set of facts in support of his claim that would entitle him to relief," a person was entitled to his or her day in court.

Disturbingly, it seems as if this standard that was first articulated in 1957 in *Conley v. Gibson* is no more.

As a result of *Iqbal,* a court must conduct a two-part examination. First, it must examine the complaint's allegations of law and fact, and consider only those allegations that amount to fact. Second, the court must make a "plausibility" determination.

It is insufficient that a complaint contain well-stated facts. Rather, the fact scenario must be "plausible," and not the result of "more likely explanations."

In reaching this decision, a court uses its "judicial experience and common sense." Leading civil procedure experts say that this equates to an extremely unreasonable amount of judicial discretion.

So my third and final point is that the Congress is now tasked with fixing *Iqbal.* In the same way that we have responded to other undesirable Supreme Court decisions, it appears that a legislative response is warranted. At our last

hearing, which discussed other questionable Supreme Court decisions, Chairman Nadler noted our efforts in working on a response to *Iqbal.*

I am committed to crafting such a response. Accordingly, I hope the witnesses at today's hearing will share their insights and guidance on what that legislative response should be.

A lot of people are relying on Congress to rollback *Iqbal,* a decision that has substantially changed the rights of civil litigants. Today's hearing continues that process of restoring justice in the courts. I know that it will greatly contribute toward our better understanding of the decision, its adverse impact on our Nation's system of justice, and possible legislative responses.

I thank Chairman Nadler for convening this very important hearing.

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Thank you, Chairman Nadler, for holding this important oversight hearing.

Access to the courts and the ability for claims to be heard by a judge or jury are fundamental to our system of justice. For over 50 years, courts have used the *Conley* standard to ensure that plaintiffs had the opportunity to present their case to a federal judge, even when they did not yet have the full set of facts.

As Chairman of the Subcommittee on Courts and Competition Policy, I believe it is extremely important that defendants be given wide latitude for pleading.

Details about the wrongful conduct are frequently in the hands of the defendants alone and it is only through the discovery process that plaintiffs are able to identify non-public information that would support their claims.

With the *Twombly* and *Iqbal* decisions, pleading standards are set so high that Plaintiffs are now frequently denied access to the courts.

In fact, since the *Iqbal* decision earlier this year, over 1600 district and appellate cases have resulted in dismissal due to insufficient pleadings. This is simply unacceptable.

Another problem with the *Iqbal* decision is that the Supreme Court bypassed the federal judiciary by amending the Federal Rules of Civil Procedure without going through the process laid out in the Rules Enabling Act.

It is the role of the Judicial Conference of the United States to change the Federal Rules though a deliberative procedure.

By bypassing the Judicial Conference's process, the Supreme Court may very well have, in the words of Justice Ginsburg, "messed up the Federal Rules."

I look forward to joining Chairman Nadler as an original cosponsor of his Notice Pleading legislation. I plan to hold a legislative hearing and mark-up this important bill in the Courts Subcommittee once the bill is introduced.

Thank you.

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Arthur R. Miller
University Professor

November 30, 2009

Subcommittee on the Constitution, Civil Rights and Liberties
Committee on the Judiciary
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To The Subcommittee on the Constitution, Civil Rights, and Civil Liberties October 27, 2009 Hearing on Access to Justice Denied: Ashcroft v. Iqbal: Response to Questions for the Record from Chairman John Conyers, Jr.

1. *How do you respond to arguments that the decision in Ashcroft v. Iqbal was necessary to weed out weak or frivolous lawsuits and is a much-needed standard that will reduce federal court caseloads?*

The Federal Rule 12(b)(6) motion is appropriate to weed out cases that are legally insufficient (e.g. "defendant gave me a dirty look"). However, it never was intended as a method of testing the factual merits or ultimate plausibility of a case, especially not by using extremely subjective factors such as "judicial experience" or "common sense" that go far beyond the four corners of the complaint. (The only comment I can make about "frivolous" litigation is that it is basically non-existent as the Federal Judicial Center has demonstrated. References to it are part of a self-serving scare tactic that has no reality to support it.)

The expanded use of the motion made possible by the Supreme Court's decisions in *Twombly* and *Iqbal* is dangerous. It runs the risk of decisions based on individual ideology, the dismissal of potentially meritorious claims, and inflicting serious damage to the enforcement of important Congressional and Constitutional policies. Premature dismissals based solely on the complaint also

raise questions about the rights of our citizens to a day in court and trial by jury.

Moreover, there are other mechanisms in the federal procedural system that serve the desired purpose of filtering inappropriate cases and there are procedures that can be tweaked to serve that purpose such as the motion for a more definite statement—so-called pinpoint or flashlight discovery limited to determining a case's "plausibility"—or the use of sanctions. Judicial management techniques also should be relied upon to perform any necessary screening function. Dismissals based on the *Twombly-Iqbal* heightened pleading requirement run the risk that cases will be terminated based on judicial ideology and exacerbate the information asymmetry problems that plague certain important substantive areas of the law. Closing the federal courthouse door without giving people any real opportunity to determine whether their cases have any merit is simply unjust.

2. *Is there statistical data that supports the position that more Rule 12(b)(6) motions to dismiss have been granted post-Iqbal?*

Understandably, few empirical studies documenting a greater frequency of dismissal under *Twombly-Iqbal* than under *Conley* are yet available because the heightened pleading is a very recent phenomenon. Two existing sources indicating an increase in dismissals are Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, draft of Oct. 12, 2009, *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764; and Joseph Seiner, *The Trouble with* Twombly: *A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009). The first of these citations surveyed a significant number of cases and concludes that there is a rather disturbing increase in Rule 12(b)(6) dismissals in important areas of federal law since *Twombly* and *Iqbal*. As the study reveals, this increase is on top of an already high dismissal rate prior to *Twombly-Iqbal* resulting from a number of courts applying fact pleading rather than notion pleading principles despite Supreme Court precedents to the contrary. My own monitoring of cases for my ongoing work on the Federal Practice and Procedure treatise and reports I have received from lawyers all around the country make it clear that *Twombly-Iqbal* motions are now a routine defense technique, slowing down the processing of cases, greatly increasing litigation costs, and dismissing cases that would not have been dismissed under *Conley*.

In addition, even judges and academics who one would assume are quite sympathetic to the Court's recent decisions recognize the significance and changes caused by these cases. *See, e.g.*, Brotherhood of Locomotive Eng'g v. Union Pacific R.R. Co., 537 F.3d 789 (7th Cir. 2008) (Easterbrook, C.J., joined by Posner, J., concurring) ("In Bell Atlantic the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier . . . ."); Richard Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Became (Disguised) Summary Judgments*, 25 WASH. J. OF L. & POLICY 61 (2007) ("The Supreme Court in *Twombly* held that the phrase 'no set of facts' has been 'questioned, criticized, and explained away long enough' But on this matter

Justice Stevens's dissent surely has the better argument. Conley has long been treated as an authoritative statement of the law that has been followed uniformly in the Supreme Court and elsewhere and the plaintiffs' allegations are quite in the spirit of the Federal Rules. The Conley complaint is fact-free but gives notice of the basic elements of the claim. *Twombly* cannot be defended if the only question is whether it captures the sense of notice pleading in earlier cases.") (citations omitted).

3. *Is a Congressional legislative response to Ashcroft v. Iqbal that restores the notice pleading standard to that which was articulated in Conley v. Gibson warranted?*

As a former Reporter and then a member of the Federal Rules Advisory Committee, I would not like to see any direct intrusion on, let alone impairment of, the rulemaking process that Congress established under 28 U.S.C. § 2072. Nonetheless, the *Twombly-Iqbal* matter is of such enormous significance that it is important—at a minimum—to signal the Advisory Committee, through legislation, that it must direct immediate and intense attention to the subject of pleading and motions to dismiss under the Federal Rules. Moreover, given the fact that as things now stand the Advisory Committee must work in the face of Supreme Court's decisions, which the rulemakers may well consider determinative despite their very flawed assumptions, only legislation can require that the inquiry be based on a pre-*Twombly-Iqbal* platform, rather than using a post-*Twombly-Iqbal* starting point.

That is an extremely important point. Given the fact that the rulemaking process is exceedingly and understandably deliberate, any revision might take two to three years to develop and promulgate. Since cases involving the rights of Americans and important public policy areas of federal law are now being dismissed under Rule 12(b)(6) on a daily basis throughout the nation, it seems extremely undesirable in my judgment to leave *Twombly-Iqbal's* heightened pleading in place for that length of time. Congressional intervention is especially justifiable since, as noted above, a number of the assumptions the Supreme Court made in these decisions have no empiric basis whatsoever—for example, the Court's disparagement of judicial case management as an alternative to outright dismissal, and its assumptions about alleged frivolous litigation. Moreover, its observations about excessive costs, really do not apply to the vast majority of federal court cases subjected to *Twombly-Iqbal* and a recent preliminary study by the Federal Judicial center indicate they have been rather exaggerated.

Returning the pleading standard to its pre-*Twombly-Iqbal* status would provide some impetus for prompt study, the development of empiric data, and any redrafting the Advisory Committee and Judicial Conference thought necessary. Moreover, it would reduce the damage to potentially meritorious cases that might be dismissed under *Twombly-Iqbal* between now and any future rule-revision and avoid practice under those two cases from becoming so embedded in the

jurisprudence that dislodging them becomes impossible despite what intense study might indicate should be done.

I hope these responses to your questions are of some value to the Committee. If I can be of any further assistance, I would be happy to be of service.

Sincerely yours,

Arthur R. Miller

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November 30, 2009

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Re: Access to Justice Denied: *Ashcroft v. Iqbal*; responses to supplemental questions

Dear Representative Nadler:

Below please find my responses to the questions you have posed following my testimony before the Committee. I thank you for the opportunity to respond and I remain at the disposal of the Committee for further explication.

1. How do you respond to arguments that the decision in *Ashcroft v. Iqbal* was necessary to weed out weak or frivolous lawsuits and is a much-needed standard that will reduce federal court caseloads?

I respond with incredulity.

A first, and important, point is that I reject the tired underlying narrative that weak and frivolous lawsuits pervade the courts and that court caseloads need to be reduced. The idea is nonsense. *See, e.g.,* Marc Galanter, *The Hundred-Year Decline of Trials and The Thirty Years War*, 57 Stan. L. Rev. 1255, 1270-71 (2005) ("A persistent and well-funded campaign depicts American civil justice as a pathological system, presided over by arrogant activist judges and driven by greedy trial lawyers, biased juries, and claimants imbued with victim ideology who bring frivolous lawsuits with devastating effects on the nation's health care system and economic well-being. Although the available evidence overwhelmingly refutes these assertions, this set of beliefs, supported by folklore and powerfully reinforced by media coverage, has become the reigning common sense.") Frivolous lawsuits are chimerical and existing tools for dealing with them are robust. Federal Judicial Center, Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure (2005), (*available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule1105.pdf/$file/rule1105.pdf) (only 3% of judges found groundless lawsuits problematic (p. 3); the great majority felt they had tools sufficient to cope with any problem (p.13)). *See also* Galanter, *The Hundred-Year Decline, supra.*

An American courtroom remains the one place in the world where a person unadorned by title and unburdened by wealth can call to account persons – human or artificial – weighted down by either. That value is at the core of the right to petition protected by the First Amendment, John Vail, *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, (*available at* http://www.thepocketpart.org/2005/12/vail.html), and it is trampled by the *Iqbal* decision.

To protect that right, the Federal Rules rejected "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). *Iqbal* again makes pleading the Victorian parlor game it had been before the Rules were adopted.

In 1938, in the depths of the Depression, we set a default: just grievances should be heard. We recognized that there was a cost to leaving the courthouse door open, but we minimized the cost by creating ways to discern early whether a particular grievance was cognizable at law. *Iqbal* re-sets that default and provides neither empirical nor policy-based support for doing it.

2. Is there statistical data that supports the position that more Rule 12(b)(6) motions to dismiss have been granted post-*Iqbal*?

The one empirical study I know of indicates that after *Twombly* and *Iqbal*, "the odds of a 12(b)(6) motion being granted rather than denied were 1.5 times greater than under *Conley*, holding all other variables constant." Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?* Am. U.L. Rev. (forthcoming) at 2 (*available at* www.ssrn.com). In cases involving constitutional civil rights, the rate of granting such motions increased by 10 percentage points from *Conley* to *Iqbal*. *Id.*

The author cautions that the short time span since *Iqbal* was decided and the relatively small number of cases decided under *Iqbal* counsel circumspection in interpreting data. *Id.* These findings, however, are wholly consistent with anecdotal reports I have received from lawyers representing plaintiffs and with review of a large number of cases in which pleadings appear to suffice under the *Conley* standard but which are problematic under the *Iqbal* standard. In addition to cases cited in my testimony, *see*:

Ojo v. Farmers Group, Inc., No. 06-55522, in which the Ninth Circuit has granted rehearing *en banc*, in part to consider whether this class action alleging racial discrimination in the sale of homeowners' insurance, which previously passed muster, survives under the *Iqbal* standard;

Avenue 6E Investments, et. al. v. City of Yuma, (2:09-cv-00297 JWS, D. Ariz. July 2, 2009) (copy of order granting motion to

dismiss appended), in which a Fair Housing Act disparate impact claim that clearly sufficed under pre-*Iqbal* standards was found, in part, not to have "plausibly" alleged disparate impact.[1]

Ansley v. Fla. Dept. of Rev., 2009 WL 1973548, *2 (N.D. Fla. 2009), in which the plaintiff is criticized, in part, for pleading the "conclusion" that he had a disability, but not the facts that support the conclusion that he had a disability, effectively demanding a revelation of sensitive medical information. The court noted, "These allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not." *Id.*

3. Is a Congressional legislative response to *Ashcroft v. Iqbal* that restores the notice pleading standard to that which was articulated in *Conley v. Gibson* warranted?

Such legislation is necessary to stave off unwarranted dismissals of cases and to re-implement the constitutional values that *Conley* recognized: access to courts is a fundamental right that serves key societal needs, see *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) (access to courts is "the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."); and decisions about plausibility and credibility are the province of juries, not judges. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") Scholars and judges are concerned that summary judgment already is employed inappropriately to wrest cases from jurors. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 600 (Nov. 2004); The Hon. Patricia Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1917 (1998). *Iqbal* exacerbates that trend and circumvents the requirement of the Rules

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[1] The relevant complaint language is as follows:

61. The houses that Hall Companies proposed to build, and still desire to build, on the Subject Property on 6,000 square foot lots could be constructed for a price more affordable to low-moderate income families. Therefore, the project would have an integrative effect by providing Hispanics and other Minorities housing choices outside of the existing Segregated Areas. Conversely, the cost of construction on 8,000 square foot lots would result in a product that could not be afforded by low-moderate income Hispanics. Therefore, the expected racial makeup of purchasers of houses for the Subject Property with 8,000 square foot zoning would be a majority of White families. However, the expected racial makeup of the purchasers with 6,000 square foot zoning would include high percentage of low-moderate income Hispanics and other low-moderate income Minorities. The action of the City Council in denying the Hall Companies request to rezone the Subject Property to 6,000 square foot lots had a disparate discriminatory impact on Hispanics and other Minorities and that action violated the Federal Fair Housing Act

Enabling Act that rules should not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Civil procedure scholars engage in an "angels on the head of a needle" debate about the precise meanings of *Conley, Twombly, and Iqbal,* but condemnation of the plausibility standard of *Iqbal* is overwhelming. *See, e.g.*, Kevin C. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. (forthcoming March 2010), at 1, (*available at* http://ssrn.com/abstract=1448796), (*Twombly* and *Iqbal* "do more than redefine the pleading rules; by inventing a test for the threshold stage of a lawsuit, they have destabilized the entire system of civil litigation."); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 Notre Dame L. Rev. (forthcoming 2010), (*available at* http://ssrn.com/abstract=1467799) (decrying the way Iqbal screens complaints, criticizing the institutional competence of the Supreme Court to make rules of this kind, and suggesting that Congress or the Judicial Conference deal with these issues); Steven B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 Wis. L. Rev. 535 (2009) (writing while *Iqbal* was pending in the Supreme Court, predicting its outcome, and noting that the Supreme Court "is ill-equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings… .")

Whatever flaws the *Conley* standard might be heir to, the relative certainty that it provides is preferable to the effects the *Iqbal* standard is working. Any problems with the *Conley* standard can be addressed in the rulemaking process, free from the knowledge that potentially viable claims, especially civil rights claims, are being aborted under *Iqbal*.

Very truly yours,

John Vail
Vice-President and Senior Litigation Counsel

Encl.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

AVENUE 6E INVESTMENTS, LLC, *et al.*,	)	
Plaintiffs,	)	**2:09-cv-00297 JWS**
vs.	)	**ORDER AND OPINION**
	)	**[Re: Motion at Docket 8]**
CITY OF YUMA, ARIZONA, a municipal corporation,	)	
Defendant.	)	

I. MOTION PRESENTED

At docket 8, defendant City of Yuma moves to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. At docket 14, plaintiffs Avenue 6E Investments, LLC and Saguaro Desert Land, Inc. oppose the motion. Defendant replies at docket 18. Oral argument was requested, but it would not assist the court.

II. BACKGROUND

This action arises from the City of Yuma's denial of a rezoning application for a parcel of land in Yuma, Arizona. The City of Yuma General Plan provides guidelines for the development of housing projects in Yuma. Under Arizona law, all zoning ordinances

must be consistent with the General Plan. The General Plan states that one of its primary goals is to "promote safe, decent, sanitary and affordable housing for all residents."[1] "The General Plan further states that zoning decisions of the City Council shall: (a) encourage affordable housing developments in new areas outside of the existing low-moderate income areas of the City; (b) encourage a variety of housing types to accommodate the various needs of different groups in the community; and (c) enforce State and Federal Fair Housing laws to ensure equal housing opportunities to all regardless of race, ethnicity, color, national origin, religion, sex, disability or familial status."[2]

Avenue 6E Investments, LLC and Saguaro Desert Land, Inc. (jointly "the Hall Companies")[3] are the owners of 42 acres of undeveloped land in the City of Yuma ("the subject property"). Prior to the Hall Companies' purchase of the subject property, KDC of Yuma, LLC ("KDC") owned the property, as well as another 38 acres to the south. KDC applied to rezone the 80-acre parcel from agricultural to R-1-8 (minimum lot size 8,000 square foot). The City Council granted the rezoning application, after which KDC built the Belleza Subdivision with single family homes on large lots on the south 38 acres and sold the remaining 42 acres to the Hall Companies.

In 2005, Perricone Development Group II ("Perricone") acquired the 80-acre parcel adjoining the west boundary of the subject property. Perricone subsequently

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[1]Doc. 1 and p. 4.

[2]*Id.* at pp. 11-12.

[3]The members and stockholders of Avenue 6E Investments, LLC and Saguaro Desert Land, Inc. are brothers Brian L. Hall, Fred T. Hall, and Michael T. Hall.

filed an application to rezone the property to R-1-6 (minimum 6,000 square foot lots). The City Council approved the rezoning application, thereby granting Perricone "the right to build the type of houses that Hall Companies intended to build on the Subject Property."[4] Rezoning the Perricone property left the Hall Companies' property almost completely surrounded by high density tracts. The subject property adjoins land to the north with a 2,500 square foot lot size, land to the east with a 4,500 square foot lot size, and the Perricone property to the west with a 6,000 square foot lot size.[5]

In June 2008, the Hall Companies determined that development of the subject property with R-1-8 zoning was not feasible because there was no demand for large lot expensive homes in Yuma due to existing inventory and the housing market decline. Consequently, the Hall Companies designed a housing project with moderately priced homes on 6,000 square foot lots for low-moderate income families, and submitted an application to the City of Yuma to rezone the subject property from R-1-8 (minimum 8,000 square foot lots) to R-1-6 (minimum 6,000 square foot lots). "The application was reviewed by the City of Yuma Department of Community Development, City Engineers, and Community Planning," who determined that the requested rezoning was consistent with the General Plan and recommended approval of the rezoning application.[6]

On July 14, 2008, the Planning and Zoning Commission held a public hearing on the Hall Companies' rezoning application. Several homeowners from the Belleza

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[4]Doc. 1 at pp. 5-6.

[5]*Id.* at p. 6

[6]*Id.* at p. 7.

Subdivision testified against rezoning, claiming that "when purchasing a home in Belleza they expected to be surrounded for two square miles by large lot expensive homes."[7] The homeowners further claimed that the Hall Companies catered to low-moderate income families and that low-moderate income families would not take care of their homes or landscape and maintain their yards, would own junk cars and park them in the streets, would allow unattended juveniles to roam the streets, would use their homes for multifamily dwellings, and would increase the crime rate in the area.[8] After the hearing, the members of the Planning and Zoning Commission voted unanimously in favor of approving the rezoning request.

On September 17, 2008, the City Council held a hearing on the Hall Companies' rezoning application. Surrounding landowners testified at the hearing, making the same arguments they raised before the Planning and Zoning Commission. The City Council subsequently denied the Hall Companies' rezoning application by adoption of Ordinance No. 02008-35. The Hall Companies allege that the City Council's action "was a final, definitive decision of the City and there exists no adequate state remedy for the violation of Hall Companies[']' rights."[9]

On February 13, 2009, the Hall Companies filed a complaint against the City of Yuma, alleging violations of their equal protection and substantive due process rights under 42 U.S.C. § 1983, claims of discriminatory intent and disparate impact under the

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[7] *Id.* at p. 1.

[8] *Id.* at pp. 7-8.

[9] *Id.* at p. 9.

Federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and violations of Article 2, Section 4 of the Arizona Constitution and the Arizona zoning statute, A.R.S. 9-462.01. The complaint alleges in pertinent part:

> The only basis for the denial was that the project was opposed by a number of neighboring landowners whose motivation was to prevent lower income families from moving into the general area. Because overwhelmingly low-moderate income families in Yuma are Hispanic or persons of color, in the City of Yuma economic segregation is the equivalent to racial discrimination. The City Council's action gave effect to the racial and ethnic bias of the neighboring landowners and thus violated Section 1983 of the Federal Civil Rights Act, 42 U.S.C. 1983 and the Federal Fair Housing Act, 42 U.S.C. 3601. The City Council's action also violated [] Article 2, Section 4 of the Arizona Constitution and the Arizona zoning statute, A.R.S. 9-462.01.[10]

The City of Yuma now moves to dismiss the Hall Companies' complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint.[11] In reviewing a Rule 12(b)(6) motion to dismiss, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."[12] "Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss."[13] A dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable

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[10] *Id.* at pp. 1-2.

[11] *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

[12] *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

[13] *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

legal theory."[14] "To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'"[15] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[17]

IV. DISCUSSION

The City of Yuma moves to dismiss the Hall Companies' claims on the grounds that 1) the federal constitutional claims are not ripe for adjudication because the Hall Companies failed to obtain a final decision on their rezoning request, 2) the Hall Companies do not have standing to bring the claims because they have not suffered an injury in fact, 3) the complaint is speculative and does not state any plausible claim for relief, 4) the City is protected from suit by absolute immunity, and 5) the requested relief is not cognizable.

Standing

"Because the question of whether a particular party has standing to pursue a claim naturally precedes the question of whether that party has successfully stated a

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[14]*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

[15]*Weber v. Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[16]*Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009).

[17]*Id.* (quoting *Twombly*, 550 U.S. at 557).

claim, [the court] address[es] this question first."[18] When standing is challenged on the basis of the pleadings, the court accepts as true all material allegations of the complaint, and construes the complaint in favor of the complaining party.[19] The City of Yuma argues that the Hall Companies do not have standing to bring their federal claims because they have not suffered a cognizable injury and cannot assert the rights of third parties for alleged racial discrimination. The Hall Companies contend that "they have suffered economic injury and monetary damages as result of the City's denial of their rezoning request, which has created a barrier to plaintiffs' construction of their housing project and prevented plaintiffs from developing their property in a reasonable manner."[20] The Hall Companies further argue that they are not attempting to assert the rights of third parties, but have standing in their own right to bring claims under Section 1983 and the FHA.

The Fair Housing Act ("FHA") makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[21] "The Supreme Court has long held that claims brought under the [FHA] are to be judged under a very liberal standing requirement. Unlike actions brought under other provisions of civil rights laws, under

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[18]*Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 371 (9th Cir. 1998).

[19]*Equity Lifestyle Properties, Inc. v. County of San Luis Obispo* , 548 F.3d 1184, 1189 (9th Cir. 2008).

[20]Doc. 14 at p. 16.

[21]42 U.S.C. § 3604(a).

the FHA the plaintiff need not allege that he or she was a victim of discrimination."[22] Rather, "any person harmed by discrimination, whether or not the target of the discrimination, can sue to recover for his or her own injury."[23] "This is true, for example, even where no housing has actually been denied to persons protected under the Act."[24] "[T]he sole requirement for standing under the [FHA] is the Article III minima of injury in fact."[25] "To meet this requirement, a plaintiff need only allege 'that as a result of the defendant's [discriminatory conduct] he has suffered a distinct and palpable injury.'"[26]

Count three of the Hall Companies' complaint, which asserts a claim of discriminatory intent under the FHA, alleges in pertinent part,

> 55. The City Council members who voted in favor of the ordinance denying Hall Companies' requested rezoning acted for the purpose of effectuating the desires of the surrounding landowners. Economic and racial segregation was the motivating factor behind the surrounding landowners desires and the members of the City Council were aware of these motivations.
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> 56. The City Council acted with discriminatory intent in violation of the Federal Fair Housing [a]ct and that action created a barrier to Hall Brothers Companies construction of their affordable housing project and as a result Hall Companies have suffered economic injury.

Count four of the complaint alleges a claim of disparate impact under the FHA and states in pertinent part that "[t]he action of the City Council in denying the Hall Companies request to rezone the Subject Property to 6,000 square foot lots had a

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[22]*Harris v. Itzhaki*, 183 F.3d 1043, 1049-50 (9th Cir. 1999).

[23]*San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998).

[24]*Id.*

[25]*Harris*, 183 F.3d at 1050 (internal quotation and citation omitted).

[26]*Id.*

disparate discriminatory impact on Hispanics and other Minorities and that action violated the [FHA]." The complaint further alleges that the City Council's action "created a barrier to Hall Companies construction of their housing project and as a result Hall Companies have suffered economic injury."[27] Accepting as true all material factual allegations in the complaint and construing the complaint in the Hall Companies' favor, the Hall Companies arguably meet the standing test under the FHA by alleging that the City of Yuma intentionally interfered with the housing rights of Hispanics, and that as a result, the Hall Companies suffered an economic injury.[28]

"Unlike the liberal pleading requirements available under the [FHA], 42 U.S.C. § 1983 requires a plaintiff to show that: (1) the conduct alleged was committed by an individual acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right."[29] Here, the Hall Companies allege that the City of Yuma's adoption of an ordinance denying the Hall Companies' rezoning application violated their rights to equal protection and substantive due process.

Citing *RK Ventures*,[30] the Hall Companies argue that they have standing to bring an equal protection claim under § 1983 for their own injuries caused by their association with members of a protected class. In *RK Ventures*, the Ninth Circuit held that appellants had standing under § 1983 to assert their own equal protection claims because "appellants were the direct targets of the City's alleged racial discrimination

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[27]Doc. 1 at p. 19.

[28]*San Pedro Hotel*, 159 F.3d at 475.

[29]*Id.* at 479 (internal quotation and citation omitted).

[30]307 F.3d 1045 (9th Cir. 2002).

due to their association with their African-American patrons" and the "City's efforts were aimed at forcing appellants to discriminate against members of the protected class."[31]

The Hall Companies' complaint alleges in pertinent part,

> 17. For many years, the Hall Companies have been the largest builder of moderately priced housing in Yuma. A high percentage of Hall Companies's customers in its moderately priced housing projects are Hispanic. Although Hall Companies builds a full range of housing products, some members of the public believe that a Hall Companies' project will attract large numbers of Hispanics.[32]

The complaint further alleges that the City of Yuma intentionally treated the Hall Companies differently than the Perricone Development Group and denied them equal protection of the law and there is no rational basis for such differential treatment. Accepting as true all material allegations of the complaint and construing the complaint in favor of the complaining party, the Hall Companies have standing to bring an equal protection claim under Section1983 for their own injuries caused by their association with members of a protected class.[33]

Ripeness

The City next contends that the Hall Companies' federal constitutional claims are not ripe for adjudication. "[R]ipeness is a question of law which must be determined by the court."[34] "A constitutional challenge to land use regulations is ripe when the developer has received the planning commission's 'final definitive position regarding

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[31]*RK Ventures*, 307 F.3d at 1056.

[32]Doc. 1 at pp. 4-5.

[33]The parties do not address whether the Hall Companies have standing to bring a substantive due process claim under Section 1983.

[34]*Herrington v. County of Sonoma*, 857 F.2d 567, 568 (9th Cir. 1988).

how it will apply the regulations at issue to the particular land in question.'"[35] More specifically, Ninth Circuit case law requires "a final decision by the government which inflicts a concrete harm upon the plaintiff."[36] "A final decision requires at least: '(1) a rejected development plan, and (2) a denial of a variance.'"[37] This same ripeness standard applies to equal protection and substantive due process claims.[38] The Ninth Circuit has recognized a "futility exception" to the final decision requirement under which "the resubmission of a development plan or the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile."[39] Similarly, under Arizona case law, "exhaustion of remedies does not refer to re-application to the same council or board for an alternative form of relief, i.e., application for a variance, from an already promulgated adverse and final decision," especially when such action by plaintiffs would be futile or useless.[40]

The City of Yuma argues that the City Council's denial of the Hall Companies' request for rezoning is not ripe for review because the Hall Companies failed to seek a variance for lot size under Yuma Code of Ordinances § 154-475, or appeal the rezoning

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[35]*Id.* (quoting *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985)).

[36]*Id.*

[37]*Id.* (quoting *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) (internal quotation omitted).

[38]*Id.*

[39]*Kawaoka v. City of Arroya Grande*, 17 F.3d 1227, 1232 (9th Cir. 1994) (quoting *Del Monte Dunes, Ltd. v. Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990)).

[40]*Town of Paradise Valley v. Gulf Leisure Corp.*, 557 P.2d 532, 542 (Ariz. App. 1976).

decision as an unlawful taking under A.R.S. § 9-500.12(A)(2). The Hall Companies argue that the City Council's denial of the rezoning application is final because the City Council is the final decision-maker for the City and the City Council rendered a final decision denying the Hall Companies' rezoning application. The Hall Companies further argue that "[w]hether plaintiffs' application had been characterized as an application for rezoning or for variance, the result is the same: The City made a final determination, denying plaintiffs' application."[41]

The court finds that the Hall Companies' federal constitutional claims are ripe for review because the City Council rejected the Hall Companies' development plan and adopted an ordinance denying the Hall Companies' rezoning application, which amounts to a final decision. Applying for a variance, which essentially seeks the same relief sought in the development plan and rezoning application, would thus appear to be futile. Moreover, the Hall Companies are attacking the constitutionality of an ordinance and thus are not required to exhaust their administrative remedies under Arizona law before seeking judicial relief.[42] "The remedy for attacking the validity of a zoning ordinance is distinguishable from the remedy of securing a variance from a zoning board of adjustment, the former being based on right and entitling a property owner to a

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[41]Doc. 14 at p. 6.

[42]*Manning v. Reilly*, 408 P.2d 414, 416 (Ariz. App. 1965); *Citizens for Orderly Development and Environment v. City of Phoenix*, 540 P.2d 1239, 1240-41 (Ariz. 1975) ("The only proper method for testing the legality or constitutionality of a legislative enactment, be it municipal, county or state, is by judicial review after the enactment and passage of the offending ordinance, resolution or statute.")

court trial on questions of fact while the latter remedy is based on a favor sought and assumes the validity of the ordinance."[43]

Failure to State a Claim

The City of Yuma next argues that the Hall Companies' complaint is speculative and fails to state a claim upon which relief may be granted. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[44] "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.'"[45] Under the Supreme Court's construction of Rule 8 in *Twombly* and *Iqbar*, the court concludes that the Hall Companies' complaint has not nudged their claims of discrimination under Section 1983 and the FHA "across the line from conceivable to plausible."[46]

To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment, the Hall Companies must show that the City of Yuma acted with an intent or purpose to discriminate against the Hall Companies based on their association with members of a protected class.[47] In their equal protection claim under Section 1983, the Hall Companies allege that "the Subject Property was treated

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[43] *Id.*

[44] *Iqbal*, 129 S.Ct. at 1950.

[45] *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

[46] *Id.* at 1950-51 (quoting *Twombly*, 550 U.S. at 570).

[47] *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

differently than the Perricone Property and there is no rational basis for such differential treatment," "[t]he City has arbitrarily and intentionally treated Hall Companies differently from the Perricone Development Group II," and the "Hall Companies' right to sue and development the Subject Property is a protectable property interest and entitled to constitutional protection."[48] These bare assertions "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[49] "As such, the allegations are conclusory and not entitled to be assumed true."[50] Moreover, the Hall Companies' complaint fails to allege that the City of Yuma acted with discriminatory intent.

The court next considers the factual allegations in the Hall Companies' complaint "to determine if they plausibly suggest an entitlement to relief."[51] The complaint alleges that "[a] high percentage of Hall Companies's customers in its moderately priced housing projects are Hispanic," and that "[a]lthough Hall Companies builds a full range of housing products, some members of the public believe that a Hall Companies' project will attract large numbers of Hispanics."[52] While the above allegations support the Hall Companies' association with members of a protected class, the complaint does not contain facts plausibly showing that the City of Yuma denied their rezoning application because of their association with Hispanics. Rather, the complaint alleges that

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[48]Doc. 1 at p. 10.

[49]*Iqbal*, 129 S.Ct. at 1951.

[50]*Id.*

[51]*Id.*

[52]Doc. 1 at p. 5.

members of the City Council "were aware of the potential racial bias against moderately priced subdivisions."[53] Discriminatory purpose implies more than "intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[54] For the above reasons, the Hall Companies have failed to state a claim for violation of the Equal Protection Clause of the Fourteenth Amendment.

"The substantive component of the Due Process Clause forbids the government from depriving a person life, liberty, or property in such a way that . . . interferes with rights implicit in the concept of ordered liberty."[55] To establish a violation of substantive due process, the Hall Companies must establish that the City Council's decision denying their rezoning application was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[56] "Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a 'clear showing of arbitrariness and irrationality.'"[57]

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[53]Doc. 1 at p. 8.

[54]*Lee*, 250 F.3d at 687 (quoting *Navarro v. Block*, 72 F.3d 712, 716 n.5 (9th Cir. 1995)).

[55]*Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 948 (9th Cir. 1996 (en banc).

[56]*Kawaoka*, 17 F.3d at 1234 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

[57]*Id.* (quoting *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)).

A threshold requirement to a substantive due process claim is the plaintiff's showing of a property interest protected by the Constitution.[58] The Ninth Circuit has recognized that landowners have "a constitutionally protected property interest" in their "right to devote [their] land to any legitimate use."[59] "An arbitrary deprivation of that right, thus, may give rise to a viable substantive due process claim in any case in which the Takings Clause does not provide a preclusive cause of action."[60] The Hall Companies do not assert that the City of Yuma has "taken" their property, but rather allege that "[t]he actions of the City Council in adopting the ordinance denying Hall Companies request for 6,000 square foot lots has prevented Hall Companies from developing the Subject Property in a reasonable manner."[61]

The court next considers whether the Hall Companies' complaint has alleged executive action on the City of Yuma's part "that rises to the level of the constitutionally arbitrary."[62] "[T]he 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose."[63] When executive action like a discrete decision on a rezoning application is at issue, "only 'egregious official conduct can be said to be arbitrary in the constitutional sense': it must

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[58]*Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007).

[59]*Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Board*, 509 F.3d 1020, 1026 (9th Cir. 2007) (quoting *Squaw Valley*, 375 F.3d at 949).

[60]*Id.*

[61]Doc. 1 at p.

[62]*Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008).

[63]*Id.*

amount to an 'abuse of power' lacking any 'reasonable justification in the service of a legitimate governmental objective.'"[64]

The conduct the Hall Companies allege falls short of being constitutionally arbitrary. The complaint alleges that the City of Yuma's denial of the Hall Companies' rezoning request "was clearly arbitrary and unreasonable without substantial relation to the public health, safety, morals or general welfare." As the above allegation is conclusory and not entitled to be assumed true, the court next considers the factual allegations in the Hall Companies' complaint "to determine if they plausibly suggest an entitlement to relief."[65] The complaint alleges that the City's action "was intended to satisfy the political pressures exerted by the surrounding landowners and give effect to their bias against low-moderate income Minorities."[66] However, the complaint also alleges that prior to denying the Hall Companies' application to rezone the subject property from R-1-8 to R-1-6, the City Council granted Perricone's application to rezone adjacent property from R-1-8 to R-1-6, thereby granting Perricone "the right to build the type of houses that Hall Companies intended to build on the Subject Property."[67] The complaint further alleges that the City of Yuma adopted the General Plan to advance several objectives, including encouraging a variety of housing types to accommodate

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[64] *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

[65] *Iqbal*, 129 S.Ct. at 1951.

[66] Doc. 1 at pp. 13-14.

[67] *Id.* at pp. 5-6.

the various needs of different groups in the community. The Ninth Circuit has established that this is a legitimate objective.[68]

Based on the facts alleged in the complaint, it is "at least fairly debatable" that the City of Yuma rationally furthered its legitimate interest of facilitating a variety of housing types to accommodate the various needs of different groups in the community by denying the Hall Companies' rezoning application because it had already granted Perricone's rezoning application for the same type of housing. "When reviewing a substantive due process challenge, this suffices."[69] Accordingly, the court rejects "as an erroneous legal conclusion the Hall Companies' assertion that the City of Yuma acted in a constitutionally arbitrary manner and concludes that the Hall Companies have failed to state a substantive due process claim.[70]

The court next considers whether the Hall Companies have stated a claim of discriminatory intent or disparate impact under the FHA. The FHA makes it unlawful to "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . race."[71] The Hall Companies' discriminatory intent claim alleges in pertinent part,

> 55. The City Council members who voted in favor of the ordinance denying Hall Companies' requested rezoning acted for the purpose of effectuating the desires of the surrounding landowners. Economic and racial

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[68]*Kawaoka*, 17 F.3d at 1236.

[69]*Shanks*, 540 F.3d at 1089.

[70]*Id.*

[71]42 U.S.C. § 3604(a).

> segregation was the motivating factor behind the surrounding landowners desires and the members of the City Council were aware of these motivations.[72]

Even assuming this allegation is true and applying the liberal pleading requirements for housing discrimination claims, the Hall Companies have failed to state a claim for discriminatory intent upon which relief can be granted. As discussed above, discriminatory intent implies more than "intent as awareness of consequences."[73] Because the Hall Companies' complaint fails to allege facts sufficient to plausibly suggest the City's discriminatory state of mind, the complaint fails to state a claim of discriminatory intent under the FHA.[74]

To establish a prima facie case of disparate impact under the FHA, plaintiff must show at least that the defendant's actions had a discriminatory effect.[75] The Hall Companies' complaint alleges in pertinent part,

> 61. The houses that Hall Companies proposed to build, and still desire to build, on the Subject Property on 6,000 square foot lots could be constructed for a price more affordable to low-moderate income families. Therefore, the project would have an integrative effect by providing Hispanics and other Minorities housing choices outside of the existing Segregated Areas. Conversely, the cost of construction on 8,000 square foot lots would result in a product that could not be afforded by low-moderate income Hispanics. Therefore, the expected racial makeup of purchasers of houses for the Subject Property with 8,000 square foot zoning would be a majority of White families. However, the expected racial makeup of the purchasers with 6,000 square foot zoning would include high percentage of low-moderate income Hispanics and other low-moderate income Minorities. The action of the City Council in denying the Hall Companies request to rezone the Subject Property to 6,000 square foot lots had a disparate

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[72]Doc. 1 at p. 15.

[73]*Lee*, 250 F.3d at 687 (quoting *Navarro v. Block*, 72 F.3d 712, 716 n.5 (9th Cir. 1995)).

[74]*Iqbal*, 129 S.Ct. at 1952, 1954.

[75]*Affordable Housing Development Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006); *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988).

> discriminatory impact on Hispanics and other Minorities and that action violated the Federal Fair Housing Act.[76]

The above allegations, if true, could suggest the discriminatory impact of the City's zoning decision. However, the complaint also alleges that the City Council approved Perricone's request to rezone the 80=acre parcel adjoining the west boundary of the subject property, giving Perricone "the right to build the type of houses that Hall Companies intended to build on the Subject Property."[77] The complaint further alleges that the parcels to the north and east of the subject property are also zoned for high density use, and that only the parcel to the south of the subject property is zoned R-1-8.[78] Based on the facts alleged in the complaint, most of the property surrounding the subject property is already zoned for high density housing, which the Hall Companies allege is affordable for low-moderate income Hispanics. Under the pleading standards set forth in *Twombly* and *Iqbal*, the Hall Companies' complaint does not contain sufficient factual matter, accepted as true, to state a claim for disparate impact that is plausible on its face.[79] Moreover, the Hall Companies have failed to plead factual content that allows the court to infer more than the mere possibility of misconduct by the City.[80] Accordingly, the court concludes that the Hall Companies' complaint fails to plead sufficient facts to state a claim for disparate impact under the FHA. Because the

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[76]Doc. 1 at p. 19.

[77]*Id.* at pp. 5-6.

[78]*Id.* at p. 6.

[79]*Twombly*, 550 U.S. at 570.

[80]*Iqbal*, 129 S.Ct. at 1950.

complaint fails to state claims upon which relief may be granted under Section 1983 and the FHA, the court will grant the City of Yuma's motion to dismiss as to the Hall Companies' federal claims and will dismiss those claims without prejudice.

Having dismissed the Hall Companies' federal claims over which the court has original jurisdiction, the court declines to exercise supplemental jurisdiction over the Hall Companies' state law claims pursuant to 28 U.S.C. § 1367(c)(3). Accordingly, the court will also dismiss the Hall Companies' state law claims without prejudice.

V. CONCLUSION

For the reasons set out above, defendant's motion to dismiss at docket 8 is **GRANTED**, and plaintiffs' claims are **DISMISSED** without prejudice. The Clerk will please enter judgment accordingly.

DATED at Anchorage, Alaska, this 2nd day of July 2009.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

December 1, 2009

Hon. Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary
Attention: Matthew Morgan
B-353 Rayburn House Office Building
Washington, DC 20515

Re: Access to Justice Denied: *Ashcroft v. Iqbal*; Responses to supplemental questions

Dear Chairman Nadler:

Thank you for the opportunity to testify before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties at its October 27, 2009 hearing on *Access to Justice Denied: Ashcroft v. Iqbal*.

Attached are my written responses to the additional questions posed by the Committee.

Cordially,

Debo P. Adegbile /s/

Debo P. Adegbile
Director of Litigation
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013

Responses to Supplemental Questions

1) How do you respond to arguments that the decision in *Ashcroft v. Iqbal* was necessary to weed out weak or frivolous lawsuits and is a much needed standard that will reduce federal court caseloads?

The heightened pleading standard imposed by *Ashcroft v. Iqbal*[1] and its predecessor *Bell Atlantic Corp. v. Twombly*[2] is the wrong approach to address any demonstrated problem with respect to federal court caseloads and frivolous lawsuits. First, a heightened pleading standard comes at the expense of a key pillar of our democracy: the guarantee of ready access to the courts for individuals to litigate meritorious but often difficult to prove claims. As I explained in my written testimony, *Iqbal* and *Twombly* will have the most significant ramifications in cases where it is hard to know whether the allegations contained in the complaint have merit without at least some limited discovery. For instance, in many civil rights cases much of the key information necessary to prove racial discrimination is in the sole possession of the alleged wrongdoers. Moreover, where discriminatory intent is an element of a claim, it is often impossible to establish state-of-mind without non-public documents and/or depositions.

Second, the new plausibility standard, even on its most favorable reading, overcorrects for concerns about the burdens that may be imposed on defendants when a district court denies a motion to dismiss and permits potential victims of discrimination to obtain discovery. Last month, the Federal Judicial Center published the preliminary results of an extensive attorney survey, in which a majority of the respondents reported that costs of discovery were the "right amount" in proportion to their clients' stakes in the case, and that such costs had "no effect" on the likelihood of settlement.[3] It should also be noted that the costs of discovery in high-stakes cases can be affected by delay or obstructionist tactics on the part of defendants. Eliminating the opportunity for discovery does not address this issue.

Third, federal judges have always proven quite capable of dealing efficiently and effectively with frivolous lawsuits through robust case management. *Iqbal* and *Twombly* deprive federal courts of the flexibility to allow potentially meritorious claims to proceed because they require an all-or-nothing decision at the pleading stage. By contrast, effective use of case management tools permits district courts to provide protection for defendants while allowing plaintiffs some discovery to facilitate assessment of the merits of their claims. For instance, Justice Breyer noted in his *Iqbal* dissent that phased discovery could have addressed concerns about excessive burdens on the former U.S. Attorney General and FBI Director, who were defendants in that case: the district court initially could have restricted discovery to lower-level government defendants and then subsequently determined, based on the material that the plaintiff obtained, whether there were sufficient grounds to warrant discovery from high-level defendants.[4]

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[1] 129 S. Ct. 1937 (2009).

[2] 550 U.S. 544 (2007).

[3] Federal Judicial Center, National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Oct. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

[4] 129 S. Ct. at 1961-62 (Breyer, J., dissenting).

2) Is there statistical data that supports the position that more 12(b)(6) motions to dismiss have been granted post-*Iqbal*?

Although *Iqbal* was decided less than seven months ago, it is evident from the initial data, anecdotal evidence from practitioners, and my own monitoring of decisions that this case and its predecessor *Twombly* are impeding litigants from pursuing serious allegations of civil rights violations. For example, in my written testimony, I cited the first of what I suspect will be numerous empirical assessments of *Iqbal*'s impact. Based on a survey of over 1,000 cases decided between 2005 and 2009, Professor Patricia Hatamyar concluded that, holding other variables constant, the odds of a district court granting a motion to dismiss after *Twombly* and *Iqbal* were 1.5 times greater than under the liberal "fair notice" pleading standard that those cases superseded.[5] In constitutional civil rights cases, the impact was particularly dramatic. Prior to *Twombly*, the rate at which motions to dismiss were granted in such cases was already high (50%). Post-*Twombly* but pre-*Iqbal*, the rate increased five percentage points. And post-*Iqbal*, the rate has already increased another five percentage points.

In my written testimony, I also cited another empirical study authored by Professor Joseph Seiner. This study demonstrated that, even before *Iqbal* was decided, *Twombly* had prompted an upsurge of dismissals of employment discrimination claims.[6] This increase was particularly remarkable considering that *Twombly* affirmed the continuing vitality of *Swierkiewicz v. Sorema N.A.*, a 2002 case in which the Supreme Court expressly rejected a heightened pleading standard for employment discrimination cases.[7]

It would be a mistake, however, to focus solely on statistical data regarding the success or failure of motions to dismiss. To understand the full implications of *Iqbal* and *Twombly*, we need to look at the extreme malleability of the newly announced plausibility standard. Reasonable judges could have differing views about the plausibility of any given complaint based upon their life experience. Evidence, that is the facts that can be gained through the discovery process, effectively acts as a useful check on untethered judicial assessments of plausibility. In addition, we must consider changes in litigants' behavior. Defense lawyers have not been shy about portraying *Iqbal* and *Twombly* as extremely favorable decisions for their clients, and there is anecdotal evidence that defendants have become increasingly vigorous in their filing of motions to dismiss.[8] Thus, *Iqbal* and *Twombly* will likely require plaintiffs to expend far more time and resources crafting their complaints. And when, as is all too common in civil rights cases, critical information is within the exclusive possession of the defendant, a victim of discrimination may be deterred from filing suit in the first place—thus preventing any redress for constitutional wrongdoing.

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[5] Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?* forthcoming, American University Law Review, draft of Oct. 12, 2009, *available at* www.ssrn.com.

[6] Joseph Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1001 (2009).

[7] 534 U.S. 506 (2002).

[8] *See, e.g.*, Ashby Jones, *Why Defense Lawyers Are Lovin' the Iqbal Decision*, Law Blog, WALL STREET J., May 19, 2009, *available at* http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision.

3) Is a Congressional legislative response to *Ashcroft v. Iqbal* that restores the notice pleading standard to that which was articulated in *Conley v. Gibson* warranted?

Yes. LDF urges Congress to pass legislation to restore the liberal "fair notice" pleading standard that was firmly in place for over fifty years prior to the Supreme Court's recent decisions in *Iqbal* and *Twombly*. As the Court unanimously recognized in *Conley v. Gibson*, the Federal Rules of Civil Procedure have never permitted—at least prior to *Iqbal* and *Twombly*—civil rights violators to inoculate themselves from charges of discrimination through pleading gymnastics: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[9]

Decided in 1957, *Conley* was in its own right a seminal civil rights case that contributed to eradicating this nation's long history of racial apartheid. In *Iqbal* and *Twombly*, the Supreme Court failed to recognize *Conley*'s history and ignored that its liberal pleading standard was one of the key reasons why our nation has made so much progress in the civil rights arena. Thus, *Iqbal* and *Twombly* imperil the progress that is fostered by vigorous enforcement of civil rights.

[9] 355 U.S. 41, 48 (1957).

Questions for Gregory Katsas from Ranking Member F. James Sensenbrenner, Jr.

1. Professor Miller testified that *Iqbal* has substantially changed the rules for pleading claims of illegal discrimination. Do you agree?

Answer: I disagree. As explained in my written statement, Judge Mark Kravitz, the Chairman of the Civil Rules Committee, reports that judges are "'taking a fairly nuanced view of *Iqbal*,'" which has *not* proven to be "'a blockbuster that gets rid of any case that is filed.'" See National Law Journal, Plaintiffs' Groups Mount Effort to Undo *Iqbal* (Sept. 21, 2009) (quoting Judge Kravitz). More recently, John Rabiej, head of the support office for the Civil Rules Committee, has confirmed the point. Mr. Rabiej reports that data from thousands of cases – which show only a nominal increase in the number of motions to dismiss filed and granted since *Iqbal* was decided, even while the total number of civil cases filed continues to rise – indicate that *Iqbal* has had "little or no impact" in the adjudication of motions to dismiss. See Business Insurance, Congress Eyes Pleading Standard (Nov. 9, 2009). Professor Miller's view is thus inconsistent with the data observed to date.

In his written testimony and at the hearing, Professor Miller suggested that *Iqbal* had implicitly overruled *Swierkiewicz* v. *Sorema*, 534 U.S. 506 (2002), which addressed pleading standards in the context of claims for illegal discrimination. That is incorrect. One court of appeals has stated that *Iqbal* limited *Swierkiewicz*, but only insofar as *Swierkiewicz* had invoked the "no set of facts" statement from *Conley* v. *Gibson*, 355 U.S. 41 (1957). See *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). As explained in my written testimony, that statement from *Conley* has never been read literally, cannot be literally true, and was repudiated by seven Justices in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 244 (2007). Moreover, following *Iqbal*, another court of appeals has cited *Swierkiewicz* as still good law for the proposition that federal pleading standards reflect "a liberal pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks* v. *Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz*, 534 U.S. 506, 514 (2002)). And the district courts continue to rely on *Swierkiewicz* routinely in adjudicating motions to dismiss, including in a handful of cases decided within the last two weeks. See, *e.g.*, *Orozco* v. *City of Murfreensboro*, 2009 WL 4042586, *3 (M.D. Tenn. Nov. 19, 2009) (claim of unlawful discrimination under Title VII) ("[c]onstruing the *Iqbal* standard together with *Swierkiewicz*"); *Belk* v. *Hubbard*, 2009 WL 3839477, *2 (E.D. Tenn. Nov. 16, 2009) (claim of unconstitutional discrimination under Equal Protection Clause) ("In deciding a motion to dismiss, the question is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his claims." (citing *Swierkiewicz*, 534 U.S. at 511)); *Queen* v. *Patel*, 2009 WL 4018580, *1 (D. Md. Nov. 16, 2009) (constitutional claim under Due Process Clause) (complaint need only "meet the 'simplified pleading standard' of Rule 8(a)(2)" (quoting *Swierkiewicz*, 534 U.S. at 513)).

2. Mr. Vail testified that the costs of civil litigation are usually modest. Do you agree?

Answer: I disagree, particularly with respect to complex litigation. In my experience, litigation costs for complex cases routinely run into the hundreds of thousands of dollars, often run into the millions of dollars, and sometimes run even higher. Moreover, litigation costs are

rapidly increasing given the problems associated with discovery of electronic records, which now account for the vast bulk of discoverable information, as explained in my written testimony.

My views are shared by the American College of Trial Lawyers. According to the College, "[e]specially when combined with notice pleading, discovery is very expensive and time consuming and easily permits substantial abuse." Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System at 8 (March 11, 2009). See also *id.* at 2 ("Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."); *id.* ("discovery can cost far too much and become an end in itself"); *id.* ("Electronic discovery, in particular, needs a serious overhaul.").

Other respected commentators agree. See, *e.g.*, Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, comment 2(b) (2005) ("Electronic discovery burdens must be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation."); Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L.J. 560, 560 (2001) ("the burdens of electronic discovery are likely to be substantially more severe than those involved in traditional litigation"); Institute for the Advancement of the American Legal System, Electronic Discovery: A View from the Front Lines 25 (2008) (noting average e-discovery cost of $3.5 million).

I recognize that discovery and other litigation costs may be lower for small or simple cases. Nonetheless, even the preliminary report cited by Mr. Vail, which surveys mainly solo practitioners and lawyers in small firms, notes median discovery costs in the tens of thousands of dollars – hardly an insignificant amount. See Federal Judicial Center National, Case-based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules at 2, 79 (Oct. 2009). And subjecting an individual to tens of thousands of dollars of litigation costs in a small case may be no less burdensome than subjecting a corporation to tens of millions of dollars of litigation costs in a complex antitrust case. In neither situation is the imposition warranted unless the plaintiff, at the outset, can allege some facts supporting a reasonable inference of liability.

3. Professor Miller and Mr. Vail have suggested that *Twombly* and *Iqbal* raise constitutional concerns. Do you agree?

Answer: I disagree. In *Tellabs* v. *Makor Issue & Rights*, 551 U.S. 308 (2007), the Supreme Court upheld the constitutionality of the heightened pleading rules imposed by the Private Securities Litigation Reform Act ("PSLRA"), which are even more onerous than the heightened pleading rules under Rule 9 of the Federal Rules of Civil Procedure. In so doing, the Court found it "plain" that the PSLRA pleading standard "does not violate the Seventh Amendment right to jury trial." *Id.* at 327. As the Court explained, in "numerous contexts" such as summary judgment, judgment as a matter of law, and exclusion of unreliable evidence,

"gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment." *Id.* at 327 n.8. See also *Galloway* v. *United States*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."); *Walker* v. *New Mexico & Southern Pacific Railroad*, 165 U.S. 593, 596 (1897) (Seventh Amendment "does not attempt to regulate matters of pleading"). Moreover, the Seventh Amendment, which by its terms applies only to "Suits at common law," preserves the right to a jury trial "as it existed under the English common law when the amendment was adopted." *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446-48 (1830). At common law, both in England and in the United States prior to the adoption of the Federal Rules of Civil Procedure in 1938, pleading rules were notoriously strict, see, *e.g.*, *Twombly*, 550 U.S. at 573-76 (Stevens, J., dissenting), and there was *no* right to discovery even for well-pleaded claims. The pleading standards confirmed in *Twombly* and *Iqbal* are less rigorous than those used for centuries at common law, and less rigorous than those upheld in *Tellabs*. Accordingly, they are plainly constitutional.

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November 10, 2009

Committee on the Judiciary
Attn: Matthew Morgan
B353 Rayburn House Office Building
Washington, DC 20515

Re: Testimony in hearing, Access to Justice Denied: *Ashcroft v. Iqbal*

Dear Mr. Morgan:

I have received the verbatim transcript of the hearing and would like to clarify my response at page 36, line 742, as I am uncertain that my simple "Yes" is clear in context.

My full response is, "Yes, I believe that the committee should restore the old rule by legislation, but I think the committee should leave in place the capacity of the Judicial Conference to consider and to propose, through the regular processes of the Rules Enabling Act, future changes to the relevant rules."

Thank you for this opportunity to clarify.

Very truly yours,

John Vail
Vice President and Senior Litigation Counsel

*See footnote, page 94 for clarification of this letter.

Opening Statement

Twombly and *Iqbal*: A License to Dismiss

by Robert L. Rothman
Chair, Section of Litigation

For 50 years, decisions on motions to dismiss for failure to state a claim were a fairly simple matter in federal court.

They were, by and large, denied.

Rarely was a motion to dismiss granted under Federal Rule of Civil Procedure 12(b)(6) in light of the famous admonition in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), 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 that would entitle him to relief."

Then, the U.S. Supreme Court decided *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), in which it discarded the oft-cited "no set of facts" standard. "[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement." Those words have proved to be a bit unfortunate because, in the two years or so since *Twombly* was decided, it appears to have caused more than its own share of confusion as litigators and judges have struggled with the meaning and scope of the opinion.

Did the Court intend to create a heightened standard? If so, would it apply only in antitrust cases such as *Twombly*, or to any complex litigation case? Or was it meant to be applied in all civil cases? With the Court's recent decision in *Ashcroft v. Iqbal*, 2009 WL 1361536 (U.S.), we have some answers, even more questions, and, at a minimum, it seems fair to conclude that *Conley* is not merely retired, it is dead and buried. Of particular note is the fact that the 5-4 majority in *Iqbal* did not include the author of the *Twombly* decision, retiring Justice David Souter, who wrote a dissent criticizing the majority for taking the holding in *Twombly* far beyond its original intent.

In *Twombly*, the Court was not so much concerned with the niceties of the pleading standard as it was with restricting access to the keys to the discovery kingdom. For with those keys comes the power to impose huge costs, both in terms of dollars and time, on the defendant. So imposing are those costs, the Court noted in *Twombly*, that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." 550 U.S. at ___.

To remedy the problem it perceived of defendants being subjected to costly discovery based on marginal pleadings, the Court took an indirect approach—stop the offenders at the discovery gate—rather than trying to deal with the discovery process itself. Somewhat surprisingly, in *Twombly* the Court imposed a more fact-based pleading requirement on an antitrust class action plaintiff only after acknowledging that district court judges have been largely unsuccessful at controlling discovery through case management.

Iqbal arises in a very different context but also involves the intersection of pleading and discovery. In *Iqbal*, the Court's concern was not so much with the financial costs of discovery as it was with allowing a lawsuit to divert the attention of two of the nation's top government officials—the attorney general and the FBI director—from their official duties. So instead of discussing, as it did in *Twombly*, the risk of parties capitulating to unreasonable settlements rather than spending large amounts of time and money defending the action, here the Court focused on the qualified-immunity doctrine's goal of "free[ing] officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" 2009 WL 1361536 at 15.

But *Iqbal* differed from *Twombly* in yet another important way. Even after dividing the allegations in the complaint into allegations of law and fact, disregarding the former and parsing the latter, the Court could not say that, taken as true, the factual allegations failed to set forth the basis for a claim. So under the guise of explaining the concept of "plausibility" first announced in *Twombly*, the Court imposed a gatekeeper-type duty

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on the district court that applies even if the allegations of the complaint are well pleaded and thus assumed to be true.

This is where *Iqbal* drastically changed the landscape for Rule 12(b)(6) motions. The Court described the gatekeeper process as "a context-specific task that requires the reviewing court to *draw on its judicial experience and common sense*." *Id.* at 13 (emphasis added). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* Then, in a particularly troubling sentence, the Court suggests that a complaint must not only be consistent with the claim asserted, but must also exclude "more likely explanations." *Id.* at 14.

What, exactly, does that mean? At a minimum, it appears to be a standard that invites district court judges to dismiss cases based on their own subjective notions of what is *probably* true—a determination that apparently can be made based on events outside the four corners of the complaint. For example, in *Iqbal*, the plaintiff—a Pakistani Muslim—sued numerous government officials asserting violation of various constitutional rights, alleging that, following the events of September 11, 2001, he was classified as a "high interest" detainee and held in extremely harsh conditions as a matter of policy based "solely on account of [his] religion, race, and/or national origin, and for no legitimate penological reason." *Id.* at 14. Although conceding his allegations, taken as true, are consistent with his theory of being classified as "of high interest" based on race, religion or national origin, the Court nonetheless found Iqbal's allegations of discriminatory treatment implausible:

> It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, *even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent* to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

Id. at 15 (emphasis added).

Of course, Iqbal did not ask the Supreme Court to "infer" anything. He merely sought to have the allegations in his complaint taken as true for purposes of the motion to dismiss so that the case could move forward with discovery and proceed to trial.

Instead, based on the majority's subjective determination of the "purpose" of the government's policy, as well as the "likely" lawfulness of the conduct at issue and "non-discriminatory intent" of FBI Director Robert Mueller, *Iqbal* was tossed out of court.

Perhaps the majority's pleading stage findings were factually correct. Perhaps not. Perhaps *Iqbal* is best explained as a result driven by the majority's stated goal of supporting the qualified immunity defense, designed to "free officials from the concerns of litigation, including 'avoidance of disruptive discovery,'" particularly in the context of those decisions made in the heat of post-9/11 fears and emotions. *Id.*

But here's the problem. The approach taken by the Court has broad and potentially far-reaching application—well beyond claims based on deprivation of constitutional rights related to post-9/11 governmental actions—because the *Iqbal* Court clarified that *Twombly* was intended to apply to all civil actions, not just complex cases such as the alleged concerted action antitrust claims asserted in *Twombly*, which impose huge discovery expenses on the defendant.

Thus, *Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success. This is so notwithstanding a complaint containing well-pled factual allegations that, if allowed to proceed to discovery and proved true at trial, would authorize a jury to return a verdict in the plaintiff's favor.

Compounding the problem is the *Iqbal* Court's decision expressly rejecting the notion that district courts may allow a limited amount of discovery to go forward

for cases on the margins of plausibility, instead taking a strict view that there is no right to any discovery if the complaint fails to meet the new plausibility requirement of Rule 8. In so holding, the Court rejected the approach suggested by the Second Circuit in *Iqbal*, which encouraged use by the district court of "discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in the challenged conduct." *Iqbal*, 490 F.3d at 158.

The Eleventh Circuit took a similar approach pre-*Iqbal* when it reversed an order granting a motion to dismiss for failure to state a claim by finding the complaint "at least arguably allege[s]" the basis for the plaintiff's claim and further noting that, "at the pleading stage, [the plaintiff] could not possibly have had access to the inside [defendant] information necessary to prove conclusively—or even plead with greater specificity—the factual basis" for its claim. *United Technologies Corp. v. Mazer*, 2009 WL 263329 *6 (11th Cir. 2009). Without such an approach, dismissal becomes far more likely, especially in cases involving facts generally not available to plaintiffs without discovery, such as evidence of fraudulent concealment or of concerted antitrust conduct.

Strikingly, in his dissent, Justice Souter characterized the 5-4 majority opinion as "bespeak[ing] a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true." *Id.* at 22. To the contrary, Souter says, *Twombly* requires that the court "must take the allegations as true, no matter how skeptical the court may be." The only exception is where the factual allegations "are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here." *Id.*

The holdings in *Twombly* and *Iqbal* present some significant challenges for our civil justice system as it wrestles with the parameters of the plausibility determination. But the real question we should be asking is whether those opinions represent a reasonable approach to dealing with a very complex issue—the burden and expense of discovery in complex litigation—or whether the civil justice system would be best served by reexamining the rules of pleading and discovery, as well as the case management powers under which the district courts now supervise the process, in context with each other, in order to find a comprehensive solution.

Indeed, the Supreme Court's summary rejection of the proposition that district judges can effectively weed out groundless claims through careful case management is not so much a criticism of district court judges as it is an acknowledgement of a systemic failure to provide a mechanism for alternative, innovative, and comprehensive approaches to pleading, discovery, and case management that might avoid the high price imposed in *Twombly* and *Iqbal*, (i.e., compelling early dismissal of potentially valid claims).

Surely, there is not a need for full-bore, no-holds-barred discovery in every case and by every party to reach a point at which a more time-efficient, cost-efficient, and merit-based disposition of cases (including the possibility of summary judgment or a reasonable settlement) than is now possible. The first step should be a more thorough examination of the extent to which discovery is being abused. That could be followed by a dialogue to explore innovative solutions to whatever problems can be documented by more than the anecdotal horror stories that we all have heard about, witnessed, or had visited upon us, but which—from a neutral perspective rather than the subjective view of the disgruntled litigant—may or may not represent the norm in our civil justice system.

The Section of Litigation is undertaking just such an effort. Together with the Federal Judicial Center, the Section is engaged in a survey of its members that will follow a similar survey conducted by a joint project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System at the University of Denver.

The final report of the joint project, released in March 2009, called for substantial and dramatic changes in the discovery process, noting that "[D]iscovery can cost far too much and can become an end in itself. As one respondent noted: 'The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else.'" The report also suggested that judges need to become much more active in designing and enforcing discovery guidelines early in a case. Notably, approximately 75 percent of the attorneys who responded to this survey had a defense orientation, with 31 percent representing defendants exclusively and another 44 percent representing both sides, but primarily defendants. Twenty-four percent of the respondents indicated they represent plaintiffs exclusively.

A survey of Section of Litigation members by the Federal Judicial Center would broaden the base of respondents and thus provide additional empirical evidence of the scope of the issues that may need to be addressed. At the same time, the Civil Rules Advisory Committee of the Judicial Conference is planning a major conference on civil litigation in federal courts for the spring of 2010 to examine pretrial costs, burdens, and delays. It is expected that the conference will consider possible rules and other changes to the civil justice system. The Section of Litigation likewise has been invited to participate in planning for this conference.

Thus, while *Twombly* represented an attempt to deal with abusive discovery, the confusion of the lower courts since that case was decided—and the Supreme Court's response in *Iqbal* of turning district court judges into ill-defined "common sense" gatekeepers of probable truth—demonstrates that a quick fix is not likely to be found merely through an adjustment to the pleading requirements. Indeed, any serious effort to craft a solution must include evaluating and balancing the legitimate needs of plaintiffs and defendants and allowing for consideration of alternative approaches to pleading, discovery, case management, and case-resolution mechanisms that might look considerably different from our current one-size-fits-all approach to civil litigation. Fortunately, it appears that significant efforts are underway to evaluate those options. ⌊

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THE TROUBLE WITH *TWOMBLY*: A PROPOSED PLEADING STANDARD FOR EMPLOYMENT DISCRIMINATION CASES

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THE TROUBLE WITH *TWOMBLY*: A PROPOSED PLEADING STANDARD FOR EMPLOYMENT DISCRIMINATION CASES

*Joseph A. Seiner**

Amorphous. *This is how the Supreme Court's recent pleading paradigm has been appropriately described. In* Bell Atlantic Corp. v. Twombly, *the Supreme Court abandoned the well-known pleading standard it had adopted fifty years earlier in* Conley v. Gibson *that a complaint should be dismissed only where there is no set of facts that could entitle the plaintiff to relief. In its place, the Court adopted a new rule that the pleadings must set forth sufficient facts to state a plausible claim. Though* Twombly *arose in the context of an antitrust case, its holding has already been extended by the lower courts to other areas of the law. The extent to which* Twombly *creates a new pleading standard for employment discrimination plaintiffs is unclear, and there is already disagreement among the judiciary over this question. If applied rigidly,* Twombly *threatens to raise the bar for civil rights litigants seeking to plead their claims.*

This Article attempts to determine how strictly the courts have been applying Twombly *to employment discrimination plaintiffs by examining the dismissal rates of employment discrimination cases in the year before and the year following* Twombly. *The results revealed a higher percentage of decisions that granted a motion to dismiss in the employment context when the courts cited the new Supreme Court decision. Through individual examination of these cases, this Article argues that the courts should be more cautious when using the plausi-*

* Joseph Seiner is an Assistant Professor at the University of South Carolina School of Law. The author would like to thank James Flanagan, Benjamin Gutman, and Daniel Vail for their generous assistance with this Article. The author would also like to thank Joe Cecil and the Federal Judicial Center for their assistance in gathering the data related to summary judgment motions discussed in this Article. The author also acknowledges the loving support of his wife, Megan, which made this Article possible. Finally, the author would like to dedicate this Article to his parents, Stephen and Alice Seiner, who, as they celebrate fifty years of marriage this year, have been a source of endless support and guidance. Any errors, miscalculations, or misrepresentations are strictly those of the author.

bility standard to dismiss discrimination claims early in the proceedings.

To help resolve the current confusion in this area of the law, this Article proposes a new pleading framework for all employment discrimination cases, which complies with the recent plausibility standard set forth by the Supreme Court. The unified model proposed by this Article would bring more certainty to the pleading process and assist the courts and litigants in assessing the sufficiency of employment claims. This Article concludes by explaining how the proposed pleading framework comports with the legal scholarship following the Twombly *decision.*

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"I'm just wondering where the Supreme Court is pointing the possession arrow on us right now."

—Judge for the Court of Appeals for the Seventh Circuit questioning at oral argument whether *Twombly* abrogated the circuit's pleading jurisprudence.[1]

I. INTRODUCTION

Former Vice President Hubert H. Humphrey once stated that "[t]he right to be heard does not automatically include the right to be taken seriously."[2] And so it is with victims of employment discrimination. Though Title VII of the Civil Rights Act of 1964 (Title VII) provides redress to those who are discriminated against in the workplace because of their race, sex, gender, national origin, or religion,[3] these victims often face an uphill battle in having their claims taken seriously in the federal court system. That battle may have just become even more difficult.

The Supreme Court recently announced a new standard for pleading under the Federal Rules of Civil Procedure in *Bell Atlantic Corp. v. Twombly*.[4] In doing so, the Court "retire[d]"[5] the standard it had announced fifty years earlier in *Conley v. Gibson*[6] that a complaint should not be dismissed unless the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief."[7] In its place, the Court adopted a new rule that to survive a motion to dismiss, a plaintiff must set forth in the complaint "enough facts to state a claim to relief that is

1. Audio Recording of Oral Argument, EEOC v. Concentra, 496 F.3d 773 (7th Cir. 2007) (No. 06-3436), *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=06-3436&submit=showdkt&yr=06&num=3436. These comments were made only four days after the Supreme Court's *Twombly* decision. *Id.*

2. Paul Healey, *De Minimus Curat Lex: A Compendium of Legal Trivia*, 89 LAW LIBR. J. 55, 84 (1997).

3. *See* 42 U.S.C. § 2000e-e-17 (2006).

4. 127 S. Ct. 1955 (2007). While this Article was in the process of going to print, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, No. 07-1015 (U.S. May 18, 2009), http://www.supremecourtus.gov/opinions/08pdf/07-1015.pdf. *Iqbal* confirms that the plausibility standard announced in *Twombly* applies to "all civil actions," *id.* at 20, but did not otherwise alter the *Twombly* standard. Further analysis of the impact of *Iqbal* on employment discrimination cases will be warranted, but the proposed pleading framework set forth in this Article should remain valid even after *Iqbal*.

5. *Twombly*, 127 S. Ct. at 1969.

6. 355 U.S. 41 (1957).

7. *Id.* at 45–46.

plausible on its face."[8] The change is significant in that it potentially raises the bar for the specificity with which a complaint must be alleged. Though only a year old, *Twombly* has already generated significant debate in both the federal courts and legal scholarship over the appropriate pleading standards under the Federal Rules.[9] Indeed, the decision has already been cited thousands of times.[10]

Twombly arose in the context of complex antitrust litigation.[11] The decision, however, has been extended beyond this sphere into other areas of the law.[12] The extent to which the Supreme Court's plausibility framework will apply to employment discrimination complaints is not completely known,[13] and there is already disagreement in the judiciary over the impact of the Supreme Court's decision on Title VII litigation.[14] If applied too rigidly, *Twombly* would significantly raise the bar for victims of employment discrimination and potentially result in numerous meritorious claims being prevented from proceeding to discovery.[15]

As the Supreme Court's plausibility standard for federal pleadings has been in place for over a year, enough data are now available to perform an analysis of the impact of the decision on employment discrimination cases. With this goal in mind, I conducted a search of all federal district court decisions issued the year before and the year after *Twombly* that addressed a motion to dismiss in the context of a Title VII case. The study examined those federal district court decisions issued the year prior to *Twombly* that relied on the *Conley* decision, as well as those decisions issued the year following *Twombly* that relied on the new Supreme Court decision. A total of 532 opinions were analyzed as part of this study, and the results demonstrated a higher percentage of decisions that granted a motion to dismiss in the Title VII context when the courts relied on *Twombly*. The data are further illuminated by individual examination of the decisions, which revealed that the lower courts are unquestionably using the new plausibility standard to dismiss Title VII claims.

Perhaps even more problematic is that employment discrimination litigants are already having a difficult time getting their claims before a

8. *Twombly*, 127 S. Ct. at 1974 (emphasis added).

9. *See* discussion *infra* Parts V, VII (discussing the approach of federal courts and legal scholarship in light of the *Twombly* decision).

10. To find cases citing *Twombly*, 127 S. Ct. 1955, I ran a Westlaw KeyCite search of the case on February 4, 2009.

11. *See Twombly*, 127 S. Ct. at 1961.

12. *See* discussion *infra* Parts V, VII (discussing the approach federal courts have taken to *Twombly* and the views of academic scholarship).

13. *See, e.g.*, Wilkerson v. New Media Tech. Charter Sch., 522 F.3d 315, 321 (3d Cir. 2008) ("[T]he exact parameters of the *Twombly* decision are not yet known . . . .").

14. *See* discussion *infra* Part V.B (discussing the approaches of the Third Circuit and Seventh Circuit after *Twombly*).

15. *See* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 158–61 (2008) (arguing that an overly rigid approach to civil rights claims after *Twombly* may prevent valid cases from proceeding).

jury. With the assistance of researchers at the Federal Judicial Center (FJC), I was able to attain further data on the success rates of employment discrimination plaintiffs when faced with a motion for summary judgment filed by the defendants. The results of this analysis revealed that over 80 percent of defendants' motions for summary judgment in employment discrimination cases are either granted or granted-in-part when decided by the district court.[16] Thus, even when Title VII plaintiffs are permitted to engage in discovery, there is still a substantial likelihood that their claims will fail to make it to trial.

Given the difficulty employment discrimination litigants already face in having their claims heard, this Article proposes that the courts should exercise great caution before applying *Twombly* too rigidly. One way of avoiding rigid pleading requirements while still complying with Supreme Court case law is for the courts to adopt a uniform framework for analyzing the sufficiency of Title VII complaints. A uniform system would clarify the confusion created over the pleading requirements and permit plaintiffs to easily understand what facts must be set forth in the complaint. *Twombly*'s plausibility standard has appropriately been called "amorphous,"[17] and more certainty is needed in this area of the law to provide guidance to the parties and the courts.[18]

This Article attempts to answer the question of what facts are necessary to establish a plausible claim of employment discrimination, and proposes a pleading framework that could be used by the courts to analyze the sufficiency of all Title VII complaints. I am aware of no explicit rules or requirements for employment discrimination plaintiffs to follow when pleading their claims. It is time for a uniform approach to be established so that the parties may easily weigh the facts set forth in a complaint against a single consistent standard. Such a framework would save the courts and litigants significant judicial resources by avoiding unnecessary disputes over the sufficiency of a complaint. At this early stage of the proceedings, it should be far simpler to determine whether the case should be permitted to proceed.

This Article begins by analyzing the history of the motion to dismiss and its application to employment discrimination litigation. The Article then analyzes the implications of the Supreme Court's recent announcement in *Twombly* of the plausibility standard for pleading. The Article subsequently sets forth the data revealing the impact of the *Twombly* decision uncovered by an extensive search of Title VII federal district court decisions over a two-year period. The Article also sets forth the results of the FJC's analysis of the success of plaintiffs defending against summary judgment motions that was performed at the author's request. The

16. *See* discussion *infra* Part IV.D. (explaining the results of the FJC study).
17. *See* Spencer, *supra* note 15, at 160.
18. *See id.*

Article then proposes a new framework for analyzing the sufficiency of all Title VII complaints, and explains the contours of the proposal. The Article concludes by explaining how the proposal fits within the recent academic scholarship on this issue.

II. THE MOTION TO DISMISS

A. *History*

Under the early American legal system, there were separate procedural structures for cases brought pursuant to the common law or equity.[19] Suits brought under equity were not as rigid as those brought under the common law, though "[p]leadings in equity provided a more detailed statement of the facts."[20] By the mid-nineteenth century, several states had adopted various code systems of pleading that integrated characteristics of both the common law and equity.[21] Over time, a preference grew for a system with less stringent pleading requirements and more "relaxed pleading rules" that would serve as the "handmaid of justice."[22] Against this backdrop, the Federal Rules of Civil Procedure were born.

The Federal Rules of Civil Procedure were put in place in 1938.[23] The new rules were embraced "with great fanfare" and seen as "an obvious advance over the earlier rules of procedure that were embodied in the standard codes."[24] Rule 8(a)(2) of the Federal Rules sets forth the standard for pleadings brought in federal court: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[25]

The adoption of this rule firmly established so-called notice pleading in the federal courts,[26] whereby plaintiffs are not required to include a

19. *See, e.g.*, Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 640 (1993).

20. *Id.* at 641; *see also* Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008) ("The ultimate result at common law was a complex, verbose, and convoluted pleading that did not make clear what, exactly, the suit was predicated on.").

21. Robins, *supra* note 19, at 641.

22. *Id.* at 643 (internal quotation omitted); *see also* Paul J. McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV. 19, 23 (1994) ("The provisions governing pleadings, amendments thereof, joinder of claims and parties, and discovery were liberally structured to promote adjudication on the merits of a lawsuit and eliminate procedural traps resulting in the misdisposition of a case.").

23. *See* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992).

24. Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62 (2007).

25. FED. R. CIV. P. 8(a)(2).

26. *See* Robins, *supra* note 19, at 644; *see also* Koan Mercer, Comment, *"Even in These Days of Notice Pleadings": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1169–70 (2004) ("In laying out the Rules' pleading requirements, the drafters of Rule 8(a)(2) explicitly avoided using the charged term 'facts.'").

THE Nation.

The Supreme Court Slams the Door

by **HERMAN SCHWARTZ**

September 30, 2009

A Supreme Court ruling in May, *Ashcroft v. Iqbal*, on how much information civil complaints in a lawsuit must contain, might seem a narrow technical matter, of interest only to lawyers and law journals. Yet, it is on just such "technicalities" that the legal rights of victims of public or private wrongdoing often hinge. For almost four decades the Court's right wing has been perfecting such technicalities as legal weapons to deny Americans an opportunity to enforce their rights in court.

In *Iqbal* the Court's five conservatives dismissed a suit against former Attorney General John Ashcroft and FBI Director Robert Mueller that arose out of the jailing of thousands of Arab Muslim men in the wake of 9/11. At issue was how much evidence the plaintiff, Javard Iqbal, needed to support his complaint about government mistreatment. Iqbal, a Pakistani Muslim, charged that he had been beaten, denied medical care and food, insulted, and otherwise brutalized by federal agents, all of which was conduct, he contended, that Ashcroft had authorized and Mueller had implemented. But Justice Anthony Kennedy, speaking for the majority, ruled that Iqbal's complaint did not set out enough facts "to state a claim to relief that is plausible on its face."
Under federal procedural rules 8(a)(2) and 9(b), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and the defendant's state of mind can "be alleged generally." These rules have consistently been interpreted liberally, because in many cases the evidence of what a defendant knew, intended or planned can be found only in his files, and until the plaintiff can remain in court long enough to have an opportunity to examine those files and to question defendants and others, the merits of the case cannot be determined.

Last year, in *Bell Atlantic Corp. v. Twombly* the Court unexpectedly raised the pleading requirements for anti-trust actions, but the majority left it unclear whether the ruling applied beyond anti-trust cases and other large, complex cases. This past May, the Court resolved that uncertainty by extending the *Twombly* rule to all civil cases, overturning decades of accepted practice. It threw out Iqbal's complaint even though it contained 153 detailed factual allegations describing the beatings, denial of medical care and the other abuses he suffered. As a resnlt, businesses that discriminate against minorities, corporations that sell harmful products and many other wrongdoers can escape having to answer in court for their actions, no matter how blatant or egregious the violation, for the *Iqbal* decision gives judges virtual carte blanche to dismiss a case without allowing the plaintiff any pretrial examination.

In the few months since the decision in *Iqbal* came down,it has resulted in the dismissal of 1500 District Court and 100 appellate court cases, many if not most of which would probably have survived; more dismissal motions are pending. Complaints against drug and other companies for multi-organ failure after taking an epilepsy drug, for false marketing and for excessive lead in baby bottle coolers

have all been thrown out at the pleading stage, as have many civil rights cases.. *Iqbal* has also been used to dismiss a First Amendment suit by anti-Bush protesters against the Secret Service, and complaints against Coca-Cola and its Colombian subsidiaries for the murder and torture of trade unionists. In all these cases, the mental element--what defendants knew and when they knew it--is usually crucial, and without going into a defendant's files and oral questioning of knowledgeable people, that cannot be determined.

The *Iqbal* case is just the latest in a long line of decisions shutting the courthouse doors, few of which have drawn any public attention. The Warren Court had tried to make it easier for victims of public or private misconduct to have their day in federal court. Since 1972, however, when William Rehnquist and Lewis Powell joined the Court, conservative justices have been trying to undo almost everything the Warren Court had begun, often with legal doctrines specially crafted for the purpose.

The conservatives began by limiting standing to sue, making it much harder for plaintiffs to establish that they had personally suffered injuries sufficiently serious to warrant going to trial. In 1972 Rehnquist and his fellow conservatives dismissed a suit by opponents of the Vietnam War challenging Army surveillance of antiwar demonstrations in which the protesters had participated.

In 1974 they held that taxpayers and citizens lacked standing to enforce the constitutional ban on members of Congress serving in the military, and the constitutional requirement that "receipts and expenditures of all public money" be made public. Two years later, they dismissed a challenge by welfare recipients to an IRS regulation that allowed nonprofit hospitals to refuse to serve the poor without losing their tax exemption, and in 1984 they threw out a suit by black children in segregated schools who challenged the IRS's failure to enforce the Congressionally banned tax exemptions for private schools that excluded African-American students. Six years later they refused to allow environmentalists to challenge government actions threatening endangered species, even though Congress had authorized such suits by "anyone." And just two years ago a new right-wing majority barred suits against the executive branch for funding religious activities.

Limiting standing to sue is not the only technique the Court's right wing uses to close the courthouse door. Here's another one: some federal statutes do not specifically provide for private enforcement, but it is obvious that beneficiaries of the statute must have such a right if they are to have any remedy at all. That is because government agencies often don't have the resources or the will to enforce a law, especially when the incumbent administration has no sympathy for the particular statute; if the law's beneficiaries cannot sue, they are left with no remedy. For these reasons in the 1960s and 1970s, the Court developed a set of criteria for determining when statutory beneficiaries could sue in their own right. When Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy joined the Court in the 1980s, however, the Court tossed out these criteria. Today, victims of violations of civil rights, housing, drug, medical-device safety and securities laws, as well as those denied benefits under Medicaid, Medicare and similar laws, may not sue on their own behalf unless Congress specifically says so

This Court has also made it all but impossible to enforce federally created rights against state governments. Resurrecting and expanding the sovereign immunity doctrine--which is found nowhere in the Constitution and is based on the long-discredited common law notion that "the king can do no wrong"--the Court in a series of 5-4 decisions has denied state employees and others the right to sue state governments for violations of the Fair Labor Standards Act and other federal statutes. The only

exception to this ban is when Congress acts to enforce the Fourteenth Amendment. The majority has, however, imposed on Congress such high-evidentiary criteria for these exceptions that most of the cases to come before the Court--cases involving disability, violence against women, age discrimination, patent protection--have been turned down.

Led by Justice Scalia, the Court has also made it impossible to challenge gerrymandering. Claiming that gerrymanders raise political issues too difficult for courts to decide--even though all nine justices agree that partisan gerrymandering is unconstitutional and the four dissenters find the problem quite manageable--the Court upheld a 2002 Pennsylvania redistricting that produced a 12-7 Republican majority in the House of Representatives in a state where Democratic voters slightly outnumber Republican.

More than 200 years ago, in *Marbury v. Madison*, Chief Justice John Marshall wrote that "the government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." And that is as true today as it was then.

About Herman Schwartz

Herman Schwartz, a professor of law at the American University, is the author of *Right Wing Justice: The Conservative Campaign to Take Over the Courts* (2004) and editor of *The Rehnquist Court* (2002), based on an October 9, 2000, special issue of *The Nation*. **more...**

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The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?

Patricia W. Hatamyar*

I. INTRODUCTION

About two years ago, the Supreme Court issued its opinion in *Bell Atlantic Corp. v. Twombly*,[1] sending "shockwaves" through the federal litigation bar.[2] Seemingly without prior warning,[3] the Court abrogated "the accepted 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" -- the standard for deciding 12(b)(6) motions[4] first stated fifty years earlier in *Conley v. Gibson*.[5] Instead, the Court announced a new "plausibility" standard: that a complaint allege "enough facts to state a claim to relief that is plausible on its face."

Twombly contained some indications that the Court intended to limit its holding to Sherman Act cases.[6] Nonetheless, the federal courts largely embraced *Twombly's* "plausible on its face" standard for all cases.[7] Almost two years to the day after *Twombly*, the Supreme Court laid the matter to rest in *Ashcroft v. Iqbal*, holding that the *Twombly* "plausibility" standard applies to all cases.[8] *Iqbal* further explained that "judicial experience and common sense" should inform the "plausibility" standard.[9]

In addition, *Iqbal* set forth a novel "two-pronged" approach to 12(b)(6) motions. First, the court should identify and ignore all "conclusions" from the complaint not entitled to be taken as true for purposes of the motion to dismiss. Second, the court should apply the "plausibility" standard to the complaint's remaining allegations.[10]

If *Twombly* had caused shock, *Iqbal* struck a blow. A firestorm of protest ensued over *Iqbal's* alleged judicial activism; Senator Arlen Specter even introduced a bill that would attempt

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* © Patricia W. Hatamyar. Visiting Professor of Law, St. Thomas University School of Law. A research grant from St. Thomas University School of Law supported work on this article. Many thanks to Dennis Corgill and Robert Mensel for their comments, and to Melodee Rhodes for her research assistanee.

[1] 550 U.S. 544 (2007).

[2] Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U.L. REV. 851 (2008).

[3] *See, e.g.*, McMahon, *supra* note 2, at 855 ("the *Conley* standard was clear and well-settled"); Thampi v. Collier County Bd. of Com'rs, No. 04-cv-441-FtM-29SPC, 2006 WL 2460654, at *1 (M.D. Fla., Aug. 23, 2006) ("The federal notice pleading standards are well settled.").

[4] FED. R. CIV. P. 12(b)(6) ("[A] party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted").

[5] 355 U.S. 41 (1957).

[6] *E.g.*, 550 U.S. at 553 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct"); *id.* at 554-55 ("This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act."); *id.* at 558-59 (discussing expense of discovery in antitrust cases).

[7] *See supra* notes116-17 and accompanying text.

[8] 129 S. Ct. 1937, 1953 (2009).

[9] *Id.* at 1950.

[10] *Id.*

to turn the clock back to "the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*."[11]

Absorbed by the vigorous academic debate, I wondered if it could be empirically demonstrated that district courts ruled much differently on 12(b)(6) motions after *Twombly*. Thus, for this article, I conducted an empirical analysis of the effect of the different Supreme Court standards on rulings on 12(b)(6) motions in the federal district courts.

I chose, as randomly as possible, 1200 cases (500 from each of the two-year periods before and after *Twombly*), and coded the cases for their rulings and other characteristics. Due to *Iqbal*'s recency, I chose (again, as randomly as possible) 200 cases decided on a 12(b)(6) motion under *Iqbal* from May-August 2009.

My statistical analysis of these cases suggests that a surprisingly large percentage of 12(b)(6) motions were already being granted under *Conley* – 46% in the database from May 2005 to May 2007. Under *Twombly*, the percentage of 12(b)(6) motions granted in the database from May 2007 to May 2009 grew to 48% -- not a remarkable increase. But *Iqbal* combined with *Twombly* may have already resulted in significantly more 12(b)(6) motions being granted than under *Conley*: 56% of the 12(b)(6) motions analyzed in the three-month period from May to August 2009 were granted. However, the short time span and smaller number of the *Iqbal* cases counsel caution in interpreting the data.

Part II of this article describes *Conley*, *Twombly*, and *Iqbal*, and surveys the development of the pleading standards in the fifty-two years spanned by these cases.[12] I conclude, as have other commentators, that although courts continued to pay lip service to the "notice pleading" ideal of *Conley*, in practice it had been seriously eroded by the time of *Twombly*.[13] *Iqbal*, though, contains not even a passing reference to notice pleading, and may portend the end of this liberal regime in the federal courts.

In Part III, I outline the design of the empirical study.[14] Part IV presents a statistical analysis of the data.[15] Of particular overall interest is the finding that 49% of the 12(b)(6) motions were granted (with or without leave to amend) over the time period of the study.[16] Further, the rate of granting such motions increased from *Conley* to *Twombly* to *Iqbal*, and the results of a multinomial logistic regression indicate that under *Twombly/Iqbal*, the odds of a 12(b)(6) motion being granted rather than denied were 1.5 times greater than under *Conley*, holding all other variables constant. Moreover, the largest category of cases in which 12(b)(6) motions were filed was constitutional civil rights. Motions to dismiss in constitutional civil rights cases were granted at a higher rate (53%) than in all cases combined (49%), and the rate of granting 12(b)(6) motions in constitutional civil rights cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%).[17]

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[11] S. 1504, 111th Cong., 1st Sess. (introduced July 22, 2009).
[12] *See infra* notes 19-165 and accompanying text.
[13] *See infra* notes 41-81 and accompanying text.
[14] *See infra* notes 166-216 and accompanying text.
[15] *See infra* notes 217-265 and accompanying text.
[16] *See infra* at Table 2.
[17] *See infra* at Table 2, Figure 4, Table 4, and Appendix Table C.

Part V cautiously concludes that *Twombly* and *Iqbal* have significantly increased the granting of 12(b)(6) motions by district courts, and suggests that such a result, if desirable, should be accomplished by the normal rule-amendment process.[18]

II. AN OVERVIEW OF THE FEDERAL PLEADING STANDARDS

A. The World Before *Twombly*

The reformist philosophy and merits-based focus of the Federal Rules of Civil Procedure ("FRCP"), first adopted in 1938, have been well chronicled elsewhere.[19] For my purposes here, suffice it to say that Rule 8(a)(2) of the FRCP – unchanged since 1938 – only requires a complaint (or other pleading seeking relief) to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The drafters chose this language deliberately to signal a softening of an earlier pleading regime known as "Code pleading," under which the equivalent requirement was that a complaint contain a "statement of the facts constituting a cause of action."[20] Case law in Code pleading regimes had devolved into endless technical bickering about distinctions between "ultimate facts," "evidence," and "conclusions."[21] Thus, the FRCP's use of the phrase "claim showing that the pleader is entitled to relief" instead of Code pleading's "facts constituting a cause of action" was an attempt to reach the merits of a dispute rather than terminating a plaintiff's case on technical grounds at the outset.[22]

Yet there were still rival pleadings philosophies. One of the FRCP's primary draftsmen, Judge Charles Clark, was convinced that pleadings motions were wasteful and often unjust, and would have eliminated them altogether.[23] The opposing camp emphasized the need for some screening effort to prevent nonmeritorious cases from proceeding.[24] The Supreme Court in *Conley v. Gibson* sided mostly with Judge Clark, at least for the moment.

1. *Conley v. Gibson*

The *Conley* "no set of facts" language materialized without discussion of the pleading issue in the lower courts and in the absence of much briefing on the pleading issue by the

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[18] *See infra* notes 266-67 and accompanying text.

[19] *E.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. at 572-76 (Stevens, J., dissenting); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 890-98 (2009); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458-60 (1943); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437-451 (1986).

[20] Anthony J. Bellia, *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 794 (2004) (citation omitted).

[21] Marcus, *supra* note 19, at 438 (Code pleading "invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper). In particular, there was great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership and execution, contain a mixture of historical fact and legal conclusion.").

[22] *See, e.g.*, Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (referring to the district court's grant of a 12(b)(6) motion, Judge Clark stated, "[H]ere is another instance of judicial haste which in the long run makes waste.").

[23] Clark, *supra* note 19, at 470-71.

[24] *See, e.g.*, Bone, *supra* note 19, at 891-93.

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TORTURED PLEADINGS: THE HISTORICAL DEVELOPMENT AND RECENT FALL OF THE LIBERAL PLEADINGS STANDARD

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INTRODUCTION

In the days after the September 11, 2001 attacks, the Justice Department implemented Operation PENTTBOM (Pentagon/Twin Towers Bombing), a massive investigation under the aegis of the Federal Bureau of Investigation (FBI).[1] As part of the investigation, federal law enforcement officials established various policies and procedures that included the arrest of hundreds of Arab and Muslim men, primarily on immigration related charges.[2] The government identified these individuals as "September 11 detainees."[3] These men were subsequently confined to various facilities, including the Metropolitan Detention Center (MDC) in Brooklyn, New York. While in custody, the Inspector General of the Department of Justice concluded that many detainees were beaten, denied medical treatment, deprived of religious freedoms, and due process rights.[4]

One of these detainees, Javaid Iqbal, sought redress for this treatment through a *Bivens*[5] action brought in the Eastern District of New York.[6] In response, defendants John Ashcroft and Robert Mueller argued that the pleadings were too conclusory and thus the case should be dismissed pursuant to 12(b)(6).[7] The District Court denied the motion to dismiss, finding in

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[1] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPT. 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPT. 11 ATTACKS 1 (2003).
[2] *Id.*
[3] *Id.* at 5.
[4] *Id.* at 142-46.
[5] In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395-97 (1971), the Supreme Court recognized the right of plaintiffs to recover money damages as a result of Fourth Amendment violations by government actors. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395-97 (1971). The Court later extended this principle to other constitutional violations.
[6] Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at * 1 (E.D.N.Y. Sept. 25, 2005).
[7] *Id.* at *12. Pleadings are the legal mechanism by which an action commences, specifically, the document "sets forth or responds to allegations, claims, denials, or defenses." BLACK'S LAW DICTIONARY, 1191, (8th ed. 1999). In

favor of Mr. Iqbal.[8] The Second Circuit largely affirmed the district court's ruling, the government appealed, and the Supreme Court granted certiorari.[9]

Rather than apply various procedural remedies available to defendants in the Federal Rules of Civil Procedure, the government in *Ashcroft v. Iqbal*[10] sought to elevate the burden on litigants at the pleadings stage by requiring plaintiffs to assert facts with particularity—a standard reserved for fraud or mistake in the Federal Rules of Civil Procedure.[11] The government's position is premised upon the Court's decision in *Bell Atlantic v. Twombly*.[12] There the Court, in an antitrust matter, held that the plaintiff, Twombly, failed to articulate plausible facts in support of their position.[13] In *Iqbal*, the Court extended the plausible facts standard to pleadings in claims against cabinet level government officials, indeed to all civil actions,[14] even though *Twombly* repeatedly rejected the application of a heightened pleading standard.[15] The challenge is, that this new "plausible" language contravenes principles of fairness in pleadings, as well as the Supreme Court's seminal decision in *Conley v. Gibson*, where the Court did not qualify the facts, and ruled that the purpose of a pleading standard is to provide defendants with notice.[16]

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the modern era, pleadings serve the purpose of providing the opposing party notice. These pleadings simply require the "pleader [to] give only a short and plain statement of the claim showing that the pleader is entitled to relief," and not a complete detailing of all the facts." *Id.*; *see also* FED. R. CIV. P. 8(a)(2).

[8] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

[9] *Id.* at 1944-45.

[10] *Id.*

[11] FED. R. CIV. P. 9(b).

[12] *Iqbal*, 129 S. Ct. at 1955.

[13] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 583(2007); *cf. Id.* at 1981 (Steven, J. dissenting) (quoting "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974), (emphasis added)).

[14] *Iqbal*, 129 S. Ct. at 1953.

[15] *Twombly*, 550 U.S. 544, 583.

[16] Conley v. Gibson, 355 U.S. 41, 47(1957). Charles E. Clark defined the notice function of Rule 8(a)(2) as:

As a result of accepting the petitioner's argument, civil rights plaintiffs must factually prove their cases in their initial pleadings, where high-level government officials assert qualified immunity. Through its decision in *Iqbal,* the Court mandates the application of the plausibility standard created in *Twombly* to all civil actions. By adopting a de facto heightened fact pleading standard, the majority in *Iqbal* rebukes seventy years of a liberal pleading standard through judicial fiat, rather than through the process established in the Rule Enabling Act of 1934.[17] Now Iqbal and all others who seek to challenge the authority and abuse of high level government actors, will be required to establish plausible facts in their initial pleadings to prove constitutionals violation before discovery, indeed, even before an answer is filed.

In Part I, this note will explore the plausibility of the facts involving Iqbal and the broader policy of holding and adjudicating "September 11 detainees," where the government detained hundreds of individuals without reliable or confirmable leads by supposed terror informants. In Part II, the fact-specific pleading will be reviewed vis-à-vis the construction of the Federal Rules of Civil Procedure (FRCP) and the evolution of pleadings as they apply to civil rights litigants—specifically, the history of pleadings, followed by the juxtaposition of earlier pleading standards compared to the FRCP. Then, I will analyze the commitment of the Supreme Court to a non-heightened liberal pleading standard and the broader implications of a heightened pleading standard on civil rights litigants. In particular, this note addresses the importance of a

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> that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case. Christopher M. Fairman, *Heightened Pleading,* 81 Tex. L. Rev. 551, 557 (2002).

For a better understanding of *Conley*, it is useful to look at the three court of appeals cases Justice Stevens discusses in his dissent that define pleadings contemporaneous to drafting of the Federal Rules. *Twombly*, 550 U.S. 544, 570; *Leimer v. State Mut. Life Assur. Co. of Worcester Mass.*, 108 F.2d 302 (8th Cir. 1940); *Continental Collieries v. Shober*, 130 F.2d 631 (3d Cir. 1942); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

[17] 28 U.S.C. § 2073 (2006).

notice pleading, where the government asserts qualified immunity. I will also discuss the devastating consequences of a heightened pleading standard on civil rights litigants. In Part III, I will review the decision, in *Iqbal*, written by Justice Kennedy for the majority and Justice Souter's dissent. And finally, this paper will discuss the Congressional response to the creation and application of the de facto heightened pleading standard in *Iqbal*.

I. DETENTION AND ALLEGED ABUSE OF JAVAID IQBAL AND GENERAL TREATMENT OF SEPTEMBER 11 DETAINEES

A. The Detention and Abuse of Javaid Iqbal

In order to understand the implications of applying a heightened pleading standard in *Iqbal*, it is important to glean the basis of the cause of action and the broader post-September 11 detainee policy. There are two distinct issues: Iqbal's treatment at MDC and the decisions by policy-makers regarding the treatment of 9-11 detainees.

Law enforcement officials arrested Iqbal, a Pakistani Muslim man who installed cable boxes, and held him in solitary confinement, where he was subjected to horrific abuse for many months.[18] The detention was part of the "hold until clear" policy instituted by then Attorney General John Ashcroft and FBI Director Robert Mueller that targeted all foreign born Muslim men in the New York area in the months following the September 11 attacks.[19]

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[18]First Amended Complaint at 15, Elmaghraby v. Ashcroft, (04 CV 1809 (JG)(JA)), No. 04 CV 01809 JG SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 25, 2005) [hereinafter Complaint].

[19] The "hold until clear policy" established by high level officials in the Department of Justice required individuals arrested on immigration charges to be detained, oftentimes for months. The Justice Department deviated from normal INS procedures, detainees "were not allowed to depart or be removed from the United States before FBI clearance, even if an Immigration Judge ordered their removal or the detainees voluntarily agreed to leave." The Sept. 11 *Detainees: Hearing reviewing the treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the Sept. 11 Attacks Before the S. Comm. on the Judiciary*, 109th Cong. ¶ 15 (2005) (statement of Glenn A. Fine, Inspector Gen. U.S. Dep't. of Justice) [hereinafter Fine, *Detainees*]. Specifically those detained in the New York area were "deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the origin of the lead or any genuine indications of a possible connection to terrorism. *Id.*

After Iqbal

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Abstract:
In Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), the Supreme Court extended the controversial pleading standard that it announced in Twombly v. Bell Atlantic Corp., 550 U.S. 544 (2007), to all civil cases. Iqbal thus confirms that all civil plaintiffs must plead enough facts to state a plausible claim to relief. In addition, the Court's decision goes even further by defining the contours of pleading discriminatory intent. Iqbal makes clear that an allegation of discriminatory intent cannot be general or conclusory, and must be supported by the proper factual context. While Iqbal and Twombly dramatically rewrite the law on federal pleading, the decisions provide little guidance for employment discrimination litigants, who must routinely establish an employer's discriminatory intent in a typical Title VII case. This Article attempts to provide that guidance - after Iqbal.

This Article undertakes multifaceted research which uncovers the success rate of employment discrimination plaintiffs at trial and when facing summary judgment, and outlines various other studies suggesting that discrimination continues to permeate through our society. Given the pervasiveness of the discrimination highlighted in these studies, a reasonable inference can be drawn that a claim of employment discrimination - with the proper factual support - is far more plausible on its face than the more doubtful allegations set forth in Twombly and Iqbal. Based on the research set forth in this paper, this Article proposes a unified analytical framework for pleading discriminatory intent in Title VII cases which navigates the Iqbal and Twombly decisions. The proposed pleading framework should serve as a blueprint for Title VII litigants, helping the courts and the parties to better evaluate allegations of discrimination. This paper further explains why Swierkiewicz v. Sorema, 534 U.S. 506 (2002), is still good law as applied to Title VII cases.

Pleading Disability

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Abstract:
A significant failure. That is how the Americans with Disabilities Act (ADA) has been described by legal scholars and disability advocates alike. The statute, which was widely expected to help prevent disability discrimination in employment, has not fully achieved its intended purpose because of the ADA's narrow interpretation in the courts. Congress recently sought to restore the employment protections of the ADA by amending the statute. Interpreting the complex and comprehensive amendments to the ADA will be a difficult task for the federal courts, which struggled to consistently apply even the original statutory terms. Complicating matters further, the proper pleading standard for disability claims was left in disarray after the Supreme Court's decision in Twombly v. Bell Atlantic Corp., 127 S. Ct. 1955 (2007), which altered fifty years of federal pleading precedent. The courts have widely applied Bell Atlantic — a complex antitrust case — to the disability context, but have done so in an inconsistent manner. The amendments to the ADA, combined with Bell Atlantic, have created a significant amount of confusion in pleading disability claims. And, the Supreme Court's recent decision in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), only adds to this confusion.

This Article performs an analysis of several hundred federal district court opinions, examining the impact of the Bell Atlantic decision on ADA claims. Attempting to provide clarity to disability pleading, this Article proposes a unified analytical framework for alleging disability discrimination, which satisfies the recent Supreme Court case law, the amendments to the ADA, and the federal rules. The analytical framework proposed by this Article would streamline the pleading process for disability claims, and provide a blueprint for litigants and courts in analyzing ADA cases. The paper concludes by exploring the possible implications of adopting the proposed model.