

**HAS THE SUPREME COURT LIMITED AMERICANS'
ACCESS TO COURTS?**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

DECEMBER 2, 2009

Serial No. J-111-64

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U.S. GOVERNMENT PRINTING OFFICE

56-719 PDF

WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
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HAS THE SUPREME COURT LIMITED AMERICANS' ACCESS TO COURTS?

WEDNESDAY, DECEMBER 2, 2009,
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Specter, Franken, and Sessions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Senator Sessions, who is virtually always here, is tied up in the Armed Services Committee meeting on Afghanistan, and other members will be going back and forth to that Committee. We can well understand why. It is an extraordinarily important issue. Those of us who met with the President yesterday before he left for West Point understand the significance. Whether you are for or against the position he has taken, it is something that every member of the Senate and the House will have to be looking at.

For this morning, we are going to examine the impact of two recent Supreme Court decisions and what they have done to Americans' access to the Nation's court system. I am doing this because I have been worried about the increasingly activist bent of the Supreme Court, and it has probably become in many ways the most activist Supreme Court certainly since my days in law school, and I am worried about the ignoring of both precedent and of Congressional legislation.

A few years ago, a slim majority of the Supreme Court undercut the landmark precedent of *Brown v. Board of Education* and its guarantee of equal justice. Now, we all know—and I remember it very well—that at the time Earl Warren spent a couple years to get a unanimous opinion in *Brown v. Board of Education* because there was going to be such a revolutionary but such a long overdue decision in this country. But a slim majority undercut it, and at that time Justice Breyer observed that “it is not often in the law, that so few, have so quickly, changed so much.” I agree with Justice Breyer. And his comment reflects the power that a mere five Justices on the Supreme Court can have in our democracy. Unlike the unanimous decision in *Brown v. Board of Education*, their actions need not be unanimous. They do not need consensus. In the

very year a Justice is confirmed, he or she can be the deciding vote to overturn precedent and settled law.

This is now the fifth hearing in 18 months held to highlight cases where literally five Justices—the slimmest majority—have changed the legal landscape by overturning precedent and undermining legislation passed by Republicans and Democrats together in Congress. Today’s hearing is yet another reminder about how just one vote on the Supreme Court can impact the rights and liberties of millions of Americans.

Today, we focus on how a thin majority of the Supreme Court has changed pleading standards. The issue may sound abstract, but certainly not to those who study the Court. As we understand it, the ability of Americans to seek redress in their court system is fundamental. In a pair of divided decisions, the Court restricted a petitioner’s ability to bring suit against those accused of wrongdoing. The Court essentially made it more difficult for victims to proceed in litigation before they get to uncover evidence in discovery. I think it is just the latest example of judicial activism.

For more than 50 years, judges around the Nation enforced longstanding precedent to open courthouse doors for all Americans. In the 1957 decision of *Conley v. Gibson*, the Supreme Court held that a plaintiff’s complaint will not be dismissed if it sets out a short and plain statement of the claim, giving “the defendant fair notice of what the claim is and the grounds upon which it rests.” This precedent reflected the intent behind the Federal Rules of Civil Procedure, adopted by Congress before I was born, to set pleading standards to allow litigants their day in court. Lawyers call this “notice pleading.” The lawyers distinguish it from specific fact pleading. The underlying intent has been to allow people their day in court and not to require them to know everything or have all the evidence they will need to prove their claim at the outset. Much of that evidence may be in the hands of the defendant and the defendant’s wrongdoing, after all. Allowing the case to begin with a good-faith claim permits the parties to engage in evidence gathering. Of course, to prevail, then the party needs to establish a claim by a preponderance of the evidence so that by the end of the case the claim of wrongdoing will be fairly tested. Any one of us who ever practiced law knows that. You file that, you have discovery. You go through the usual things, and then the case may expand. You may be amending your pleading. You may add additional counts. Every lawyer—every lawyer, plaintiff or defendant—knows this.

But in two cases—*Iqbal* and *Twombly*—the Supreme Court abandoned the 50-year-old precedent established in *Conley*—a precedent that every lawyer has always followed, certainly that I did when I was in private practice. Now the Court requires that prior to discovery, a judge must assess the “plausibility” of the facts of an allegation. In his dissent, Justice Stevens called *Twombly* a “dramatic departure from settled procedural law” and “a stark break from precedent.” He predicted that this decision would “rewrite the Nation’s civil procedure textbooks” because it “marks a fundamental—and unjustified—change in the character of pretrial practice.” Justice Souter, the author of the *Twombly* decision, dissented in *Iqbal* because he believed the five-Justice majority created a new rule

that was “unfair” to plaintiffs because it denied them a “fair chance to be heard.”

But these activist decisions do more than ignore precedent; they also pose additional burdens on litigants seeking to remedy wrongdoing. And as a result of this judge-made law, litigants could be denied access to the facts necessary to prove wrongdoing. As this Committee learned last year from the testimony of Lilly Ledbetter, employees are often at a disadvantage because they do not have access to the evidence to prove their employer’s illegitimate conduct, and if the employer is involved in illegitimate conduct, usually they do not broadcast that fact and you have to discover it otherwise. In fact, I believe that her civil rights claim would not have survived a motion to dismiss under the new standard. Our justice system cannot ignore the reality that a defendant often holds the keys to critical information which a litigant needs to prove unlawful conduct.

By making the initial pleading standard so much tougher for plaintiffs to reach, the conservative majority on the Supreme Court is making it more difficult to hold perpetrators of wrongdoing accountable. I believe this will result in wrongdoers avoiding accountability under our laws.

Of course, wealthy corporate defendants and powerful Government defendants of either a Democratic or Republican administration would prefer never to be sued and never to be held accountable. These new judge-made rules will result in prematurely closing the courthouse doors on ordinary Americans seeking the meaningful day in court that our justice system has provided.

As we will hear from our witnesses today on the impact of these two cases, we will hear that it has been immediate and expansive. According to the *National Law Journal*, 4 months after *Iqbal*, more than 1,600 cases before lower Federal courts have cited this. This precedent has the potential to deny justice to thousands of current and future litigants who seek to root out corporate and governmental wrongdoing.

We all know that a right without a remedy is no right at all. That is what is at stake here. And I fear that these decisions are not isolated rulings but, rather, part of a larger agenda by conservative judicial activists to undermine Americans’ fundamental rights. The Seventh Amendment to the Constitution guarantees the right of every American to a jury trial. That guarantee is undermined if the rules for getting into court are so restrictive that they end up closing the courthouse door.

I thank Senator Whitehouse, the Chairman of the Subcommittee on Administrative Oversight and the Courts, for working to hold this hearing. And I know that he, when I have to leave, is going to take over chairing it and rely on his own experience in that.

Did you want to add anything before we go to the witnesses? Feel free.

Senator WHITEHOUSE. I have a statement, but if we could just move along.

Chairman LEAHY. Then we will call as the first witness—and I thank Senator Specter and Senator Franken also for being here. Senator Specter especially has spoken out numerous times about the courts undermining what has been legislative intent.

John Payton is the Director-Counsel and President of the NAACP Legal Defense Fund. He is the sixth person to lead LDF in its 67-year history. He continues the legacy of a historic organization started by Thurgood Marshall. He was previously a partner in the Wilmer Hale law firm, and he received his law degree from Harvard University. Mr. Payton is not a stranger to this Committee at all.

Please go ahead, sir.

STATEMENT OF JOHN PAYTON, PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., WASHINGTON, D.C.

Mr. PAYTON. Good morning, and thank you for inviting me to testify at this really very important hearing. I agree with Chairman Leahy about how important this is.

The brief answer to the question posed by the title of the hearing, "Has the Supreme Court limited Americans' access to courts?," is "Yes." I have submitted written testimony, and I am not going to go over all of that written testimony. But I thought in my oral remarks I would try to put this in context to actually explain how I see what the stakes are here, what is at issue here.

The Legal Defense Fund is the country's first civil rights law firm. I believe we remain the country's finest civil rights law firm. We were founded in 1940—which is just as the Federal Rules went into effect. We have used those rules to great effect. Relying on the Constitution and the laws and those rules, we brought civil rights and human rights cases on behalf of African Americans, Hispanic Americans, Asian Americans, white Americans, men and women, straight and gay. We have helped create an anti-discrimination principle that applies to employment, public accommodations, education, housing, union representation, police treatment, voting, and economic justice.

The ability to enforce rights created power in the people who were the victims of discrimination. That is, rights create power. When an aggrieved person—an African American who is denied the low mortgage rate that is offered to a white person, for example—when an aggrieved person can assert rights in court, it empowers that individual. Those rights can be asserted against the Government, from the local to the Federal. Those rights can also be asserted against private parties, from individuals to a large corporation.

But as the Chairman said, for those rights to be real, they must be enforceable. That is, if there is a right without a remedy, it is not a right. For those rights to be real, they must be enforceable, and that enforceability requires access to courts. One of the critical elements of our system of justice is access to courts. If that access is curtailed, the power of victims of discrimination to redress wrongdoing is also curtailed.

This fundamental principle of open access is now threatened in very real terms by two recent Supreme Court decisions, *Twombly* and *Iqbal*. Although *Iqbal* was decided just this year, these decisions have already resulted in the results that Chairman Leahy described in the National Law Journal article. We are already seeing people denied access to courts, and when they are denied access to

courts, their rights are being curtailed. By suddenly imposing new pleading requirements that are far more stringent than the long-standing standard set forth in the Federal Rules, the Supreme Court has erected a significant barrier that operates to deny victims of discrimination their day in court. This is nothing short of an assault on some of our most cherished democratic principles.

As District Judge Jack Weinstein recently commented about the detrimental impact of this heightened pleading standard, “[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.”

Civil rights always matter. Human rights always matter. But they matter especially right now. The recession may be over for Wall Street, but for increasing numbers of people who have lost their jobs, it is only getting worse. We have double-digit unemployment overall.

The Washington Post reported last week that the unemployment rate for African-Americans is 34.5 percent. Those are Depression levels. Those are Depression-era levels.

Discrimination thrives in this environment. Everybody knows that. Not having a job often means people feel as though they are not really a part of their community. They lose their dignity. Not having a job because of racial discrimination makes people feel like they are not part of the larger society. Having enforceable rights is critical to maintaining our social cohesion and inclusiveness.

We have worked very hard, the Legal Defense Fund, and I would say the country as a whole, to erect the set of laws that actually bring us together and allow us all to have rights.

The Legal Defense Fund believes that Congress should act immediately to prevent the Supreme Court’s ruling in *Iqbal* and *Twombly* from further undermining access to courts for victims of discrimination.

I want to thank Senator Specter and this Committee for moving so urgently in trying to address this issue, and I look forward to working with Senator Specter and with the Committee on this issue. Given the important policy objectives behind our Nation’s civil rights laws and the hard-fought battles to secure their passage, Congress has a substantial interest in robust enforcement of the civil rights laws. It should treat seriously threats that can, as one court warned, “chill” the pursuit of civil rights claims. Congress should take steps to ensure that persons can enter the courthouse door when seeking protection under civil rights statutes. There is no more important issue with respect to our civil rights than the issue that is before this Committee today. If you close the door, then people cannot enforce rights. And if they cannot enforce rights, those rights do not exist for them.

Thank you very much.

[The prepared statement of Mr. Payton appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Payton. I apologize for having stepped out of the room there. I had a call I had to return. I have read your testimony, and I appreciate it.

Greg Garre recently served as Solicitor General in the Bush administration. I think that is where we first met. And he received

his law degree from the George Washington University, currently is a partner at Latham & Watkins here in Washington, D.C.

Mr. Garre, thank you for taking the time. Please go ahead, sir.

STATEMENT OF GREGORY G. GARRE, PARTNER, LATHAM & WATKINS, LLP, WASHINGTON, D.C., AND FORMER SOLICITOR GENERAL OF THE UNITED STATES

Mr. GARRE. Thank you, Chairman Leahy, and thank you, members of the Committee. It is an honor to appear before you today and participate in this important discussion on the Supreme Court's recent decisions in *Ashcroft v. Iqbal* and *Bell Atlantic v. Twombly*.

Nearly a year ago to this day, I had the privilege of appearing before the Supreme Court and arguing the *Iqbal* case as Solicitor General of the United States. The Court's decision in *Iqbal*, which followed and applied its *Twombly* decision, provides important guidance on the threshold standards for pleading claims in Federal court. The *Iqbal* and *Twombly* decisions stand for a proposition that ought to be noncontroversial and come as little surprise: In order to subject a defendant to the demands of civil litigation, conclusory and implausible allegations of wrongdoing will not suffice. Rather, a plaintiff must provide allegations that, if true, permit a reasonable inference that the defendant is liable for the alleged misconduct.

Far from bolts out of the blue, the *Iqbal* and *Twombly* decisions are firmly grounded in prior precedent at both the Supreme Court and the appellate level. Indeed, courts have for decades recognized that broad and conclusory allegations of wrongdoing are not sufficient to state a claim for relief, and that while it is generous, the Federal notice pleading regime it is not limitless. The *Iqbal* and *Twombly* decisions are a natural outgrowth of that well-settled law, and the decisions serve important interests. In particular, as the *Iqbal* case underscores, they ensure that Government officials are not distracted from performing their duties by the demands of civil discovery and responding to implausible claims of wrongdoing. As Justice Stevens recognized more than 25 years ago, protecting Government officials from such burdens is critical to ensuring that our officials "perform their sensitive duties with decisiveness and without potentially ruinous hesitation."

If, as Second Circuit Judge Jose Cabranes observed, Mr. *Iqbal* were successful in obtaining discovery from the former Attorney General and Director of the FBI based on his conclusory allegations, then "little would prevent other plaintiffs from claiming to be aggrieved by national security programs and policies from following the blueprint laid out by this lawsuit to require officials charged with protecting our Nation from future attacks to submit to prolonged and vexatious discovery processes." Fortunately, that blueprint does not exist today thanks to the Supreme Court's decision in *Iqbal*.

In the wake of the *Twombly* and *Iqbal* decisions, some critics have suggested that the decision will usher in a sea change in Federal pleading practice and result in the wholesale dismissal of claims. The evidence simply does not bear this out. The most comprehensive study of which I am aware is now being conducted by

the Advisory Committee on Civil Rules, which is comprised of judges and practitioners who are experts in civil procedure. That study, which has looked at every appellate decision discussing and citing the *Iqbal* case, concludes that the decisions have not resulted in any major change in pleading practice.

Particularly in light of the lack of evidence of any wholesale change in pleading practice at this time, Congressional action is not warranted at this time.

Moreover, if the proposed legislation were enacted, it would not only create great uncertainty and unpredictability as to pleading standards, but substantially lower the standards from the law that existed at the time of *Twombly* and *Iqbal*. In particular, legislation that would mandate the so-called "no set of facts" language from *Conley v. Gibson* would be unsound. *Conley's* no set of facts language has never been taken literally by the lower courts, and as seven Justices, led by Justice Souter, recently observed, *Conley's* "no set of facts" language has been "questioned, criticized, and explained away long enough." Mandating that standard would be a recipe for conflict and confusion in the lower courts, not to mention an invitation for baseless and implausible lawsuits.

Finally, there is a process for monitoring the situation and responding, if need be: the judicial rulemaking process established by the Rules Enabling Act. The Rules Committees, which are comprised of the Nation's top experts on Federal practice and procedure, are particularly well suited to evaluate the situation and determine whether any response is warranted. With respect to this Committee, there is no reason for Congress at this time to supplant the time-honored judicial rulemaking process here.

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

[The prepared statement of Mr. Garre appears as a submission for the record.]

Chairman LEAHY. Well, thank you, Mr. Garre, for being here. You obviously know that maybe some will disagree with your testimony, but as I have found before, you have stated your position very succinctly, and I appreciate that.

Professor Stephen Burbank is currently the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. He teaches classes in civil procedure and received his law degree from Harvard University.

Professor, we are delighted to have you here. Please go ahead, sir.

STATEMENT OF STEPHEN B. BURBANK, DAVID BERGER PROFESSOR FOR THE ADMINISTRATION OF JUSTICE, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PENNSYLVANIA

Mr. BURBANK. Thank you, Chairman Leahy and members of the Committee. Thank you for inviting me to testify about the vitally important question whether recent decisions of the Supreme Court have limited Americans' access to court. I commend the Committee for recognizing the serious potential for damage posed by these decisions. I would like specially to commend Senator Specter for his early action in introducing a bill to overrule the Court's decisions,

thus signaling concern to the bench, the bar, and the public, and stimulating interest and debate. Appendix A to my prepared statement includes a draft substitute amendment for the Committee's consideration. It takes a somewhat different approach that was inspired by a provision in the 1991 Civil Rights Act, reflecting my view that the primary purpose of any legislation responding to the Court's decisions should be to restore the status quo until and unless careful study, enabled by a process that is open, inclusive, and thorough, supports the need for change.

I am concerned that the Court's decisions in *Twombly* and *Iqbal* may contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to jury trial, and the emasculation of private civil litigation as a means of enforcing public law. I am particularly concerned because in rendering them the Court evaded the statutorily mandated process that gives Congress the opportunity to review, and if necessary to block, prospective procedural policy choices before they become effective. Both the process used to reach these decisions and their foreseeable consequences undermine democratic values.

Of course, no one yet knows enough about the impact of *Twombly* and *Iqbal* to state with confidence that they will cause a radical change in litigation behavior or the results of litigation. Still, Appendix B to my prepared statement contains a sample of many lower-court cases suggesting or making explicit that complaints have been dismissed that would not have been dismissed previously, and early empirical work suggests that *Twombly* and *Iqbal* have indeed had a disproportionately adverse impact on the usual victims of "procedural" reform—civil rights plaintiffs.

Moreover, the relevant question should be, in my opinion: Who should bear the risk of irreparable injury? In my view, it should not be those usual victims of "procedural" reform, and it should not be the intended beneficiaries of Federal statutes that Congress intended to be enforced through private civil litigation.

Notwithstanding recurrent pressure to authorize fact pleading in certain categories of cases, the Supreme Court repeatedly insisted that such a change would require rulemaking or legislation, and in recent years, the Rules Committees of the Judicial Conference abandoned proposals to adopt fact pleading across the board. In light of this history, *Twombly* and *Iqbal* prompt the question: What changed other than the membership of the Supreme Court? My prepared statement identifies what in the architecture of these decisions may lead to mischief, both of the sort that the framers of the original Federal Rules sought to avoid and a whole new brand of mischief reposing in a generally applicable plausibility requirement that depends upon "judicial experience and common sense."

I conclude, in any event, that the defects of process, institutional competence, and democratic accountability underlying the Court's decisions are sufficiently serious, standing alone, to warrant legislation requiring a return to the status quo ante until they have been cured by a new (and very different) process.

I usually avoid the term "judicial activism" because, in my experience, people use it as a label to describe court decisions they do not like without reference to an objective standard. *Twombly* and particularly *Iqbal* are examples of judicial activism according to an

objective standard—namely, the Enabling Act and the Court’s own decisions distinguishing judicial interpretation from judicial amendment of the Federal Rules. For the Court has told us that “we are bound to follow a Federal Rule as we understood it upon its adoption, and we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”

Twombly and *Iqbal*’s defenders must pretend that interpretation is a process sufficiently capacious to accommodate:

First, the abandonment of the system of notice pleading that the drafters of the original Federal Rules intended, that Congress and the bar were told in 1938 had been implemented in the Federal Rules, and that the Supreme Court embraced as early as 1947;

Second, its replacement by a system of complaint parsing that is hard to distinguish from the complaint parsing under Code pleading that the drafters of the original Federal Rules explicitly rejected;

And, third, a wholly new general requirement of plausibility.

I understand that the difference between interpretation and judicial lawmaking is one of degree rather than kind, but here the degrees of separation approach 180.

In sum, comparing the role that those who wrote the Federal Rules envisioned for pleading and what they thought could fairly be demanded of plaintiffs filing complaints with the new world celebrated by *Twombly* and *Iqbal*’s defenders leaves no doubt that the Court in those cases ignored previous acknowledgments that it has no power to rewrite the rules by judicial interpretation. One can only wonder at the spectacle of Justices who deride who deride a “living Constitution” enthusiastically embracing living Federal Rules. From this perspective, the legislation I favor would bring back the Federal Rules in Exile.

[The prepared statement of Mr. Burbank appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Professor. Incidentally, I agree with what you said about Senator Specter. This is an area where both publicly but also in many, many conversations we have had privately, when he was Chairman of this Committee and otherwise, he has taken that position. Senator Specter has been nothing but totally consistent in that regard, and I applaud him for that. I am glad you mentioned that.

Mr. Payton, the *Iqbal* decision was issued just 6 months ago, and it involves technical procedural questions. One of the things I have heard from people when we scheduled this hearing, they said, “Why not just wait until the new standard gets sorted out by the lower courts or by the Civil Rules Committee of the Judicial Conference?” How would you respond to that? Why not just wait? Why should we act?

Mr. PAYTON. Well, here is what we know—

Chairman LEAHY. Is your microphone on, sir?

Mr. PAYTON. Here is what we know and why we really cannot wait. In that short period of time, the decision has had an effect on the cases I was talking about, civil rights cases, and it has resulted in many of them being dismissed that otherwise would not have been dismissed. Those victims of discrimination, those alleged

victims of discrimination, they cannot wait. Their cases were thrown out. And every day we go forward, more will be thrown out.

Let me put this in—I do not want to overstate this, and I think I did not overstate it. I am not saying that all civil rights cases are being dismissed. I am not saying that we know enough to say that there has been a wholesale abandonment of civil rights cases. But we know enough right now to know that *Iqbal* has had a very harmful effect on substantial numbers of civil rights cases. I do not think there is any question about that. The cost of waiting is thousands of cases being thrown out that otherwise would have proceeded and would have been found to be meritorious. So waiting has an enormous price and cost, I would say, to the fabric of our society. People who are victims of discrimination will be foreclosed from proceeding to vindicate their rights. If you cannot enforce your rights, you do not have rights. That is why we cannot wait.

Chairman LEAHY. Thank you.

Mr. Garre, you would disagree, I assume. Make sure your microphone is on.

Mr. GARRE. I certainly agree with Mr. Payton that there has not been any evidence of a wholesale change in pleading practice. I think the study that I referred to in my testimony being undertaken by the Advisory Committee on Civil Rules indicates that courts have not seen a major change in pleading practice.

One of the questions that that study raises is with respect to the cases that have been dismissed—and there have been some cases that have been dismissed, civil rights cases, other cases. We need to know more. We need to know whether or not meritorious claims are being dismissed. We need to know whether these are cases that would have been dismissed under the law before *Iqbal* and *Twombly*. Are there cases that are being dismissed because of any change in the law from *Iqbal* and *Twombly*? And we also need to know—and I think this is very important. We need to know where cases are dismissed, what is happening when plaintiffs are given liberal leave to amend their complaints and come back and attempt to state new claims. At that point, are plaintiffs coming back with sufficient allegations?

One of the things that the courts have made clear—and this has not changed at all—is that there is liberal leave for amending pleadings granted under the Federal Rules, Federal Rule 15. In fact, the *Iqbal* case was remanded, so the plaintiff could be given an opportunity to amend.

So I think there is a lot that we need to know.

Chairman LEAHY. I am going to ask Professor Burbank the same question, but you say you have to know if they are meritorious cases. If they are dismissed, how are we ever going to know if they are meritorious?

Mr. GARRE. Well, what I mean by that, Senator, is that these are cases that would have met the pleading threshold under Rule 8 even if you went back and looked at the law before *Twombly* and *Iqbal*, which did make clear that, number one, conclusory allegations were not sufficient to state a claim; and, number two, that you had to state something more at reasonable inference for believing there is wrongdoing.

Professors Wright and Miller, in their famous treatise said before the *Twombly* case, I quote, “The pleading must contain something more than a statement of facts that really creates a suspicion of a legally cognizable right of action.”—which I think is the same concept that the Supreme Court has expressed in the plausibility, a reasonable inference of wrongdoing.

So I think that the quarrel that I would have with Mr. Payton is only insofar as let us look at the cases that have been dismissed and make an assessment as to whether these are cases that are being dismissed as a result of some new standard or these are cases that would not have met the threshold standard to begin with.

Chairman LEAHY. But I also worry—I mean, we could look at them. We could look at them, and we could spend years looking at them, and by then you may have no remedy at all because of the time. But I understand your answer.

Professor Burbank, the same question to you, sir. Why shouldn’t we just wait?

Mr. BURBANK. Thank you. I think, in response to Mr. Garre’s remarks, it is important to note that the cases contained in Appendix B to my prepared statement are cases only following *Iqbal*—not following *Twombly*, but only following *Iqbal*—in which it is suggested or made explicit that these are complaints that would have survived under the previous regime.

Second, I am sorry, but the memorandum that Mr. Garre refers to is not a study at all. It is a summary of cases by a law clerk. Now, I have great respect for law clerks. I was once a law clerk myself. And I have great respect for the person for whom—

Chairman LEAHY. So was I.

Mr. BURBANK. For the judge for whom this person is a law clerk. But it is a summary of cases, appellate decisions and a non-random sample of district court cases. It is not a study. Mr. Garre is confused. The Federal Judicial Center, on behalf of the Rules Committees, is conducting a study looking at actual docket entries. That is going to take quite a while. That is going to take quite a while. But the Kuperman—if that is her name—memorandum is not a study at all. There is a study underway, and it will take a good deal of time.

Now, I agree with Mr. Payton that we should not wait, you should not wait, the Congress should not wait, because we are talking here about irreparable injury. These are cases, when they are dismissed, they are not going to be able to be brought back. The law of preclusion, even if there is a change in the pleading law, will prevent these people from ever having their rights enforced. Moreover, there is a risk of irreparable injury not just to individual plaintiffs who are now being dismissed under *Twombly/Iqbal*, but to the values and policies that underlie a whole host of Congressional statutes that Congress intended to be enforced through private civil litigation.

Chairman LEAHY. My time is exhausted, but what I worry about in this whole thing is a 5–4 decision which, at least in my impression, changes precedent dramatically, changes our Rules of Civil Procedure by Court fiat.

I have been at meetings of the Judicial Conference. The Chairmen and Ranking Members of both the Judiciary Committees of the House and Senate are always invited to speak there. If the Chief Justice wanted to change the Rules of Civil Procedure, frankly, I think it would have been a lot better to have asked the Judicial Conference, raise it with them, ask for changes. You have got the Rules Enabling Act. You have got all the other processes flowing through, and at least there would be a great deal of input rather than five people—I am not sure that any of them have been trial judges, but to do this, it just bothers me a great deal.

But, anyway, my time is up. I am going to turn the gavel over to Senator Whitehouse, and I thank you all very much.

Senator WHITEHOUSE [presiding]. Thank you, Chairman. By virtue of my role as stand-in Chair for the remainder of the hearing, the witnesses will be enjoying my company through the entire hearing. And so I will put myself at the end of the list and yield my time to Senator Specter, who will be followed by Senator Franken and anybody else who should arrive, and then I will bat clean-up toward the end.

Senator Specter.

Senator SPECTER. Mr. Garre, we have the Rules Enabling Act, which explicitly set forth the procedures for an Advisory Committee on Civil Rules, then a Standing Committee on Civil Rules, the full Judicial Conference, and the Supreme Court, and then Congress has the last word. Isn't what the Supreme Court has done here in the face of contravening that express legislation engaging in, as Professor Burbank says, "judicial lawmaking"?

Mr. GARRE. Senator Specter, I do not think that is what the Supreme Court has done here. I think it has done here what is done in numerous cases dealing with questions arising under the Federal—

Senator SPECTER. Well, if it has done it in numerous cases, that does not absolve it from judicial lawmaking. They do that all the time, perhaps not quite as flagrantly.

Mr. GARRE. I think what the Court is doing here is interpreting Rule 8, and the language in Rule 8, in particular, it says "short and plain statement of the claim" showing that the plaintiff is entitled to relief. And I think if you look at the *Twombly* case, which was a 7-2 decision written by Justice Souter, where there was widespread consensus on the Court of what the standard should be, they are interpreting Rule 8, and that is a perfectly legitimate function for the Supreme Court.

Senator SPECTER. Professor Burbank, isn't that a highly strained interpretation of what went on here? Isn't this draconian, to use a better word than "sea change," in the pleading rules?

Mr. BURBANK. Yes, Senator. It is a fairy tale, and for those who are being kicked out of court, it is a grim fairy tale. That is with one "M." This is not interpretation under any reasonable interpretation of that word.

Indeed, I would note that, to my knowledge, no Court had ever previously relied on the word "showing" for the purpose for which the Court relied on it in *Twombly* and *Iqbal*. This is not interpretation. These cases cannot, if you will excuse me, plausibly be tied to the Supreme Court's own previous cases.

If you look at the cases on which Mr. Garre relies in attempting that, you will find that two of them were authored by Justice Stevens. Guess what? Justice Stevens dissented in both *Iqbal* and *Twombly*. You will find that another one—and there are only four or five cases cited by Mr. Garre—authored by Justice Breyer, was a unanimous opinion, which means that it was joined by Justice Stevens. And then if you look further at the details of those cases, you will find that they do not, in fact, come close to what the Court did in *Iqbal* and *Twombly*, which, of course—

Senator SPECTER. Professor Burbank—

Mr. BURBANK.—is why Justice Stevens dissented.

Senator SPECTER [continuing]. I hate to interrupt you, but you have already convinced me, and I want to turn to Mr. Payton.

Congratulations on what the NAACP Legal Defense Fund does and congratulations to you. And we do not have time to take up all of the meritorious claims which would be tossed out. And just a personal aside, this decision is a decision I found particularly disheartening, objectionable, because the first day in law school with Charles E. Clark, the author of the Rules of Civil Procedure, in 1938—then he was on the Second Circuit—talked about the notice pleading of *Dioguardi v. Durning* and getting away from common law pleading rules which had stifled meritorious claims, if there was something totally out of order, just using procedure to toss people out of court.

We do not have time to take up all the areas where it is going to hurt, but none is more important than civil rights. And I would be interested in, as factual as you can be, about how this is going to undermine civil rights enforcement.

Mr. PAYTON. Thank you very much. I think that that is what I go over in my written testimony, category by category, just how this has already undermined civil rights plaintiffs. You know, to put it in the context of your first question to Mr. Garre, the normal order of making changes in the Federal Rules would have resulted in a multi-year study by the various advisory committees into what the effect of any such changes would be on all sorts of cases, including civil rights cases.

As far as I am aware, there was no concern given in either *Iqbal* or *Twombly* about the effect of those decisions on anything beyond the four corners of those decisions. And here we are now trying to deal with something that has had, I would say, very predictable consequences that are going to affect the ability of our civil rights plaintiffs to actually vindicate themselves when there has been no real exploration of that at all. And I think it is critical that we go back to the status quo, prior to *Iqbal* and *Twombly*, in order to preserve something that has been so important, I would say, to the fabric of our society. A person comes in and says that she is a black woman, that she applied for a job, and that she saw her application taken to the back room and she heard from somebody that it was put into a pile and no one reviewed her application. She brings that claim, and under *Iqbal* and *Twombly*, maybe she gets thrown out. Before *Iqbal* and *Twombly*, she gets discovery, and she actually gets to find the smoking gun.

You know, there are smoking guns out there, and under the plausibility standard, maybe those cases get thrown out. If you are

not thrown out, you can discover the smoking gun—and we all know all sorts of cases where, in the course of discovery the document shows up that, in fact, reveals that there was really an awful procedure that was occurring.

We know the consequences right now of what has happened because of *Iqbal*. We know the consequences. They may be greater than we feared. But we know the consequences already have been harmful to very important civil rights, I would say, values we all share. Let us make sure we put that to an end.

Senator SPECTER. Just a concluding statement. It is infrequent that we have such a blatant case of judicial lawmaking. There are lots of other cases which are not detected and not acted upon, and I am continuing the battle to televise the Supreme Court so there will be some public understanding. Well, the public is never going to understand this issue, but this Committee is moving faster. There is companion legislation in the House, and I hope that we are able to move promptly.

There is one thing that there is unanimity on around here. It is hard to find something, but on judicial lawmaking, I think everybody agrees it ought not to be done.

Thank you very much, Mr. Chairman.

Senator WHITEHOUSE. We are joined by the distinguished Ranking Member, who had important business with the Armed Services Committee earlier, and I would now call on him, if he wishes, to make his opening statement or simply questions the witnesses. Which would you prefer so the clock knows?

Senator SESSIONS. Well, maybe a little of both.

Senator WHITEHOUSE. All right.

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM
THE STATE OF ALABAMA**

Senator SESSIONS. You know, one of the great events in my life was when I graduated from law school, in that year Alabama abandoned common law pleading and went to Federal Rules notice pleading. But prior to that, if you were going to file a lawsuit, you had to file a complaint that had some merit to it. You had to assert what rights you were filing under—Is this trespass? Is it negligence? Is it trespass on the case?—and create a whole body of pleading, demurrers, and such. It was a complicated process, and I felt we made progress when we moved away from that.

But there has been a general sustained concern—and it is not against civil rights or anything else—that notice pleading becomes anything: “I do not like it. I think maybe I was abused. Pay me money. I want to sue you, and I want to take 2 years in court, and it will cost you \$50,000, \$500,000, and you will pay me, anyway.”

So I think it is perfectly right that the Supreme Court would affirm a rule that if you cannot assert a facially plausible cause of action in your complaint, it ought not to go forward. If we are going to change the law—and Senator Specter has a bill to reverse the Supreme Court’s ruling, which is supported by the Federal Committee on Rules, I understand, and I expect them to submit some communication to our Committee to explain their view on it. If we have a change, we really ought to tighten up this thing a little bit. The pendulum has swung so far. In law school, you know, the ques-

tion of the professors was: Can you file a complaint on point paper? Remember, we heard that discussion.

So that is my basic view of it. I do not see anything wrong with a requirement that a person who sues somebody at least be able to produce a coherent complaint so that it is facially plausible, but, you know, sorry I could not be here earlier. I look forward to examining more in-depth the different opinions that we have.

Mr. Garre, is this some dramatic alteration of the law in the Supreme Court's decisions that represents a major change in the way courts have been handling complaints over the years?

Mr. GARRE. Thank you, Senator. No, the evidence that I have mentioned indicates that it has not been a drastic change. I referred to the memorandum being conducted under the auspices of the Advisory Committee, and Professor Burbank pointed out that that is being prepared by a law clerk for the Committee. If that is not good enough, I would point you to the statements of the Chair of that Committee, Judge Kravitz, who said earlier this fall that the courts were taking a fairly nuanced view of the *Iqbal* case.

And I think you are quite right. Fundamentally the question is: Should it be enough for a plaintiff to present a conclusory and implausible claim to invoke the full machinery of the civil litigation process? Should it be enough for a plaintiff to come in with an implausible claim on its face, even accepting the allegations as true, to subject a defendant in any kind of case, whether it is a Government defendant in presenting potential interference with carrying out that person's duties, or another defendant. And I think if you go back and you look at the Supreme Court decisions that I cite in my testimony, and if you look at the legion of case law in the lower courts before *Twombly*, they recognize quite clearly that, no, conclusory allegations are not enough, and that, yes, you have to have an allegation that is plausible that supports a reasonable inference of wrongdoing.

I think that is, all things speaking, a fairly low threshold that is consistent with the notice pleading regime, and I think it is well grounded in prior precedent.

Senator SESSIONS. Well, a lot of complaints are out there that most any kind of person who feels aggrieved sues a large number of defendants, and hopefully they can somehow shake some money out of them. And, frequently, people will pay several thousands of dollars, even if they have no liability at all, rather than spend large amounts of money in defense. Is it true—I guess you lawyers, I have heard some of these lawyers charge \$500 an hour. Well, you have been sued. You are in Federal court. And you have got to advise your client. Can you go in there and say to your client, "Well, client, I do not think there is any problem here. I have spent 10 hours on it, and you now owe me \$5,000." Or are you going to say, "I better check this out. I do not want to get to court and be ambushed." And they spend 100 hours. It easily can happen in these cases, and for not a lot of good if a person cannot state a claim that has a facial plausibility to it that would justify going to court.

I know the old rules were too restrictive. Massachusetts and Alabama stayed within the last two States, I think, that stayed in that area, and we moved totally to the notice pleading of the Federal Rules. I think it is better. But I am just not feeling that the law

in America is being changed if the courts insist that at least you have a plausible complaint.

The courts have dealt with this over the years as to what the notice pleading standard was set in *Conley v. Gibson*. It announced in *Conley* that it allowed dismissal only when the plaintiff can prove no set of facts to support his claim which would entitle him to relief. And courts have wrestled with that, no set of facts requirement for a number of years.

Justice Souter in *Twombly* stated that the “no set of facts” standard has “earned its retirement” after “puzzling the profession for 50 years.” In short, the *Conley* standard was confusing and too vague to be useful. To clarify that, the Court adopted a plausibility standard which requires a claim to be plausible on its face and not a formulaic recitation of the elements of a cause of action. So, to me, that is kind of what the Court is talking about.

Just briefly, Mr. Payton, I will let you respond. Has the Court there got it wrong? Has Justice Souter, writing for the majority, somehow committed a big error in saying that you have got to have a facially plausible complaint to go forward?

Mr. PAYTON. Let me make two points here. I think that pre-*Twombly* and *Iqbal*, federal courts had no problem weeding out cases that lacked merit. I think Mr. Garre has referred to them, and you have referred to them. I think courts had no problem weeding them out. The problem with what the Supreme Court has done now is that *Iqbal* and *Twombly* are having a very harmful impact on cases that I believe everyone would agree should have been allowed to go forward.

You say “plausibility.” Let me tell you the problem with plausibility. Plausibility requires the district judge to actually decide what in his or her sense is plausible. The *Conley v. Gibson* case—let me just use that case—is the implementation of a cause of action that was developed by Charles Houston, who was the founder of the Legal Defense Fund. He argued two cases in the 1940s, *Steele* and *Tunstall*, and the challenge in those cases—and it is the same challenge that is in *Conley v. Gibson*—is whether or not an all-white union has a duty to its black members, a duty of fair representation.

When Houston argues those cases, there is no such legal requirement. He puts forward those facts, and he argues to the Court and he wins, and the Court says there is a duty of fair representation that the white union has to its black members. The same issue comes up in *Conley v. Gibson*. And the question is: Is there, in fact, that duty in the context of the facts in *Gonley*?

If you simply said it is a plausibility standard, the plausibility standard would have knocked that case out. It would have knocked that case out. There are an awful lot of cases out there where civil rights plaintiffs would be out of court under a plausibility standard—even though today everyone in this room would acknowledge that those cases established principles that we cherish as what our civil rights laws ought to be.

The way to go about doing any change in our Federal Rules is you do the study first to see what effects it has. If there is a concern about complex antitrust cases, let us see what we ought to do about complex antitrust cases, but do not throw out the civil rights

cases in the wave of trying to deal with *Twombly*, which is a complex antitrust case.

There is an order of things here that is really quite important, and the harm that we are now doing to our panoply of civil rights cases is completely undeserved and harms our entire society. That is my point. It harms our entire society.

Senator SESSIONS. Well, I will look at that and just review it, but I do not think those complaints would be dismissed out of hand. I think you can formulate a complaint that a union has got a duty to represent all its members. So I think we can get overconcerned about the implications.

Senator WHITEHOUSE. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

I have got to say I am a little confused here on something, and basically it is what has happened since *Iqbal*, because Mr. Garre basically said that there is a study that said that nothing bad has happened, and Professor Burbank has said there was not a study really at all, it was just a summary. So I do not like being told something is a study and it is a summary. I mean, I think we have a right—the Ranking Member said that he is going to look back. He is sorry he arrived late, but he wants to look back at the difference of opinions. And I think we are all entitled to our opinions. But we arrive at opinions by looking at facts, and facts come from studies, not summaries and memoranda. And I think that in testimony to Congress, it should be accurate when you characterize something.

So what is confusing to me is that Mr. Garre seems to be saying that nothing meritorious has been turned down, and Mr. Burbank says there has been, by virtue of this study, which was not a study, after all. So I guess, Mr. Payton, can you give me any examples of something meritorious in the civil rights area or in any area that you think should have been heard that was not?

Mr. PAYTON. We go over some cases in my written testimony one by one. I think the dispute is a little bit different, so let me just say what the dispute is.

What I heard Mr. Garre say is there has been no wholesale change. But that is a concession that there has been a change, and that change has clearly affected civil rights cases.

Now, we do not know the full impact of that change, but we certainly know there has been a change that has harmed civil rights plaintiffs. I do not think there is any question at all about that. I do not think Mr. Garre is going to contest that there has been a change that has harmed civil rights cases.

The extent of it we can argue about, but my point is we should not tolerate any change, and that is not the way we should be proceeding here. I believe the change is far larger than he thinks it is, but he concedes that there has been a change, I would say even a significant change. He says it is not a wholesale change, but if this were a wholesale change, this room would be filled with thousands of people in here talking about what has happened. We have only had 6 months since this decision.

So the cases have not actually percolated up so that we could see them, but on the matters that really affect the fabric of our society, I do not think there is any question about that.

You know, Senator Sessions, what I was saying about plausibility is that when you are trying to get the court to adopt a brand-new cause of action, that is why a district judge may not think it is plausible. A lot of civil rights law has been made by courts in complaints that we have filed, where we have asked courts to actually let us proceed so we can show that actually this ought to be part of the lexicon of our civil rights laws.

Senator FRANKEN. Can you give us just one example from your written testimony?

Mr. PAYTON. Oh, sure. We had an example of a Hispanic man who was denied the ability to vote, and he filed a complaint challenging that, and he was thrown out of court on the grounds that he actually could not show enough to say that he was the victim of discrimination. That would have clearly passed under the standard in place 2 years ago.

There is a whole raft of cases just like that where people used to be able to simply walk into Court and they now are being held to standards that are very difficult to meet, and in the case I just mentioned, the plaintiff may not have been able to amend his complaint to solve that. He could have brought that claim before and actually probably have prevailed on it.

Senator FRANKEN. So there has been a raft of complaints, a raft of cases like this?

Mr. PAYTON. Yes.

Senator FRANKEN. In your judgment.

Mr. PAYTON. Yes.

Senator FRANKEN. But a raft is short of wholesale?

Mr. PAYTON. Here is what we do not know—

Senator FRANKEN. I am really trying to get some kind of distinction that means something to me.

Mr. PAYTON. Yes. That distinction does not mean anything to me, either. There have been very substantial numbers of cases that have been harmed already. Whether that amounts to what someone would view as a wholesale change, I am actually indifferent to that. There have been substantial numbers of cases in the civil rights area that have been harmed. Those numbers of cases are only going to increase as we go through time.

My point is we should not have wanted to harm any of those cases. That is not the way we should go about changing our Federal Rules and our notice pleading requirement.

Senator FRANKEN. So what we had was a study that was not a study saying it was not a wholesale change, but it is really a summary and there has been a raft of change.

Mr. PAYTON. Substantial numbers of cases have been affected.

Senator FRANKEN. Thank you.

Mr. PAYTON. Substantial numbers of cases have been affected.

Senator FRANKEN. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator.

Mr. Garre, since you are the person here defending this opinion, let me ask you to defend the plausibility standard. I have a number of concerns about it, the first of which is that I do not find it anywhere else in the law. It seems to have been invented for this particular occasion.

The second problem that I have with it is that, in my experience, misconduct is inherently implausible. It is implausible that the woman that Mr. Payton referred to who brought in her resume and who was African-American and when that went into the back office somebody would be so callous as to just throw that into the wastebasket without further analysis because she was black. That is implausible.

It is implausible that a CEO with a bizarre fetish goes after a female staffer in some way that is inappropriate and in violation of her right to a workplace that is free of that kind of discrimination and harassment.

It is always implausible, I would say, when there are these sort of, you know, bizarre or wrongful elements of conduct. So when you say that the standard is that something, if it is implausible, that is a strike against it, that seems to be putting a big thumb on the scales here and buttressing the status quo in which everybody is presumed to be a regular person who will not engage in this kind of conduct.

And, last, it is so subjective. The whole notion of plausibility is the relationship between a hypothesis and a set of beliefs. It imports the judge's set of beliefs into the equation in a way that I have never seen before in the law. And it strikes me, particularly—and I know the very distinguished Senator from Alabama will disagree with me, but particularly when you have a bench that has been deliberately, in my view, populated with people who bring a particular worldview that when you say, "OK, guys, bring that worldview into this discussion," you are stacking it up against the plaintiff. You have got a standard that has no meaning because it has never been used before. You have got a standard that is highly subjective. And you have got the sort of substantive bias against the plaintiff's general allegation because thank God those general allegations tend to be—guess what?—implausible because most people are good and do not engage in that kind of behavior.

How can you defend the use of the word "plausibility"?

Mr. GARRE. Thank you, Senator. First, if I could just make two preliminary remarks and then address your question.

Senator WHITEHOUSE. Sure.

Mr. GARRE. I wanted to refer to page 21 of my written testimony which describes the memorandum that I referred to earlier being undertaken by the Advisory Committee, and so I think it clearly sets forth what that memorandum is and what it says, and that refers to Senator Franken's questions, and I did want to state that for the record.

Second, there was some reference earlier to the *Conley* case and the suggestion that that case would come out differently under *Iqbal*. And I would point the Committee to page 563 of the *Twombly* decision where the Court specifically says that the complaint in *Conley* "amply" stated a claim under the Federal Rules of Civil Procedure. What the Supreme Court took issue with was a sentence in *Conley* where it described the "no set of facts" language. The Court did not take issue with the result in *Twombly*—in *Conley*, and that is made clear in the *Twombly* decision.

Senator WHITEHOUSE. All right. Now—

Mr. GARRE. But let me answer your question.

Senator WHITEHOUSE. As former Solicitor General, I thought you would be better about answering questions.

Mr. GARRE. I appreciate that, Senator.

Senator WHITEHOUSE. We are not the Supreme Court, but we do want our questions answered.

Mr. GARRE. Plausibility is—

Senator SESSIONS. Well, he maybe said a little comment on the preamble of your question. Excuse me.

Senator WHITEHOUSE. Now everybody is jumping in. It is getting harder and harder to get a question answered in a hearing around here.

Mr. GARRE. That is familiar from the Supreme Court, Senator.

The plausibility standard is defined as a reasonable inference of wrongdoing. You look at the factual allegations, you assume that they are true, and then the question is: Is there a reasonable inference of—

Senator WHITEHOUSE. But they do not use the word “reasonable.” They use the word “plausible.” And that is, to me, a rather unique word.

Mr. GARRE. Senator, they define plausibility as a reasonable inference of wrongdoing. That is in the Court’s decision. I can find—

Senator WHITEHOUSE. So you would be perfectly comfortable getting rid of the word “plausible” once and for all and switching it with “reasonableness” because that is what it really means?

Mr. GARRE. I think that is—

Senator WHITEHOUSE. You are comfortable dumping the plausibility standard and using a pure—using “reasonableness” wherever the word “plausibility” appears.

Mr. GARRE. I think that is the way that the Court itself described the standard, Senator. And if you go back and you look at the cases—and I have cited a number of them in my testimony—where they do not—

Senator WHITEHOUSE. Why would they—this is a Court that knows what words mean. The word “reasonable” is one of the most widespread words in jurisprudence. Why would they bring in a different word, “plausible,” if they did not intend to open the field to a more subjective point of view on the part of judges? Why not just use the word “reasonable” when “plausible” has a meaning that allows for more subjective application? I mean, if you look at the definition of “plausible,” it is “superficially fair or reasonable or valuable, but often specious.” Superficially, the quality of seeming reasonable—not being reasonable, seeming reasonable or probable. It is a word with a different meaning. Why would they use that word when reasonableness is a known, widely used, almost term of art in the law? Why bring in a word that is not a term of art and that imparts that subjective element that allows a judge to say, “Well, that does not seem right to me, particularly when what you have in these cases is a fight of somebody who has been injured against the status quo that would like to sort of deprecate that injury or that it actually never happened?”

Mr. GARRE. I think to the extent, Senator, you are concerned about confusion about what “plausibility” means, I think the decision answers it, and it is on page 1949 of the *Iqbal* decision, where

the Court says, "What do we mean by 'plausibility'? We mean the plaintiff must plead 'factual content' that allows the Court to draw a reasonable inference that defendant is liable for the misconduct alleged."

And if you look at the *Iqbal* case and the *Twombly* case, it explains what the Court meant—

Senator WHITEHOUSE. So you do not see any hint or whisper of mischief in the importation of this word "plausible" into these decisions?

Mr. GARRE. Well, I think as defined—

Senator WHITEHOUSE. On purpose.

Mr. GARRE [continuing]. By the Court's decisions, and we are interpreting the Supreme Court's decisions. And I think if you look at what "plausibility" meant in *Iqbal* and in *Twombly*—in *Twombly* you had a complaint that alleged an antitrust conspiracy among competitors who engaged in parallel conduct. And what the Court said is, "Hey, we are going to accept these allegations as true." But that is not a plausible claim of wrongdoing because competitors deal in a parallel way all the time, and that is not illegal. You have got to provide more allegations to create an inference that there was wrongdoing.

Senator WHITEHOUSE. My point is the difference semantically between "plausible" and "reasonable" is that "reasonable" connects more directly to an objective standard; whereas, "plausibility," by its very definition, imports a subjective point of view of the judge and the Court. And I do not see a good reason for that step, from reasonableness to plausibility. There is an actual semantic step that is taken there, and they did not need to do it. They did do it. I cannot believe that they did not do it on purpose. And when the distinction is that clear, it is basically a license to legislate from the bench.

Mr. GARRE. And with respect, Senator, I think the Court did answer that concern in its decision when it defined—

Senator WHITEHOUSE. Well, they backed away from the term "plausibility" by defining it in terms of "reasonableness," but they still left it hanging out there to be used by judges in a way that has dominated the discussion today about this piece of judicial legislation, if you will.

Mr. GARRE. But I think a judge that read that word in the abstract without reading the Court's decision would not be doing his or her job, and I do not think we should assume that judges are disregarding the Supreme Court's decision.

The one other thing I would say is that these are principles that were agreed to by seven Justices led by Justice Souter in the *Twombly* case, and in the *Iqbal* case, the disagreement on the Court was not about what the principles were. It was about whether they were misapplied in that case. So there is a widespread consensus on the Court that these are the proper principles and interpreting Rule 8 of the Federal Rules of Civil Procedure.

Senator WHITEHOUSE. Well, we will see. Anyway, do you wish to have a second round?

Senator SESSIONS. Yes.

Senator WHITEHOUSE. We have to wrap up in about 10 minutes.

Senator SESSIONS. OK, and I appreciate that, and you are very generous allowing me to go over.

Senator WHITEHOUSE. And I would like to reserve 3 minutes for closing, so take a second round.

Senator SESSIONS. OK. Well, Justice Souter talked about the *Conley* standard should be “best forgotten as an incomplete, negative gloss.” That is what he said about it. And I guess the seven Justices all signed on to that opinion. Is that right, Mr. Garre? Mr. Garre, you are reading your book there, but looking at the Advisory Committee notes to Rule 11, which requires the plaintiff’s attorney to file a legitimate complaint, it says this: “What constitutes a reasonable inquiry may depend” on factors including “whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or other members of the bar.”

First, “plausible” does strike me—and I agree with you, Mr. Chairman, it is an unusual word. It is not something that we have normally seen a lot in law, but this was at least used in the Advisory Committee notes to Rule 11. I guess it never—but it just strikes me is that the Court is saying that notice pleading does not mean anything, you have got some responsibilities to craft a complaint that sets forth a cause of action that is worthy of requiring the defending party to spend perhaps hundreds of thousands of dollars to defend himself. A lawsuit is a serious thing. It is not sufficient to say, “I do not think that I was allowed to vote because of bias.” I do not know what the complaint was in that voting case, but you have to assert some basis before the county or city or the State, whoever defended that case, has to spend all the money and go to a lawsuit. You have got to assert a complaint that has some value there.

In looking at your remarks in other matters, there are quite a number of cases, including the Second Circuit and others who have adopted this, haven’t they, Mr. Garre, and have not criticized it or expressed reluctance to follow the Supreme Court decision? They seem to have adopted it, for the most part. Is that correct?

Mr. GARRE. I think that is correct, Your Honor. I mean, certainly there is a debate—

Senator SESSIONS. You get an “A” for saying “Your Honor,” but—

[Laughter.]

Senator SESSIONS. It does convince me that you have been in court before in your life, and that is a good thing.

Mr. GARRE. Thank you, Senator.

Senator SESSIONS. Thank you. Mr. Chairman, I think you raise a good point. I do not know how you can word this, but in my view, creating—in my view, if we are going to write a statute to deal with the problem of pleading, I think the statute should be crafted in a way that requires a little more than the *Conley* case does, and I think practice and history shows us that as a matter of policy—not a lot more. A notice pleading is still a strong part of our law, and I support that. You do not want to throw people out of court for an unjustified reason. But everybody—the Rules of Procedure require that the law—the Rules of Procedure require some integ-

rity and some coherence in the pleading, or else you do not go to court, you do not get in court. It is just that simple.

So how we draw that line, I do not know. "Plausibility," I agree, Mr. Chairman, is a word that I am not that familiar with, but they have defined it. They seem to have reached a view of how it should be defined and how it should be applied in the cases. And I do not think we should jump over the Rules Committee and be rewriting that Rule of Procedure today. Let us see where it goes, and let us see what they will correspond with us and what they will tell us their view is.

Thank you.

Senator WHITEHOUSE. I thank the Ranking Member.

By way of sort of closing out, I guess, we have dealt with a lot of real specifics here, and I would like to do one of those sort of Google map bounces where you go way up before you come back down to the details again, and put what I think is the context for this decision forward, and that will, I guess, help define how plausible it is that this is a purely technical judgment by the Supreme Court and that it has no further purpose to close the courthouse doors.

You know, I have said this before; I will say it again. We have seen over many years, I think, a very deliberate and surprisingly overt strategy to populate the courts, and particularly the Federal courts, with judges who have a particular political persuasion. It has been part of the Republican Party's proclaimed strategy, so it is no secret. And the fact that an enormous infrastructure has been set up to accomplish it, vetting infrastructure like the Federalist Society to get people tuned up for the judicial appointments down the road, and the result has been that a small and determined group of ideologically active judges can control the Supreme Court when it wishes by 5-4. And it is not just a potential. You have seen it work out in a whole variety of different areas, not the least of which is the discovery of a constitutional right to own guns that had previously gone unnoticed by Supreme Courts for 220 years, and suddenly 5-4, poof, it magically appears.

And scholars like Jeffrey Toobin who have looked at the Court for a long time have noted that they seem to be persistently and deliberately driving the Court in a particular direction and have noted the consistency between that particular direction and the current political ideology of the present Republican Party.

And when you have a decision like this that tends to close the courthouse doors to consequences against senior Government officials, particularly senior Bush administration Government officials, particularly senior Bush administration Government officials that were involved in the national security programs that have been the subject of great criticism—and, in fact, there is a report due out any day on the Office of Legal Counsel, what went wrong there that permitted the torture program to go forward—it is hard not to see this in a context when there are clear winners and losers associated with this. And the clear winners are the corporations who have their own independent effort to demean and revile the courthouse and the jury and try to make it look like it is a real impediment on them and an unfair burden to be sued. And I think that is frankly unconstitutional. I think that our constitutional struc-

ture is not just executive, legislative, and judicial branches; it also includes juries. Juries turn up three times in the Constitution, not just the Article III courts but juries themselves. And I think corporations would love a world in which the only Government officials that they ever had to answer to were ones who had been rendered supple to their views by campaign contributions and corporate money.

Tampering with legislators, tampering with executives is something that is licensed by our campaign finance laws. Tampering with a jury is an offense. And, yes, I think there are plenty of corporations who would like never to have to appear before a jury again because they cannot influence that jury. It is against the law to do that. It is the last place where somebody who is getting rolled, who all institutions of Government are stacked against, can still have their last stand and find a hearing and get a neutral judge and, more importantly, a jury of their peers who cannot be tampered with about the decision before them to make that call.

And I cannot see this choice that the Court has made as independent of all of those surrounding facts. I think it is implausible.

The hearing will remain open—

Senator SESSIONS. Mr. Chairman, could I just respond to say that I do not—I believe that Chief Justice Roberts and the six other Justices who ruled on this—I guess Roberts was on this opinion. Was he on this opinion? These are people who have seen thousands and hundreds of thousands of lawsuits work their way through the system, and they have a growing consensus that we have got a lot of frivolous lawsuits in the system, and that a person ought to at least be able to file a facially plausible complaint to get into court.

This is not some agenda by some secret group out here. The Committee on Rules supports this agenda. Justice Cornyn—I will offer his statement for the record. He is a former Justice of the Texas Supreme Court. He supports it. So I think it is just a question of can we create a—has the Court improperly created—properly using the existing rules, interpreted erroneously to say that your complaint should have facial plausibility? And if we want to argue about that word, perhaps, but I think it is not against the law and the history of litigation in America. And, in fact, you go back 100 years, and you really had to plead with specificity to stay in court. It is a lot easier to be in court today than it used to be.

Thank you.

Senator WHITEHOUSE. You are very welcome. The statement of Justice Cornyn, Senator Cornyn, Attorney General Cornyn, will be accepted into the record, as, without objection, will a number of other statements. My own is already in.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Senator WHITEHOUSE. There is a coalition letter and statements from Hon. Louis Pollak; from Simon Lazarus of the Senior Citizens Law Center; from Alan Morrison at the George Washington University Law School; Michael Dorf at Cornell University Law School; Steve Crowley at the University of Michigan; Doug Richards at Cohen Millstein; Joseph Seiner, a professor at the University of South Carolina School of Law; David Shapiro, emeritus professor at Harvard Law School; Professor Spencer at Washington Lee Law

School; Professor—I cannot read it—Subin at Northeastern University School of Law.

In any event, they will all be accepted into the record without objection, as well the statement of Senator Feingold.

[The statements appears as a submission for the record.]

Senator WHITEHOUSE. The record of the hearing will remain open for an additional week for any further statements that anybody wishes to add. This has been, I think, an instructive and lively hearing. All of the witnesses were extremely well prepared and thoughtful and argued their cases extremely well, and I was very impressed with the quality of the testimony. So I thank each of you for being here, and I will, without further ado, adjourn the hearing.

[Whereupon, at 11:35 a.m., the Committee was adjourned.]

[Questions and answers and submission for the record.]

[Additional material is being retained in the Committee files, see Contents.]

QUESTIONS AND ANSWERS

“Has the Supreme Court Limited Americans’ Access to Courts?”
Hearing before the U.S. Senate Committee on the Judiciary
December 2, 2009

**Professor Stephen Burbank’s Answers to the
Written Questions of Senator Tom Coburn, M.D.**

1. In your testimony, you acknowledged that it is too early to determine the real impact of *Iqbal* and *Twombly* on “litigation behavior or the results of litigation.” This is consistent with the findings of the Advisory Committee on Civil Rules, which has found no evidence of a “drastic change” in pleading practice to date.¹ You have also previously written that changes in the Rules too often prompt “Congress to initiate its own half-baked reforms” and that you would favor a “moratorium on procedural law reform” until “empirical evidence” tells us “what we are doing.”² You nonetheless advocate congressional reform here based on the conclusory statement that the “usual victims of procedural reform” should not have to bear the risk of “irreparable injury.” Why would it not be more prudent to delay any legislative action until everyone can better understand what, if any, impact *Iqbal* and *Twombly* have had on the lower courts’ approach to pleading standards?

Answer: First, the Advisory Committee made no such findings in the cited memorandum, and the evidence, although limited, prompts concern both that a substantial number of people are being denied access to court as a result of *Twombly* and *Iqbal*, and that those I called “the usual victims of ‘procedural’ form” are suffering that fate disproportionately. As I stated in an answer to a post-hearing question from Senator Specter:

Alas for those anxious to make Ms. Kuperman, the author of the memorandum in question, not only the most famous law clerk in the country but the youngest member of the Advisory Committee, (1) she is just a law clerk (although a very nice and bright one), (2) her memorandum is not a study but rather a summary of post-*Iqbal* appellate decisions and a non-random sample of district court decisions, (3) the unsupported characterizations in the brief prefatory section of the memorandum are her opinions, and (4) they are highly contestable.

Indeed, Ms. Kuperman’s memorandum led me to many of the cases that are cited in Appendix B to my prepared statement. These are cases that either suggest or explicitly state that *Iqbal* has caused the dismissal of complaints that would not have been dismissed in the pre-*Twombly* era. They thus answer the only question about dismissed cases discussed at the hearing that makes sense (once Senator Leahy pointed out that, without discovery, one cannot determine whether

¹ See November 25, 2009 Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee Concerning the “Application of Pleading Standards Post-*Ashcroft v. Iqbal*” at 2.

² Stephen B. Burbank, *Symposium: Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 Brooklyn L. Rev. 841, 842 (1993).

complaints that have been dismissed under *Twombly* and *Iqbal*, but that would have survived under prior law, had merit, which was, of course, an animating insight of those who framed the Federal Rules). In sum, even if the cases in Appendix B and other similar cases do not signal what Mr. Garre referred to as “wholesale dismissal of complaints” (pg. 22, without defining that term), they do signal a loss of access for a substantial number of people.

It is convenient for supporters of *Twombly* and *Iqbal* to conflate Ms. Kuperman’s memorandum with the broader effort to reconsider pleading, motions to dismiss and discovery that the Advisory Committee has undertaken, an ambitious effort that includes original empirical investigations by the Federal Judicial Center. That work, which involves a number of quantitative and qualitative projects that merit the term “study,” will take time. Moreover, as to pleading and motions to dismiss, it will be of limited inferential value, at least if the goal is, as it should be, to compare the costs and benefits of the system of notice pleading and broad discovery with the costs and benefits of systems proposed to replace it. See my answer to Question 6 below.

In the meanwhile, we have very limited data. A few law review articles include analyses of slices of post-*Twombly* and/or post-*Iqbal* experience based on published opinions. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011. Contrary to Mr. Garre’s assertion (pg. 34), “the most comprehensive study to date” is not the Kuperman memorandum but rather a study (using econometric techniques) of some 1200 cases by Professor Patricia Hatamyar that is cited at page 7 note 3 of my prepared statement. This study also suffers from the biases that afflict work based on published decisions (even after the advent of computerized data bases). But it is probably the best we have for now, and it suggests that what I have called “the usual victims of ‘procedural’ reform” are being differentially and adversely affected by *Twombly* and especially *Iqbal*. Thus, Professor Hatamyar concluded that “the largest category of cases in which 12(b)(6) motions are filed was constitutional civil rights. Motions to dismiss in constitutional civil rights cases were granted at a higher rate (53%) than in cases overall (49%), and the rate of granting 12(b)(6) motions in constitutional civil rights cases increased in the cases selected from Conley (50% to *Twombly* (55%) to *Iqbal* (60%).”

Second, I do not advocate “congressional reform” at this time. Rather, I advocate respect for the Rules Enabling Process and a return to the status quo ante pending a thorough, open, inclusive and evidence-based study by the rules committees of the Judicial Conference. As stated in an answer to one of Senator Specter’s post-hearing questions:

[Any] plea for respect of the Enabling Act process should have been addressed to the Supreme Court. Since, however, it is too late for that, it falls to Congress to insist on the exclusivity of that process for judicial amendments to the Federal Rules. That is the first goal of the substitute amendment proposed in Appendix A

[to my prepared statement]. The second is to ensure that Congress does not repeat the Court's mistakes and thus that it waits for the results of the informed, thorough and open process upon which the rules committees have embarked before deciding whether legislation prescribing different pleading standards is required. The third goal is to ensure that, pending the results of the Enabling Act process, the Court's improvident decisions do not cause irreparable injury either to those without the ability to satisfy their requirements or to federal statutory provisions designed for private enforcement.

2. Your temporary legislative proposal would require pleading standards to be governed by judicial interpretations of the Federal Rules of Civil Procedure that existed on May 20, 2007. Won't this require federal courts to basically guess the meaning of the standards they should apply? Under your proposal, would it be inappropriate for them to apply the pleading standard articulated in *Twombly* and *Iqbal*? If so, if the courts do not have a clear standard (like that laid out in *Twombly* and *Iqba*.), how will lower courts avoid employing varying legal standards?

- a. What was the standard – as you understand it – on May 20, 2007?

Answer: Under the proposed substitute amendment in Appendix A to my prepared statement, the federal courts would simply return to applying the law governing dismissal or striking of pleadings on the stated grounds (and judgment on the pleadings) that they applied before *Twombly* was decided, with the added congressional direction to ensure that such law was consistent with pre-*Twombly* decisions of the Supreme Court. This should not prove difficult. Lower federal courts had no difficulty understanding and applying the provision of the 1991 Civil Rights Act that was the model for my proposal. Any uncertainty and/or inconsistency – and there would be some – would be no greater than (and I doubt that it would be as great as) the uncertainty and inconsistency that have followed *Twombly* and *Iqbal*. The notion that *Twombly* and *Iqbal* lay out a “clear standard” is preposterous. As stated on page 18 of my prepared statement:

Most risible of all the arguments I have heard against the status quo approach I favor is that it will “guarantee inconsistency.” As if *Twombly* and *Iqbal* -- with the latter's paeon to “judicial experience and common sense” leading the way -- will bring about consistency. I prefer the devil I know to the devil I do not know, at least until such time as there has been a thorough, open, and democratically accountable lawmaking process that justifies installing a new king of the nether regions.

Apart from, and antecedent to, the variousness of “judicial experience and common sense,” *Iqbal* in particular is notably unclear about how courts should parse complaints, separating the factual allegations that are entitled to a presumption of truth from the conclusory allegations that are not. As I observed in an answer to one of Senator Specter's post-hearing questions:

Following *Twombly* and *Iqbal*, a great deal turns on the trial court's determination whether an allegation is “conclusory” in nature. That determination will dictate

whether the allegation is entitled to a presumption of truth, and it will weigh heavily in any subsequent plausibility analysis that the court conducts. But the Supreme Court has given lower courts absolutely no guidance in determining when an allegation is, in fact, “conclusory”. Under *Twombly*, the magnitude of this problem was not immediately apparent, as the allegation of conspiracy that was found to be “conclusory” basically took the form of a pure recitation of an element of the plaintiff’s claim, suggesting that the Court’s holding on this point would be limited to allegations fitting that description and/or not providing “fair notice” to defendants. In *Iqbal*, however, the majority dismissed as “conclusory” two allegations that were much more specific in nature, as to which there could be no problem of inadequate notice: one in which the plaintiff claimed that the Attorney General was the “principal architect” of the specific policies challenged, and another claiming that the FBI Director was “instrumental in [their] adoption, promulgation, and implementation.” By holding that these allegations -- which go much further than mere recitations of elements -- were nonetheless “conclusory” in nature, the majority raised the stakes considerably. But it said nothing about how courts and litigants are supposed to determine whether allegations are “conclusory,” instead behaving as though the answer to the question was self-evident. It was certainly not self-evident to the dissenters, who disagreed with the majority that these allegations were “conclusory” and would have accorded them a presumption of truth. The result is a standard that lacks predictability, rationality or fairness.

- a. A return to pre-*Twombly* standards for dismissing or striking pleadings on the stated grounds would reinstate “the “notice pleading” regime of *Conley v. Gibson*, with such refinements as the Court had made, chiefly in (or prompted by) antitrust and securities cases and cases involving the defense of official immunity – see *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), and *Crawford-El v. Britton*, 523 U.S. 574 (1998) – together with any refinements made by the courts of appeals that were consistent with the Court’s decisions. It is to be hoped that this process would again untangle the distinctive roles that, as the *Conley* Court recognized, those who wrote the Federal Rules intended for the motion to dismiss under Rule 12(b)(6) and the motion for a more definite statement under Rule 12(e). As discussed in my answer to Question 8 of Senator Specter’s post-hearing questions, the confusion about *Conley*’s “no set of facts” language was largely self-induced by lower courts intent on covertly smuggling fact pleading back into federal law. In any event, under my proposal it quite clearly would be inappropriate for the federal courts to apply either the aggressive and arbitrary complaint-parsing of *Iqbal* (compare *Papasan v. Allain*, 478 U.S. 265, 283-92 (1986)), or *Twombly*’s plausibility standard as generalized in *Iqbal*. It would also be improper for the federal courts to follow the *Iqbal* Court’s absurd interpretation of Rule 9(b). As stated in my answer to Question 2 of Senator Specter’s post-hearing questions:

Finally as to Supreme Court precedent, the *Iqbal* Court’s maiming of Rule 9(b) – which is so critically important in discrimination cases -- was both without precedent in the Court’s decisions and demonstrably inconsistent with the intent

of the drafters of the Federal Rules (and hence presumably with the Court's original understanding). The Advisory Committee Note accompanying Rule 9 in 1938 listed Order 19, Rule 22 of the English Rules as the source or inspiration for Rule 9(b). That source provided: "Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, *it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred*" (emphasis added). Determined to reverse the Second Circuit notwithstanding that court's measured and thoughtful opinion, the five justice majority in *Iqbal* found it necessary not only to disregard the petitioners' concession about supervisory liability and change the law of official immunity, but also to rewrite Rule 9(b). In that respect, *Iqbal* is without any grounding or foundation at all.

3. If courts are not empowered to dismiss conclusory and implausible claims, won't that be an invitation to exploit liberalized pleading standards and launch costly discovery fishing expeditions?
 - a. How do you propose addressing this concern?

Answer: In its 1947 decision in *Hickman v. Taylor*, 329 U.S. 495, the Supreme Court observed that "[t]he new rules ... restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial." *Id.* at 501. The Court also stated "that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts of his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.* at 507 (footnote omitted). Thus, my first response is that the question suggests the extent of the revolution created by *Twombly* and *Iqbal* – without using the Enabling Act process and thus without giving Congress an opportunity to review, and if necessary to block, the profoundly important policy choices the Court made before they became effective. My second response is the same I gave to a post-hearing question from Senator Specter regarding Gregory Garre's "contention in his prepared statement that a statute overruling *Twombly* and *Iqbal* would "exact enormous costs" (p. 24) for civil defendants and society (pp. 29-33)." [I dealt separately with a similar contention about government officials].

I do not understand the predicate for Mr. Garre's assertion (pg. 24) that the alternative to *Twombly* and *Iqbal* is "a system in which courts permitted conclusory and implausible claims to go forward." I thought he believed that the pre-*Twombly* landscape (which is what the proposed substitute bill in Appendix A would restore) was one in which appellate courts, in dialogue with the Supreme Court, were moving seamlessly toward the point staked out in those decisions. (But see my answer to Question 2 above).

I agree, however, that rational public policy in this area must reflect a comparative evaluation of the costs of alternative pleading (and discovery) regimes. Rational public policy must also attend, however, to the benefits of the alternatives – a dimension simply absent from Mr. Garre’s prepared statement and testimony. Moreover, in a system like ours that has depended heavily on private civil litigation to enforce public law, rational public policy must consider what would replace litigation (and how it would be funded) if one or more of the alternatives portended a substantial decrease in enforcement through litigation. Thus, for instance, do Americans really want the SEC or FTC sufficiently well-funded (through taxpayer dollars) and powerful to pick up the slack? Or is the real goal here, at the end of the day, no enforcement?

Contentions about the “enormous costs” of the system of notice pleading and broad discovery are not just a talking point for defenders of *Twombly* and *Iqbal*. They are a talking point that the business community and others intent on dismantling private civil litigation as a means of securing compensation for injury and enforcing public laws have been repeating for decades, hoping (alas, not without reason) that constant repetition of myths will weaken any inclination to doubt them. For thoughtful, empirically based responses to this and other similar litigation myths, I refer the Committee to the submissions of Professors Theodore Eisenberg and Steven Croley.

Mr. Garre also ignores, for purposes of comparison, the burdensome costs associated with administering the Court’s newly expanded definition of a “conclusory” allegation. Following *Twombly* and *Iqbal*, a great deal turns on the trial court’s determination whether an allegation is “conclusory” in nature. That determination will dictate whether the allegation is entitled to a presumption of truth, and it will weigh heavily in any subsequent plausibility analysis that the court conducts. But the Supreme Court has given lower courts absolutely no guidance in determining when an allegation is, in fact, “conclusory”. Under *Twombly*, the magnitude of this problem was not immediately apparent, as the allegation of conspiracy that was found to be “conclusory” basically took the form of a pure recitation of an element of the plaintiff’s claim, suggesting that the Court’s holding on this point would be limited to allegations fitting that description and/or not providing “fair notice” to defendants. In *Iqbal*, however, the majority dismissed as “conclusory” two allegations that were much more specific in nature, as to which there could be no problem of inadequate notice: one in which the plaintiff claimed that the Attorney General was the “principal architect” of the specific policies challenged, and another claiming that the FBI Director was “instrumental in [their] adoption, promulgation, and implementation.” By holding that these allegations -- which go much further than mere recitations of elements -- were nonetheless “conclusory” in nature, the majority raised the stakes considerably. But it said nothing about how courts and litigants are supposed to determine whether allegations are “conclusory,” instead behaving as though the answer to the question was self-evident. It was certainly not self-evident to the dissenters, who disagreed with the majority that these

allegations were “conclusory” and would have accorded them a presumption of truth. The result is a standard that lacks predictability, rationality or fairness. Allowing such an unguided and arbitrary standard to define the capacity of litigants to obtain remedies for their injuries will impose heavy transaction and social costs.

Like his predecessors in this campaign, Mr. Garre ignores decades of systematic empirical research showing that discovery is not a ubiquitous problem but rather that it is a problem in only a small slice of litigation—typically, high stakes, complex cases. A recent preliminary report of the Federal Judicial Center is to the same effect. *See* Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report (Oct. 2009).

At least, however, all the talk about costs should focus attention on the fact that the perceived problem is not pleading, but rather discovery. Moreover, even if attention were paid only to costs, denying court access to civil rights plaintiffs so that large business corporations engaged in high stakes, complex commercial cases could be spared what Judge Easterbrook called “impositional discovery,” would seem doubly feckless: first, because it targeted the wrong part of the litigation process, and second, because it did so in all cases, when only a small proportion of cases posed the problem to be addressed. The latter is a major cost of insisting upon the same rules of procedure across the landscape of substantive law, so-called trans-substantive procedure. In that regard, it may be that Congress should amend the Rules Enabling Act to authorize the proposal of substance-specific rules when necessary to avoid such costs. If it were to do so, however, Congress should prescribe that proposed substance-specific rules would become effective only if adopted by legislation (rather than under the normal report-and-wait provision of the Enabling Act).

Finally and again, if one is to examine the costs of discovery, the quest for wise public policy requires that one also consider the benefits of discovery. In that regard, it is no coincidence that the chief architect of the 1938 Federal Rules on discovery, Professor Edson Sunderland, was a progressive well acquainted with that movement’s emphasis on “legibility” (transparency) as a necessary condition for effective regulation. As Judge Patrick Higginbotham put it:

Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. *Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.*

Patrick Higginbotham, *Foreword*, 49 ALA. L. REV.1, 4-5 (1997) (emphasis added). *See also* Statement of Stephen N. Subrin.

I would only add, for Senator Coburn's benefit, that another important source of factual information, as opposed to cosmic anecdotes, about litigation, is my colleague, Tom Baker's book, *The Medical Malpractice Myth* (2005).

4. Are you concerned about how the legislation proposed in the House and Senate will affect Federal Rule of Civil Procedure 9(b), which imposes heightened pleading requirements for fraud claims?
 - a. Should a plaintiff be allowed to bring a suit in federal court accusing someone else of fraud without presenting real facts to support that claim?

Answer: This is one reason why I do not support the legislation proposed in the House. It is not clear that S. 1504 would affect Rule 9(b), since *Conley v. Gibson* did not involve a complaint that was subject to that Rule. It is quite clear that the proposed substitute amendment in Appendix A to my prepared statement would not affect the correct understanding of that Rule's treatment of complaints alleging fraud or mistake. As discussed above, it would also restore the original understanding of the rest of Rule 9(b), the egregious misinterpretation of which by the *Iqbal* Court is one of the most striking illustrations of the majority's contempt for the Enabling Act process and of the selective nature of some justices' attachment to originalism. In sum, I support what those who wrote Rule 9(b) intended as to both matters treated there -- greater particularity in pleading fraud (or mistake) and no requirement of pleading facts as to conditions of mind.

Hearing Before the Senate Committee on the Judiciary
“Has the Supreme Court Limited Americans’ Access to Courts?”
December 2, 2009

Stephen B. Burbank’s Answers to Senator Arlen Specter’s Post-Hearing Questions

1. Why do you believe that the proposed substitute amendment appearing in Appendix A to your prepared statement is preferable to S. 1504, H.R. 4115, or any other legislative proposal that either specifies a standard for pleading complaints or limits the grounds under which a complaint can be dismissed under Rule 12 of the Federal Rules of Civil Procedure?

Answer: The substitute amendment proposed in Appendix A reflects my views that (1) the Court’s decisions in *Twombly* and *Iqbal* resulted from a process that for this purpose was both illegitimate and inadequate, (2) although legislation is a legitimate process for amending the Federal Rules, the Enabling Act process is usually to be preferred and is preferable in this instance (at least as a basis for ultimate congressional judgment), and (3) nonetheless, legislative action is required now to prevent irreparable injury pending the completion of the Enabling Act process.

The process leading to *Twombly* and *Iqbal* – adjudication under Article III – and hence the decisions themselves were illegitimate because they effected consequential changes to the Federal Rules of Civil Procedure without affording Congress the opportunity to review, and if necessary to block, the new policy choices contained in those decisions before they became effective. They thus violated the requirements of the Rules Enabling Act and ignored the Court’s own decisions on the differences between judicial interpretation and judicial lawmaking (see my answer to Question 3 below).

The process and hence the decisions were inadequate because adjudication did not give the Court, and the Justices otherwise lacked, the information, experience, and breadth of perspectives that are necessary for wise prospective lawmaking about matters as fundamental as access to court and the private enforcement of public law.

Congress does not suffer from the deficits in democratic accountability of the Court’s decisions in *Twombly* and *Iqbal*. Rather than itself running the risk of legislating pleading law on the basis of incomplete information and partial perspectives, however, Congress should insist on respect for the process it has prescribed in the Enabling Act, as amended, in delegating legislative power to the Court to make prospective supervisory rules.

Some legislative action is necessary now, however, to forestall the damage that the Court’s decisions could do in the three to four years that it will take the Judicial Conference’s rules committees properly to address the issues under the Enabling Act process. That is, for the reasons suggested in my answer to Question 5 below, the risk of irreparable injury to those who cannot satisfy these decisions’ new standards, as well as to policies underlying statutes that the

enacting Congress intended to be enforced through private litigation, is sufficiently serious to require a return to the status quo existing before *Twombly* was decided.

Finally, although the approach taken in Appendix A would necessarily yield some uncertainty and inconsistency, they could not in my view be any greater than the uncertainty and inconsistency that new statutory standards would engender -- even those that sought a return to *Conley v. Gibson* (see my answers to Questions 2 and 8 below) -- or as great as that which *Iqbal's* capricious complaint-parsing and privileging of "judicial experience and common sense" have already created (see my answer to Question 6 below).

2. What is your response to the contention that *Twombly* and *Iqbal* follow logically from, or at least are consistent with, pre-*Twombly* decisions of the Supreme Court and the lower federal courts—or, as Gregory Garre contends in his prepared statement, that *Twombly* and *Iqbal* are "firmly grounded in decades of prior precedent at both the Supreme Court and federal appellate level . . ." (p. 11). In answering this question, please address whether the decisions of the Supreme Court on which Mr. Garre relies (pp. 11-14) support *Twombly* or *Iqbal*.

Answer: This is a common refrain of those who defend the Court's decisions, as I learned when engaging in an on-line debate with lawyers seeking to provide the same assurance. See Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf>. But it misrepresents the pre-*Twombly* decisions of the Supreme Court and invests lower court cases – some of which ignored binding Supreme Court precedent – with authority equal to that of the Court's decisions.

The dubiety of this argument is immediately suggested when one considers that, of the four Supreme Court decisions relating to pleading that Mr. Garre discusses in any detail on the cited pages of his prepared statement, Justice Stevens authored the Court's opinions in two (*Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) and *Crawford-El v. Britton*, 523 U.S. 574 (1998)). Having dissented in both *Twombly* and *Iqbal*, Justice Stevens would surely be surprised to learn that they were "firmly grounded" in his prior opinions for the Court. He would doubtless have the same reaction to the notion that the (unanimous) decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), or part III of *Papasan v. Allain*, 478 U.S. 265, 283-92 (1986), both of which he joined, were part of the stealth dismantling of *Conley v. Gibson* that this argument posits.

In *Dura Pharmaceuticals*, the Court held that a plaintiff alleging securities fraud must "prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss," 544 U.S. at 346, rejecting the Ninth Circuit's view that "plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of misrepresentation." *Id.* at 340 (internal citation omitted). It is thus not surprising that the Court found insufficient a complaint alleging only "that the plaintiffs 'paid artificially inflated prices for Dura's securities' and suffered 'damage[s]'," which the Court interpreted as "suggest[ing] that the plaintiffs considered the allegation of purchase price inflation alone

sufficient.” *Id.* at 347. So viewed, *Dura* reflects an application of precedent holding that, in ruling on a motion to dismiss a court “must assume that the [plaintiff] can prove the facts alleged in its complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the [applicable substantive] laws in ways that have not been alleged.” *Associated General Contractors*, 459 U.S. at 526. To be sure, in explaining its holding concerning the insufficiency of the complaint -- under the influence of the Private Securities Litigation Reform Act of 1995 -- the *Dura* Court invoked *Conley’s* gloss on Rule 8 to the effect that a complaint must provide the defendant with “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” 544 U.S. at 346 (quoting *Conley*, 355 U.S. at 47). *Dura* may therefore have encouraged the *Twombly* Court’s conflation of the two separate parts of the *Conley* decision that I discuss in my answer to Question 8 below. But neither *Dura* nor *Associated General Contractors* suggests a requirement of factual specificity (to survive a Rule 12(b)(6) motion) remotely approximating that which emerges from the complaint-parsing of *Iqbal*. The same is true of *Papasan*, where, in connection with the petitioners’ allegation that they had been deprived of a minimally adequate education, the Court stated that “[a]lthough for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.” 478 U.S. at 286. Moreover, whatever one thinks of the *Twombly* Court retrojecting the concept of “plausibility” as a means to police inferences in antitrust conspiracy cases to the motion to dismiss stage, none of the Court’s prior decisions provides even a hint that in Rule 8’s “showing” lurks the general plausibility requirement that the *Iqbal* Court announced.

Not only is the common refrain evidenced by Mr. Garre’s prepared statement misleading in broad outline. His description of two decisions authored by Justice Stevens is misleading in the particulars. Thus, he states (at page 12) that in *Associated General Contractors* the “Court – in an opinion written by Justice Stevens – held that the district court erred in failing to require the union ‘to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss.’ *Id.* at 528 n.17.” *In fact, the Court held the exact opposite.* Reasoning that “the Court of Appeals properly assumed that such coercion might violate the antitrust laws,” 459 U.S. at 528, the Court observed in the cited footnote (which would have been an odd place for a holding) that “[h]ad the District Court required the union to describe the nature of the alleged coercion before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson* ... too far.” *Id.* at 528 n.17. The Court did go on to suggest that “[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id.* Not only, however, is this statement dictum (in a footnote); it does not specify the tool(s) to be used for the exercise of the posited power. For that we should look to the second of Justice Stevens’ opinions that is unrecognizable in Mr. Garre’s prepared statement.

According to Mr. Garre (page 14), in *Crawford-El* “the Court has instructed trial courts to ‘insist’ that a plaintiff “put forward specific, nonclusory factual allegations” that establish cognizable injury’ before allowing a suit ‘to survive a pre-discovery motion for dismissal or summary judgment.’” This is a surprising account of a decision in which the Court observed 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.” 523 U.S. at 595. As a result of selective quotation and elision, a reader might believe that the *Crawford-El* Court (re)formulated the standard governing Rule 12(b)(6). In fact, however, the Court rejected a lower court’s effort to create a heightened burden of proof of state of mind, applicable at the summary judgment stage and at trial, in cases involving a qualified immunity defense. Calling such an “indirect effort to regulate discovery . . . a blunt instrument,” *id.* at 595, the Court reminded federal trial judges of “some of the existing procedures available . . . in handling claims that involve examination of an official’s state of mind.” *Id.* at 597. In particular, the Court noted that, in a case “against a public official alleging a claim that requires proof of wrongful motive,” *id.* at 597, the “firm application of the Federal Rules of Civil Procedure” referred to in *Butz v. Economu* 438 U.S. 478, 508 (1978), can be achieved through other means, including a court-ordered reply under Rule 7 or the grant of a motion for a more definite statement under Rule 12(e). See *Crawford-El*, 523 U.S. at 597-98.

Finally as to Supreme Court precedent, the *Iqbal* Court’s maiming of Rule 9(b) – which is so critically important in discrimination cases -- was both without precedent in the Court’s decisions and demonstrably inconsistent with the intent of the drafters of the Federal Rules (and hence presumably with the Court’s original understanding). The Advisory Committee Note accompanying Rule 9 in 1938 listed Order 19, Rule 22 of the English Rules as the source or inspiration for Rule 9(b). That source provided: “Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, *it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred*” (emphasis added). Determined to reverse the Second Circuit notwithstanding that court’s measured and thoughtful opinion, the five justice majority in *Iqbal* found it necessary not only to disregard the petitioners’ concession about supervisory liability and change the law of official immunity, but also to rewrite Rule 9(b). In that respect, *Iqbal* is without any grounding or foundation at all.

Since lower federal courts lack the power to overrule the Supreme Court, their decisions on these questions are of little interest. It is true that few courts took literally the “no set of facts” language in *Conley*. Yet, as I discuss in my prepared statement and in response to Question 8 below, that is hardly surprising given that there was widespread misunderstanding (even if self-induced) of the role that language was intended to play, and, as suggested in *Conley* itself (see also *Crawford-El*, *supra*), a remedy for a “the defendant wronged me” type of complaint was always available under Rule 12(e) – the requirement of “fair notice.”

It is also true that some post-*Conley* lower court decisions refused to accord the presumption of truth to “legal conclusions,” which the Court itself had done. See *Papasan*, *supra*. As the string cites on pages 15-19 of Mr. Garre’s prepared statement reveal, however, many of them went further, indirectly requiring fact pleading. They did so without authority in Supreme Court decisions. Moreover, during a decade in which many of the cited decisions were rendered, the Court twice found it necessary to reverse attempts directly to impose fact pleading outside of the Enabling Act process – most recently in 2002. This is why in my prepared statement (at 19) I observed that what some defenders of *Twombly* and *Iqbal* represent as a

conversation or debate between the Supreme Court and the lower federal courts (culminating in the Court's recent decisions) is "akin to that between a parent and a serially wayward child."

Even if some lower court decisions presaged the level of complaint-parsing in which the *Iqbal* Court indulged, and even if they did so without flouting governing Supreme Court authority, the resulting arbitrary distinctions – between "facts," "threadbare allegations," and "conclusions" -- are demonstrably inconsistent with a fundamental premise of the system of notice pleading that the drafters of the Federal Rules intended to implement in 1938, that the Court embraced in 1947 (in *Hickman v. Taylor*), and that it reaffirmed in 1957 (in *Conley*).

3. Did the Supreme Court in *Twombly* or *Iqbal* cross the line between (permissibly) interpreting (or reinterpreting) and (impermissibly) amending the Federal Rules of Civil Procedure? If you answer "yes," please explain.

Answer: Yes. My answer to the previous question, both in general and with specific reference to the institution of a general plausibility requirement and the Court's rewriting of Rule 9(b), demonstrates why it is impossible to defend those decisions as mere interpretations (or reinterpretations) of the Federal Rules, at least if that term implies continuity with the past. Even before *Iqbal*, a number of conservative judges and scholars appeared to agree *See, e.g.,* Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific, 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, J., joined by Posner, J., concurring in denial of reh'g en banc) ("In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier."); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL'Y 61, 64 (2007) ("*Twombly* ... can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases.")

Nor can they be saved from the charge of judicial lawmaking (here, judicial amendment) by the insight that judicial interpretation and judicial lawmaking shade into each other. The Court itself has provided an objective standard for distinguishing the two when a Federal Rule promulgated under the Enabling Act is in question. Thus, in order to protect the Enabling Act process, that statute's limitations on rulemaking, and the power it accords Congress to review and, if necessary to block, prospective procedural policy choices, the Court has foreclosed from treatment as mere interpretation (or reinterpretation) giving meaning to a Federal Rule that is different from the meaning the Court understood "upon its adoption." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). *See also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and amended limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge ... any substantive right'" (quoting 28 U.S.C. § 2072(b) (2000))). In my prepared statement (at 17-18), I marshal powerful evidence, in addition to *Hickman* and *Conley*, of the Court's likely original understanding of pleading and motions to dismiss under the Federal Rules. Finally, apart from the formal illegitimacy and patent inadequacy of the course pursued in *Twombly* and *Iqbal*, those decisions have undermined (by drastically altering) a key architectural element of the infrastructure for the private

enforcement of public law upon which Congress may reasonably be deemed to have relied when passing numerous post-1938 statutes containing pro-plaintiff fee-shifting and/or multiple damages provisions (which are clear signals of the perceived importance of private enforcement).

4. What is your response to Mr. Garre's contention in his prepared statement (p. 38) that "any necessary response" to *Twombly* and *Iqbal* "should be addressed through" the process for amending the Federal Rules of Civil Procedure established by the Rules Enabling Act?

Answer: In addition to the responses contained in my answers to Questions 1 and 3 above and in my prepared statement (at 19-20), I would only point out that this plea for respect of the Enabling Act process should have been addressed to the Supreme Court. Since, however, it is too late for that, it falls to Congress to insist on the exclusivity of that process for judicial amendments to the Federal Rules. That is the first goal of the substitute amendment proposed in Appendix A. The second is to ensure that Congress does not repeat the Court's mistakes and thus that it waits for the results of the informed, thorough and open process upon which the rules committees have embarked before deciding whether legislation prescribing different pleading standards is required. The third goal is to ensure that, pending the results of the Enabling Act process, the Court's improvident decisions do not cause irreparable injury either to those without the ability to satisfy their requirements or to federal statutory provisions designed for private enforcement.

5. What is the state of research on the question whether *Twombly* or *Iqbal* have limited access to the federal courts? Please comment, in particular, on the memorandum prepared for the Advisory Committee on Civil Rules to which Mr. Garre refers in his prepared statement (pp. 20-22, 34).

Answer: Alas for those anxious to make Ms. Kuperman, the author of the memorandum in question, not only the most famous law clerk in the country but the youngest member of the Advisory Committee, (1) she is just a law clerk (although a very nice and bright one), (2) her memorandum is not a study but rather a summary of post-*Iqbal* appellate decisions and a non-random sample of district court decisions, (3) the unsupported characterizations in the brief prefatory section of the memorandum are her opinions, and (4) they are highly contestable.

Indeed, Ms. Kuperman's memorandum led me to many of the cases that are cited in Appendix B to my prepared statement. These are cases that either suggest or explicitly state that *Iqbal* has caused the dismissal of complaints that would not have been dismissed in the pre-*Twombly* era. They thus answer the only question about dismissed cases discussed at the hearing that makes sense (once Senator Leahy pointed out that, without discovery, one cannot determine whether complaints that have been dismissed under *Twombly* and *Iqbal*, but that would have survived under prior law, had merit, which was, of course an animating insight of those who framed the Federal Rules). In sum, even if the cases in Appendix B and other similar cases do

not signal what Mr. Garre referred to as “wholesale dismissal of complaints” (pg. 22, without defining that term), they do signal a loss of access for a substantial number of people.

It is convenient for supporters of *Twombly* and *Iqbal* to conflate Ms. Kuperman’s memorandum with the broader effort to reconsider pleading, motions to dismiss and discovery that the Advisory Committee has undertaken, an ambitious effort that includes original empirical investigations by the Federal Judicial Center. That work, which involves a number of quantitative and qualitative projects that merit the term “study,” will take time. Moreover, as to pleading and motions to dismiss, it will be of limited inferential value, at least if the goal is, as it should be, to compare the costs and benefits of the system of notice pleading and broad discovery with the costs and benefits of systems proposed to replace it. See my answer to Question 6 below.

In the meanwhile, we have very limited data. A few law review articles include analyses of slices of post-*Twombly* and/or post-*Iqbal* experience based on published opinions. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011. Contrary to Mr. Garre’s assertion (pg. 34), “the most comprehensive study to date” is not the Kuperman memorandum but rather a study (using econometric techniques) of some 1200 cases by Professor Patricia Hatamyar that is cited at page 7 note 3 of my prepared statement. This study also suffers from the biases that afflict work based on published decisions (even after the advent of computerized data bases). But it is probably the best we have for now, and it suggests that what I have called “the usual victims of ‘procedural’ reform” are being differentially and adversely affected by *Twombly* and especially *Iqbal*. Thus, Professor Hatamyar concluded that “the largest category of cases in which 12(b)(6) motions are filed was constitutional civil rights. Motions to dismiss in constitutional civil rights cases were granted at a higher rate (53%) than in cases overall (49%), and the rate of granting 12(b)(6) motions in constitutional civil rights cases increased in the cases selected from Conley (50%) to *Twombly* (55%) to *Iqbal* (60%).”

6. What is your response to Mr. Garre’s contention in his prepared statement that a statute overruling *Twombly* and *Iqbal* would “exact enormous costs” (p. 24), both for government officials (pp. 25-29) and for civil defendants and society (pp. 29-33).

Answer: I address the question as to government officials in my answer to Question 7 below. As for “civil defendants and society,” I do not understand the predicate for Mr. Garre’s assertion (pg. 24) that the alternative to *Twombly* and *Iqbal* is “a system in which courts permitted conclusory and implausible claims to go forward.” I thought he believed that the pre-*Twombly* landscape (which is what the proposed substitute amendment in Appendix A would restore) was one in which appellate courts, in dialogue with the Supreme Court, were moving seamlessly toward the point staked out in those decisions. (But see my answer to Question 2 above).

I agree, however, that rational public policy in this area must reflect a comparative evaluation of the costs of alternative pleading (and discovery) regimes. Rational public policy

must also attend, however, to the benefits of the alternatives – a dimension simply absent from Mr. Garre’s prepared statement and testimony. Moreover, in a system like ours that has depended heavily on private civil litigation to enforce public law, rational public policy must consider what would replace litigation (and how it would be funded) if one or more of the alternatives portended a substantial decrease in enforcement through litigation. Thus, for instance, do Americans really want the SEC or FTC sufficiently well-funded (through taxpayer dollars) and powerful to pick up the slack? Or is the real goal here, at the end of the day, no enforcement?

Contentions about the “enormous costs” of the system of notice pleading and broad discovery are not just a talking point for defenders of *Twombly* and *Iqbal*. They are a talking point that the business community and others intent on dismantling private civil litigation as a means of securing compensation for injury and enforcing public laws have been repeating for decades, hoping (alas, not without reason) that constant repetition of myths will weaken any inclination to doubt them. For thoughtful, empirically based responses to this and other similar litigation myths, I refer the Committee to the submissions of Professors Theodore Eisenberg and Steven Croley.

Like his predecessors in this campaign, Mr. Garre ignores decades of systematic empirical research showing that discovery is not a ubiquitous problem but rather that it is a problem in only a small slice of litigation—typically, high stakes, complex cases. A recent preliminary report of the Federal Judicial Center is to the same effect. *See* Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report (Oct. 2009).

Mr. Garre also ignores, for purposes of comparison, the burdensome costs associated with administering the Court’s newly expanded definition of a “conclusory” allegation. Following *Twombly* and *Iqbal*, a great deal turns on the trial court’s determination whether an allegation is “conclusory” in nature. That determination will dictate whether the allegation is entitled to a presumption of truth, and it will weigh heavily in any subsequent plausibility analysis that the court conducts. But the Supreme Court has given lower courts absolutely no guidance in determining when an allegation is, in fact, “conclusory”. Under *Twombly*, the magnitude of this problem was not immediately apparent, as the allegation of conspiracy that was found to be “conclusory” basically took the form of a pure recitation of an element of the plaintiff’s claim, suggesting that the Court’s holding on this point would be limited to allegations fitting that description and/or not providing “fair notice” to defendants. In *Iqbal*, however, the majority dismissed as “conclusory” two allegations that were much more specific in nature, as to which there could be no problem of inadequate notice: one in which the plaintiff claimed that the Attorney General was the “principal architect” of the specific policies challenged, and another claiming that the FBI Director was “instrumental in [their] adoption, promulgation, and implementation.” By holding that these allegations -- which go much further than mere recitations of elements -- were nonetheless “conclusory” in nature, the majority raised the stakes considerably. But it said nothing about how courts and litigants are supposed to determine whether allegations are “conclusory,” instead behaving as though the answer to the question was self-evident. It was certainly not self-evident to the dissenters, who disagreed with the majority

that these allegations were “conclusory” and would have accorded them a presumption of truth. The result is a standard that lacks predictability, rationality or fairness. Allowing such an unguided and arbitrary standard to define the capacity of litigants to obtain remedies for their injuries will impose heavy transaction and social costs.

At least, however, discussion of the alleged costs of the system that *Twombly* and *Iqbal* replaced should focus attention on the fact that the perceived problem is not pleading, but rather discovery. Moreover, even if attention were paid only to costs, denying court access to civil rights plaintiffs so that large business corporations engaged in high stakes, complex commercial cases could be spared what Judge Easterbrook called “impositional discovery,” would seem doubly feckless: first, because it targeted the wrong part of the litigation process, and second, because it did so in all cases, when only a small proportion of cases posed the problem to be addressed. The latter is a major cost of insisting upon the same rules of procedure across the landscape of substantive law, so-called trans-substantive procedure. In that regard, it may be that Congress should amend the Rules Enabling Act to authorize the proposal of substance-specific rules when necessary to avoid such costs. If it were to do so, however, Congress should prescribe that proposed substance-specific rules would become effective only if adopted by legislation (rather than under the normal report-and-wait provision of the Enabling Act).

Finally and again, if one is to examine the costs of discovery, the quest for wise public policy requires that one also consider the benefits of discovery. In that regard, it is no coincidence that the chief architect of the 1938 Federal Rules on discovery, Professor Edson Sunderland, was a progressive well acquainted with that movement’s emphasis on “legibility” (transparency) as a necessary condition for effective regulation. As Judge Patrick Higginbotham put it:

Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. *Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.*

Patrick Higginbotham, *Foreword*, 49 ALA. L. REV.1, 4-5 (1997) (emphasis added). *See also* Statement of Stephen N. Subrin.

7. Would legislation overruling *Twombly* and *Iqbal* invite frivolous and vexatious litigation against government officials by terrorists and others? In particular, should Congress be concerned that such legislation would render government officials more vulnerable to the costs, including distraction, of discovery?

Answer: The argument prompting this question is flawed for five reasons. First, there is no evidence that pre-*Twombly/Iqbal* litigation imposed on the government officials who are presumably of interest for this purpose – high government officials involved in matters affecting national security -- the sort of costs that the defense of official immunity, and the panoply of procedural protections undergirding it, seek to prevent. There is thus no evidence that that the

then-governing law (which the proposed substitute amendment in Appendix A would restore) permitted such costs to be imposed. Second, the argument ignores, as the Supreme Court ignored in *Iqbal*, the meticulous guidance that the Second Circuit gave to the district court in order to protect against such costs. Third, like the argument addressed in my answer to Question 6, single-minded attention to costs pretermits consideration of the benefits of litigation against government officials. Fourth, those who profess concern about encouraging “terrorists” to sue government officials seem not to have considered the additional roadblocks that *Twombly/Iqbal* may pose for the *victims of terrorism* to pursue terrorists and the funders of terrorism in American courts. Fifth, as with the argument addressed in my answer to Question 6, even if *Iqbal* had been a response to actual problems, it would have been a feckless and unnecessary response, again illustrating a major cost of trans-substantive procedure.

First, since the Supreme Court rejected the argument that national security concerns warranted according the defense of absolute immunity to the Attorney General in 1985, I am aware of no evidence that the pre-*Twombly/Iqbal* system of notice pleading has permitted frivolous cases to go forward, thus subjecting high government officials to the costs, including distraction, that broad discovery could impose. Indeed, with the exception of *Clinton v. Jones* – a case that defenders of *Twombly* and *Iqbal* may regard differently – I am not aware of any case in which high level officials have been subjected to discovery. In particular, I do not believe that any Attorney General has ever been subjected to discovery in a lawsuit seeking to hold him or her personally accountable for constitutional violations. Similarly, I do not believe that any Attorney General has ever had to pay attorney’s fees, let alone damages, in any civil case in which that individual was a defendant. Citing and selectively quoting from Bennett Boskey’s book, *Some Joys of Lawyering* (2007), Mr. Garre (at pg. 27) neglects to mention that the same source reports that Attorney General Levi was rarely even informed that he had been sued (because his subordinates were so confident that he would be dismissed from the case). See *Joys* at 113. He also does not mention Mr. Boskey’s acknowledgment that all of the lawsuits were resolved without Attorney General Levi having to testify, “even in a deposition, although in a couple of cases it was prudent to file an affidavit by him showing his total non-connection with the matter in controversy.” *Id.* at 114. The reason, of course, is that the lower federal courts had (and have) ample tools to prevent unwarranted imposition, both those available in all cases (some of which are well described in the statement submitted by Professor Tobias Wolff) and those specially crafted to protect the defense of official immunity.

Second, and as a good example of such tools, consider the guidance that the Second Circuit gave to the district court in *Iqbal*, guidance reflecting existing tools and powers that the Supreme Court chose to ignore.

In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its 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 challenged conduct. In a case such as this

where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.

We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98, 118 S. Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. See *Harlow*, 457 U.S. at 821, 102 S. Ct. 2727 (Brennan, J., concurring) ("[S]ummary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

Iqbal v. Hasty, 490 F.3d 143, 158-59 (2d Cir. 2007), *rev'd*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Third, understandable concern to protect against unwarranted imposition upon government officials trying to do their jobs should not be allowed to shut from view the benefits of litigation even in this sensitive domain. Put otherwise, rendering such litigation effectively impossible or very difficult -- as *Iqbal* does -- may impose a cost of its own, namely, regression to a society that lacks the will to hold government officials, high or low, accountable for violations of civil rights, civil liberties, and other interests that the law (supposedly) protects. Indeed, whatever the proper balance between false positives and false negatives that pleading law should seek to achieve in general, special care should be taken not to tip the balance too much against those seeking redress of their grievances against the government and its agents in litigation. The Second Circuit observed:

We fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack. We also recognize that some forms of governmental action are permitted in emergency situations that would exceed

constitutional limits in normal times. ... But most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

Iqbal, 490 F.3d at 159.

Fourth, although the considerations discussed above suggest that expressed concerns about frivolous and vexatious suits by “terrorists” against government officials have no basis in experience, the Committee has before it evidence of current efforts by those defending alleged terrorists and funders of terrorists to leverage *Twombly* and *Iqbal* into a get-out-of-court-free card in litigation brought on behalf of the victims of 9/11. See Letter from Sean P. Carter, Esq. to Senator Arlen Specter (Dec. 9, 2009).¹ Having described those efforts, which are documented in exhibits, Mr. Carter observes:

Nevertheless, the arguments these defendants have raised on the basis of *Twombly* and *Iqbal* raise significant concerns about the impact of those decisions on the ability of future terrorism victims to sustain claims against knowing and intentional sponsors of terrorism. In this regard, it is important to note that the September 11th plaintiffs and their counsel invested millions of dollars in pre-suit investigations into the sources of al Qaeda's financial and logistic support, before even bringing claims against any party. That investment was undertaken in recognition of the strong public interest in the circumstances which gave rise to the September 11th Attacks, and sadly made possible by the horrific scale of those Attacks.

It is unreasonable to expect that future victims of terrorism will be able to marshal similar resources in investigating potential claims against alleged terror sponsors. Because the financial and logistic infrastructures of terrorist organizations are by their very nature covert, the heightened pleading standards announced by the Supreme Court in *Twombly* and *Iqbal* may well foreclose such victims from sustaining meritorious claims against parties who have in fact sponsored terrorism against the United States and its citizens.

Significantly, through the Anti-Terrorism Act, 18 U.S.C. § 2333 et seq, Congress created a substantive cause of action under federal law for the benefit of terrorism victims against persons who knowingly provide material support or resources to the terrorist organization responsible for their injuries. In doing so, Congress made clear its view that civil actions by terror victims should play an important role in deterring the sponsorship of terrorism, and thereby promoting our national security. This approach makes good sense, as terrorist sponsors often lay beyond the reach of U.S. prosecutors and their own states frequently lack the political will to pursue criminal proceedings or economic sanctions, even where the evidence is clear. Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey highlighted this problem in testimony presented to the Senate Committee on Finance on April 30, 2008, explaining that:

One of our greatest challenges will be to foster the political will

¹ I am one of the counsel for the plaintiff victims in this litigation.

required to deter terrorist financiers more consistently and effectively. It has proven difficult to persuade officials in some countries to identify and to hold terrorist financiers publicly accountable for their actions. This lack of public accountability undermines our ability to deter other donors."

Testimony of Under Secretary for Terrorism and Financial Intelligence Stuart Levey Before the Senate Committee on Finance, April 1, 2008, available at <http://www.treas.gov/press/releases/hp898.htm>.

For those very reasons, civil claims will often represent the only effective means to hold terrorist sponsors accountable for their deliberate targeting of the United States, and thereby deter the financing of terrorism by other would be donors. See *Boim v. Holyland Foundation for Relief and Development*, 549 F.3d 685, 691 (7th Cir. 2008) (*en Banc*) ("suits against financiers of terrorism can cut the terrorists' lifeline"). Unfortunately, the Supreme Court's rulings in *Twombly* and *Iqbal* threaten the vitality of that important tool for promoting our national security.

Id. at 2-3.

Fifth, accepting for purposes of argument that the problems to which the *Iqbal* Court responded were real, the remedy was, again, demonstrably overbroad. Moreover, here the Court should not be allowed to hide behind the supposed requirement of the Enabling Act's reference to "general rules" that Federal Rules be trans-substantive. For as I have pointed out, the Court could have required fact pleading in cases involving government officials entitled to the defense of official immunity (or some subset thereof) as a matter of substantive federal common law (the source of the official immunity defense). See my prepared statement at pages 9, 21 n.74; Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 555-56, 558. Finally, for those who still believe (contrary to the evidence) that a return to the status quo ante would unleash a (literally) unprecedented wave of frivolous litigation against such officials and that existing tools would be inadequate to nip those cases in the bud, there is similarly an easy, targeted response at hand. Congress could carve them out of legislation such as the proposed substitute amendment in Appendix A.

8. In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court wrote: "In appraising the sufficiency of a complaint we follow of course 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." How should this statement be interpreted? How did the Supreme Court interpret it before *Twombly*?

Answer: In my prepared statement, I observed:

The architecture of *Iqbal's* mischief -- undoubtedly a major source of regret for the author of the *Twombly* decision, who dissented in *Iqbal* -- is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e). *Conley's* "no set of facts" language concerned the former question, not the latter, with the result that even if post-

Conley courts were technically correct in invoking that language when denying 12(b)(6) motions to dismiss, the same courts could have granted Rule 12(e) motions for more definite statement (had defendants made them and had the complaints in fact provided inadequate notice). Although the *Twombly* Court “retired” the “no set of facts” language, it did not retire, but rather perpetuated and exacerbated, this mistake.

Prepared Statement at 11.

In addition, discussing the attempt by defenders of *Twombly* and *Iqbal* to “normalize [those decisions] from an institutional perspective,” I commented:

A variation of the argument that the Court didn’t really change the Federal Rules in question, but rather merely reinterpreted them, is the argument that, prior Supreme Court decisions aside, *Twombly* and *Iqbal* didn’t really change the law that was applied in the lower federal courts. There is a grain of truth in this argument, since it is probably true that very few courts took *Conley*’s “no set of facts” language literally. This is hardly a surprise both because, as I discussed above, that language was not intended to speak to the question of factual specificity and (relatedly) because a Rule 12(e) motion (for a more definite statement) has always been available to deal with a “the defendant wronged me” type of complaint.

Id. at 18-19.

That this interpretation of the “no set of facts” language is an accurate description of the *Conley* Court’s intended meaning is supported by the facts of that case and the architecture of the Court’s opinion, and it is confirmed by reading the three cases that the Court cited in support of “the accepted rule” that the language formulates.

The question tested by the defendants’ motion to dismiss in *Conley* was whether the plaintiffs could recover under the Railway Labor Act for the discrimination in union representation that they alleged. Drawing on “the general principles laid down in [three of its prior decisions],” 355 U.S. at 45, and noting that the ability of employees to file “their own grievances with the Adjustment Board or sue their employer for breach of contract ... furnish[ed] no sanction for the Union’s alleged discrimination,” *id.* at 47, the Court deemed it unnecessary to “pass on the Union’s claim that it was not obliged to handle any grievances at all because [the justices were] clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.” *Id.*

The *Conley* Court treated separately the defendants’ objection “that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal [was] therefore proper.” *Id.* Reasoning that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts on which he bases his claim,” and that “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,” *id.*, and adducing in support the “illustrative forms appended to the Rules,” the Court concluded that “[s]uch simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial

procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Id.* at 47-48. In a footnote to the last quoted language, the Court cited Rule 12(e), Rule 12(f), Rule 12(c), Rule 16, Rules 26-37, Rule 56, and Rule 15. *See id.* at 48 n.9.

Any residual doubt that the “no set of facts” language in *Conley* referred not to the factual specificity of the complaint but rather to the ability of a plaintiff, even a plaintiff alleging the most egregious facts, to recover under the governing substantive law, is dispelled by reading the three cases cited in support of “the accepted rule.” *See id.* at 46 n.5. Although *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), is the most famous of the three, in part because it was authored by Judge Charles Clark, the Reporter of the original Federal Rules and the primary drafter of the pleading rules, and in part because of the lengths to which that court was willing to go in preserving from dismissal the pro se complaint of an Italian immigrant, it is not the most informative. To be sure, the Second Circuit stated that “[u]nder the new rules of civil procedure, there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only that there be a ‘short and plain statement of the claim showing that the pleader is entitled to relief’ ... and the motion for dismissal under Rule 12(b) is for failure to state ‘a claim upon which relief can granted.’” *Id.* at 775. Moreover, the Court went on to conclude that “however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced – and, indeed, required by [federal law].” *Id.* For crystal clear doctrinal guidance concerning the meaning of *Conley*’s “no set of facts” language, however, one should turn to the first case cited by the *Conley* Court, *Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302 (8th Cir. 1940).

In reversing the dismissal of an amended complaint under Rule 12(b)(6), the Eighth Circuit drew on its prior decisions concerning motions to dismiss bills of complaint for want of equity to give meaning to the new Federal Rule. Citing one of those decisions for the proposition that “[t]o warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated,” *id.* at 305, the *Leimer* court observed that a motion under Rule 12(b)(6) “[t]ook] the place of the former demurrer in an action at law or motion to dismiss a bill of complaint for want of equity.” *Id.* The court continued:

A demurrer or a motion to dismiss for want of equity admitted, for the purposes of the demurrer or motion, all facts well pleaded in the complaint. Under the present practice, we think, the making of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by limitations.

In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12(c) and thereafter applying for judgment on the pleadings under Rule 12(h)(1), or by moving for a summary judgment under Rule 56, we think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.

Id. at 305-06.²

Whatever else one can say about *Conley*, neither the opinion in that case nor the Court that decided it can fairly be taxed with the confusion that the *Twombly* Court ascribed to the “no set of facts” language. Moreover, as my prepared statement and answer to Question 2 above demonstrate, responsibility for most of that “confusion” resided with the lower federal courts, not with the Supreme Court,³ and much of it was not confusion at all but rather a disguised attempt to circumvent the Enabling Act and the Court’s repeated rejection of attempts to impose heightened pleading requirements in certain categories of cases deemed to be problematic. In particular, consciously or unconsciously, the complaint-parsing that was barely evident in post-*Conley*, pre-*Twombly* Supreme Court opinions, but all too common in lower federal court cases, went far to restore the pre-Federal Rules demurrer or motion to dismiss for want of equity as described by the *Leimer* court in the first paragraph quoted above, effectively blurring the distinction noted by that court, as by the Court in *Conley*, between the function of a Rule 12(b)(6) motion and the various means by which to require or achieve greater factual specificity, including Rule 12(e). By “retiring” the “no set of facts” language in *Conley*, and relying (for the first time) on the “showing” language in Rule 8 and (for a purpose for which it was not intended) on the “fair notice” language of *Conley* as linguistic props for a plausibility requirement, the *Twombly* Court completed the process of conflating what the *Conley* Court saw as two analytically distinct requirements (virtually assuring the retirement of Rule 12(e) motions), at least in antitrust conspiracy cases. *Iqbal* both made it clear that this corruption of the original understanding of the Federal Rules was total corruption and, by the example of complaint-parsing that was both unusually aggressive and manifestly arbitrary, brought the Federal Rules perilously close to that which the drafters had repudiated. In considering the costs of the resulting system of fact pleading, it is essential to keep in mind that its rejection in 1938 was animated as much by the perception that it was unjust as it was by concern for the transaction costs of motion practice in search of elusive distinctions.

² The third decision cited by the *Conley* Court, *Continental Collieries, Inc. v. Shober*, 130 F.2d 631 (3d Cir. 1942), relies heavily on *Leimer*. See *id.* at 635.

³ This occasion does not permit me to develop in greater detail the treatment of *Conley* in Supreme Court decisions prior to *Twombly*. However, I believe that I have examined every Supreme Court decision quoting *Conley*, and I am satisfied that Justice Stevens’ account of that history is well-founded. See *Twombly*, 550 U.S. at 577 with n. 4 (Stevens, J., dissenting). Of course, as my answer to Question 2 above suggests, Justice Stevens has repeatedly demonstrated an awareness of the different roles of Rule 12(b)(6) and 12(e) that some of his colleagues may not have had in mind when invoking *Conley*.

Questions for the Record for Greg Garre, submitted by Senator Sessions
Hearing Title: "Has the Supreme Court Limited Americans' Access to Courts?"

Judicial Conference Study

- 1) During your hearing, you referred to a memorandum drafted for the Federal Judicial Conference's Advisory Committee for Federal Rules of Civil Procedure as a 'study' of the case developments after the decision in *Ashcroft v. Iqbal*. Please explain your reference to the memorandum as a 'study,' including whether any component of the Federal Judiciary has referred to this memorandum as a study.

The memorandum – the November 25, 2009 Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee Concerning the “Application of Pleading Standards Post-*Ashcroft v. Iqbal* – is discussed at pages 20-21 of my written testimony and available at <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf>. As my testimony explains (p. 21), Ms. Kuperman is the Rules Law Clerk for the Honorable Lee H. Rosenthal, Chair of the Standing Committee on the Rules of Practice and Procedure. A “study” is “a careful examination or analysis of a phenomenon, development, or question.” *Webster’s New Collegiate Dictionary* 1447 (1981). This memorandum “addresses application of pleading standards” in the wake of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and was prepared as part of the Civil Rules Advisory Committee’s ongoing effort to “examin[e] the effect of these decisions.” Mem. at 1. The memorandum is more than 150 pages long and “review[s]” each appellate decision that has been issued since *Iqbal* that has “examined” or “discussed” *Iqbal*, along with scores of district court decisions examining or discussing *Iqbal*. *Id.* at 2 & n.2. In addition, the memorandum contains a three-page “summary of the case law” that sets forth various conclusions based on the case law that is examined by the memorandum, including that, “[o]verall, the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints.” *Id.* at 2. The Federal Judiciary’s own web site on the federal rules of practice, procedure, and evidence tellingly refers to the memorandum as a “Caselaw Study on Post-*Iqbal* Cases 11/25/09.” (Emphasis added.) See <http://www.uscourts.gov/rules/>.

The conclusions set forth in this memorandum are supported by the data provided to this Committee on December 9, 2009 by the Honorable Mark R. Kravitz, Chair of the Advisory Committee on Civil Rules, and the Honorable Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure. Among other things, that data – which is drawn from docket entries from each of the 94 United States District Courts – confirms that *Iqbal* and *Twombly* have had a negligible impact as a general matter on the filing or adjudication of motions to dismiss. For example, the data

indicate that, in the four months before *Twombly* was decided, there were 71,711 new cases filed; 24,653 motions to dismiss filed; and 9433 motions to dismiss granted. Similarly, in the four months after *Iqbal* was decided, there were 84,398 new cases filed; 30,591 motions to dismiss filed; and 11,632 motions to dismiss granted. Those figures indicate that motions to dismiss were filed in about 34 percent of all cases before *Twombly* and in about 36% of all cases after *Iqbal*, and that courts granted motions to dismiss at about the same rate – *i.e.*, as to about 38% of all such motions – before *Twombly* and after *Iqbal*. The data also belie the suggestion that civil rights cases have been particularly affected by *Iqbal* and *Twombly*. For example, as to civil rights employment cases, in the four months before *Twombly*, motions to dismiss were filed in 51% of all such cases, granted in 20%, and denied in 8%. By contrast, in the four months after *Iqbal*, motions to dismiss were filed in 44% of all such cases, granted in 16%, and denied in 6.6%. The data indicate a similar pattern as to other types of civil rights cases. The data is attached to these responses and available at www.uscourts.gov/rules (see “Statistical Information on Motions to Dismiss re *Twombly/Iqbal*: Dec 2009”).

National Security

- 1) You testified that reversing *Iqbal* and *Twombly* could have a potentially devastating cost for government officials charged with keeping our country safe from attacks domestically and abroad. If the Notice Pleading Restoration Act (S. 1504) had been the applicable law at the time *Iqbal* was under review by the Supreme Court, what do you think would have been the outcome?

I believe that the case would have been decided in favor of Mr. Iqbal, which means that Mr. Iqbal would have been able to subject the former Attorney General of the United States and Director of the FBI to discovery demands on the basis of his conclusory and implausible allegations of wrongdoing by those high-ranking officials. What is more, as Second Circuit Judge Jose A. Cabranes observed, if Mr. Iqbal were successful in obtaining discovery from the former Attorney General and FBI Director based on his bare-bones complaint, then “little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.” 490 F.3d 143, 179 (concurring). And the threat of such litigation would, in turn, seriously “jeopardize[] the important policy interest Justice Stevens aptly described as ‘a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.’” *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (concurring in the judgment)).

The Supreme Court itself emphasized those same concerns in *Iqbal*, observing that “[l]itigation, though necessary to ensure that officials comply with the law, exacts 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.” 129 S. Ct. at 1953. And, as the Court continued, “[t]he costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, ‘a national and international security emergency unprecedented in the history of the American Republic.’” *Id.*

- 2) Had discovery been allowed to proceed in the *Iqbal* case, would the plaintiff – a convicted felon who had been removed to Pakistan – have been able to rely on his implausible complaint to issue subpoenas for information about the federal government’s counterterrorism measures following the attacks of September 11, 2001? Please explain.

Yes. If discovery had been allowed, Mr. Iqbal could have sought sensitive information concerning the federal government’s counterterrorism measures in the wake of the September 11 attacks, including, for example, the sources or methods that the FBI used in the course of its investigation into the attacks as well as sensitive discussions between the Attorney General of the United States and FBI Director about the appropriate response to the attacks. District court judges of course have discretion to entertain objections to discovery requests. But as Justice Souter wrote for seven Justices of the Supreme Court in *Twombly*, the “comment lament” has been that “the success of judicial supervision in checking discovery abuses has been on the modest side.” 550 U.S. at 559. And experience shows with respect to the habeas litigation brought by the Guantanamo detainees, for example, that litigants may seek to use the discovery process to obtain highly classified information concerning the government’s counterterrorism measures. See also *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (holding that information sought concerning the government’s response to the September 11 attacks, including names of detainees and reasons for their detention, was not subject to release under the Freedom of Information Act; observing that such “information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts”).

- 3) Where government officials fail to produce sensitive national security information, including on the basis of state secrets defenses, do they face potential discovery sanctions, see, e.g., *Al Haramain v. Obama*? Please explain.

Yes. As *Al Haramain v. Obama* illustrates, courts may seek to impose discovery sanctions – including a finding of liability on the merits and potential money damages – on the government for refusing to comply with discovery demands for highly classified information including asserted state secrets. See *In re National Security Agency Telecommunications Record Litigation*, 2009 WL 1468792 (N.D. Cal. May 22, 2009). Cf. *Al-Adahi v. Obama*, 2009 WL 4724614 (D.D.C. 2009) (holding government in civil contempt for failing to videotape detainee’s testimony).

- 4) Are the types of national security concerns identified in your testimony limited to civil lawsuits brought by suspected terrorists against high ranking government officials?

No. While those concerns are particularly acute with respect to claims against high-ranking officials such as the Attorney General or Director of the FBI, they also exist with respect to law suits leveled against lower-level government officials and law-enforcement officers – including the agents serving as the front-line of defense in our cities and communities – who also enjoy qualified immunity from suit under the Supreme Court’s precedents and are critical to the government’s efforts to prevent and investigate national security threats and attacks.

- 5) In your view, could a legislative reversal of the *Iqbal* and *Twombly* decisions increase the litigation costs and discovery expenses of local governments and public officials outside of the national security realm, e.g., law enforcement and prison officials?

Yes. The same concerns – including the costs of diverting the time, attention, and resources of these officials and the threat of chilling decisive action – would extend to local law enforcement officials and officers outside the national security context, including police officers, prison guards, public school teachers, and other public employees performing discretionary functions. Lawsuits challenging the actions of such individuals may be brought in federal court – and thus be subject to the federal civil pleading standards – under the inferred *Bivens* cause of action, 42 U.S.C. 1983, or other federal statutes. The qualified immunity doctrine exists to protect such individuals from the burdens of vexatious and meritless litigation, including the burdens of discovery. See *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment) (“[A]voidance of disruptive discovery is one of the very purposes of the official immunity doctrine . . .”). Yet legislation overriding *Iqbal* and *Twombly* would subject such officials to burdensome discovery demands merely on the basis of conclusory and implausible allegations of wrongdoing.

Written Questions of Senator Tom Coburn, M.D.
 Gregory G. Garre, Partner, Latham & Watkins, LLP
 “Has the Supreme Court Limited Americans’ Access to Courts?”
 Hearing before the U.S. Senate Committee on the Judiciary
 December 9, 2009

1. Would the proposed legislation – S. 1504 – have any impact on the cost of health care in the country, particularly for small businesses that are struggling to stay in business?
 - a. If this Congress fails to pass meaningful medical malpractice reform, what will the relationship be between liberalized pleading standards and malpractice claims?

As I have explained in my testimony (pp. 33-37), the proposed legislation would at a minimum create substantial uncertainty and unpredictability over pleading standards and, if interpreted to provide for a literal application of the “no set of facts” language from *Conley v. Gibson*, 355 U.S. 41 (1957), would substantially liberalize the pleading standards by allowing conclusory and implausible allegations of wrongdoing to proceed to discovery. This would undoubtedly increase the costs and burdens imposed on small businesses (and other businesses) from baseless litigation because it would mean that a plaintiff could subject a defendant to the demands of discovery even on the basis of a bare-bones and implausible complaint of wrongdoing. Although the costs of discovery may vary from one case to the next, the thousands of dollars of attorney’s fees that may be entailed in responding even to relatively minor discovery requests no doubt would harm small businesses, particularly in the current economic climate – and, of course, the millions of dollars that can be quickly consumed by discovery in larger cases would unquestionably burden businesses. By liberalizing the pleading standards, Congress would also make it easier for plaintiffs to subject doctors and health care providers to the burdens of civil litigation by filing conclusory and bare-bone complaints. This, too, almost certainly would increase the litigation costs incurred by doctors and health care providers.

2. Can you elaborate on how reversal of the *Iqbal* decision will subject government officials to more civil litigation and the affect that it potentially has on jeopardizing our national security?

Second Circuit Judge Jose A. Cabranes said it best in his separate concurring opinion in the Second Circuit. As he explained, Mr. Iqbal sought to subject the former Attorney General and FBI Director to “inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American

Republic.” 490 F.3d 143, 179. If Mr. Iqbal had been allowed to obtain such discovery on the basis of his conclusory and implausible claims of wrongdoing against those high-ranking officials, then “little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.” *Id.* And the threat of such “vexatious discovery processes” and baseless litigation would jeopardize the compelling “national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.” *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring in the judgment)). Thanks to the Supreme Court’s decision in *Iqbal*, that “blueprint” does not exist today and the officials who are on the watch during the next national security crisis need not fear such abuses.

3. You stated in your testimony that *Twombly* and *Iqbal* are “firmly grounded in decades of prior precedent.” Do you believe those who are advocating Congressional action in response to these Supreme Court decisions have any basis for characterizing the cases as departures from prior Supreme Court interpretations of the Federal Rules of Civil Procedure regarding pleading requirements?

The *Twombly* and *Iqbal* decisions clarified the civil pleading standards in important respects. In particular, in *Twombly*, Justice Souter – writing for a broad-based seven-Justice majority – explained that *Conley*’s “no set of facts” language “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 showing any set of facts consistent with the allegations in the complaint.” 550 U.S. at 563. I disagree with critics who claim that the *Twombly* and *Iqbal* decisions represent a sudden departure from prior precedent. As I have explained in my testimony (pp. 11-20), in my judgment the decisions have deep roots in prior case law at the Supreme Court and appellate level, which has long recognized that a conclusory and implausible claim is not sufficient to state a claim for relief under the civil rules.

4. Are you aware of any “meritorious” lawsuit filed in the aftermath of *Iqbal* that you believe was improperly dismissed under Fed. R. Civ. P. 12(b)(6)?

Perhaps the clearest example is *Erickson v. Pardus*, 551 U.S. 89 (2007). In that case – which was decided in the wake of *Twombly*, which of course clarified the pleading standards applied in *Iqbal* – the Supreme Court reversed the dismissal of an inmate’s claim alleging the unconstitutional denial of medical treatment. To the extent that courts misapply *Twombly* and *Iqbal* and dismiss “meritorious” claims (*i.e.*, claims that satisfy the pleading threshold), then the courts of appeals may reverse such decisions and reinstate the claims. See, *e.g.*, *Fowler v. UPMC Shadyside*, 578 F.3d 203, 212 (3d Cir. 2009) (reversing district court’s dismissal of employment discrimination claim; “[w]e have no trouble finding that Fowler has adequately pleaded a claim for relief under [*Twombly* and *Iqbal*].”)

5. You stated in your testimony that it is too early to determine the real impact of *Iqbal* and *Twombly* on civil litigation in federal courts. Would it be appropriate for Congress to delay any action on the issue of pleading requirements until everyone can better understand what, if any, impact *Iqbal* and *Twombly* have had on the lower courts' approach to pleading requirements?

Yes. At a minimum, Congress should defer any legislative action until more is known about the impact of those decisions on civil litigation in the federal courts. That is particularly true given that, as I have explained in my testimony (pp. 20-24) and my answers to the questions submitted for the record, (1) the case law and data thus far indicates that the decisions are *not* having a significant widespread impact on civil litigation in the federal courts and (2) the Judicial Conference is closely monitoring the situation and in the best position to respond if need be.

6. You indicated that allowing "conclusory and implausible allegations" to proceed to discovery would increase the likelihood that litigants with baseless claims would use discovery as a means to either "find a claim or, even worse . . . to harass a defendant." Are there sufficient rules in place to prevent abusive discovery or does the advent of electronic data make discovery abuse impossible to prevent?

As I explained in my testimony (pp. 29-33), the costs of civil discovery – and especially electronic discovery – are often enormous. As seven Justices recognized in *Twombly*, courts have not succeeded in "checking discovery abuses." 550 U.S. at 559; see *id.* ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if grounded, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."). Indeed, as Judge Frank Easterbrook has observed, "[j]udges can do little about impositions of discovery when parties control the legal claims to be presented and conduct the discovery themselves." *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989), quoted in *Twombly*, 550 U.S. at 559. The promise of "minimally intrusive discovery" therefore provides only "cold comfort" to defendants. *Iqbal*, 129 S. Ct. at 1954.

7. You noted in your testimony that the proposed legislation would, "at a minimum, cast doubt on" pleading standards contained in various statutes, such as the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(c)(2). Given that many prisoner lawsuits are brought *pro se*, what effect would the proposed legislation have on these lawsuits, which are already arguably subject to diminished judicial scrutiny at the pleading stage?¹

The Supreme Court has reiterated post-*Twombly* in the pleading context that "[a] document filed *pro se* is 'to be liberally construed.'" *Erickson v. Pardus*, 551 U.S. 89,

¹ See, e.g., *Mayan v. Adm'r Waupun Corr. Inst.*, No. 08-C-0618, 2008 U.S. Dist. LEXIS 92392, at *4 (E.D. Wis. Oct. 31, 2008) ("The court is obliged to give the plaintiff's *pro se* allegations, however inartfully pleaded, a liberal construction.") (internal quotations omitted); *Tejada v. Mance*, No. 9:07-CV-0830 (NAM/GHL), 2008 U.S. Dist. LEXIS 85566, at *20 (N.D.N.Y. Sept. 12, 2008) ("pro se civil rights pleadings are to be construed with an extra degree of liberality") (magistrate report adopted at 2008 U.S. Dist. LEXIS 85558 (N.D.N.Y. Sept. 22, 2008)).

94 (2007). Nevertheless, even when liberally construed, a complaint may fail to state an adequate claim for relief. See, e.g., *Pugh v. Smith*, 333 Fed. Appx. 478 (11th Cir. 2009); *Garrison v. Braddock*, 229 F.3d 1151 (6th Cir. 2000) (Table) (“a *pro se* complaint, although liberally construed, does not require the court to conjure unplead allegations”) (citing *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989).) To the extent that the proposed legislation is interpreted to require a literal application of *Conley*’s “no set of facts” language, then prisoner lawsuits that previously would have been dismissed because they stated only conclusory and implausible allegations of wrongdoing (even when liberally construed) would be allowed to proceed.

8. Does the proposed legislation distinguish between the general pleading requirements applicable to most cases and the special, heightened pleading requirement in Federal Rule 9(b) applicable to claims of fraud?

No. As I explained in my testimony (p. 37), the proposed legislation therefore would appear to override or, at a minimum, cast doubt on the heightened pleading requirement in Fed. R. Civ. P. 9(b) for “fraud or mistake.”

- a. What would happen if we loosened the pleading requirements that are currently applicable to fraud cases?

As one court recently observed, “Rule 9(b) serves three purposes: (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints ‘as a pretext for the discovery of unknown wrongs’; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to ‘prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). See also C. Wright & A. Miller, *Federal Practice and Procedure* § 1296 (A purpose of Rule 9(b) is to “guard[] against the institution of a fraud-based action in order to discover whether unknown wrongs actually have occurred”). Each of those important interests would be directly undermined by loosening the heightened pleading standards applicable to fraud-based claims.

- b. Before concluding your testimony, you described why judicial rulemaking is a superior vehicle for addressing any changes to pleading standards. In particular, you highlighted that judicial rulemaking “minimizes the risk of unintended consequences.” What, if any, unintended consequences do you foresee if changes to pleading standards are the product of legislative action?

As I explained in my testimony (pp. 38-40), the Judicial Conference and, in particular, the Advisory Committee on Civil Rules is comprised of judges and lawyers who are experts in federal practice and procedure. Any amendment to the Rules requires careful consideration of the interrelationship with other Rules as well as statutes and the potential practical ramifications of the amendment. The Judicial Conference occupies

an unmatched vantage point to make that complex and practice-based assessment. And, as explained in the December 9, 2009 letter to Ranking Member Sessions from the Honorable Mark R. Kravitz, Chair of the Advisory Committee on Civil Rules, and the Honorable Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure, the Civil Rules Committee and Standing Committee “are at this moment deeply involved” in monitoring the case law in the wake of *Iqbal* and *Twombly* and fulfilling their statutorily directed function of providing a “neutral, independent, and thorough analysis of the rules and their operation.” (The December 9, 2009 letter and supporting data are included in this testimony and attached hereto.) Moreover, to the extent that the proposed legislation is intended to address a perceived departure from prior pleading standards and material increase in the dismissal of complaints or affect on civil litigation, as I have explained the case law and data compiled to date by the Judicial Conference indicates that *Iqbal* and *Twombly* have not had a significant impact on civil litigation in the federal courts. The proposed legislation nevertheless not only would create uncertainty and predictability over the gateway pleading requirements, but – especially if the legislation is interpreted to call for a literal application of *Conley*’s “no set of facts” language – substantially loosen the pleading standards that existed before *Twombly* and impose potentially devastating costs on government officials who face suits for actions allegedly carried out in the course of their duties, including those officials responsible for protecting the nation against terrorist attacks. It is difficult to believe that Congress would intend such unsettling and potentially devastating consequences.

ATTACHMENT

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

December 9, 2009

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Sessions:

This letter briefly comments on the "Notice Pleading Restoration Act of 2009" (S. 1504) and the "Open Access to Courts Act of 2009" (H.R. 4115) on behalf of the Judicial Conference Standing Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Both S. 1504 and H.R. 4115 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so. The bills would affect Rule 12(b)(6), Rule 12(c), Rule 12(e), and Rule 8, other related rules, and statutes. We ask that this letter be made a part of the record of the hearing entitled "Has the Supreme Court Limited Americans' Access to Courts?" held by the Senate Committee on the Judiciary on December 2, 2009.

Both S. 1504 and H.R. 4115 recognize the important role of the Rules Committees of the Judicial Conference under the Rules Enabling Act (28 U.S.C. §§ 2071-2077) in drafting the procedural rules that apply in the federal courts, including the rules for pleadings and motions to dismiss. Seventy-five years ago, Congress enacted the Rules Enabling Act. The Act charged the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. Congress designed the Rules Enabling Act rulemaking process in 1934 and reformed it in 1988 to produce the best rules possible by ensuring broad public participation and thorough review by the bench, the bar, and the academy. The internet has made this process truly transparent and inclusive. As recent experience with Civil Rules 26 and 56 has demonstrated, the Rules Committees are dedicated to obtaining the type of reliable empirical information

Honorable Jeff Sessions

Page 2

needed to enact rules that will serve the American justice system well and will not produce unintended harmful consequences. The different House and Senate bills demonstrate some of the difficulties in an area as fundamental and delicate as articulating the pleading standard for the many different kinds of cases filed in the federal courts.

The Civil Rules Committee and the Standing Committee are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act. The Committees, working with the Federal Judicial Center, are gathering and studying the information needed both to understand how Rule 8, Rule 12, and other affected rules – which have not been changed substantively since 1938 – have in fact worked since the Supreme Court decided *Twombly* and *Iqbal* and to consider changes to the text of these rules and other related rules.

At the request of the Civil Rules Committee, the law clerk for the Chair of the Standing Committee wrote a memorandum describing the case law since *Iqbal* was decided. That memorandum sets out circuit court opinions issued to date that examine *Iqbal* or discuss how district courts are to apply *Iqbal* to different kinds of cases, and sets out many district court opinions discussing *Iqbal*. The memorandum is available on the Rules Committees' website.¹ The memorandum will be regularly updated as additional cases are decided, and the updates will be posted on the Rules Committees' website as well.

Charts and graphs setting out preliminary data from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal* are also on the Rules Committees' website.² This data will be updated periodically, and those updates will be posted on that website. The Federal Judicial Center is gathering more detailed data on motions to dismiss, which will also be made available. In addition, even before *Iqbal*, the Rules Committees had begun a thorough reexamination of how pleading and discovery are actually working in federal cases and what changes should be considered. Major empirical work on discovery costs and burdens – which are inextricably linked to pleading standards – is underway in preparation for a May 2010 conference at the Duke Law School hosted by the Civil Rules Committee. The Rules Committees will of course make the results of this work available to all.

¹<http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf>

²<http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf>

Honorable Jeff Sessions
Page 3

Thank you for considering these comments and the information the Committees' work will produce.

We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system that we are all dedicated to preserving and improving.

Sincerely,



Lee H. Rosenthal
Chair
Standing Committee on
Rules of Practice and Procedure



Mark R. Kravitz
Chair
Advisory Committee on Civil Rules

cc: Honorable Sheldon Whitehouse
Honorable Arlen Specter

Identical letter sent to: Honorable Patrick Leahy

MOTIONS TO DISMISS
INFORMATION ON COLLECTION OF DATA

The following tables and graphs on motions to dismiss before and after *Twombly* and *Iqbal* are based on data collected electronically from the 94 district courts' docket entries. This information is not routinely included in the Administrative Office statistical reports for the courts. Though the data was reviewed for accuracy, some quality control steps that are part of the Administrative Office's reports were not applied. The electronically collected information is from the courts' docket entries, and the underlying docketed motions and orders were not read. As a result, if there are errors in the docket entry, those errors are in the data. The Federal Judicial Center is engaged in a study that will include reviewing underlying motions to dismiss and orders in a large number of randomly sampled cases, providing more information and an additional check on accuracy.

Certain information could not be collected electronically from the docket entries and is not reflected in the data. The data does not distinguish among the different types of motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Though most motions to dismiss are filed under Rule 12(b)(6) for failure to state a claim on which relief can be granted, motions to dismiss filed under Rule 12(b)(1-5) and (7) are included in the data. The assumption is that the rate of motions to dismiss under Rule 12(b)(1-5) and (7) has remained stable during the period. The Federal Judicial Center study will include this information.

The data does not reveal whether motions to dismiss were granted with or without leave to amend, and, if with leave to amend, whether the case continued with an amended complaint. The Federal Judicial Center study will also include this information.

The courts do not rule on a significant number of motions to dismiss, often because the case settles without court intervention. Although the data includes the filing of these motions, the data does not include the disposition of these motions.

Finally, the data excludes Multi-District Litigation (MDL) cases.

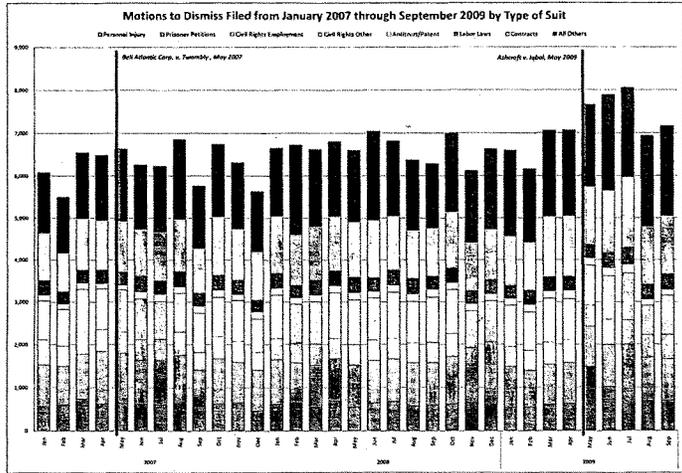
Cases and Motions to Dismiss Filed From January 2007 through September 2009

Case No.	2007		2008		2009	
	Jan	Dec	Jan	Dec	Jan	Dec
2007 CIVIL	1,056	1,212	1,274	1,052	1,034	1,024
2007 CRIMINAL	1,081	1,204	1,052	1,052	1,034	1,024
2007 APPELLATE	1,115	1,204	1,052	1,052	1,034	1,024
2007 MOTIONS TO DISMISS	1,115	1,204	1,052	1,052	1,034	1,024
2007 TOTAL	4,367	5,020	4,430	4,206	4,136	4,100
2008 CIVIL	1,081	1,204	1,052	1,052	1,034	1,024
2008 CRIMINAL	1,081	1,204	1,052	1,052	1,034	1,024
2008 APPELLATE	1,081	1,204	1,052	1,052	1,034	1,024
2008 MOTIONS TO DISMISS	1,081	1,204	1,052	1,052	1,034	1,024
2008 TOTAL	4,324	5,016	4,206	4,206	4,136	4,100
2009 CIVIL	1,081	1,204	1,052	1,052	1,034	1,024
2009 CRIMINAL	1,081	1,204	1,052	1,052	1,034	1,024
2009 APPELLATE	1,081	1,204	1,052	1,052	1,034	1,024
2009 MOTIONS TO DISMISS	1,081	1,204	1,052	1,052	1,034	1,024
2009 TOTAL	4,324	5,016	4,206	4,206	4,136	4,100

1. Case numbers include all cases filed from Jan 1, 2007 through Dec 31, 2009. This includes cases filed in 2007, 2008, and 2009. The numbers do not include cases filed in 2006 or 2010. The numbers do not include cases filed in 2007, 2008, and 2009 that were dismissed or otherwise disposed of before the end of the year. The numbers do not include cases filed in 2007, 2008, and 2009 that were dismissed or otherwise disposed of before the end of the year. The numbers do not include cases filed in 2007, 2008, and 2009 that were dismissed or otherwise disposed of before the end of the year.

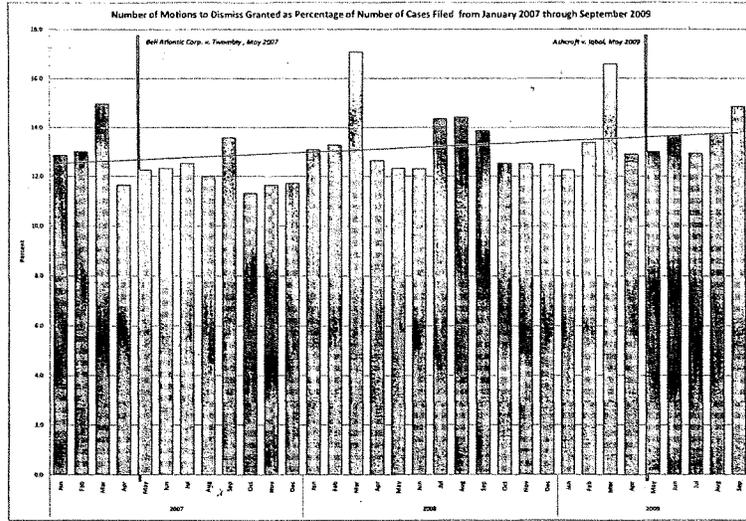
Cases and Motions to Dismiss Filed From January 2007 through September 2009

CASE TYPE	2007												2008												2009																
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec					
Personal Injury	25	34	24	22	31	17	15	10	12	17	17	18	24	22	14	21	10	10	10	11	12	14	17	24	21	12	14	14	14	14	14	14	14	14	14	14	14	14	14	14	14
Product Liability	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11
Contract Disputes	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11
Real Estate	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11
Employment	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11
Insurance	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11
Other	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11



1. Data includes motions to dismiss filed under Rule 12(b)(2)-(7) in cases filed from January 2007 through September 2009. Rule 12(b)(6) motions to dismiss cannot be tracked and is not included.
 2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
 3. Data does not include 50% cases in the number of motions to dismiss.
 4. The data were extracted directly from the text of 56 district court district entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

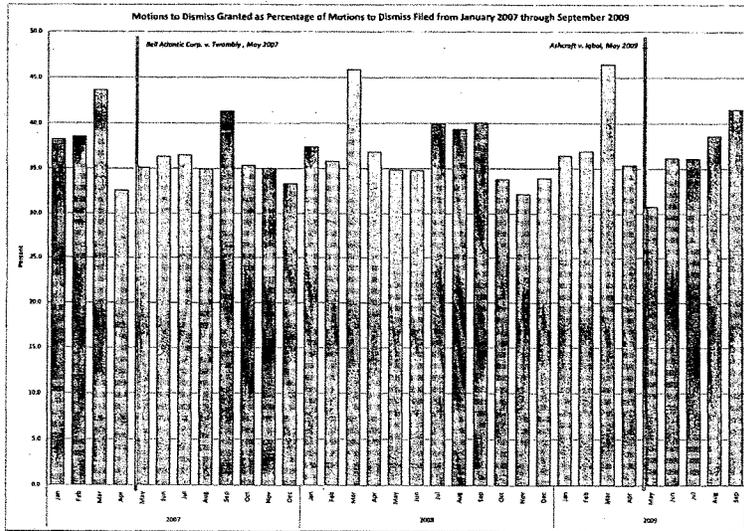
Revised: December 2, 2009
 Prepared by Statistics Division, Administrative Office of the U.S. Courts.



1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed from January 2007 through September 2009. Rule 12(b)(6) motions to dismiss cannot be broken out in this data.
 2. Data does not include motions to dismiss that were granted in part and denied in part.
 3. Data does not include data on whether motions to dismiss were granted with or without leave to amend.
 4. Data does not include MDL cases in which the total number of cases filed or the motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: December 2, 2009

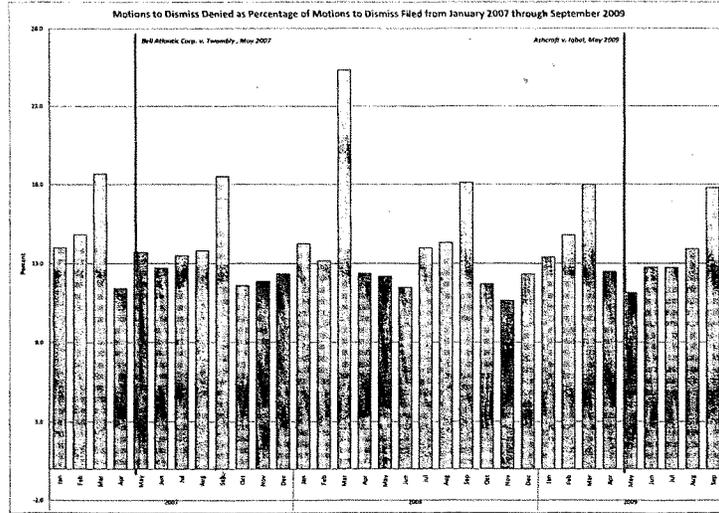
Prepared by Statistics Division, Administrative Office of the U.S. Courts.



1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed from January 2007 through September 2009. Rule 12(b)(6) motions to dismiss cannot be broken out in this data.
 2. Data does not include motions to dismiss that were granted in part and denied in part.
 3. Data does not include data on whether motions to dismiss were granted with or without leave to amend.
 4. Data does not include MDL cases in the number of motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: December 2, 2009

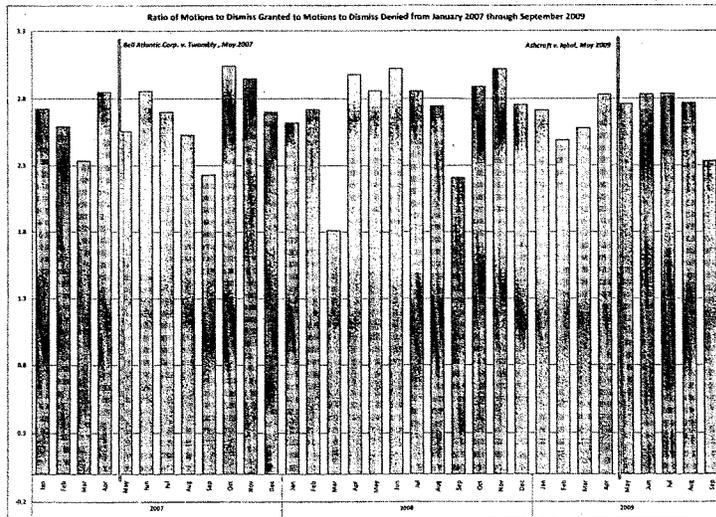
Prepared by Statistics Division, Administrative Office of the U.S. Courts.



1. Data includes motions to dismiss filed under Rule 12(b)(3)(1) in cases filed from January 2007 through September 2009. Rule 12(b)(3) motions to dismiss cannot be broken out in this data.
 2. Data does not include motions to dismiss that were granted in part and denied in part.
 3. Data does not include data on whether motions to dismiss were granted with or without leave to amend.
 4. Data does not include MDL cases in the number of motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: December 2, 2009

Prepared by Statistics Division, Administrative Office of the U.S. Courts



1. Data includes motions to dismiss filed under Rule 12(b)(3)(1) in cases filed from January 2007 through September 2009. Rule 12(b)(3) motions to dismiss cannot be broken out in this data.
 2. Data does not include motions to dismiss that were granted in part and denied in part.
 3. Data does not include data on whether motions to dismiss were granted with or without leave to amend.
 4. Data does not include MDL cases in the number of motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: December 2, 2009

Prepared by Statistics Division, Administrative Office of the U.S. Courts

MOTIONS TO DISMISS IN "CIVIL RIGHTS EMPLOYMENT CASES" AND "CIVIL RIGHTS OTHER CASES"
 PRE-*TWOMBLY* (JANUARY - APRIL 2007) AND POST-*IQBAL* (JUNE - SEPTEMBER 2009)*

Civil Rights Employment Cases

Monthly Average for Four Months before *Twombly*

1,026 cases
 525 motions to dismiss (51% of cases)
 208 motions granted (20% of cases)
 82 motions denied (8% of cases)

Monthly Average for Four Months after *Iqbal*

1,275 cases
 561 motions to dismiss (44% of cases)
 205 motions granted (16% of cases)
 85 motions denied (6.6% of cases)

Civil Rights Other Cases

Monthly Average for Four Months before *Twombly*

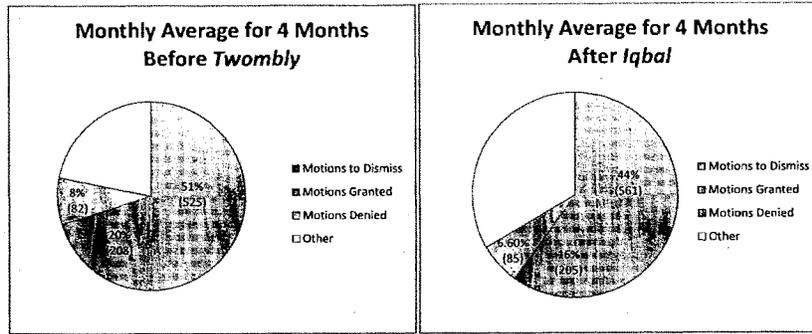
1,290 cases
 937 motions to dismiss (73% of cases)
 333 motions granted (26% of cases)
 82 motions denied (6.4% of cases)

Monthly Average for Four Months after *Iqbal*

1,463 cases
 941 motions to dismiss (64% of cases)
 362 motions granted (25% of cases)
 126 motions denied (8.6% of cases)

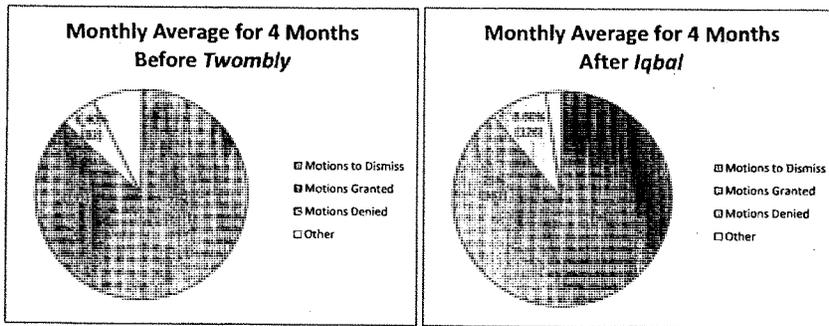
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- * 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed four months before *Twombly* and four months after *Iqbal*.
 2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
 3. Data does not include motions to dismiss that were granted in part and denied in part.
 4. Data does not include MDL cases in the number of motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistical system, and they did not pass through all the quality controls of the statistics system.

Motions to Dismiss in "Civil Rights Employment Cases"
*Pre-Twombly (January - April 2007) and Post-Iqbal (June-September 2009)*¹



¹ 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed four months before *Twombly* and four months after *Iqbal*.
 2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
 3. Data does not include motions to dismiss that were granted in part and denied in part.
 4. Data does not include MDL cases in the number of motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistical system, and they did not pass through all the quality controls of the statistics system.

Motions to Dismiss in "Civil Rights Other Cases"
*Pre-Twombly (January - April 2007) and Post-Iqbal (June-September 2009)*²



² 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed four months before *Twombly* and four months after *Iqbal*.
 2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
 3. Data does not include motions to dismiss that were granted in part and denied in part.
 4. Data does not include MDL cases in the number of motions to dismiss.
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T 202.682.1300
F 202.682.1312

December 23, 2009

Julia Gagne
Hearing Clerk
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Ms. Gagne:

On behalf of John Payton, I am submitting his written responses to follow-up questions from Committee members regarding his testimony at the United States Senate Committee on the Judiciary hearing entitled, "Has the Supreme Court Limited Americans' Access to Courts?" on December 2, 2009.

I am also submitting grammatical changes to the transcript of John Payton's oral testimony before the Committee. As requested, we have marked the changes directly on the transcript and flagged the pertinent pages.

If you have any questions, please contact me at 202-682-1300.

Thank you.

Sincerely,


Leslie Proll
Director, Washington Office

Enclosures

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JOHN PAYTON'S RESPONSES TO
WRITTEN QUESTIONS FROM SENATORS FRANKEN AND COBURN
DECEMBER 23, 2009

Responses to questions from Senator Franken

- 1. Both *Ashcroft v. Iqbal*, 129 S. Ct. 1937, and *Gross v. FBL Financial Services*, 129 S. Ct. 2343, came down this year. In other words, right now, employers are making tough employment decisions, cutting pay and laying people off, and right now, the Supreme Court is making it harder for employees to get their day in court, and actually win when they get there. What effect has this timing had on employees who are the victims of discrimination?**

In a series of 5-4 decisions, including *Iqbal* and *Gross*, a narrow conservative majority of the Supreme Court has made it more difficult for victims of discrimination to obtain redress at precisely the moment that robust enforcement of our nation's anti-discrimination laws is most essential. Discrimination of all forms thrives during an economic downturn. The recession has had a particularly severe impact for racial minorities. For instance, the unemployment rate for African American men, ages 16 to 24, was 34.5% in October 2009, more than three times the rate for the general population.¹ Additionally, while the recession may be ending for Wall Street, it remains a devastating reality for the older American workers whose rights were directly and adversely affected by the Supreme Court's decision in *Gross*. Ensuring that the federal courts remain open and accessible to all Americans is important to help maintain social cohesion and inclusiveness at a time when our society is under severe economic stress.

- 2. Please describe your views on the impact of a plausibility standard in assessing a motion to dismiss in civil rights cases. Is such a standard workable in the civil rights context?**

The new heightened plausibility standard promulgated by the Supreme Court in *Iqbal* and *Twombly* is particularly unworkable in the civil rights context. For instance, when a defendant files a motion to dismiss a complaint claiming intentional race discrimination, *Iqbal* directs the judge to review the allegations in the complaint and determine—based on his or her “judicial experience and common sense”—whether lawful intent or racial animus is a more plausible explanation for the events that occurred.² That inquiry is necessarily highly subjective because it requires judges to draw upon their own personal background and assumptions. There is a significant risk that discrimination may be viewed as an aberration from twenty-first-century societal norms. Accordingly, it may be the case that racial animus is thus considered an implausible explanation for a particular event or occurrence—especially in the absence of the type of “smoking gun” evidence that is often produced through discovery, which plaintiffs are not generally entitled to obtain at the pleading stage of litigation.

¹ V. Dion Haynes, *Blacks Hit Hard by Economy's Punch*, WASH. POST, Nov. 24, 2009; see also Charles M. Blow, *Black in the Age of Obama*, N.Y. TIMES, Dec. 4, 2009.

² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009).

Responses to questions from Senator Coburn

1. In your testimony, you cited *Vallejo v. City of Tucson* as an example of how *Twombly* and *Iqbal* affect voting rights. In that case the court found that although plaintiff was not given a provisional ballot when he arrived without sufficient identification, this was a “garden variety” and “isolated” error in a lawful election that did not amount to racial discrimination. In your testimony, you noted that the plaintiff in this particular case was dismissed without ever having the benefit of discovery. However, a study by the Caltech/MIT project found that the effects of long lines at polling stations and inaccuracies in the registration database could have effectively cost as many as six million Americans their vote in the 2000 election. Do you believe that each of these six million voters should be able to bring suits against cities, counties, and states across the country and force them to expend the significant costs associated with discovery for what are likely “garden variety” errors?

In my written testimony, I cited *Vallejo v. City of Tucson* in order to highlight a key problem with the new heightened pleading standard promulgated in *Iqbal* and *Twombly*. In *Vallejo*, city officials conceded that they wrongfully denied a provisional ballot to Frank Vallejo, a Mexican American disabled veteran. A key contested factual issue was whether or not this conceded error was an “isolated incident.”³ Vallejo contended that it was the result of a discriminatory municipal practice or procedure; if that allegation proved true, the city could have been held liable under the Voting Rights Act. Prior to *Iqbal* and *Twombly*, it had never been the case that a federal court was authorized to resolve such a contested factual issue at the pleading stage. Under the judicial system enshrined by our Constitution, laws, federal rules, and political traditions, such issues should be resolved by fact-finders, following a period of discovery, to help determine the merits of the claims. Relying on *Iqbal* and *Twombly*, the district court in *Vallejo* usurped the fact-finder’s role and effectively made findings in favor of the city—without even affording the plaintiff an opportunity for discovery to determine whether the city was acting pursuant to a discriminatory policy or practice. In so doing, Vallejo was denied the ability to appropriately vindicate his rights.

The NAACP Legal Defense and Educational Fund, Inc. (LDF) strongly believes that voters who have been disenfranchised in such a way that may violate the Voting Rights Act and other federal protections should be able to prosecute their claims. The 2000 election—which resulted in the widespread disenfranchisement of minority voters including nearly one million African American citizens—firmly established that increased vigilance and aggressive enforcement are necessary to prevent the erosion of our bedrock democratic rights. Investigations by LDF and others revealed glaring deficiencies in state and local voting policies and practices, ranging from defective and inferior voting equipment, which had a particularly severe impact on minority communities, to reckless or intentionally discriminatory voter roll purges. The results of these investigations helped prompt important congressional action to further safeguard

³ No. CV 08-500 TUC DCB, 2009 WL 1835115, at *2 (D. Ariz. June 26, 2009).

Americans' voting rights, including the Help America Vote Act (HAVA), Public Law 107-252, signed into law in October 2002.

2. You also mentioned prisoner litigation in your testimony. Even after Congress enacted the Prison Litigation Reform Act, prisoners have still been able to haul city officials into court for all sorts of implausible claims – from claims of cruel and unusual punishment when a prison physician and nurse would not provide more than a prompt X-ray and two examinations for a hurt pinky finger to claims of deliberate indifference to a serious medical need when an inmate was not given his toothpaste of choice. How do you reconcile your argument that prisoner civil rights and access to courts should be protected with cases like these?

- a. Are these the sorts of cases you deem worthy of proceeding to discovery?**
- b. If not, on what basis do you believe a court could dismiss such claims before discovery if S. 1504 were enacted?**

In my written testimony, I discussed one recent case, *Kyle v. Holinka*, that involved a challenge to a prison's policy of racial segregation in cell assignments.⁴ The plaintiff alleged that prison officials made numerous statements acknowledging the discriminatory policy, and there was no question that those officials were subject to suit. Rather, the dispute centered on whether the plaintiff should also be able to proceed against the prison warden and other high ranking officials. Post *Iqbal*, the district court dismissed the claim against the warden and the other high ranking officials on the ground that the plaintiff failed to allege any facts showing that they implemented the discriminatory policy. This decision highlights the detrimental impact of the new heightened pleading standards promulgated by *Iqbal* and *Twombly*. It seems entirely implausible that a warden could fail to notice that prison staff were operating a segregated prison, or that they would have continued to do so if the warden had ever ordered an end to the practice.

More generally, it is critical that government officials are held accountable for unlawful discrimination wherever it occurs. As the Supreme Court has made clear, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”⁵ The Prison Litigation Reform Act was never intended to close off access to the courts in cases such as *Kyle v. Holinka*, where prisoners allege severe patterns or practices of racial discrimination. Without more information, it is difficult for me to comment on complaints alleging other types of violations. Suffice it to say, we believe that there are adequate procedural measures in place to ensure that non-meritorious claims alleged by prisoners do not move forward in the federal court system.

⁴ No. 09-cv-90-slc, 2009 WL 1867671 (W.D. Wis. June 29, 2009)..

⁵ *Turner v. Safley*, 482 U.S. 78, 84 (1987).

- 3. Another aspect of your testimony dealt with employment discrimination. Because the proposed legislation would sustain even those complaints consisting of only conclusory or implausible allegations, would this not subject government officials and agencies to meritless lawsuits filed by former employees with an ax to grind? Worse yet, could not former employees file claims against the government merely for harassment, and then later hope to find a claim as discovery progressed?**

A return to the law which has existed for the last fifty years would in no way subject the government to meritless lawsuits. There is no empirical evidence that, prior to *Iqbal* and *Twombly*, the federal courts were permitting meritless employment discrimination lawsuits of this nature to proceed. To the contrary, the data reveals that federal courts too often have disfavored employment discrimination plaintiffs, and this atmosphere appears to have discouraged potential plaintiffs from seeking redress in federal courts.⁶

Moreover, it is LDF's position that the proposed legislation should not have a significant impact on employment discrimination cases for the following reason. *Iqbal* and *Twombly* did not overrule the Court's prior 2002 decision in *Swierkiewicz v. Sorema N.A.* In *Swierkiewicz*, the Supreme Court unanimously and expressly rejected a heightened pleading standard in employment discrimination cases. For several reasons, *Swierkiewicz* remains good law.⁷ *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*."⁸ Moreover, *Iqbal* relied heavily on *Twombly*, in which the Court explicitly distinguished *Swierkiewicz* and affirmed its continuing vitality.⁹

Nevertheless, as I explained in my written testimony, some courts have erroneously applied *Iqbal* and *Twombly* to employment discrimination cases. Legislation that addresses the detrimental impact of these two cases should help clear up the confusion, and thus prevent unwarranted dismissals of employment discrimination claims at the pleading stage before plaintiffs have the opportunity to obtain discovery to support their allegations. Discovery is particularly important in employment discrimination cases because it is often only through review of an employer's records that a "smoking gun" is revealed.

⁶ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 Harv. L. & Pol'y Rev. 103 (2009).

⁷ 534 U.S. 506 (2002).

⁸ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007).

4. **The U.S. Supreme Court and lower federal courts across the country have indicated that *Conley*'s "no set of facts" language is impossible to apply literally because it would allow a wholly conclusory statement of a claim to survive a motion to dismiss whenever the court could imagine some set of facts that would support recovery. For this reason, courts have been applying the *Conley* standard in a non-literal, practical way for decades. If the proposed legislation passes, do you believe a literal application of the standard is appropriate, or should courts look to cases decided after *Conley* but before *Twombly* for guidance?**

In the five decades after the Supreme Court decided *Conley*, no Supreme Court Justice ever "express[ed] any doubt" about the "adequacy" of *Conley*'s interpretation of the Federal Rules of Civil Procedure.¹⁰ To the contrary, prior to *Iqbal* and *Twombly*, the Supreme Court repeatedly and consistently rebuffed attempts by lower courts to undermine *Conley*.¹¹ There is no question that *Iqbal* and *Twombly* changed the rules of the game for civil litigants. The key point in *Conley* is this: "[A]ll 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."¹² As the Court emphasized in *Conley*, "[t]he 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."¹³ *Iqbal* and *Twombly* place renewed emphasis on precisely the sort of pleading gymnastics that *Conley* and the Federal Rules rejected. The demise of *Conley*'s "fair notice" approach to pleading encourages litigants to engage in excessive wrangling and delay at the pleading stage and thus impedes practical and fair-minded resolution of civil rights claims and other litigation on the merits.

¹⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting).

¹¹ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

¹² *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)).

¹³ *Id.* at 48.

SUBMISSIONS FOR THE RECORD
 UNIVERSITY OF DENVER | INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM

RESTORING COMPLETE ACCESS TO JUSTICE IN AMERICA'S COURTS

WHO WE ARE

The Institute for the Advancement of the American Legal System at the University of Denver (IAALS) is a national, nonpartisan organization dedicated to improving the process and culture of the civil justice system. One of our core initiatives is to improve the civil justice system by making it more efficient and cost-effective. To this end, we conduct legal and empirical research on the impact of civil rules on litigation, and propose solutions to streamline the litigation process.

TWOMBLY, IQBAL AND ACCESS

There is legislation currently pending before the United States Congress (H.R. 4115 and S. 1504) that purports to restore access to the Federal court system for plaintiffs whom the sponsors argue are barred from such access by two recent United States Supreme Court opinions.

The legislation is seriously flawed. First, it removes the issue of pleadings and access from the forum where it should be debated and resolved: the federal court rulemaking process. Second, it couches access to the courts much too narrowly. Access is not just about getting in the door of the courthouse, as the proposed legislation implies. Access is also about having a system that is affordable and effective such that claimants have the ability to participate in every stage of the litigation process, including jury trials. To achieve that broader vision of access, the courts must streamline their procedure, devote their resources efficiently and require parties to narrow their disputes. Otherwise, the civil justice system is in danger of capsizing from cost and delay. By framing access as just a "key to the courthouse door" issue, the two bills actually intensify the broader problem. Lastly, the legislation purports simply to overturn two Supreme Court opinions, but actually goes far beyond that goal and rolls back decades of precedent and statutory mandate.

TWOMBLY AND IQBAL: THE PROBLEM? OR, PERHAPS JUST A FLAWED SOLUTION TO THE PROBLEM?

The Supreme Court's recent decisions in *Bell Atlantic Co. v. Twombly* and *Ashcroft v. Iqbal* reflect concerns about the disproportionate impact of discovery in civil cases. In *Twombly*, an antitrust case, the Court's concern was that the parties would encounter the "potentially enormous expense of discovery" without even the possibility of uncovering relevant evidence to support the plaintiff's allegations. In *Iqbal*, a civil rights case, the Court similarly expressed

concern that the discovery process would exact “heavy costs” without producing evidence that would support the plaintiff’s case.

In both *Twombly* and *Iqbal*, the Supreme Court’s approach to this dilemma was to require more information at the pleading stage; specifically, pleadings had to contain enough factual matter (taken as true by the court) to establish “plausible grounds” that the allegations were true before the expensive apparatus of the court process kicks into gear.

The *Twombly/Iqbal* approach is premised on a notion that should command universal agreement: no one – plaintiff or defendant – should be subjected to the financial and emotional costs of civil litigation if there is no hope of a claim or defense succeeding at trial. One can debate whether the Supreme Court’s specific approach in *Twombly* and *Iqbal* is the right one. One cannot fault the Court, however, for attempting to resolve the longstanding and serious problem of full court access.

THE PROPOSED LEGISLATION: NO SOLUTION AT ALL

Senate Bill 1504 (the “Notice Pleading Restoration Act of 2009”) would defeat *Twombly* and *Iqbal* by requiring that a federal court not dismiss a complaint “except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”

House Bill 4115 (the “Open Access to Courts Act of 2009”) would use the same standard to prevent the granting of a motion to dismiss unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.”

Whatever one thinks of the Supreme Court’s solution to an out-of-control civil litigation process in *Twombly* and *Iqbal*, a reversion to a standard first announced more than half a century ago is categorically the wrong approach. The proposed legislation would open the doors to the courthouse, but would do nothing to assure that parties are able to afford a day in court. Neither bill contains any solution to the problems of cost and delay caused by the combination of vague allegations and unfettered discovery and motion practice. Neither bill proposes a better way to focus the disputed issues and bring cost-effective civil litigation to the federal courts. The bills focus only on one stage of court access – getting in the courthouse door – without addressing the long-term access issues that potentially affect every litigant, plaintiff or defendant.

Further, the bills would uproot more than five decades of common law and statutory development. Cases interpreting *Conley* since 1957 – including several cases that explicitly recognized the access problems associated with cost and delay – would apparently no longer be good law. Similarly, at least some pieces of legislation passed by the Congress to address the same issues, including the Private Securities Litigation Reform Act of 1995 and the Prisoner

Litigation Reform Act of 1995, might be invalidated. The result could well be to swamp the courts with lawsuits of questionable merit – precisely the types of suits that the Congress sought to preclude. The result of that outcome would be far less time dedicated to the cases with real merit, and a far less ‘accessible’ system in a real sense.

INFORMED EXPERTS SHOULD DEVELOP WORKABLE SOLUTIONS

The dialogue about the best way to ensure full access to courts is well underway in the appropriate forum. Attorneys, judges, lawmakers, policymakers, social scientists and interested observers are collecting information on the impact of the current system on access to justice. The conversation has been going on for several years, and will continue in May 2010 with a major conference sponsored by the Advisory Committee on Rules of Civil Procedure.

The best way to promote access to courts is to allow these informed experts to debate and develop workable solutions, based on empirical evidence and collective experience. These experts can amend the Federal Rules of Civil Procedure through channels long established and supported by Congress. They can thoughtfully consider the available options and craft solutions reflective of diverse opinions and experiences.

Legislation would foreclose this dialogue and cut off Congress’s own preferred mechanism for rules reform. There is no pressing reason to do this. Decision-makers wrestling with these issues need to look at the broad questions of access, not just the narrow ones. The Rules Enabling Act process best serves that goal.

CONCLUSION

The Institute strongly urges the defeat of these two pieces of legislation. The right answer to assuring access to a workable civil justice system is to implement thoughtful, tailored solutions to the problem of expense and delay and not to package the problem in an overly simplified way that would, in fact, decrease real access.

October 26, 2009

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

We are writing to urge you to support legislation that would restore the legal standards required to bring federal court litigation that have been the law for half a century. In two recent cases, the U.S. Supreme Court fundamentally changed these standards and erected new barriers that may keep victims of unlawful conduct from getting into court to prove their claim, thereby immunizing lawbreakers from appropriate sanction and encouraging disrespect for the law.

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the Court created a brand new requirement that federal complaints must meet in order to overcome motions to dismiss. The Court ruled that the complaint must state enough facts to persuade the presiding court that the claim is "plausible." Prior to *Twombly*, the Court had followed a standard set out in 1957 in *Conley v. Gibson*, 355 U.S. 41 (1957), which said that civil cases should not be dismissed "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 Court further said that the claimant does not need to "set out in detail the facts upon which he bases his claim." The Court cited the language of *Conley* in at least a dozen decisions in the half-century since the case was decided.

In *Twombly*, without benefit of any new rulemaking proceedings, new statutory language or any significant new empirical information, the Court discarded the *Conley* standard in favor of a new, subjective, "plausibility" standard. In May, the Court expanded on the new standard in *Ashcroft v. Iqbal*, _____ U.S. _____ (May 18, 2009), ruling that civil claimants 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." Through these two cases, the Court devised its own novel pleading standards, thus usurping the authority of Congress and the assigned legislative rule-making role of the Judicial Conference.

Operating under these vague and subjective new legal standards, defendants are increasingly urging federal judges to dismiss federal lawsuits, before the claimants have any opportunity to develop facts in support of their claims through discovery, on the basis that the factual allegations do not establish a "plausible" claim for relief. Because information about the details of wrongful conduct is often in the hands of the defendants, many meritorious cases could be dismissed before the discovery process begins, and

The Honorable Patrick Leahy
 October 26, 2009
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wrongdoers will then escape accountability. Indeed, meritorious cases have been thrown out of federal court under the new *Iqbal* standards because claimants were unable to identify nonpublic facts in their initial pleadings, such as the precise time, place and manner of the alleged misconduct.

The new standards substantially hamper access to the courts for people who are harmed by illegal conduct, undermine the fundamental right to a jury trial, and infringe the rights of civil plaintiffs to due process of law, fundamental fairness and their day in court. According to a September 21, 2009 article in the *National Law Journal* (attached), motions to dismiss based on *Iqbal* have already produced more than 1,500 district court and 100 appellate court decisions. The American Bar Association's *Litigation News* reported that, in the two years after *Twombly*, federal circuit courts relied on the new standards to dismiss federal lawsuits involving the environment, medical malpractice, dangerous drugs, investor protection, disability rights, civil rights, employment discrimination and the taking of private property.

The severe nature of the mischief *Iqbal* is creating is shown by a Third Circuit decision, *Fowler v. UPMC Shadyside*, ___ F.3d ___, 2009 WL 2501662 (3d Cir. Aug. 18, 2009) (No. 07-4285), which actually held that *Iqbal* silently overruled the part of the *Twombly* decision rejecting heightened pleading standards in employment discrimination cases.

Rule 8 of the Federal Rules of Civil Procedure requires claimants to file a "short and plain statement" of the claim. In the *Twombly* and *Iqbal* decisions, the Supreme Court unilaterally expanded the rule to require a factual basis that is "plausible" and "reasonable" in the subjective judgment of lower court judges. As long as this new standard is the law of the land, the doors to federal court can be slammed shut on many Americans harmed by serious wrongdoing. Congress should act swiftly to restore the legal standards that have kept the courthouse doors open for the last half-century.

Sincerely,

Alliance for Justice
 American Antitrust Institute
 American Association for Justice
 American Civil Liberties Union
 The Brennan Center for Justice at NYU School of Law
 Center for Justice & Democracy
 Christian Trial Lawyer's Association
 Committee to Support the Antitrust Laws
 Community Catalyst
 Consumer Federation of America
 Consumers Union

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Earthjustice
Environment America
Essential Information
The Impact Fund
La Raza Centro Legal
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
Mexican American Legal Defense and Educational Fund
NAACP Legal Defense and Educational Fund
National Association of Consumer Advocates
National Association of Shareholder and Consumer Attorneys
National Consumer Law Center
National Consumers League
National Council of La Raza
National Crime Victims Bar Association
National Employment Lawyers Association
National Senior Citizens Law Center
National Whistleblowers Center
National Women's Law Center
Neighborhood Economic Development Advocacy Project
Public Citizen
Sierra Club
Southern Poverty Law Center
Taxpayers Against Fraud
U.S. Public Interest Research Group

Cc:

The Honorable Herb Kohl
The Honorable Dianne Feinstein
The Honorable Russell Feingold
The Honorable Richard Durbin
The Honorable Charles Schumer
The Honorable Benjamin Cardin
The Honorable Amy Klobuchar
The Honorable Sheldon Whitehouse
The Honorable Edward Kaufman
The Honorable Arlen Specter
The Honorable Al Franken

The Honorable Jeff Sessions,
Ranking Member
The Honorable Orrin Hatch
The Honorable Charles Grassley
The Honorable Jon Kyl
The Honorable Lindsey Graham
The Honorable John Cornyn
The Honorable Tom Coburn

“Has the Supreme Court Limited Americans’ Access to Courts”
Hearing Before the United States Senate Committee on the Judiciary
December 2, 2009

INVITED STATEMENT OF JOHN S. BECKERMAN
Associate Dean
Rutgers University School of Law, Camden, New Jersey

TO THE HONORABLE MEMBERS OF THE JUDICIARY COMMITTEE:

I am Associate Dean of Rutgers Law School in Camden, New Jersey, where I teach Civil Procedure and Complex Civil Litigation, among other subjects. Before entering legal academia in 1990, I practiced litigation privately in New York City, in two firms that mainly represented institutional clients, mostly as defendants in civil litigation, and earlier clerked for the Honorable José A. Cabranes, then United States District Judge for the District of Connecticut, and now United States Circuit Judge for the Second Circuit.

In 1995, I wrote an article entitled Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, published in 104 YALE L. J. 2053 (1995), with Elliott J. Weiss. It was reprinted twice, in SECURITIES LAW REVIEW--1996, 279, ed. Donald C. Langevoort; and in 37 CORPORATE PRACTICE COMMENTATOR, 431 (1995), ed. Robert B. Thompson and was selected by Corporate Practice Commentator as one of the best securities law articles of 1995. It contained procedural proposals that inspired Congress to enact the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 (P.L. 104-67), amending the Securities Act of 1933 and the Securities Exchange Act of 1934 and -- rare for a law review article -- is regarded as the definitive legislative history of those provisions. See In re Cendant Corp. Litigation, 264 F.3d 201, 261-62 (3d Cir. 2001); S. Rep. No. 104-98, at 11 n. 32 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 690 n. 32. In 2000, I wrote an article entitled Confronting Civil Discovery's Fatal Flaws, published in 84 MINNESOTA L. REV. 505 (2000), and reprinted in 49 DEFENSE L. J. 419 (2000), ed. Richard Patterson. It contained both theoretical and practical analysis of why discovery fails to work as intended in complex and high-stakes cases, and of the incentive structure underlying so-called Rambo litigation. Thus I am fully familiar with both the impact of procedural changes and the burdens that can be imposed by large-scale discovery in complex cases, as well as the need for discovery to prove cases at trial.

I am deeply troubled by the decisions of the Supreme Court of the United States in Bell Atlantic v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). Rather than merely "clarifying" the requirements of Rule 8, Fed.R.Civ.P. concerning pleading, these two cases instead changed the legal standard for deciding motions to dismiss for failure to state a claim on which relief can be granted under Rule 12(b)(6), from stating a claim that is legally sufficient to stating facts sufficient for the Court to find the claim "plausible." This is a radical departure from sixty years of procedural consensus agreeing that cases should be decided on the merits rather than on the pleadings and that discovery should be available to aid plaintiffs in proving claims that may be meritorious.

The aspect of Twombly and Iqbal that I find most insidious is that they will totally shut the Courthouse door to plaintiffs in cases in which factual information necessary to plead claims that the Court would find "plausible" is exclusively within the knowledge, possession or control of defendants. Without discovery or the totally uncommon circumstance of a proverbial "smoking gun" in plaintiff's possession, how will any plaintiff ever again be able to plead a claim of antitrust conspiracy (as in Twombly), or of intentional violation of constitutional

rights (as in Iqbal) that the Court will find “plausible,” to say nothing of many other categories of commonly occurring wrongs, including intentional employment discrimination?

The Court’s insistence that its plausibility gloss is generally applicable to Rule 8, Fed.R.Civ.P., dramatically tilts the litigation playing field in favor of defendants. Indeed, given the generality of the language in Twombly and Iqbal, it would be malpractice for a lawyer to fail to advise any defendant client with sufficient means to take a shot at a motion to dismiss the complaint for lack of plausibility. Given the number of areas in which private enforcement through civil litigation is universally recognized as an essential supplement to public or administrative enforcement mechanisms – including securities, antitrust, the environment, and public health to name only a few – this tilting of the playing field will have predictable deleterious effects, however unintended, on many aspects of law that Congress intended to protect of the public.

I commend the Committee for seeking a solution to these problems, and would support any solution that restores the status quo ante Twombly.

Respectfully submitted,

/s/ John S. Beckerman

John S. Beckerman

Camden, New Jersey
December 11, 2009

Prepared Statement of Stephen B. Burbank
David Berger Professor for the Administration of Justice
University of Pennsylvania

Hearing on Whether the Supreme Court has Limited Americans' Access to Court
Before the Committee on the Judiciary
United States Senate
December 2, 2009

Introduction¹

Mr. Chairman and members of the Committee: Thank you for inviting me to testify today on the vitally important question whether recent decisions of the Supreme Court have limited Americans' access to court. I commend you for recognizing the serious potential for damage posed by these decisions. I would like specially to commend Senator Specter for his early action in introducing a bill, S. 1504, to overrule the Court's decisions, thus signaling concern to the bench, the bar and the public, and stimulating interest and debate. Appendix A to this statement includes a draft substitute amendment for the Committee's consideration. It was inspired by a provision in the 1991 Civil Rights Act and by the dialogue among proceduralists that Senator Specter's bill (and the House bill modeled on it) stimulated.

The draft substitute amendment reflects my view that the primary purpose of any legislation responding to the Court's decisions should be to restore the status quo concerning pleading and motions to dismiss in federal civil actions until careful study, enabled by a process that is open, inclusive, and thorough, supports the need for change. It also reflects my view that any such change should be effected by amendments to the Federal Rules of Civil Procedure, by statute, or by some combination of the rulemaking and legislative processes. The goal should be a process that best deploys and facilitates the technical expertise, policy judgment and democratic accountability that are necessary for wise and legitimate lawmaking about access to court – the very antithesis, in other words, of the process that the Court has followed.

By way of background, I have been teaching and writing about federal practice and procedure, court rulemaking, judicial independence and accountability, and the relations between the federal judiciary and Congress for thirty years. My work on court rulemaking includes the definitive history of the Rules Enabling Act of 1934.² I have also been active in providing advice and assistance to Congress and to the federal judiciary. Thus, for example, I advised Representative Kastenmeier and testified before both the House Subcommittee he chaired and a Senate Subcommittee on the legislation, ultimately enacted in 1988, that made important changes to the process by which Federal Rules and amendments are considered.³ I also testified before a Senate Subcommittee on proposals to change the arrangements for the discipline or removal of

¹ This prepared statement draws on Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535; Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009), and Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy* (manuscript).

² See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

³

Since 1934, then, the rulemaking structure has evolved to include more decision makers, to provide for the representation of persons other than the Justices of the Supreme Court, to facilitate public notice and comment, to provide notes that accompany the text throughout the drafting and approval process, and to lengthen the opportunity for congressional review. None of these changes came about as a matter of grace on the part of the Supreme Court; rather, they were imposed by Congress through changes to the enabling legislation.

Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119 (2002).

federal judges, advocating the creation of a commission to study the issues. When Congress authorized such a commission, the Speaker of the House appointed me a member, and I was a principal author of its report. I have served twice as a Reporter for the Third Circuit, twelve times as a panelist or moderator (or both) at Third Circuit judicial conferences, and occasionally as a speaker or panelist at the judicial conferences of other circuits. In 2005 I conceived, and with Gregory Joseph recruited some twenty other academics and lawyers to implement, a project to review the proposed Restyled Federal Rules of Civil Procedure. This massive volunteer enterprise led to scores of recommended changes, many of which were accepted by the Advisory Committee and are part of the 2007 Restyled Federal Rules. Finally by way of example, I have served as an informal consultant to many committees of the federal judiciary, organized at least three conferences/symposia at the request of the federal judges who chaired those committees, and both testified before, and moderated discussions with, them on numerous occasions.

In sum, Mr. Chairman, in both scholarship and public service activities I am guided by twin commitments to an independent and accountable judiciary and to the institutions and values of democracy. I am here today because I believe that the recent decisions of the United States Supreme Court that prompted this hearing, *Bell Atlantic Corp. v. Twombly*,⁴ and *Ashcroft v. Iqbal*,⁵ challenge both of those commitments. These decisions involve the legal standards to be used for assessing the adequacy of complaints to withstand motions to dismiss in federal civil actions. A third decision involving the same problem, *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*,⁶ was decided shortly after *Twombly*. Although at one level concerned with technical requirements of pleading – the process by which, at the beginning of a case, parties disclose their claims and defenses to each other and the court – at another level, these cases raise important questions about access to court, compensation for injury, the enforcement of public law, the role of litigation in democracy and the role of democracy in litigation.

The degrees of particularization and persuasiveness of a complaint's allegations that a system requires implicate the ability of putative plaintiffs to pursue adjudication of disputes on the merits (withstand a motion to dismiss), including their ability to discover relevant information from defendants in order to prove their allegations at trial (or to defeat a motion for summary judgment). They thus also implicate the ability of those who have been injured to use litigation in order to secure compensation, and the ability of government to use private litigation for that purpose (i.e., in place of social insurance), and for the enforcement of social norms (i.e., in place of administrative enforcement).

From the perspective of those who are or may be sued, pleading requirements implicate the ease with which they can be haled into court and forced to incur direct and opportunity costs in defending against, or settling, what may be meritless claims. Finally, from the (self-interested) perspective of the judiciary, pleading requirements implicate the volume of civil litigation and the types of litigation activity that filed cases exhibit, both of which affect the allocation of resources by court systems that in this country are chronically underfunded.

I am concerned that *Twombly* and *Iqbal* may contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to jury trial, and the emasculation of

⁴ 550 U.S. 544 (2007).

⁵ 129 S. Ct. 1937 (2009).

⁶ 551 U.S. 308 (2007).

private civil litigation as a means of enforcing public law. I am particularly concerned because in rendering them the Court evaded the statutorily mandated process that gives Congress the opportunity to review, and if necessary to block, prospective procedural policy choices before they become effective. Both the process used to reach these decisions and their foreseeable consequences undermine democratic values.

Of course, no one yet knows enough about the impact of *Twombly* and *Iqbal* to state with confidence that they will cause a radical change in litigation behavior or the results of litigation. Still, Appendix B to this statement contains a sample of many lower court cases suggesting or making explicit that complaints have been dismissed that would not have been dismissed previously, and early empirical work suggests that *Twombly* and *Iqbal* have had a disproportionately adverse impact on the usual victims of “procedural” reform – civil rights plaintiffs.⁷ Moreover, the relevant question now should be: Who should bear the risk of irreparable injury? In my view, it should not be those usual victims of “procedural” reform, and it should not be the intended beneficiaries of federal statutes that Congress intended to be enforced through private civil litigation.

The remainder of this prepared statement is organized as follows. I will first describe the choices made by those who drafted the original Federal Rules on pleading and sketch the role of notice pleading in the federal litigation landscape in the intervening years. My account reveals that, notwithstanding recurrent pressure to authorize fact pleading in certain categories of cases, the Supreme Court repeatedly insisted that such a change would require rulemaking or legislation, and that the rules committees of the Judicial Conference abandoned proposals to adopt fact pleading across the board as political dynamite. In light of this history, *Twombly* and *Iqbal* prompt the question what changed other than the membership of the Supreme Court. I then describe and discuss the Supreme Court’s decisions in those cases, identifying what in their architecture may lead to mischief, both of the sort that the framers of the original Federal Rules sought to avoid and a whole new brand of mischief reposing in a generally applicable plausibility requirement that depends on “judicial experience and common sense.” From there I turn to the defects of process, institutional competence and democratic accountability underlying the Court’s decisions in *Twombly* and *Iqbal*. In my view, these defects are sufficiently serious, standing alone, to warrant legislation requiring a return to the status quo ante until they have been cured by a new (and very different) process. In the concluding section I bring together the arguments in favor of legislation, as well as responses to arguments that I have encountered by those who oppose it.

Pleading in Historical Perspective

The Rules Enabling Act was enacted in 1934. In 1935 the Supreme Court appointed an Advisory Committee to draft the rules that would implement this delegation of congressional power to make prospective, legislation-like rules. The original Advisory Committee interpreted the Enabling Act’s reference to “general rules” as requiring not just rules that would be applicable in all district courts but also rules that would be applicable in every type of civil action (trans-substantive). The latter interpretation added a practical imperative to the Advisory Committee’s preference for rules, including pleading rules, that were simple and flexible in the

⁷ See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, available at <http://ssrn.com/abstract=1487764>.

tradition of equity (ignoring that equity procedure had itself often led to technicality and complexity in pleading and otherwise). On the matter of pleading, the committee was in part reacting to the existence in many states of pleading rules – applicable in federal courts in those states -- that required the plaintiff to state facts supporting each element of the alleged legal basis or cause of action relied on. Those who drafted the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions – among “facts,” “conclusions,” and “evidence” – that they thought were arbitrary or metaphysical. As Edgar Tolman, who bore major responsibility for explaining the proposed new Federal Rules to Congress, put it in his 1938 House testimony:

I want you now to consider this provision in Rule 8, as to what you have to put into your paper. You used to have the requirement that a complaint must allege the “facts” constituting the “cause of action.” I can show you thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to whether a pleading contained a “cause of action”; and of whether certain allegations were allegations of “fact” or were “conclusions of law” or were merely “evidentiary” as distinguished from “ultimate” facts. In these rules there is no requirement that the pleader must plead a technically perfect “cause of action” or that he must allege “facts” or “ultimate facts.” [Rule 8 prescribes] the essential thing, reduced to its narrowest possible requirement, “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁸

They also believed that pleading was a poor means to expose the facts underlying a legal dispute, a role that could better be played by discovery. Again, Tolman explained:

One important consideration should be emphasized as to the method by which, under these rules, the opponents may be adequately advised as to the real matter in controversy. The simplified pleadings provided for ..., which give a general view of the controversy are supplemented by the provisions for depositions, discovery and pretrial practice ... which enable each side by the examination of witnesses, documents, and other evidence, to ascertain in advance of the trial, precise knowledge as to the nature of the case.⁹

In addition, vast changes in social and economic life since the mid-nineteenth century had made it harder for many of those suffering injuries – for instance those without resources to conduct an extensive pre-filing investigation – to know exactly what the facts were. This was another reason the Advisory Committee determined to reduce the role of pleading in the new procedural system it was fashioning for the twentieth-century federal courts. The members were also aware that Congress had in the past sought to promote private enforcement of public law (as in the antitrust statutes) and that the New Deal Congress was enacting an unprecedented number of regulatory statutes. Knowing that new legal bases of relief were being developed as a result of federal legislation, the committee wanted to escape the confinement of fact pleading and of the other dominant system at the time – common law procedure. They repeatedly emphasized that the procedures they had drafted should help insure that cases were decided on the merits rather than on the pleadings.

⁸ *Rules of Civil Procedure for the District Courts of the United States: Hearings Before the H. Comm. on the Judiciary, 75th Cong. 94 (1938)* (statement of Edgar B. Tolman, Secretary of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court).

⁹ *Id.* at 98.

For all of these reasons, the original Advisory Committee decided to provide in Rule 8 that “[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings and motions are required.” The Rule only required the plaintiff to supply in the complaint “a short and plain statement of the claim showing that the [plaintiff was] entitled to relief.” Neither the term “cause of action” nor “facts” was used. Moreover, in Rule 9 the committee made clear both that the Federal Rules required particularized allegations only of fraud or mistake, and that no such requirement applied with respect to “malice, intent, knowledge and other conditions of a person’s mind.”

The committee attached forms to the rules showing how very little was required of plaintiffs -- just enough that (1) the defendant could answer the complaint and the case could proceed to the next step, discovery, and (2) in the event of other litigation involving the same parties and subject matter, the law of res judicata (claim preclusion) could be applied. Thus, the only allegation regarding liability in Restyled Form 11 (“Complaint for Negligence”) is: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff.” In discussing its original (pre-restyling) version (Form 9) at an Institute for members of the bar that was held in October 1938, after the Federal Rules became effective, Dean Charles Clark, the Committee’s Reporter, observed:

[A]n allegation which says simply that the defendant did injure the plaintiff through his negligence is too general and would not stand, for really that tells you no differentiating features about the case whatsoever, except the very broad word “negligence”; while on the other hand ...the statement of the act in question in a general way, and with a characterization that it is negligent, is sufficient. That is the allegation in this form (Form 9). Here, instead of saying defendant’s negligence caused the injury, you say that defendant negligently drove his automobile against the plaintiff, who was then crossing the street, and you have then the case isolated from every other type of case of the same character, really from every other case, as a pedestrian or collision case. *At the pleading stage, in advance of the evidence, before the parties know how the case is going to shape up, that is all, in all fairness, you can require.*¹⁰

The Federal Rules of 1938 provided access to a highway that might attract and could accommodate a great deal of private litigation, including litigation enforcing public law. In the years following 1938, a number of Supreme Court decisions including *Hickman v. Taylor*¹¹ in

¹⁰ AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF SYMPOSIUM AT NEW YORK CITY 241 (1938) (emphasis added). *See also id.* at 308 (“What these rules do emphasize with respect to the contents of a pleading (as the forms in the Appendix show) is that any plain telling of the story that shows that the pleader is entitled to relief upon the grounds he states is sufficient to bring the pleader’s cause into court. That the statement or averment includes a conclusion of law is no ground for a motion to strike or for a motion to make definite, merely because the statement or averment embodies a conclusion which might be elaborated by a more particularized detailing of the facts.”) (George Donworth). *See also infra* note 33 (relationship between Rule 12(b)(6) and Rule 12(c)).

¹¹ 329 U.S. 495, 501 (1947).

1947 and, most prominently, a 1957 case called *Conley v. Gibson*,¹² embraced the concept of “notice pleading,” permitting plaintiffs to allege very little in their complaints, and that in general terms. Decided shortly after some federal judges urged an amendment to Rule 8 in order to reintroduce fact pleading, and soundly rejecting that approach, *Conley* was repeatedly cited with favor by the Supreme Court and lower federal courts (in fact, thousands of times).

Eventually, however, aspects of the 1938 system, including notice pleading and the restrictive view of summary judgment that initially prevailed, assumed a different complexion when combined with other litigation-empowering devices such as broad discovery (further unleashed by amendment to the Federal Rules in 1970), statutory incentives to litigate (e.g., a host of new federal statutes with pro-plaintiff fee-shifting provisions), the modern class action (created by amendments to the Federal Rules in 1966), and an increasingly entrepreneurial bar (assisted by decisions striking down anti-competitive regulations like the traditional ban on advertising). As the federal litigation highway became congested, the federal judiciary responded to the perceived docket crisis (which was exacerbated by inadequate resources) by turning to one approach after another -- from managerial judging, to sanctions, to summary judgment, to heightened pleading. Although different in many respects, these approaches share the quest for greater definition and the ability it affords courts to make rational judgments as to whether a case should be permitted to proceed.

Apparently persuaded that an invigorated summary judgment procedure -- already embraced by many lower federal courts starting in the 1970's and blessed by the Supreme Court in the mid-1980's -- was not a sufficient response to contemporary litigation ills, a number of lower federal courts performed a similar operation on the pleading rules. Notwithstanding the Supreme Court's embrace of notice pleading and the listing of only a few matters requiring greater factual specificity in Federal Rule 9(b), some courts determined that certain types of cases should be subject to heightened pleading requirements. In its *Swierkiewicz* and *Leatherman* decisions, one a civil rights case and the other an employment discrimination case, the Supreme Court twice within a decade rejected such judge-made rules as inconsistent with the Federal Rules and with the principle that Federal Rules can be changed only through the Enabling Act process or by statute.¹³ Apparently the message was lost on, or simply unacceptable to, some lower federal courts, as the technique persisted even after *Swierkiewicz*.¹⁴ By this time it bordered on lawlessness.

During the same period when the Supreme Court was warning the district and appeals courts that notice pleading was still the law, efforts were again made (as they were prior to *Conley*) to persuade the Advisory Committee on Civil Rules to propose amendments that would implement some form of fact pleading on a trans-substantive basis. On a number of occasions the Advisory Committee quickly determined not to proceed. Because such amendments would obviously and directly implicate access to court and the enforcement of substantive rights,

¹² 355 U.S. 41 (1957).

¹³ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). See also *Crawford-El v. Britton*, 523 U.S. 574 (1998).

¹⁴ See, e.g., *Perry v. Southeastern Boll Weevil Erad. Fund, Inc.*, 154 Fed. Appx. 467, 472 (6th Cir. 2005); *Danley v. Allen*, 540 F.3d 1298, 1313-14 (11th Cir. 2008).

rulemaking in the area would attract intense interest group activity (on both sides) and would lead to intense controversy in Congress. The Chief Justice appoints all members of rulemaking committees and meets regularly with key participants. He was undoubtedly aware of this history.

Tellabs, Twombly and Iqbal: The Archaeology and Architecture of Mischief

The stage is now set for a consideration of the two decisions that have brought us here today. In order to understand and appreciate the significance of *Twombly* and *Iqbal*, however, it is helpful to recall that shortly after *Twombly*, the Court decided *Tellabs*, interpreting provisions in the Private Securities Litigation Reform Act of 1995 that superseded Federal Rules 8 and 9 in securities fraud cases by requiring not only factual particularity but a prescribed level of persuasiveness. The statutory language in question provides that “the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [scienter].”¹⁵ The *Tellabs* Court’s interpretation of “strong inference” was that “an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference.”¹⁶

Seeking to apply the Supreme Court’s decision in *Tellabs* on remand to the court of appeals, Judge Posner observed that “[t]o judges raised on notice pleading, the idea of drawing a ‘strong inference’ from factual allegations is mysterious.”¹⁷ In doing so, he aptly described the sense of cognitive dissonance currently afflicting those who practice, or are otherwise concerned with, pleading in the federal courts. For, pleading’s new – or more precisely renewed¹⁸ – prominence in the procedural landscape is hardly confined to cases brought under the PSLRA.

In *Twombly*, the Court reinstated the dismissal under Rule 12(b)(6) of an antitrust conspiracy complaint brought under § 1 of the Sherman Act against the regional telecommunications service providers remaining after the breakup of AT&T. In reversing a panel of the Second Circuit, the Court “retired” the language in *Conley v. Gibson* that “a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief.”¹⁹ Agreeing, however, with *Conley* that a complaint must give “fair notice of what the . . . claim is and the grounds upon which it rests,”²⁰ the Court interpreted the latter as requiring that its “[f]actual allegations must be enough to raise a right to relief above the speculative level[.]”²¹ The Court then held that for a § 1 Sherman Act claim

¹⁵ 15 U.S.C. § 78u-4(b)(2) (2006).

¹⁶ *Tellabs*, 551 U.S. at 324.

¹⁷ *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir. 2008).

¹⁸ *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573-74 (2007) (Stevens, J., dissenting) (discussing notice pleading as a response to “[t]he English experience with Byzantine special pleading-rules” and the Field Code’s requirement of pleading “‘facts’ rather than ‘conclusions’”).

¹⁹ 355 U.S. at 45-46; *see Twombly*, 550 U.S. at 563 (“[T]his famous observation has earned its retirement”).

²⁰ *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).

²¹ *Id.*

these standards “require[d] a claim with enough factual matter (taken as true) to suggest that an agreement was made.”²² Disregarding direct allegations of conspiracy as conclusory, the Court held that the plaintiffs’ claims were not plausible because they rested on “parallel conduct and not on any independent allegation of actual agreement among [defendants].”²³

After *Twombly* came down, it was suggested that the ambiguity of the Court’s opinion was strategic, empowering the lower courts to vary requirements to withstand a motion to dismiss depending on perceived differences in procedural (i.e., discovery) demands and/or substantive contexts, with the Court retaining the power to police egregious excesses while preserving deniability.²⁴ An alternative account is simply that the Court’s goal of changing the Federal Rules outside of the Enabling Act process without admitting that it was doing so understandably yielded a confusing opinion.²⁵

In any event, it now appears that two of the justices who joined the Court’s opinion in *Twombly*, including the author of that opinion, believed that the interpretation of the Federal Rules in that case represented a relatively minor reorientation, appropriate for the specific substantive context and other cases in which the federal courts strictly police the inferences that are permissible under the substantive law and/or for cases portending massive discovery. For these justices, in other words, *Twombly* did not represent a change in pleading standards that could fundamentally alter the role of litigation in American society.²⁶ Their belief was understandable but, at least in retrospect, naïve.

²² *Id.* at 556.

²³ *Id.* at 564.

²⁴

More probably, *Twombly* is an exercise in strategic ambiguity that empowers the lower federal courts to tighten pleading requirements in cases or categories of cases that augur similar discovery burdens (or are otherwise disfavored), while preserving deniability in the Court through the use of its discretionary docket to correct perceived excesses (as in *Erickson*).

Editorial, *The Devil in the Details*, 91 JUDICATURE 52 (2007). The author was Chair of the Editorial Committee of the American Judicature Society at the time this editorial was published. The reference is to *Erickson v. Pardus*, 551 U.S. 89 (2007), a case decided a few weeks after *Twombly* (without argument and *per curiam*) in which the Court reversed the Tenth Circuit’s affirmation of a judgment dismissing a prisoner’s complaint under Rule 12(b)(6). For reasons why *Erickson* did not provide much comfort to those concerned that *Twombly* was generally applicable (not confined to antitrust cases), see Editorial, *supra*.

²⁵ Compare, e.g., *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (the Court’s “task is to apply the text, not to improve upon it”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (“[W]e are bound to follow Rule 23 as we understood it upon its adoption, and ... we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered, a process properly tuned to the instruction that rules of procedure ‘shall not abridge ... any substantive right.’”).

²⁶ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (Souter, J., dissenting); *id.* at 1961 (Breyer, J. dissenting).

The *Iqbal* case involved claims brought by a citizen of Pakistan whom federal officials arrested after the 9/11 attacks and who was detained at the (federal) Metropolitan Detention Center in Brooklyn, New York, pending trial on charges of fraud in connection with identification documents to which he ultimately pleaded guilty, leading to his removal to Pakistan. The complaint alleged that Iqbal's seven-month confinement in highly restrictive conditions resulted from unlawful racial and religious discrimination. It also alleged that a number of lower-level F.B.I. and Bureau of Prisons officials and employees were liable for such violations of his rights as use of excessive force, unreasonable and unnecessary strip and body-cavity searches and denial of medical care while in detention. Finally, Iqbal asserted that Robert Mueller, the Director of the F.B.I., and John Ashcroft, the Attorney General of the United States, adopted and/or approved policies and directives pursuant to which he was confined, policies and directives that purposefully discriminated on the basis of religion and race.²⁷

In affirming the district court's decision denying motions to dismiss four counts against Mueller and Ashcroft, Judge Newman for a panel of the Second Circuit sought to apply *Twombly*, which had been decided less than two months earlier. He concluded:

[T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the plaintiff alleges satisfies the plausibility standard [of *Twombly*] without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.²⁸

The Supreme Court granted the Solicitor General's petition for a writ of certiorari. In its brief, the Government argued that, in furtherance of the policies underlying the defense of official immunity, the Court should require that complaints against high-level government officials contain "'specific, nonconclusory factual allegations' that establish ... cognizable injury."²⁹

In light of a slow trickle of ever more troubling information about how the previous administration fought the war on terrorism – despite an approach to governmental secrecy that would have made Ceausescu proud --³⁰ the Court should have affirmed the Second Circuit and allowed *Iqbal* to proceed to discovery, even if "limited and tightly controlled."³¹ Alternatively, the Court should have forthrightly required fact pleading as a matter of substantive federal common law, that is, as a necessary protection for the judge-made defense of official immunity.³² After all, there could be no question of inadequate notice in *Iqbal* even if that were a

²⁷ See *Iqbal v. Hasty*, 490 F.3d 143, 147-49, 165, 174-76 (2d Cir. 2007), *rev'd*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²⁸ *Id.* at 175-76; *see also id.* at 166.

²⁹ Brief for Petitioners at 15, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Aug. 29, 2008) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)); *see id.* at 28.

³⁰ "Under Romanian law, anything that is not a 'State secret' is a 'Service secret' – in other words, everything is secret." *Reinsurance Co. of America, Inc. v. Administratia Asiguratorilor de Stat*, 902 F. 2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring).

³¹ *Iqbal*, 490 F.3d at 158.

³² See Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV.

relevant question under Rule 12(b)(6) (as opposed to Rule 12(e)).³³ Moreover, Judge Newman's careful analysis of the complaint as pleaded with respect to the defendants of interest – the Attorney General and the Director of the FBI – made it difficult to hold that a general plausibility test under Rule 12(b)(6) had not been met. To do so, indeed, seemingly would advance the view, absurd on its face, that the Federal Rules impose on plaintiffs generally a more demanding standard to survive a motion to dismiss than does the PSLRA on plaintiffs in securities fraud cases.³⁴ The Government denied that it was calling for the imposition of a heightened fact pleading requirement in cases against high-level government officials who are entitled to the immunity defense,³⁵ as well it might because the Court has made it impossible for the judiciary openly to impose such a requirement other than through the Enabling Act process. Comments at the oral argument suggested, however, that the Court might accept the Second Circuit's view of *Twombly* as prescribing a flexible "plausibility standard," but take a different

535, 555-56, 558.

³³ See *Iqbal*, 490 F.3d at 166 ("And like the Form 9 complaint approved in *Bell Atlantic*, *Iqbal*'s complaint informs all of the defendants of the time frame and place of the alleged violations"). The Second Circuit did, however, note generally that "in order to survive a motion to dismiss under the plausibility standard of [*Twombly*], a conclusory allegation concerning some elements of a plaintiff's claim might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. See Fed. R. Civ. P. 12(e)." *Id.* at 158.

Responding to a contention that the complaint in Form 9 [now 11] "would be insufficient in any court of law," Dean Clark observed:

Now, as to what the law is generally in this country, I have studied it a good deal on this very point, and I think one must hesitate to make too definite pronouncements. My impression is that very few courts would hold such a general statement wholly invalid; that is, would hold that it did not state a cause of action. I am quite sure that a great many of the leading courts would say that the only possible objection is lack of detail, and the only question would be whether it would be subject to a motion to make more definite and certain.

AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT CLEVELAND, OHIO 222, 223 (1938).

³⁴ I share the Second Circuit's view that the allegations that Ashcroft and Mueller were personally involved in the adoption and/or approval of the policies and directives challenged in *Iqbal* tell a story that is reasonable to believe. Note that the *Iqbal* complaint does not attempt to hold those individuals responsible for the quotidian abuses during confinement that it alleges in claims against lower-level officials and employees.

³⁵ See, e.g., Transcript of Oral Argument at 11, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) [hereinafter *Iqbal* Transcript] (No. 07-1015) ("And we're not asking for a heightened pleading standard, Justice Ginsburg.") (Solicitor General Garre); Reply Brief for Petitioners at 12, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) ("Petitioners do not ask the Court to adopt any heightened pleading standard. Rather, their position is that the lower courts failed to follow this Court's decisions in this area and give a 'firm application' of the Federal Rules").

view of the appropriate contextual plausibility judgment than did the lower courts in *Iqbal*.³⁶ And that is what the Court did, changing the (judge-made) law of official immunity, disregarding direct allegations of intentional discrimination as conclusory, and deeming inferences of such motivation for the actions taken, in light of the revised substantive law, implausible when compared to other accounts they could imagine.

Over the dissent of four justices -- again, including the author of the Court's opinion in *Twombly* and another justice who joined that opinion -- the Court in *Iqbal* inconsistently treated some of the complaint's assertions as factual allegations and others as conclusions. Most notably, the Court disregarded direct allegations of intentional discrimination, notwithstanding Rule 9(b)'s assurance that "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally."³⁷ That move enabled the Court, however breezily, to assess the plausibility of the inferential basis for the theory of the plaintiff's case.³⁸ Relying on "judicial experience and common sense,"³⁹ the Court found the complaint implausible. Because the Federal Rules are trans-substantive, the Court was constrained to make clear that its approach applies across the board -- that *Twombly* cannot be confined to its substantive context (antitrust) or according to some other criterion (e.g., cases with heavy discovery burdens).⁴⁰

The architecture of *Iqbal*'s mischief -- undoubtedly a major source of regret for the author of the *Twombly* decision, who dissented in *Iqbal* -- is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e). *Conley*'s "no set of facts" language concerned the former question, not the latter, with the result that even if post-*Conley* courts were technically correct in invoking that language when denying 12(b)(6) motions to dismiss, the same courts could have granted Rule 12(e) motions for more definite statement (had defendants made them and had the complaints in fact provided inadequate notice). Although the *Twombly* Court "retired" the "no set of facts" language, it did not retire, but rather perpetuated and exacerbated, this mistake.

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Well, I thought, and others may know better in connection to Bell Atlantic, but I thought in Bell Atlantic what we said is that there's a standard but it's affected by the context in which the allegations are made. That was a context of a particular type of antitrust violation and that affected how we would look at the complaint. And here because we're looking at litigation involving the Attorney General and the Director of the FBI in connection with their national security responsibilities, there ought to be greater rigor applied to our examination of the complaint.

Iqbal Transcript, *supra* note 35, at 36-37 (Chief Justice Roberts). *See id.* at 43 ("What you have to show is some facts, or at least what you have to allege are some facts, showing that they knew of a policy that was discriminatory based on ethnicity and country of origin.") (Chief Justice Roberts).

³⁷ FED. R. CIV. P. 9(h). *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

³⁸ *See Iqbal*, 129 S. Ct. at 1951-52. Note that, prior to dealing with the adequacy of the complaint, the Court changed the law of official immunity, making it even more difficult to impose liability on officials in supervisory positions. *See id.* at 1947-49.

³⁹ *Id.* at 1950.

⁴⁰ *See id.* at 1953.

The Court's other errors were built on this rotten foundation. Thus, the power that the Court claimed to carve a complaint, accepting some allegations of fact as true while ignoring others ("threadbare allegations"), as well as mixed allegations of law and fact, as conclusory, was, from an originalist perspective, misguided. In *Twombly*, the Court ignored allegations of conspiracy; in *Iqbal*, notwithstanding Rule 9(b), it ignored allegations of discriminatory intent. The discretionary power of the judge to follow his or her personal preferences in assessing the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded. Yet, as I have discussed, an important reason why the drafters of the 1938 Federal Rules rejected fact pleading is that one person's "factual allegation" is another's "conclusion."

Even more misguided, however, was the (wholly new) general power the Court claimed to assess the legal plausibility of a complaint. Unlike Rule 56 (summary judgment), Rule 12(b)(6) was not intended to serve as a tool for separating wheat from chaff. As noted, the *Conley* Court's use of the "no set of facts" language was intended to address only those situations in which, no matter how compelling the facts alleged, the law did not provide relief. That is a far cry from the power to assess the plausibility of recovery under an accepted theory of relief. Moreover, although the plausibility analysis in *Twombly* involved assessing competing inferences in a well-trodden path of antitrust law, in *Iqbal* the Court was at sea, subjecting the competing inferences, most of which were left to the justices' imaginations, to an implicit comparative exercise. *Iqbal* thereby confirmed the view that *Twombly* was an invitation to the lower courts to make ad hoc decisions, often reflecting buried policy choices, and with little fear of reversal because of the impotence of federal appellate review to police discretionary decision-making.

Employment discrimination cases are one category likely to suffer at the hands of district judges implementing a contextual plausibility regime. Systematic empirical evidence has long demonstrated how poorly employment discrimination plaintiffs fare in federal court.⁴¹ A recent Federal Judicial Center study reveals that employment discrimination cases terminate by summary judgment at rates far higher than other categories of cases.⁴² One reason may be that we are witnessing in employment discrimination cases the results of what Professors Kahan, Hoffman and Braman call "cognitive illiberalism"⁴³ in their recent article on the dangers of summary adjudication exemplified by the Supreme Court's decision in *Scott v. Harris*.⁴⁴ The reason is that in employment discrimination cases one would expect "Americans [to] interpret

⁴¹ See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. LEG. STUD. 429 (2004); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 1 (2009).

⁴² See Memorandum to Judge Michael Baylson from Joe Cecil and George Cort 17 (Aug. 13, 2008) (Table 12) (available from author).

⁴³ Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009). See *id.* at 896.

⁴⁴ 550 U.S. 372 (2007). This discussion is adapted from my letter opposing a proposed amendment to Rule 56 (summary judgment). See letter from Stephen B. Burbank to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Jan. 28, 2009).

th[e] facts against the background of competing subcommunity understandings of social reality,”⁴⁵ making them strong candidates for the operation of cognitive biases of the sort those authors document.

The *Iqbal* Court’s reliance on “judicial experience and common sense” is, in certain types of cases, an invitation to “cognitive illiberalism” more worrisome than when summary judgment is involved. At least in the latter situation judicial subjectivity is disciplined by an evidentiary record created after discovery. No such constraint operates when a judge assesses the plausibility of a complaint in connection with a motion to dismiss. Judgments about the plausibility of a complaint are necessarily comparative.⁴⁶ They depend in that regard on a judge’s background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual’s cultural predispositions⁴⁷ as are judgments about adjudicative facts. Whether or not *Twombly* and *Iqbal* draw in question the compatibility of the motion to dismiss with the Seventh Amendment right to jury trial,⁴⁸ this perspective suggests a reason for judicial humility in addition to the consideration that plaintiffs confronting a motion to dismiss have had no access to formal discovery. Both plaintiffs and jurors in employment discrimination cases will often have “recognizable identity-defining characteristics” that might cause them to dissent from a view of plausibility grounded in a judge’s cultural predispositions.⁴⁹

Institutional Questions: Defects of Process, Institutional Competence, and Democratic Accountability

I turn now to the institutional questions raised by the Court’s decisions in *Twombly* and *Iqbal*. For this purpose it is again useful to recall the *Tellabs* decision, in which the Court struggled with the ambiguities of the PSLRA’s statutory pleading requirements. There is an important difference, however, between figuring out what the Supreme Court meant in its *Tellabs* decision,⁵⁰ and sorting out the confusion that *Twombly* and *Iqbal* have created. The ambiguities the *Tellabs* Court explored arose in the interpretation of statutory language prescribing procedural requirements for a specific substantive context. They thus emerged from a democratic process that is acknowledged as appropriate for the resolution of broad questions of social policy such as access to court, compensation for injury, and norm enforcement. Whether or not the choices underlying the provision considered in *Tellabs* are wise, they are confined to cases brought under the PSLRA. And if the policy choices it reflects are buried, the concern is democratic accountability in the weak sense of lawmakers taking responsibility for their actions.

The Federal Rules at issue in *Twombly* and *Iqbal*, by contrast, were crafted for all civil actions in the federal courts under a delegation from Congress that seeks to restrict prospective

⁴⁵ Kahan et al., *supra* note 43, at 887.

⁴⁶ “The plausibility of an explanation depends on the plausibility of alternative explanations.” *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008).

⁴⁷ See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUT. L. REV. 705, 767-71 (2007); Russell M. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

⁴⁸ See Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

⁴⁹ See Kahan et al., *supra* note 43, at 898-99.

⁵⁰ See Geoffrey P. Miller, *Pleading after Tellabs*, 2009 WISC. L. REV. 507.

court rulemaking to the realm of “procedure” as opposed to “substantive rights.”⁵¹ As suggested by that dichotomy, they emerged from a process that, although it has increasingly come to resemble the legislative process in some respects in recent decades,⁵² is *not* acknowledged as appropriate for the resolution of broad questions of social policy. If any such policy choices are buried in the Federal Rules – or (more likely) in discretionary decisions made under their authority – the resulting concern involves democratic accountability in both the weak sense previously defined and in the strong sense of separation of powers.⁵³

Although *Tellabs* is conclusive proof, were it needed, that Congress has learned that procedure is power, at least Congress was well-positioned institutionally to evaluate the social costs and benefits of setting a high bar for complaints filed without benefit of formal discovery, and its task in doing so was circumscribed by the social policies germane to the domain of substantive securities law. In *Twombly* and *Iqbal*, by contrast, the Court was not well-positioned institutionally to evaluate even the procedural costs and benefits of tightening the pleading screws on plaintiffs, even in the isolated substantive law contexts involved in those cases.⁵⁴ The Court acting as such under Article III was even less well-positioned to estimate the procedural costs and benefits of a general rule of plausible pleading, let alone the broader social costs and benefits of such a rule. Still, the Article III process may have been all that the Court thought was available, since the justices likely knew through the Chief Justice that changing pleading requirements through the Enabling Act process had been considered and abandoned as political dynamite on more than one occasion, including in the recent past. If so, the Chief Justice may have changed his mind since the time when, as a member of the Justice Department, he apparently wrote:

Not only are unelected jurists with life-tenure less attuned to the popular will than regularly elected officials, but judicial policymaking is also inevitably inadequate or imperfect policymaking. The fact-finding resources of courts are limited – and inordinately dependent upon the facts presented to the courts by the interested parties before them. Legislatures, on the other hand, have extensive fact-finding capabilities that can reach far beyond the narrow special interests urged by parties in a lawsuit. Legislatures can also devise comprehensive solutions beyond the remedial powers of

⁵¹ The Rules Enabling Act, as currently codified but reflecting a limitation that has existed since 1934, provides that “[s]uch rules shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b) (2006).

⁵² See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1724 (2004) (noting that “the changes in the rulemaking process in the 1980s that were designed to open it up to more and more diverse points of view, make it more transparent, and diminish the need for congressional involvement, may in fact have facilitated a process of redundancy wherein participants treat rulemaking that is at all controversial as merely the first act”).

⁵³ See Stephen B. Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1475 (1987).

⁵⁴ On the theoretical and practical differences between making law by decision vs. by Federal Rule, see generally Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 698-713 (1988).

courts.⁵⁵

A number of the policy questions presented by *Twombly* and *Iqbal* would have benefited from the fruits of empirical research, even if only research whose results had already been published. Consider in that regard the *Twombly* Court's discussion of the costs of discovery. Eschewing any reference to systematic as opposed to anecdotal data, the majority relied to a great extent on an article by Judge Easterbrook that is heavy on theory and light on facts.⁵⁶ Not only was that article's analysis predicated on a law and economics model of so-called "impositional discovery;" it was published in 1989, before substantial changes to the discovery rules in 1993, 2000, and 2006, changes that the *Twombly* Court ignored. I am reminded of an observation about the Seventh Circuit's attempt to turn Rule 11 into a "fee-shifting statute": "Theory is an irresponsible basis for lawmaking about something as important as access to court. And it is especially irresponsible when the lawmaking involves judicial amendment of a Rule... ." ⁵⁷ Finally in this aspect, quite apart from systematic empirical research, consideration of many of the policy questions implicated in *Twombly* and *Iqbal* would have benefited from a base of experience with federal trial court litigation broader than that possessed by the members of the Supreme Court, almost all of which predated Justice Stevens' appointment in 1975.

The political scientist Sean Farhang has recently written about the institutional incentives underlying, and dynamics affecting, "formalized, private enforcement regime[s]."⁵⁸ He challenges narratives that attribute the enormous growth of federal statutory litigation starting in the 1960's to an imperial judiciary responding to the self-interested efforts of irresponsible lawyers. Instead, his evidence suggests that the phenomenon may be the result of conscious congressional choices to empower private litigation through devices such as pro-plaintiff attorney fee-shifting and multiple damage provisions. Moreover, recalling the "stickiness of the status quo," Farhang demonstrates how resistant litigation-empowering statutory provisions are to change.

From this perspective, notice pleading can be seen as an important architectural element of a private enforcement regime that was created by the federal judiciary pursuant to congressional delegation. Once entrenched through *Conley v. Gibson*, notice pleading became part of the background against which Congress legislated. It also became part of the status quo and thus was highly resistant to change through the lawmaking process that brought it forth – the Enabling Act process. Further, from this perspective, desiring to effect change, the Court was equally hobbled by the inertial power of the status quo and the limitations created by foundational assumptions and operating principles associated with the Enabling Act process. In

⁵⁵ Draft Article on Judicial Restraint, National Archives & Records Administration, Record Group 60: Department of Justice, Accession # 60-89-372, Box 30 of 190, Folder: John G. Roberts, Jr. Misc.

⁵⁶ See *Twombly*, 550 U.S. at 559, 560 n.6 (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)).

⁵⁷ Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1947-48 (1989).

⁵⁸ Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 825 (2008).

initiating change through its power to decide cases and controversies, however, the Court was forced to forego the informational, participatory and other benefits that the rulemaking process affords.⁵⁹

Conclusion: Congress Should Restore the Status Quo Ante Until the Case for Fundamental Change Has Been Made on the Basis of Reliable Information and through a Legitimate Process

Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy those decisions' requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries. As Judge Nygaard stated in the *Phillips* case, "[f]ew issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts."⁶⁰ In that respect, the Court's recent pleading decisions may signal a striking departure from the pleading (and discovery) regime that has been a cornerstone of modern federal litigation and that Congress is presumed to have had in mind when enacting scores of statutes, including statutes in which Congress included incentives for private enforcement.⁶¹

Fifty years ago between 11% and 12% of federal civil cases had a trial in open court. In recent years between 1% and 2% of federal civil cases have terminated at or after trial. This is a staggering reduction in trials in less than half a century. Put otherwise, during a period that witnessed an enormous increase in civil case filings, there has been a reduction in the absolute number of cases terminating at or after trial. *Twombly* and *Iqbal* are likely further to erode the role of trials and of juries, another respect in which those decisions may undermine democratic values.

⁵⁹

Requiring that changes take place through the rulemaking process – rather than through adjudication – at least increases the chances that amendments will be subjected to a deliberative process and informed by practical knowledge. In addition, the structure of the rulemaking process facilitates informed and deliberative decision making and permits a holistic approach to the revision of the Rules. Although the rulemakers have not always made as much use of this opportunity as they could, the rulemaking process clearly affords better access to empirical data than does adjudication. It also provides a better framework for input by all interested persons and allows the rulemakers to revise their proposals in response to such input. Moreover, the rulemakers can amend several provisions at the same time, which helps maintain coherence in the rules, and permits fine-tuning of proposed changes.

Struve, *supra* note 2, at 1140 (footnotes omitted). See also Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases* 4, 11-12 (Draft 08/10/2009), available at <http://ssrn.com/abstract=1446897>.

⁶⁰ *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

⁶¹ See, e.g., *Ocasio-Hernandez v. Fortuno-Burset*, 2009 WL 2393457, at *6 n.4 (D. P.R. Aug. 4, 2009) ("Certainly such a chilling effect was not intended by Congress when it enacted Section 1983.").

At the end of the day, normative assessment of these possible developments depends, or should depend, on careful identification and comparative evaluation of the costs and benefits of the litigation system to which notice pleading, accompanied by the opportunity for broad discovery, contributed and that which is proposed as a replacement, as well as consideration of alternative institutional avenues of change. One need not reach the former steps, however, in order to conclude that *Twombly* and *Iqbal* were serious mistakes. For, as I have demonstrated, there are many reasons to deplore the use of litigation as opposed to rulemaking or legislation as the vehicle of change, whether one is concerned about the process that should be used before important public policy decisions are made or about democratic accountability. Although Sean Farhang's work helps to explain the course pursued, it does not justify that course.

Ultimately, these decisions raise the question whether our society remains committed to private litigation as a means of securing compensation for injury and enforcing important social norms. From that perspective, another important policy issue they raise is whether, if we retreated from that commitment, we would provide alternatives such as social insurance and administrative enforcement.⁶² In addressing that question, decision-makers presumably would benefit from information about experience in other countries that did not previously share our commitment to private litigation, that have provided alternatives, but that are now rethinking the best way to achieve their societal goals. It is interesting if not ironic that a number of such countries have decided, among other reforms, to relax bans on contingent fee litigation and to experiment with group and other forms of aggregate litigation.⁶³ *In any event, from this perspective it is again apparent that the policy questions are not the sort that should be answered by nine judges in the exercise of Article III judicial power, with little information, less experience and no power to implement non-litigation alternatives.*

The arguments against legislation restoring the status quo ante that I have encountered are transparently teleological. Thus, some argue that it was not illegitimate for the Court to reinterpret a Federal Rule, that, in other words, *Twombly* and *Iqbal* were no more judicial amendments than was *Conley*. The argument is not persuasive for numerous reasons.

First, it is difficult to find *Twombly*'s (let alone *Iqbal*'s) standards in the relevant work of Charles Clark, the chief architect of the pleading rules, and difficult to separate his views from those of the Advisory Committee that he served as Reporter. Second, as Tolman testified, the original Advisory Committee found "thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to whether ... certain allegations were allegations of 'fact' or were 'conclusions of law'."⁶⁴ Third, a generally applicable requirement of "plausibility" is unquestionably an innovation. Fourth, the Court has told us that "we are bound to follow [a Federal Rule] as we understood it upon its adoption, and ... we are not free to alter it except

⁶² See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

⁶³ See, e.g., CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE* (2008); Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 710-11 (2002) (describing U.K. change of position regarding "litigation on spec" as a direct result of cuts in the legal aid budget).

⁶⁴ *Hearings*, *supra* note 8, at 94.

through the process prescribed by Congress in the Rules Enabling Act.”⁶⁵ Clark’s pertinent statements about Rules 8 and 12 aside, if one insists on better evidence of the Court’s original understanding than *Conley*, there are (1) *Hickman v. Taylor*⁶⁶ (“The new rules, however, restrict the pleadings to the task of notice-giving... .”); (2) Tolman’s 1938 testimony to Congress, and (3) explanations of the new Federal Rules by members of the Advisory Committee at educational events that were held for the practicing bar in 1938.⁶⁷

Those who seek to normalize *Twombly* and *Iqbal* from an institutional perspective thus must pretend that “interpretation” is a process capacious enough to accommodate (1) the abandonment of the system of notice pleading that Clark intended, that Congress and the bar were told in 1938 had been implemented in the Federal Rules, and that the Supreme Court embraced as early as 1947, (2) its replacement by a system of complaint-parsing that is hard to distinguish from that which the drafters of the Federal Rules explicitly rejected, and (3) a wholly new general requirement of “plausibility.” I understand that the difference between interpretation and judicial lawmaking is one of degree rather than kind, but here the degrees of separation approach one hundred and eighty.

In sum, comparing the role that those who wrote the Federal Rules envisioned for pleading, and what they thought could fairly be demanded of plaintiffs filing complaints, with the new world celebrated by *Twombly*’s and *Iqbal*’s defenders, leaves no doubt that the Court in those cases ignored previous acknowledgments that it has “no power to rewrite the Rules by judicial interpretation.”⁶⁸ Even before *Iqbal*, a number of judges and scholars not known for bleeding hearts appeared to agree.⁶⁹ One can only wonder at the spectacle of justices who deride a “living Constitution” enthusiastically embracing living Federal Rules. From this perspective, the legislation I favor would bring back the Federal Rules in Exile.

A variation of the argument that the Court didn’t really change the Federal Rules in question, but rather merely reinterpreted them, is the argument that, prior Supreme Court decisions aside, *Twombly* and *Iqbal* didn’t really change the law that was applied in the lower federal courts. There is a grain of truth in this argument, since it is probably true that very few courts took *Conley*’s “no set of facts” language literally. This is hardly a surprise both because, as I discussed above, that language was not intended to speak to the question of factual specificity and (relatedly) because a Rule 12(e) motion (for a more definite statement) has always been available to deal with a “the defendant wronged me” type of complaint.

⁶⁵ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999).

⁶⁶ 329 U.S. 495, 501 (1947).

⁶⁷ *See, e.g., supra* note 10.

⁶⁸ *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

⁶⁹ *See, e.g., Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific*, 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, J., joined by Posner, J., concurring in denial of reh’g en banc) (“In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier.”); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 64 (2007) (“*Twombly* ... can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases.”).

Surrounding that grain of truth, however, is the distinctly unappealing reality that some of the lower court decisions that support the argument were the essentially lawless lower court decisions I referred to earlier. That is, the “conversation” or “debate” between the Court and lower federal courts that some defenders of *Twombly* and *Iqbal* imagine was in fact akin to that between a parent and a serially wayward child.⁷⁰ Moreover, the notion, which I have also heard expressed, that *Twombly* and *Iqbal* can be seen as an invitation to the lower courts to do openly what they were doing even under *Conley*, is no more appealing because it either imagines an ex post blessing of lawless behavior or compounds the phenomenon of buried policy choices against which the Enabling Act process seeks to guard.

Other arguments that I have encountered deserve even less attention. The notion that good lawyers have already adapted to *Twombly/Iqbal* reveals the blinkered vision of those who espouse it, namely the kind of lawyers who have disproportionate influence in the rulemaking process and deserve some of the blame for creating a procedural system that is beyond the means of the middle class. For, it is a notion that ignores the resource constraints on pre-filing investigations and information asymmetry problems that beset some putative plaintiffs and may make it impossible to meet the new standard of plausible pleading. The same defect undermines an argument that relies on the ability to amend after dismissal (if the court grants permission to do so), and nobody aware of the pleading jurisprudence of some courts of appeals after *Swierkiewicz* and *Leatherman* is likely to take too much comfort from the availability of an appeal from a judgment of dismissal. Of course, all such arguments are of the “it’s not so bad” variety, an argument that speaks but faintly to the merits of the Court’s decisions – and with faint praise -- and not at all to the fundamental process objection that animates this testimony. Most risible of all the arguments I have heard against the status quo approach I favor is that it will “guarantee inconsistency.” As if *Twombly* and *Iqbal* -- with the latter’s paean to “judicial experience and common sense” leading the way -- will bring about consistency. I prefer the devil I know to the devil I do not know, at least until such time as there has been a thorough, open, and democratically accountable lawmaking process that justifies installing a new king of the nether regions.

Finally, opponents of legislation restoring the status quo ante also argue that Congress should respect the Enabling Act process and that there is no evidence that time is of the essence. As to R-E-S-P-E-C-T, the advice might better have been offered to and heeded by the Court, whose decisions in *Twombly* and *Iqbal* could not have been more disrespectful of the Enabling Act process.⁷¹ Indeed, legislation of the sort I favor would restore the Enabling Act process to

⁷⁰ In that regard, the (unanimous) Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), did not accept a requirement of fact pleading that had been imposed by a lower federal court. It used the occasion of litigation governed by the PSLRA to contextualize the requirement that a complaint provide fair notice. *Dura* may have facilitated part of the analysis in *Twombly*, but it is light years away from *Iqbal*.

⁷¹ In this regard, given *Swierkiewicz*’s insistence on the use of the Enabling Act process to impose fact pleading, it is particularly interesting that the Third Circuit has taken the view that “because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*. Fowler

the position it was always intended to have when it is proposed to change Federal Rules. And as to whether time is of the essence, the Enabling Act process takes about three years, which is appropriate for matters requiring thorough study, particularly when the rulemakers commission original empirical research. Again, who should bear the risk of irreparable injury while the rulemakers assess the impact of *Twombly* and *Iqbal* and determine whether to recommend amendments to the Federal Rules?⁷²

Apart from the admittedly incomplete evidence of the impact of changed standards to which I have referred, there is no guarantee that the Court would accept any changes that the rulemakers (after three years or so of work) might propose, since “a Court that wishes to change a Rule, but resists doing so via interpretation, will support (and transmit to Congress) a proposed amendment that effects the desired change; but a Court that has changed a Rule via interpretation may be reluctant to approve a proposed amendment that would undo its work.”⁷³ In light of the patent inadequacy of the process that was used to reach these decisions (whether or not it was formally illegitimate), asking the usual victims of “procedural” reform also to bear that risk seems to me as insupportable as telling those whose complaints have been dismissed under the new regime, when they would have survived to discovery under the old, that the sky is not falling. That, of course, depends upon where you live.

Because the Supreme Court’s recent pleading decisions are at odds with premises underlying the Federal Rules, with precedent, and with congressional expectations, and because those seeking access to the federal courts should not have to bear the risk of irreparable injury as a result of improvident Supreme Court decisions, legislation to restore the status quo is necessary and appropriate. In addition, such legislation is needed to avert irreparable injury to the important social norms underlying federal statutes in which Congress has included multiple damage recovery and/or one-way pro-plaintiff fee-shifting provisions that signal Congress’s preference for vigorous private enforcement. Once legislation restoring the status quo is in place, it will be time to consider change after a thoughtful and deliberate study within more democratic processes. The Supreme Court, acting as such (that is, rather than as Congress’s delegate under the Enabling Act), is incapable of conducting or acting on such a study, because it lacks the information, experience and political legitimacy to make an informed judgment about either the procedural or the broader social costs and benefits of changing pleading law.

Although it is certainly possible that careful study could yield a contrary conclusion, I suspect that notice pleading should remain the norm, at least so long as the Federal Rules are trans-substantive. That seems to me particularly likely to be true given that the main concerns

v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). *But see, e.g.*, *Gilman v. Inner City Broadcasting Corp.*, 2009 WL 3003244 (S.D. NY. Sept. 18, 2009).

⁷² In addition, the longer *Twombly* and *Iqbal* are permitted to remain in effect, the harder it will be to wean lower courts of their standards.

⁷³ Struve, *supra* note 2, 1135-36. As previously suggested, only a lawyer, and at that only a lawyer on a mission, could argue with a straight face that the Court’s recent pleading decisions did not “change a Rule.”

underlying the Court's recent decisions have to do not with pleading, but with discovery.⁷⁴ On the other hand, Congress has required greater factual specificity and persuasiveness in pleading when they were deemed important to the attainment of particular substantive goals, as it did in securities cases. Congress can do so again, if necessary. I have no doubt that Congress would benefit from a careful study by the federal judiciary – particularly if it focused on the real perceived problem -- but the fruits of such study need not be in the form of proposed amendments to the Federal Rules of Civil Procedure. They could instead be presented as recommendations to Congress. The point in any event is that Congress alone has the power to calibrate decisions about the level of enforcement in one realm (e.g., litigation) with those in another (e.g., administrative enforcement), power that the Supreme Court lacks when acting in any capacity.

⁷⁴ Note again that if concern about discovery in lawsuits against high government officials drove the decision in *Iqbal*, the problem could have been addressed by requiring fact pleading as a matter of substantive federal common law (the source of the official immunity defense). See *supra* text accompanying note 32. See also *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc) (“There is a powerful argument that the substantive right of qualified immunity supplants the Federal Rules’s scheme of pleading by short and plain statements.”). It could also have been addressed (*and still can be*) by statute. Either approach would have avoided the imposition of the costs of *Iqbal* on the entire universe of federal court plaintiffs. The Court’s failure to take a more targeted approach not only demonstrates one of the costs of trans-substantive procedure; it also raises the question whether the discovery rationale captures the Court’s full agenda.

APPENDIX A

Below is a draft substitute amendment to implement an approach that would return the law governing pleading and pleading motions to the status quo before *Twombly* and *Iqbal*, until such time as change were effected by amendments to the Federal Rules of Civil Procedure or by statute. The approach was suggested by 42 U.S.C. § 2000e-2(k)(C), a provision of Title VII added by the Civil Rights Act of 1991, which requires that “the demonstration of [an alternative employment practice] shall be in accordance with the law as it existed on June 4, 1989... .”

Section 1. The Congress of the United States finds that

(a) the decisions of the Supreme Court of the United States in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), decided on May 21, 2007, and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), are inconsistent with fundamental premises underlying the Federal Rules of Civil Procedure, with the Court's previous decisions interpreting those rules, and with congressional expectations formed and relied upon over a period of more than seventy years;

(b) the law governing pleading and pleading motions should be restored to the status quo ante pending thorough study by appropriate institutions through processes that are open and inclusive;

(c) time is of the essence because of the risk of irreparable injury to those who lack the information or resources to comply with the Court's recent pleading decisions, and to important public policies underlying federal statutes that the enacting Congress intended to be enforced through private civil litigation, and

(d) prior to May 21, 2007, some lower courts disregarded decisions of the Supreme Court interpreting the Federal Rules of Civil Procedure relating to pleading and pleading motions, and undermined the system of notice pleading intended by those rules and decisions, by insisting on heightened pleading requirements.

Section 2. Except as expressly provided by an Act of Congress enacted heretofore or hereafter or by a Federal Rule of Civil Procedure effective hereafter, the law governing (a) dismissal or striking of all or any part of a pleading containing a claim or defense for failure to state a claim, indefiniteness, or insufficiency and (b) judgment on the pleadings, shall be in accordance with interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower courts in decisions consistent with such interpretations, that existed on May 20, 2007.

Section 3. This Act shall apply in all actions pending in any federal court on its effective date and in all actions commenced on or after its effective date.

APPENDIX B

United States ex rel. Lobel v. Express Scripts, Inc., 2009 WL 3748805, at *1 (3d Cir. Nov. 10, 2009) (unpublished) (“Lobel’s failure even to cite *Twombly* and *Iqbal* in either of his two briefs is a telling omission. When Lobel’s amended complaint is analyzed under the more exacting standard established by those cases, it falls well short.”).

Arar v. Ashcroft, 2009 WL 3522887, at *51 (2d Cir. Nov. 2, 2009) (en banc) (Parker, J., dissenting):

The flaws in the majority’s approach are not unique to Arar, but endanger a broad swath of civil rights plaintiffs. Rarely, if ever, will a plaintiff be in the room when officials formulate an unconstitutional policy later implemented by their subordinates. Yet these closeted decisions represent precisely the type of misconduct that civil rights claims are designed to address and deter. Indeed, it is this kind of executive overreaching that the bill of rights sought to guard against, not simply the frolic and detour of a few “bad apples.” The proper way to protect executive officials from unwarranted second-guessing is not an impossible pleading standard inconsistent with Rule 8, but the familiar doctrine of qualified immunity.

In re Travel Agent Com’n Antitrust Litigation, 2009 WL 3151315, at * 13, *15, *16 (6th Cir. Oct. 2, 2009) (Merritt, J., dissenting):

As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple ‘plausibility,’ but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial evidence. . . . The antitrust cases decided in both courts of appeals and district courts since *Twombly* and *Iqbal* are few, and most of the cases decided by district courts have yet to reach the courts of appeals. . . . The uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims. . . . There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Using the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence.

Panther Partners, Inc. v. Ikanos Commcn's, 2009 WL 2959883, at *4 (2d Cir. Sept. 17, 2009) (“[W]e recognize that *Iqbal* and *Twombly* raised the pleading requirements substantially while this case was pending”).

Al-Kidd v. Ashcroft, 2009 WL 2836448, at *23 (9th Cir. Sept. 4, 2009) (“post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints.”).

Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir 2009) (upholding plaintiffs’ claim against motion to dismiss, but making it clear that standards have changed):

The Supreme Court's opinion makes clear that the *Twombly* "facial plausibility" pleading requirement applies to all civil suits in the federal courts. After *Iqbal*, it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949. To prevent dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See id.* at 1949-50; *see also Twombly*, 550 U.S. at 555, & n.3.

Iqbal additionally provides the final nail-in-the-coffin for the "no set of facts" standard that applied to federal complaints before *Twombly*. *See also Phillips*, 515 F.3d at 232-33. Before the Supreme Court's decision in *Twombly*, and our own in *Phillips*, the test as set out in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), permitted district courts to dismiss a complaint for failure to state a claim only if "it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Under this "no set of facts" standard, a complaint effectively could survive a motion to dismiss so long as it contained a bare recitation of the claim's legal elements.

....

We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.

Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629-30 (6th Cir. Ohio 2009) (complaint dismissed, but no indication that result would have been different under *Conley*)

The Supreme Court recently raised the bar for pleading requirements beyond the old "no-set-of-facts" standard of *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that had prevailed for the last few decades. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). . . Indeed, while this new *Iqbal/Twombly* standard screens out the "little green men" cases just as *Conley* did, it is designed to also screen out cases that, while not utterly impossible, are "implausible." . . . Exactly how

implausible is "implausible" remains to be seen, as such a malleable standard will have to be worked out in practice.

Moss v. U.S. Secret Service, 572 F.3d 962, 972 (9th Cir. 2009) ("Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief . . . Under the Court's latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. As many have noted, this is a significant change, with broad-reaching implications.").

Ayres v. Ellis, 2009 U.S. Dist. LEXIS 103109, at **14-15 (D. N.J. Nov. 4, 2009): After discussing differences between *Conley* and *Iqbal* (e.g., "The Third Circuit observed that *Iqbal* provided the "final nail-in-the-coffin" for the "no set of facts" standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), which was applied to federal complaints before *Twombly*."), the district court dismissed the pro se complaint by pre-trial detainee who was assaulted by prisoners while in prison:

Plaintiff's medical claims against the nursing personnel cannot be entertained because: (a) Plaintiff did even not name the nurses that treated him as defendants in this matter; and (b) did not state what particular denial of medical care resulted in the alleged infection (rather, Plaintiff merely offered the Court his self-serving conclusory statement, in violation of Rule 8 pleading requirements, as clarified in *Twombly* and *Iqbal*).

Kasten v. Ford Motor Co., 2009 U.S. Dist. LEXIS 101348, at *15 (E.D. Mich. Oct. 30, 2009) (dismissing discrimination claim) ("The Court has no doubt Plaintiffs' Complaint would have survived a motion to dismiss before *Iqbal* expanded *Twombly* to all civil actions. However, Plaintiffs' factual allegations are too meager to satisfy the Supreme Court's newly-announced standard.").

Mitchell v. Sosa, 2009 U.S. Dist. LEXIS 89961, at **11-12 (D. Colo. Sept. 29, 2009) (dismissing prisoner's pro se *Bivens* claim):

It is possible Plaintiff's claim would survive if the Court were operating under *Conley v. Gibson*'s "no set of facts" pleading standard, under which "a complaint [would] not be dismissed for failure to state a claim unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim . . ." *Robbins v. Oklahoma*, 519 F.3d 1242, 1246 (10th Cir.2008) (quoting *Conley*, 355 U.S. at 45-46 (1957)). Under that standard, "a complaint containing only conclusory allegations could withstand a motion to dismiss if there was a possibility that a fact not stated in the complaint could render the complaint sufficient." *VanZandt v. Oklahoma Department of Human Services*, 276 Fed.Appx. 843, 846 (10th Cir. 2008) (citing *Robbins*, 519 F.3d at 1246)).

As mentioned, however, the pleading standards have changed. Plaintiff's complaint will not survive unless he states a plausible entitlement to relief. Plaintiff's claim -- a loose collection of disjointed words -- does not plausibly allege that Defendant violated Plaintiff's constitutional rights. Thus, it must be dismissed.

Fed. Trade Comm'n v. Innovative Mktg., Inc., 2009 WL 2959680, at *2 n.2 (D. Md. Sept. 16, 2009) (*Twombly* and *Iqbal* "represent a new framework for reviewing the sufficiency of

complaints under Rule 8); *id.* at *7 (“*Twombly* and *Iqbal* may have raised the bar for stating a claim under Rule 8, but not to the extent proposed by D’Souza.”).

Elan Microelectronics Corp. v. Apple, Inc., 2009 WL 2972374, at *3 (N.D. Cal. Sept. 14, 2009) (“It is not easy to reconcile Form 18 [for direct patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a ‘short and plain statement,’ it offers little to ‘show’ that the pleader is entitled to relief . . . Under Rule 84 of the Federal Rules of Civil procedure, however, a court must accept as sufficient a pleading made in conformance with the forms.”).

McClelland v. City of Modesto, 2009 WL 2941480, at *5 (E.D. Cal. Sept. 10, 2009) (“the fact remains that, since *Twombly*, the requirement for fact pleading has been significantly raised”).

Procentury Ins. Co. v. Harbor House Club Condo. Ass'n, 2009 U.S. Dist. LEXIS 73362, at **20-21 (D. N.J. Aug. 19, 2009) (dismissing complaint by condo association against insurance agent alleging that it was negligent in the issuance of an insurance policy):

Here, Harbor House has alleged that Cowles & Connell, acting as ProCentury’s insurance agent, issued the policy negligently by “failing to provide the necessary and correct information, failing to ascertain the true nature of the risk, failing to make proper inquiry or to explain the coverages afforded, and in failing to act in accordance with the standard of conduct for insurance agents and brokers performing such services in the District of New Jersey.” (Third Party Compl. P 28.) Under the previous, more permissive pleading standard, this claim may have been sufficient. See *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (“On such a focused and literal reading of *Conley*’s ‘no set of facts,’ a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”).

However, under the current, more stringent pleading standard articulated by the Supreme Court in *Twombly*, and reiterated in *Iqbal*, Harbor House’s claim fails.

Young v. City of Visalia, 2009 WL 2567847, at *6 (E.D. Cal. Aug. 18, 2009) (“In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. “bare allegations”) is no longer viable.”). *Accord*, **Lewis v. City of Fresno**, 2009 WL 2905738, at *10 (E.D. Cal. Sept. 4, 2009).

Coleman v. Tulsa Cty. Bd. Of Cty. Comm’rs, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009) (stating that claim might have survived under *Conley* standard)

Doe ex rel. Gonzales v. Butte Valley Unified School Dist., 2009 WL 2424608, at **8-9 (E.D. Cal. Aug. 6, 2009):

Although *Iqbal*’s majority opinion itself did not intimate any seachange, jurists and legal commentators have observed that the decision marks a striking retreat from the highly permissive pleading standards often thought to distinguish the federal system from “ ‘the hyper-technical, code-pleading regime of a prior era,’ 129 S.Ct. at 1949. . . Prior to *Iqbal*, many courts—including this court and, apparently, the Supreme Court itself—read Rule 8

to express a 'willingness to "allow [] lawsuits based on conclusory allegations ... to go forward,"'. . . . Indeed, for over half a century, district courts had been instructed that the 'short plain statement' required by Rule 8 'must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."' . . . Now, however, even the official Federal Rules of Civil Procedure Forms, which were touted as 'sufficient under the rules and ... intended to indicate the simplicity and brevity of the statement which the rules contemplate,' Fed. R. Civ. Proc. 84, have been cast into doubt by *Iqbal*. . . . Accordingly, although the court will grant in part defendants' motion to dismiss, the court will also permit plaintiff leave to amend. Plaintiff, however, is admonished to thoroughly and carefully set forth his allegations in any subsequent amended complaint, as both judicial resources and fairness to defendants preclude unlimited opportunities to amend the pleadings."

Ocasio-Hernandez v. Fortuno-Burset, 2009 WL 2393457, at *6 n.4 (D. P.R. Aug. 4, 2009) (acknowledging that complaint "clearly met the pre-*Iqbal* pleading standard," and stating that *Iqbal* creates harsh results, making political discrimination claims nearly impossible to plead without "smoking gun" evidence. "Certainly such a chilling effect was not intended by Congress when it enacted Section 1983.")

Ibrahim v. Department of Homeland Sec., 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009):

Ibrahim has not pleaded that defendants took action because of and not merely in spite of her being Muslim and a Malaysian citizen. That plaintiff was Muslim and detained is not enough to draw an inference of discrimination under the *Iqbal* standard. No additional facts, such as derogatory statements, are alleged. Accordingly, as pled, the discrimination claims against San Francisco officers or Bondanella are insufficient. A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court. Yet, the harshness is mitigated here. Counsel for the San Francisco defendants and Bondanella admit that plaintiff's Fourth Amendment claim can go forward. This means that discovery will go forward. During discovery, Ibrahim can inquire into facts that bear on the incident, including why her name was on the list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.

Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC, 2009 WL 2191318, at *13 (S.D. N.Y. July 23, 2009) ("[I]n the context of the case, a blanket statement that a defendant 'confirmed an intention to pay' without any factual details supporting that allegation does not state a plausible claim for relief. While such allegations may have provided sufficient notice pleading in the past, *Twombly* and *Iqbal* provide clear instructions that conclusory statements about a party's alleged intentions should be accompanied with supporting factual allegations where circumstances so demand.").

Williams v. City of Cleveland, 2009 WL 2151778, at *4 (N.D. Ohio July 16, 2009):

A municipality can only be held liable under § 1983 if the complaint alleges that Plaintiff's injury directly resulted from the municipality's policies or customs. . . . Under

the heightened pleading standard articulated by the Supreme Court of the United States in recent decisions, Plaintiff's amended complaint does not sufficiently state a § 1983 claim. . . Plaintiff's amended complaint recites the critical element of a § 1983 claim against a municipality--a policy or custom--but does so in a conclusory manner. Plaintiff makes no factual allegations that can support the conclusion that the City has a policy or custom of ignoring exculpatory evidence and continuing with prosecutions. To merely state that the City has a policy or custom is not enough; Plaintiff must allege facts, which if true, demonstrate the City's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. Here, while Plaintiff has alleged facts sufficient to demonstrate that exculpatory evidence was ignored in his case, he has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy. Accordingly, the amended complaint would not state a claim cognizable under federal law. Thus, Plaintiff's motion for leave to amend the complaint is denied as futile and Count V of Plaintiff's complaint against the City is dismissed.

Carpenters Health & Welfare Fund of Philadelphia v. Kia Enters. Inc., 2009 WL 2152276, at *3 (E.D. Pa. July 15, 2009) (dismissing discrimination claim):

The Supreme Court's clarification of federal pleading standards in *Twombly* and *Iqbal* has raised the bar for claims to survive a motion to dismiss by emphasizing that a plaintiff cannot rely on legal conclusions or implausible inferences from factual allegations to state a claim..

....

Kia has attempted to plead sufficient additional facts to 'nudge' its allegations of discrimination across the 'line from conceivable to plausible' by alleging, on information and belief, that the plaintiffs do not make similar efforts to collect unpaid CBA obligations from non-minority-owned businesses. Kia, however, offers no specific facts in support of the plaintiffs' alleged disparate treatment of minority and non-minority businesses. In the absence of any more specific allegations identifying particular instances of disparate treatment, these allegations are merely 'legal conclusions couched as factual allegations,' which under *Twombly* and *Iqbal* cannot be taken as true.

Argeropoulos v. Exide Techs., 2009 U.S. Dist. LEXIS 59009, at **15-16 (E.D.N.Y. July 8, 2009) (dismissing hostile work environment claim)

Plaintiff alleges that the anecdotes he provided were merely some examples of discrimination that occurred on a "daily and continuous basis because he is Greek." Am. Comp. P 45. When combined with the two anti-Greek statements pled in the Amended Complaint, this 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. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). But it does not survive the Supreme Court's "plausibility standard," as most recently clarified in *Iqbal*, 129 S. Ct. at 1949-1953. In applying the plausibility standard set forth in *Twombly* and *Iqbal*, a court "assume[s] the [] veracity" only of "well-pleaded factual allegations." *Id.* at 1950. Thus, the Court need not accept as true Plaintiff's

conclusory and entirely non-specific allegation that similar conduct occurred on a "daily and continuous basis because he is Greek." Rather, Plaintiff must plead sufficient "factual content" to allow the Court to draw a "reasonable inference" that Plaintiff suffered from a hostile work environment. *Iqbal*, 129 S. Ct. at 1949. And Plaintiff has not done so. At most, Plaintiff's national origin hostile work environment claim is "conceivable." *Id.* at 1951. But without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is "plausible." *Id.*

Ansley v. Florida Dep't of Revenue, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009) (concluding that although "[t]hese allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal* ... now they do not").

Kyle v. Holinka, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (court describes *Iqbal* as "implicitly overturn[ing] decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion.").

Fulk v. Village of Sandoval, 2009 WL 1606897, at *2 (S.D. Ill. June 9, 2009) (court grants leave to amend "[b]ecause of the recent change in federal pleading standards").



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December 9, 2009

Senator Arlen Specter
U.S. Senator
711 Hart Building
Washington, DC 20510

Re: Notice Pleading Restoration Act of 2009

Dear Senator Specter:

I submit this letter in response to a request received from Matthew Wiener of your office for a brief summary of the impact of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* on the claims advanced in the consolidated multi-district litigation proceeding *In Re: Terrorist Attacks on September 11, 2001*, 03 MDL 1570.

By way of background, the September 11 terrorism litigation asserts claims on behalf of more than 6,000 victims of the September 11, 2001 Terrorist Attacks – the families of the nearly 3,000 people killed in the Attacks, thousands of individuals who survived but were severely injured as a result of the Attacks, and commercial entities that suffered in excess of \$10 billion in economic damages due to the Attacks. The September 11 plaintiffs have brought suit against numerous foreign states, purported charities, individuals and corporations which are alleged to have provided material support or resources to al Qaeda in the years leading up to September 11, 2001. Since 2004, I have served as a co-chair of the Plaintiffs' Executive Committees in the September 11 terrorism litigation.

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In the wake of the Supreme Court's decisions in *Twombly* and *Iqbal*, virtually every defendant in the September 11 terrorism litigation invoked those rulings in support of efforts to obtain outright dismissal of the claims brought by the September 11 plaintiffs.¹ Pursuant to those decisions, the defendants have argued that the district court should broadly discount the allegations of plaintiffs' complaints and related pleadings, which span literally thousands of pages and address the complex and covert inner-workings of the al Qaeda terrorist network, as "conclusory" and insufficient to subject al Qaeda's alleged material sponsors and supporters to the "burdens of discovery." In furtherance of these arguments, the defendants have sought to exploit the inherently ambiguous and subjective distinction drawn by the Supreme Court between "factual allegations" and "legal conclusions," urging the district court to "draw on its judicial experience and common sense" and disregard plaintiffs' detailed and direct allegations of knowledge and conspiratorial conduct as "mere [legal conclusions]."

To this point, the district court has not issued any decision addressing the defenses raised by the defendants in the September 11 terrorism litigation under *Twombly* and *Iqbal*, and the September 11 plaintiffs strenuously maintain that their detailed allegations go well beyond the requirements of Rules 8 and 9, even as re-envisioned by the Supreme Court. Indeed, contrary to the defendants' compulsive efforts to label the September 11 plaintiffs' pleadings as "conclusory," the 2nd Circuit Court of Appeals expressly acknowledged that those pleadings contain "a wealth of detail (conscientiously cited to publish and unpublished sources)."

Nevertheless, the arguments these defendants have raised on the basis of *Twombly* and *Iqbal* raise significant concerns about the impact of those decisions on the ability of future terrorism victims to sustain claims against knowing and intentional sponsors of terrorism. In this regard, it is important to note that the September 11th plaintiffs and their counsel invested millions of dollars in pre-suit investigations into the sources of al Qaeda's financial and logistic support, before even bringing claims against any party. That investment was undertaken in recognition of the strong public interest in the circumstances which gave rise to the September 11th Attacks, and sadly made possible by the horrific scale of those Attacks.

It is unreasonable to expect that future victims of terrorism will be able to marshal similar resources in investigating potential claims against alleged terror sponsors. Because the financial and logistic infrastructures of terrorist organizations are by their very nature covert, the heightened pleading standards announced by the Supreme Court in *Twombly* and *Iqbal* may well foreclose such victims from sustaining meritorious claims against parties who have in fact sponsored terrorism against the United States and its citizens.

¹ Just ten (10) days after the Supreme Court handed down its decision in *Twombly*, the Defendants' Executive Committee filed a supplemental brief on behalf of "all defendants with motions to dismiss pending" in the September 11 terrorism litigation, citing *Twombly* as additional support for their dismissal motions. At the time of that filing, approximately 90 defendants had pending motions to dismiss, including Specially Designated Global Terrorists al Haramain Islamic Foundation and Yassin al Kadi. In a July 8, 2009 letter to the district court, the Defendants' Executive Committee, again writing on behalf of all defendants with pending motions to dismiss, cited the Supreme Court's decision in *Iqbal* as additional authority in support of those motions. The district court has not yet ruled on any of the motions at issue. Copies of the Defendants' Executive Committees' *Twombly* and *Iqbal* submissions, as well as a separate letter brief filed by defendant National Commercial Bank, are enclosed as attachments A, B and C hereto.

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Significantly, through the Anti-Terrorism Act, 18 U.S.C. § 2333 et seq, Congress created a substantive cause of action under federal law for the benefit of terrorism victims against persons who knowingly provide material support or resources to the terrorist organization responsible for their injuries. In doing so, Congress made clear its view that civil actions by terror victims should play an important role in deterring the sponsorship of terrorism, and thereby promoting our national security. This approach makes good sense, as terrorist sponsors often lay beyond the reach of U.S. prosecutors and their own states frequently lack the political will to pursue criminal proceedings or economic sanctions, even where the evidence is clear. Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey highlighted this problem in testimony presented to the Senate Committee on Finance on April 30, 2008, explaining that:

One of our greatest challenges will be to foster the political will required to deter terrorist financiers more consistently and effectively. It has proven difficult to persuade officials in some countries to identify and to hold terrorist financiers publicly accountable for their actions. This lack of public accountability undermines our ability to deter other donors.”²

Testimony of Under Secretary for Terrorism and Financial Intelligence Stuart Levey Before the Senate Committee on Finance, April 1, 2008, available at <http://www.treas.gov/press/releases/hp898.htm>.

For those very reasons, civil claims will often represent the only effective means to hold terrorist sponsors accountable for their deliberate targeting of the United States, and thereby deter the financing of terrorism by other would be donors. *See Boim v. Holyland Foundation for Relief and Development*, 549 F.3d 685, 691 (7th Cir. 2008) (*en banc*) (“suits against financiers of terrorism can cut the terrorists’ lifeline”). Unfortunately, the Supreme Court’s rulings in *Twombly* and *Iqbal* threaten the vitality of that important tool for promoting our national security.

Respectfully,



SEAN P. CARTER

SPC/bdw

cc: Senator Sheldon Whitehouse

² In that same testimony, Under Secretary Levey lamented that “[e]ven some of our best partners still lack the political will or national authorities to consistently and aggressively disrupt terrorist financing networks.” *Id.* Testimony of Under Secretary for Terrorism and Financial Intelligence Stuart Levey Before the Senate Committee on Finance, April 1, 2008, available at <http://www.treas.gov/press/releases/hp898.htm>. Levey’s testimony to the Senate Committee on Finance echoed statements he made in an interview on the six year anniversary of the September 11th Attacks, during which Levey noted that “not one person identified by the United States and United Nations as a terror financier has been prosecuted by” Saudi Arabia. *U.S.: Saudis Still Filling Al Qaeda’s Coffers*, ABC News, September 11, 2007, available at <http://blogs.abcnews.com/theblotter/2007/09/us-saudis-still.html>.

EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: TERRORIST ATTACKS ON
SEPTEMBER 11, 2001

Civil Action No. 03 MDL 1570 (GBD)

This document relates to: All Actions

NOTICE OF SUPPLEMENTAL AUTHORITY

This Notice, submitted on behalf of defendants with motions to dismiss pending in this MDL, is filed to bring to the Court's attention the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (May 21, 2007), which reversed a decision of the Second Circuit.¹ A copy of the Supreme Court's decision is attached.

Plaintiffs in this MDL have sued hundreds of defendants, accusing individuals, non-profits, financial institutions, foreign officials, and sovereign states of complicity in the September 11 attacks. Plaintiffs' allegations against many of these defendants rest on conclusory assertions, with little or no supporting factual averments, that defendants conspired with terrorists or intentionally aided terrorism directed at the United States. Many defendants accordingly moved to dismiss the claims against them on a variety of grounds, including for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. Judge Richard C. Casey granted many of these motions on the ground that conclusory allegations are insufficient either to establish personal jurisdiction or to state a claim; others were denied without prejudice to re-filing; and still others remain pending.

¹ In *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), the Second Circuit reversed a decision by Judge Gerard Lynch dismissing a conclusory charge of conspiracy for failure to state a claim under § 1 of the Sherman Act.

The Supreme Court's decision in *Twombly* confirms that, as Judge Casey held,² conclusory allegations such as those plaintiffs make here are insufficient to survive a motion to dismiss. The Court first held, as a general pleading principle, that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Slip op. at 8 (brackets omitted). To plead a conspiracy claim under federal antitrust law, the Court explained, a complaint must state "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 9. Neither "a bare assertion of conspiracy" nor "a conclusory allegation of agreement" suffices. *Id.* at 10.

In explaining those principles, the Court rejected a literal reading of the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), making clear that a plaintiff claiming conspiracy must allege specific facts sufficient to "show" that an agreement was made. *See id.* at 8-9 and n.3. The Court explained that the *Conley* language, which many plaintiffs in this MDL have relied upon in opposing pending motions to dismiss, "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 showing any set of facts consistent with the allegations in the complaint." *Id.* at 16. The Court explained that, even though "heightened fact pleading of specifics" is not required under Federal Rule of Civil Procedure 8, a complaint must allege "enough facts to state a claim for relief that is plausible on its face," not merely one that is "conceivable." *Id.* at 24.

² *See In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 794-804, 812-16 (S.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 553-56, 558-59 (S.D.N.Y. 2005).

Applying those principles, the Court held that “a few stray statements” in a complaint “speak[ing] . . . of agreement” between defendants did not properly allege a conspiracy because those statements were, without more, “mere[] legal conclusions.” *Id.* at 18; *see also id.* at 8 n.3 (“blanket assertion[] of entitlement to relief” is insufficient); *id.* at 10 n.5 (the lines “between the conclusory and the factual” and “between the factually neutral and the factually suggestive” “[e]ach must be crossed” to survive a motion to dismiss).

The Supreme Court’s decision establishes that, absent specific factual averments, conclusory allegations — for example, that defendants conspired with terrorists or intentionally and knowingly supported terrorism directed at the United States — are insufficient to withstand a motion to dismiss for lack of personal jurisdiction or for failure to state a claim. The Supreme Court’s decision in *Twombly* accordingly validates the approach that Judge Casey took to these issues, and that approach should govern this Court’s resolution of pending motions to dismiss.

Respectfully submitted,

/s/ Michael K. Kellogg

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May 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of May 2007, I caused copies of the foregoing Notice of Supplemental Authority to be served electronically through the Court's ECF system upon all parties in this MDL scheduled for electronic notice.

/s/ Elizabeth M. Forney
Elizabeth M. Forney

EXHIBIT "B"

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July 8, 2009

Via Overnight Mail & Facsimile

Hon. George B. Daniels
United States District Court Judge
Southern District of New York
Daniel P. Moynihan United States Courthouse
500 Pearl Street, Room 630
New York, NY 10007-1312

Re: *In re Terrorist Attacks on September 11, 2001*, 03 MDL 1570 (GBD)

Dear Judge Daniels:

In anticipation of the status conference scheduled for July 15, 2009, I write on behalf of the Defendants' Executive Committee to address the implications of the Supreme Court's denial of plaintiffs' petition for a writ of certiorari from the Second Circuit's decision in these matters.

In light of the Supreme Court's denial of plaintiffs' petition – which leaves the Second Circuit's decision standing as the law of the case and the law of the Circuit – the Defendants' Executive Committee respectfully submits that this Court should proceed to dispose of pending motions to dismiss in accordance with our prior briefing regarding the implications of the Second Circuit's decision. *See* Supplemental Brief on Second Circuit Decision, No. 03 MDL 1570 (GBD) (Oct. 17, 2008) (Doc. # 2140); Defendants to Be Dismissed on the Basis of the Second Circuit's Decision, No. 03 MDL 1570 (GBD) (Oct. 17, 2008) (Doc. # 2141-2) ("Defendants' Dismissal Chart"); Defendants' Reply to Plaintiffs' Supplemental Brief on Second Circuit Decision, No. 03 MDL 1570 (GBD) (Nov. 25, 2008) (Doc. # 2146).

In previously addressing the implications of the Second Circuit's decision on pending motions to dismiss, plaintiffs agreed that all claims in all cases against thirteen defendants should be dismissed absent further review of the Second Circuit's decision. *See* Plaintiffs' Response to

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Defendants' List of Defendants, No. 03 MDL 1570 (GBD) (Nov. 25, 2008) (Doc. # 2148-2).¹ In addition, plaintiffs have previously stipulated to the dismissal of HRH Prince Naif bin Abdulaziz Al-Saud, HRH Prince Salman bin Abdulaziz Al-Saud, and the Saudi High Commission – all appellees in the Second Circuit appeal – from the remaining cases in which they are defendants. See Defendants' Dismissal Chart at 1 n.1. Although, for the reasons discussed in prior briefing, the Second Circuit's decision requires the dismissal of many more than these sixteen defendants, the Defendants' Executive Committee submits that the Court should begin by promptly dismissing all claims against these defendants. We attach a proposed order to that effect.

Once the Court has entered the proposed order, the Court should proceed to address the remaining defendants' motions to dismiss in a manner consistent with our prior submissions. Many of those pending motions to dismiss raise FSIA and/or personal-jurisdiction defenses and hence are governed by the Second Circuit's decision, as explained in our supplemental briefing. Other pending motions to dismiss are based on service of process, Rule 12(b)(6), or other grounds.

With respect to the pending motions to dismiss, we note that the Supreme Court recently issued a significant decision clarifying plaintiffs' pleading requirements. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (May 18, 2009). That decision declared that plaintiffs' frequently cited *Conley* standard – under which a motion to dismiss was to be denied unless “it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief,” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) – is officially “retired.” *Iqbal*, 129 S. Ct. at 1944. The Supreme Court has now made clear that, instead, a court reviewing a motion to dismiss, whether for failure to state a claim or otherwise, must put aside conclusory assertions and evaluate the “well-pleaded, nonconclusory factual allegation[s]” (*id.* at 1950), if any, to determine whether “they plausibly give rise to an entitlement to relief,” *id.* “[W]here 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’” (*id.* (quoting Fed. R. Civ. P. 8(a)(2)), and should be dismissed. For reasons already stated in the applicable briefs, plaintiffs repeatedly fail that standard and the Court should proceed to address those motions under this authority.

If the Court believes that a status conference on July 15, 2009 would be useful to address these issues, the Defendants' Executive Committee will be happy to participate. Alternatively, it may be appropriate to convene a status conference after the Court has decided motions to dismiss directly affected by the Second Circuit's and Supreme Court's decisions.

¹ Those defendants are: Sheikh Abdullah bin Khalid Al Thani; Saudi Joint Relief Committee; Saudi Arabian Red Crescent Society; Ahmed Zaki Yamani; Hamad Al Husaini; Zahir Kazmi; Mohamed Al Mushayt; Khalid Al Rajhi; Alfaisaliah Group (a/k/a Faisal Group Holding Co.); Al Aqsa Islamic Bank; Binladin Group International; Mohammed Binladin Company; and Mushayt for Trading Establishment.

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Reply to Plaintiffs' Letter

In their letter to the Court, plaintiffs raise seven issues. We address each in turn.

1. Plaintiffs first argue (at 1-2) that there is an "acute" need for a case management conference on July 15, 2009 and that a contrary position would be "absurd." As explained, the Defendants' Executive Committee stands ready to participate in a status conference if the Court would find that useful. We note, however, that many of the topics raised by plaintiffs are substantive and are thus not appropriate for consideration at a procedural conference. Furthermore, as we have also observed, the appropriate course may be to convene a conference after the Court has had the opportunity to address the motions to dismiss directly affected by the Second Circuit's and Supreme Court's decisions. There is nothing "absurd" about this position, which would permit the Court to convene a procedural conference after narrowing the case significantly through resolution of many pending motions to dismiss.

2. Plaintiffs make a number of substantive arguments (at 2-5) regarding the state of the law as it relates to the pending motions to dismiss. These letters are not a proper forum to address these issues. At plaintiffs' suggestion, the parties have already comprehensively briefed the implications of the Second Circuit's decision, and plaintiffs should not be permitted to revisit (and in many respects revise) their contentions now. Nevertheless, to ensure a complete record, we briefly address each of plaintiffs' arguments below.

First, plaintiffs assert that the Second Circuit's decision requires dismissal of claims against only *two* remaining defendants, both of which are sovereign agencies of Saudi Arabia: the Saudi Joint Relief Committee ("SJRC") and the Saudi Arabian Red Crescent Society ("SRCS"), with all remaining defendants requiring a "a case by case analysis of [plaintiffs'] claims and allegations . . . and extrinsic evidence submitted of record." Pls. Letter at 2. Plaintiffs' position appears to be a direct refutation of *plaintiffs' own prior representation regarding the effect of the Second Circuit's decision on this litigation*. Following that decision – and in the immediate aftermath of a status conference at which the plaintiffs themselves proposed briefing on the effect of the Second Circuit's decision – this Court "directed" defendants to provide "a list of all defendants . . . for whom they contend" the Second Circuit's "rulings would require dismissal." Order, No. 03 MDL 1570 (GBD) (Sept. 15, 2008) (Doc. # 2134). The Court further directed that "plaintiffs' counsel shall designate those listed defendants for whom there exists a good faith basis to assert that those rulings should not be so dispositive." *Id.* As explained above, pursuant to the Court's order, plaintiffs expressly

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stipulated that the Second Circuit's decision, if left standing on review, mandated dismissal of all claims against *thirteen* defendants. *See supra* p. 2 n.1.²

Plaintiffs' apparent attempt to disregard their prior submission without even acknowledging it should be rejected. Plaintiffs have for years complained about the pace of this litigation, and a critical step in advancing these cases is the resolution of the pending motions to dismiss. This Court established a procedure for doing so in the wake of the Second Circuit's decision. As we have previously emphasized, plaintiffs' identification of thirteen defendants with respect to whom they had no "good faith basis" to pursue claims was far too narrow; their effort now to backtrack as to eleven of those thirteen, with no explanation whatsoever, is beyond the pale. As to those eleven defendants, plaintiffs have previously submitted – pursuant to this Court's order and subject to Rule 11 – that they have no "good faith basis" to keep them in the case. They should be held to that submission.

Second, plaintiffs argue (at 3) "the United States expressly rejected in its brief to the Supreme Court" the personal-jurisdiction arguments in our prior supplemental briefing. According to plaintiffs, the "United States advocated that the Second Circuit's decision should be read narrowly, as merely reflecting perceived deficiencies in the allegations." *Id.* (internal quotation marks omitted). Plaintiffs "submit that this Court should adopt and follow the United States' interpretation of the Second Circuit's decision." *Id.*

This Court, however, is bound to follow the holdings of the Second Circuit, not the views of the Executive Branch as relayed by the Solicitor General in a litigation brief. As we explained in our supplemental briefing, the Second Circuit's decision, properly read, forecloses the principal jurisdictional theory advocated by plaintiffs in this litigation and accordingly has direct application to numerous pending motions to dismiss. *See* Defs. Supp. Br. at 12-34; Defs. Supp. Reply Br. at 7-18. Specifically, the Second Circuit, in reviewing allegations that are indistinguishable from those pending against many of the remaining defendants, rejected plaintiffs' principal theory of personal jurisdiction – namely, that any allegation of material support for al Qaeda, no matter how temporally, geographically, or causally remote from the September 11 attacks, is sufficient to establish personal jurisdiction. Indeed, plaintiffs themselves have interpreted the Second Circuit's decision in just this way in briefing before the Supreme Court, and they have expressly assailed the position they now advocate as "*based on a disingenuous and incorrect assertion* that the Second Circuit's decision could possibly be read as 'focus[ing] on the inadequacy of the particular allegations before it.'"³ Plaintiffs' calculated shift

² These thirteen defendants are in addition to the three defendants (Princes Naif and Salman and the Saudi High Commission) who were appellees in the Second Circuit and whom plaintiffs had previously stipulated would be dismissed from all remaining cases in the event the Second Circuit affirmed. *See supra* p. 2. On July 2, 2009, the undersigned emailed a copy of defendants' proposed order to a representative of the Plaintiffs' Executive Committee, stating that we "believe that the proposed order accurately reflects the plaintiffs' stipulations" and asking the representative to "[p]lease let me know if you disagree." Plaintiffs did not respond.

³ Supplemental Brief of Petitioners in Response to Brief of the United States, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640, at 9 (June 6, 2009) (emphasis added).

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in positions regarding the meaning of the Second Circuit's decision should be rejected. And, because it is the opinion of the Second Circuit, not the views of the Solicitor General, that bind this Court, there is no basis for plaintiffs' request (at 3) that this Court afford the parties "the opportunity to update the supplemental briefing and charts . . . to formally incorporate the views of the United States."⁴

In any event, plaintiffs mischaracterize the position of the United States. The Solicitor General wrote that a complaint "would need to allege facts that could support the conclusion that the defendant acted with the requisite intention and knowledge," Brief of the United States as Amicus Curiae, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640, at 19-20 (May 2009) (citing *Iqbal*) ("U.S. Brief"), and that "the district court rightly focused on the sufficiency of the allegations to establish that the defendants' intentional acts of funding the charities were done with the knowledge that they would support al Qaeda's jihad against the United States," *id.* at 20. Consistent with the Second Circuit, the Solicitor General explained that, under *Calder v. Jones*, 565 U.S. 783 (1984), "due process is not satisfied merely because a defendant can 'foresee' that his actions 'will have an effect' in the foreign jurisdiction." U.S. Brief at 18 (quoting 565 U.S. at 789). Rather, "one who undertakes 'intentional and allegedly tortious actions' that are 'expressly aimed' at the forum are subject to jurisdiction there." *Id.* This is a far cry from plaintiffs' position that any allegation of material support to al Qaeda anywhere, anytime, and however indirectly, suffices for personal jurisdiction.⁵

Third, and relatedly, plaintiffs point to the Solicitor General's brief for the view that "foreign officials may not claim immunity under the FSIA." Pls. Letter at 3-4. On that basis, they argue that this Court should (1) apply common law immunity to remaining FSIA defendants and (2) invite Statements of Interest from the United States. *Id.* But, as this Court has recognized, the Second Circuit squarely held – in this very case – that the FSIA applies to individuals. *See* Order, No. 03 MDL 1570 (GBD) (Sept. 15, 2008) (Doc. # 2134) ("Individual officials of a foreign state, acting in their official capacity, are . . . protected by the FSIA grant of immunity for their official-capacity acts."). That decision is the law of this case and the law of this Circuit. This Court has no authority to depart from the holding of the Second Circuit on the basis of a litigation brief filed by the Executive Branch, particularly where the views of the Executive Branch with respect to the scope of the FSIA are entitled to no deference. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) ("the FSIA's reach" is "a pure question of statutory construction" on which the views of the Government "merit no special deference") (internal quotation marks and alterations omitted). Furthermore, because the FSIA

⁴ If such supplementation is allowed, however, defendants request the opportunity to respond – for the first time – to inaccurate and misleading assertions embodied in plaintiffs' charts.

⁵ Plaintiffs also assert in a footnote that certain foreign defendants may not be "entitled to invoke Due Process protections in the first place." Pls. Letter at 3 n.1. But the Second Circuit necessarily rejected this argument in applying the protections of the Due Process Clause to five foreign defendants to affirm their dismissals on personal-jurisdiction grounds. Furthermore, defendants have already explained why plaintiffs' position is deeply flawed. *See* Defendants' Response to Plaintiffs' Notice of Supplemental Authority in Relation to All Pending Motions to Dismiss for Failure to State a Claim and/or For Lack of Personal Jurisdiction, No. 03 MDL 1570, at 7-8 (GBD) (Mar. 13, 2009) (Doc. # 2162).

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applies to the remaining individual defendants raising this defense and because no exception to immunity applies, whether these defendants would also be entitled to immunity under the common law is irrelevant.⁶ There is thus no conceivable basis for inviting the views of the United States.

Fourth, it is unclear whether plaintiffs agree that all dismissals based on sovereign immunity should be final. With respect to the SJRC and SRCS, plaintiffs seek to “reserve their right to argue on appeal that the Second Circuit’s FSIA ruling is wrong, and that jurisdiction is available under the FSIA for the claims advanced against the SJRC and [SRCS].” Pls. Letter at 2. Plaintiffs are of course free to contest the Second Circuit’s ruling in the court of appeals, but, to the extent they contend that the Court should delay that process by refusing to order final dismissals as to FSIA defendants, we disagree. Sovereign immunity under the FSIA is immunity not just from liability, but also from “the attendant burdens of litigation.” *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998). To ensure that litigants benefit from the immunity to which they are entitled, claims of immunity should be completely and finally resolved as early as possible. *See Robinson v. Government of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001); *Rein*, 162 F.3d at 755-56. Accordingly, dismissals based on sovereign immunity are regularly certified as final under Federal Rule of Civil Procedure 54(b). *See, e.g., Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 241 (2d Cir. 1996) (affirming judgment entered under Rule 54(b) dismissing claims as barred by foreign sovereign immunity); *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 83 (2d Cir. 1983) (Friendly, J.) (same); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 70 (2d Cir. 1977) (affirming entry of Rule 54(b) judgment dismissing claim as barred under act of state doctrine). Deferring the entry of final judgment on the dismissed claims until after the resolution of the claims still pending would effectively deprive FSIA defendants of their immunity by forcing them to continue actively monitoring cases from which they have been properly dismissed to ensure that their interests are fully protected. Plaintiffs provide “no just reason” for that result. Fed. R. Civ. P. 54(b).

Finally, plaintiffs argue (at 4) that, with respect to Rule 12(b)(6) motions to dismiss, this Court should follow the “comprehensive statement of the law” set forth in *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008). But the implications of *Boim* have already been the subject of supplemental-authority submissions by the parties. *See Defendants’ Response to Plaintiffs’ Notice of Supplemental Authority in Relation to All Pending Motions to Dismiss for Failure to State a Claim and/or For Lack of Personal Jurisdiction*, No. 03 MDL 1570 (GBD) (Mar. 13, 2009) (Doc. # 2162); *Plaintiffs’ Notice of Supplemental Authority in Relation To All Pending Motions To Dismiss For Failure To State a Claim and/or Lack of*

⁶ We have already explained why plaintiffs’ (renewed) suggestion (at 4 n.2) that the FSIA may not apply to the acts of the remaining individual FSIA defendants is wrong. *See* Defs. Supp. Reply Br. at 3-6. These cases are therefore unlike *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), where the Second Circuit considered immunity under the common law because it was not settled whether the FSIA supplies immunity for former governmental officials. *See* 563 F.3d at 14 (holding “[t]he FSIA is silent with regard to former foreign government officials” but the “[c]ommon law recognizes the immunity of former foreign officials” and thus the Court “need not decide” whether the FSIA applies to “former foreign official[s]”).

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Personal Jurisdiction, No. 03 MDL 1570 (GBD) (Feb. 4, 2009) (Doc. # 2156). For the reasons we have previously explained: (1) *Boim* has no application to issues of personal jurisdiction; and (2) *Boim* does not, as plaintiffs once again incorrectly argue (at 4), “confirm[] that plaintiffs have stated valid claims against all of the defendants under the ATA.”⁷

3. Recognizing that their complaints are in many if not most cases insufficient to survive review under the Supreme Court’s established pleading standards, plaintiffs request (at 5-6) that this Court adopt a “procedure” allowing for amendment. The Defendants’ Executive Committee strongly disagrees that any such procedure is necessary.⁸ To the contrary, plaintiffs have already had ample opportunity to amend the complaints in these cases and already have done so multiple times. The complaint in *Ashton*, for example, is the sixth amended complaint; the *Burnett* complaint is the third amended complaint; and the *Federal Insurance* complaint has also already been amended. This is in addition to the numerous amendments plaintiffs made, or attempted to make, to their pleadings by filing RICO statements. Pursuant to Case Management Order No. 2, the final deadline for filing amended pleadings was July 31, 2005 – nearly four years ago. See Case Management Order No. 2, 03 MDL 1570, ¶ 13 (RCC) (June 16, 2004) (Doc. # 247). Contrary to plaintiffs’ claim (at 5), that date was more than one year after the release of the Final Report of the National Commission on Terrorist Attacks Upon the United States, so plaintiffs had more than sufficient time to amend their complaints to take account of that report. Plaintiffs’ request to further amend the complaints now is untimely.

Moreover, plaintiffs’ request to amend would substantially delay resolution of the cases as it would necessarily require further individualized briefing under Federal Rule of Civil

⁷ *Boim* is not controlling or dispositive of Rule 12(b)(6) motions in this proceeding: (1) the facts in *Boim* are markedly different from the allegations against the diverse and differently situated defendants in these cases; (2) the majority opinion in *Boim* contains flawed reasoning (as cogently highlighted in the dissenting opinion); (3) the majority opinion in *Boim* is inconsistent in material respects with the law of the case in this litigation, as previously established by Judge Casey, see *In re Terrorist Attacks of September 11, 2001*, 349 F. Supp. 2d 765, 825, 828 (S.D.N.Y. 2005); and (4) under the Supreme Court’s recent decision in *Iqbal*, discussed above, only “nonconclusory factual allegations” may be considered in assessing whether a complaint “plausibly” shows an entitlement to relief. To the extent this Court believes that resolution of individual Rule 12(b)(6) motions warrants more detailed consideration of the impact, if any, of *Boim*, defendants have previously expressed their willingness to submit supplemental briefs. See Defendants’ Response to Notice of Supplemental Authority at 8.

⁸ Plaintiffs also argue (at 5) that “the Second Circuit went out of its way observe” that the complaints contain a “wealth of detail” and, on that basis, they assert that “all motions to dismiss alleging deficiencies in the pleadings should be dismissed.” (internal quotation marks omitted). That is absurd. The Second Circuit’s offhand comment regarding a “wealth of detail” in an appeal not involving any of the allegations against remaining defendants could not conceivably be deemed a holding applicable to any of the remaining defendants, much less one that would require rejecting all arguments regarding pleading deficiencies with respect to remaining defendants. Moreover, as explained above, the Supreme Court’s decision in *Iqbal* post-dates the Second Circuit’s opinion here and imposes pleading requirements under Rule 8 that the Second Circuit did not address.

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Procedure 15(a) as to whether in individual cases plaintiffs should be allowed to amend. If, in the wake of that briefing, the Court permits amendment, individual defendants would then file new motions to dismiss, with new rounds of briefing. Because that delay would substantially prejudice defendants who have already stood erroneously accused of complicity in terrorism for more than six years, this Court should reject plaintiffs' request for a "procedure" to facilitate further amendment of their complaints. *See Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) ("motions to amend should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party") (internal quotation marks omitted).

4. Plaintiffs also suggest (at 6) that "limited oral argument" will be necessary to resolve pending motions to dismiss. The Defendants' Executive Committee does not agree. The resolution of remaining motions to dismiss can be accomplished by applying established legal standards (set forth in the Second Circuit's decision and recent Supreme Court decisions) to the specific claims and allegations against remaining moving defendants. Because this analysis can be accomplished on the basis of the papers, it is not clear that oral argument would be useful. Of course, if the Court found it necessary to hold oral argument as to any specific motions and/or issues, defendants would be happy to participate.

5. Plaintiffs request (at 6) that the Court act on Letters Rogatory to the International Criminal Tribunal for the Former Yugoslavia, which plaintiffs have previously submitted. The Defendants' Executive Committee takes no position on this issue here, other than to note that resolution of this issue does not require the time and expense of a global status conference.

6. Plaintiffs ask (at 6) that the Court act on a request for *in camera* review of classified U.S. Government documents that were improperly disclosed to plaintiffs' counsel and subsequently reclaimed from plaintiffs' counsel by agents of the Federal Bureau of Investigation. The U.S. Government and the National Commercial Bank ("NCB") have already submitted substantial briefing in opposition to plaintiffs' request. Rather than respond in this letter to plaintiffs' request that "the Court should review those documents, at the very least in connection with any determination concerning the need for additional jurisdictional discovery from NCB," we respectfully refer the Court to the briefing by plaintiffs, the Government, and NCB in connection not only with plaintiffs' motion for "declaratory relief" concerning the classified documents, but also with NCB's motion to strike new arguments improperly raised in plaintiffs' reply in support of their "declaratory relief" motion.⁹

⁹ That briefing is docketed as follows:

Plaintiffs' Motion for Declaratory Relief:

- Plaintiffs' motion and supporting papers. MDL Doc. ## 2157-2159.
- NCB's opposition and supporting papers. MDL Doc. ## 2160-2161.
- Government's opposition letter (Mar. 9, 2009). Filed as MDL Doc. # 2161, Ex. D.
- Plaintiffs' reply papers. MDL Doc. ## 2163-2164.

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Plaintiffs' letter (at 3) also discusses the impact of the Supreme Court's denial of certiorari on the plaintiffs' application for specific-jurisdiction discovery from NCB, which is currently pending before Magistrate Judge Maas. We respectfully invite the Court's attention to the June 30, 2009 letter on that subject from NCB's counsel to Judge Maas. NCB's letter takes the position that the Second Circuit's decision precludes the "jurisdictional discovery" that plaintiffs have requested when, as here, this Court has not yet assessed whether the plaintiffs have "establish[ed] a prima facie case that the district court ha[s] jurisdiction" over NCB under the standards announced by the Court of Appeals. See NCB Letter at 1 (June 30, 2009) (quoting *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 96 (2d Cir. 2008), *cert. denied*, --- U.S. ---, 2009 WL 1835181 (June 29, 2009)).

7. Finally, plaintiffs conclude with a call for "[e]fficient [m]anagement" of these cases going forward. To the extent plaintiffs mean to suggest that pending motions to dismiss should be promptly addressed, the Defendants' Executive Committee agrees. Now that the Second Circuit has established principles of law that serve as the law of the case and law of this Circuit on several important threshold issues, and in light of the Supreme Court's denial of certiorari as well as its further clarification of the standards governing motions to dismiss, the Defendants' Executive Committee believes that many if not all pending motions to dismiss can be resolved expeditiously.

By contrast, to the extent plaintiffs' reference to "[e]fficient [m]anagement" refers to the remaining suggestions in their letter, plaintiffs' submission is fundamentally at odds with their purported desire to move these cases forward. As explained above, plaintiffs seek to withdraw their prior stipulation of dismissal as to eleven defendants; they seek still more briefing (apparently on a case-by-case basis) on scores of motions to dismiss, many of which they acknowledge have been pending for several years; and they propose still further amendment of pleadings that have already been amended multiple times. Each of plaintiffs' proposals amounts to a request that the Court delay consideration of threshold motions to dismiss that are ripe for resolution on the current record. For this reason, as well as those set forth above, plaintiffs' proposals should be rejected.

Nor does the Defendants' Executive Committee agree that "regular" case management conferences are necessary going forward. Instead, the Court should continue its practice of scheduling conferences at six-month intervals, with the parties providing their positions in advance regarding whether the conference should go forward and, if so, what issues should be addressed. With respect to plaintiffs' suggestion that the Court modify its case management

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- Government's letter in response to plaintiffs' reply (Apr. 3, 2009). Filed as MDL Doc. # 2173, Ex. A.

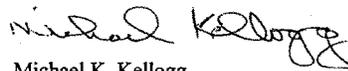
NCB's Motion to Strike:

- NCB's motion and supporting papers. MDL Doc. ## 2166-2167.
- Plaintiffs' opposition. MDL Doc. # 2171.
- NCB's reply papers. MDL Doc. ## 2172-2173.

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orders, the Defendants' Executive Committee will respond if and when the plaintiffs submit any concrete recommendations but it does not believe that modifications are warranted at this time.

Respectfully submitted,



Michael K. Kellogg
Defendants' Executive Committee

cc:

Magistrate Judge Frank Maas (via overnight mail and facsimile)
All MDL 1570 counsel of record (via email)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001)	Civil Action No. 03 MDL 1570 (GBD)
)	
)	
)	

This document relates to: All Actions

(PROPOSED) ORDER

1. WHEREAS, plaintiffs and defendants have stipulated that all remaining claims against certain defendants should be dismissed if the prior dismissal of certain claims against those defendants by the District Court were affirmed by the Second Circuit on appeal and those decisions have been so affirmed on appeal;¹ and

2. WHEREAS, plaintiffs and defendants have stipulated that all claims against certain other defendants should be dismissed if the Second Circuit's decision in *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), were left standing and that decision has been left unreviewed either by the Second Circuit or the Supreme Court,²

IT IS HEREBY ORDERED that all remaining claims against

HRH Prince Naif bin Abdulaziz Al-Saud;
HRH Prince Salman bin Abdulaziz Al-Saud;
Saudi High Commission;
Sheikh Abdullah bin Khalid Al Thani;
Saudi Joint Relief Committee;
Saudi Arabian Red Crescent Society;
Ahmed Zaki Yamani;
Hamad Al Husaini;
Zahir Kazmi;
Mohamed Al Mushayt;

¹ See MDL Doc. Nos. 915, 918, 932, 1466, 1506, 1510, & 1677-78.

² See MDL Doc. No. 2148-2.

Khalid Al Rajhi;
Alfaisaliah Group (a/k/a Faisal Group Holding Co.);
Al Aqsa Islamic Bank;
Binladin Group International;
Mohammed Binladin Company; and
Mushayt for Trading Establishment,

are dismissed **WITH PREJUDICE** in all cases in this Multi-District Litigation. The Court further finds, pursuant to Federal Rule of Civil Procedure 54(b), that there is no just reason for delay in the entry of a final judgment with respect to the claims and defendants noted above. The Clerk of the Court is accordingly directed to prepare and enter a final judgment consistent with this Order.

Dated: July ____, 2009
New York, New York

Honorable George B. Daniels
United States District Judge

EXHIBIT "C"

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May 22, 2009

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BY FACSIMILE

The Honorable Frank Maas
United States Magistrate Judge
United States District Court for the
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 740
New York, NY 10007-1312

Re: *In re Terrorist Attacks on September 11, 2001*, MDL 03-1570 (GBD)(FM)
This document relates to: All Cases

Dear Judge Maas:

On behalf of defendant, The National Commercial Bank ("NCB"), I am writing to advise Your Honor of the recent decision of the Supreme Court of the United States in *Ashcroft v. Iqbal*, 556 U.S. ___, 2009 WL 1361536 (May 18, 2009), which reversed a decision of the United States Court of Appeals for the Second Circuit. NCB respectfully submits that the *Ashcroft* decision prohibits any reliance on the *Federal Insurance* plaintiffs' factually implausible and conclusory allegations against NCB as a basis for authorizing their jurisdictional discovery requests. I did not have the opportunity to read the *Ashcroft* decision before the May 19 conference at which the *Federal Insurance* discovery requests were discussed.

In *Ashcroft*, the Supreme Court held that Fed. R. Civ. P. "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at *13 (emphasis added). Sensitive to the "burdens of discovery," the Court in *Ashcroft* made clear that its earlier decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies to all types of legal claims and requires that, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at *12 (quoting *Twombly*, 550 U.S. at 570). As the Court explained:

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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. ...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.’” ... Determining 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. But where the well-pleaded facts do not permit the court to infer more than the possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.” In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. 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. at *12-*13 (emphasis added) (citations omitted).

The Supreme Court also rejected the argument that allegations of intent can be made in conclusory fashion, noting that “the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual content.” *Id.* at *17. Dealing there with “discriminatory intent,” the Court held that Fed. R. Civ. P. “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.” *Id.*

Both in our May 14, 2009 letter to Your Honor, and during the May 19, 2009 discovery conference, NCB contended that: for the same reasons that Your Honor previously held as to the *Burnett* and *Ashton* plaintiffs (under pre-*Twombly* standards), the *Federal Insurance* plaintiffs’ conspiracy-jurisdiction allegations concerning NCB are “conclusory” and “fail[] to make a prima facie showing of conspiracy” with the al Qaeda attackers; the extrinsic factual record nonetheless trumps mere allegations, and forecloses any good faith factual basis for the *Federal Insurance* plaintiffs’ conspiracy-jurisdiction theory; and *Terrorist Attacks III* in any event forecloses the legal sufficiency of that theory. The *Federal Insurance* plaintiffs contended that their discovery requests could rely solely on the

¹ *In re Terrorist Attacks on September 11, 2001*, 440 F. Supp. 2d 281, 285 (S.D.N.Y. 2006) (Maas, U.S.M.J.) (“Discovery Order”). “The plausibility standard applicable to a Rule 12(b)(6) motion is, of course, distinct from the *prima facie* showing required to defeat a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.” *Arar v. Ashcroft*, 532 F.3d 157, 174 (2d Cir. 2008), *reh’g en banc granted* (Aug. 12, 2008). In evaluating the plaintiffs’ conspiracy allegations, the Court’s June 2006 Discovery Order relied on both Rule 12(b)(2) and Rule 12(b)(6) principles as they had been applied by Judge Casey in *Terrorist Attacks I*. See Discovery Order, 440 F. Supp. 2d at 286-87.

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conspiracy-jurisdiction allegations concerning NCB in their First Amended Complaint and RICO Statements, and that their jurisdictional theory was consistent with *Terrorist Attacks III*.

In light of *Ashcroft*, NCB respectfully submits that, even if the *Federal Insurance* plaintiffs could rely exclusively on their own allegations against NCB (rather than extrinsic facts) as a basis for their discovery requests, those allegations do not meet the plausibility standards of *Ashcroft* and *Twombly* because they are: (i) wholly conclusory in alleging NCB's intent to support al Qaeda's attacks on the United States; (ii) factually-discredited (e.g., the alleged Saudi government "audit" of NCB transfers and contributions to charities, and Yassin's Kadi's alleged employment by NCB); (iii) facially inapplicable to NCB (e.g., the OFAC sanction of Kadi); (iv) legally immaterial under *Terrorist Attacks III* (e.g., the Cannistraro "channel" claim); or (v) fanciful (e.g., the allegation that, decades after the 1950s founding of NCB (*Fed. Ins.* 1st Am. Compl. ¶ 285), Kadi and Khalid Bin Mahfouz "formed" NCB as an "offshoot" of Muwafaq (MDL Dkt. 1710 at p. 23)).

Under the plausibility standards of *Ashcroft* and *Twombly*, the *Federal Insurance* plaintiffs' conspiracy-jurisdiction allegations against NCB at the very most raise only the "mere possibility of misconduct," and therefore cannot "unlock the doors of discovery" with respect to those allegations. Moreover, we respectfully submit that the most efficient way to test the plausibility of those allegations under *Ashcroft* and *Twombly*—as well as their legal sufficiency under *Terrorist Attacks III*—is to complete the briefing of NCB's renewed motion to dismiss promptly, and without further jurisdictional discovery.

Respectfully submitted,



Mitchell R. Berger
Counsel for Defendant
The National Commercial Bank

cc: The Honorable George B. Daniels
All Counsel

Statement of Senator Cornyn

This Committee should be exploring ways to reduce the incidence and costs of frivolous litigation. Instead, today we are discussing whether to make it easier to file frivolous suits. This is regrettable. We should not be holding this hearing. Far from "limit[ing] Americans' access to courts," the Supreme Court's decisions in the *Iqbal* and *Twombly* cases upheld the unremarkable principle that plaintiffs should not be able to sue somebody unless they have a plausible factual basis for doing so.

The decisions were correct and consistent with longstanding case law. They stand for the simple proposition that you have to have a reason to sue somebody. This is common sense to everybody but a handful of left-wing special interest groups.

Seeking to reverse these common-sense decisions, Sen. Specter has introduced S.1504, the Notice Pleading Restoration Act of 2009. This bill is premature and unwise. At best, the bill is premature—it seeks to reverse a Supreme Court case that was released just over 6 months ago and that is only starting to be applied. The Judicial Conference is carefully studying the effect of these cases on pleading standards, and if any changes are needed, they should be based on the considered, studied judgment of the Judicial Conference pursuant to the Rules Enabling Act.

But we know that the Specter bill would make it easier for trial lawyers to file frivolous lawsuits without a factual basis, and easier for suspected terrorists to sue American military and law enforcement officials.

The Specter bill would make it easier than it has ever been to file a frivolous lawsuit. Only frivolous lawsuits are affected by the *Iqbal* and *Twombly* decisions. If a plaintiff cannot even articulate facts that, if true, would plausibly establish liability, then the plaintiff should not be allowed to waste the time and money of the court and the defendant in onerous and frivolous litigation.

Plaintiffs' lawyers would prefer to be able to bring a lawsuit even without a factual basis. If they can merely survive a motion to dismiss, then trial lawyers can compel defendants to engage in the costly discovery process in the hopes of happening upon a plausible legal theory, or extracting a settlement from a defendant who would rather make the frivolous case go away than go to the expense of defending it.

As a former Texas District Court judge and Supreme Court justice, I strongly believe that our courts exist to right wrongs, not to empower trial lawyers to conduct unfounded fishing expeditions or extract nuisance-value settlements. If plaintiffs cannot articulate the wrong that was committed against them, then they should not be able to exploit the civil justice system for profit. Lawsuits without a factual basis benefit nobody but the trial bar, and should be dismissed.

But worse than encouraging frivolous lawsuits, the Specter bill would also make it easier for our enemies to sue military, law-enforcement, and administration officials for carrying out their official duties. The *Iqbal* case to which the Specter bill is a response was an attempt by a Pakistani suspected terrorist to sue Attorney General John Ashcroft and FBI Director Robert Mueller. Javid Iqbal was arrested in New

York shortly after the 9/11 attacks on criminal charges to which he pleaded guilty. He was determined by the FBI to be "of high interest" in the 9/11 investigation. After he was cleared of involvement in the 9/11 attacks and returned to Pakistan, Iqbal sued 34 current and former federal officials alleging that they had discriminated against him based on his race, religion, and national origin. Iqbal sued Ashcroft and Mueller despite that he did not cite any facts that could plausibly support the conclusion that they had impermissibly discriminated against him. Iqbal's claims lacked a basis in fact, and they were rightly rejected by the Supreme Court.

The natural effect of the Specter bill's overturning the *Iqbal* decision would be that, in the future, terror-suspect detainees could more easily sue top-level law enforcement and administration officials for detaining them. The Specter bill would make these cases very difficult to dismiss. At a time that the administration is pursuing an ill-conceived strategy of giving foreign terrorists access to domestic courts for their criminal trials, the Specter bill would compound this error by giving terrorists access to domestic courts to bring frivolous civil suits as well. I find this unfathomable and unjustifiable.

I will oppose the Specter bill, and regret that it is receiving a hearing in this Committee.

WRITTEN STATEMENT OF STEVEN P. CROLEY
HEARING OF THE COMMITTEE ON THE JUDICIARY
“HAS THE SUPREME COURT LIMITED AMERICANS’ ACCESS TO COURTS?”
UNITED STATES SENATE
DECEMBER 2, 2009

Chairman Leahy, Ranking Member Sessions, and Committee Members:

Thank you very much for the opportunity to provide written testimony to the Committee in connection with today’s hearing.

My name is Steven Croley. I am a Professor of Law at the University of Michigan Law School, and a graduate of the University of Michigan (A.B.), the Yale Law School (J.D.), and Princeton University (Ph.D.). I teach and conduct research focusing on administrative law, civil procedure, and related subjects. I have also represented many parties, plaintiffs and defendants, in federal court. My current research examines how the rules of civil procedure, including rules of pleading, encourage and/or discourage litigation brought by deserving and undeserving litigants. My testimony will address these same issues, with the aim of putting the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) in larger perspective.

Access to Courts as a Requirement of Civil Justice

To begin with a simple but important observation, courts cannot administer justice on their own. Rather, they do so only when prompted by litigants before them. In other words, courts need litigants to mobilize them. And litigants need courts as well, for only courts can provide the legal remedies sought by those who have suffered a legal wrong. This simple

truth carries important implications: If courts are *not* accessible, then legal wrongs cannot possibly find remedy. The quality of the civil litigation system therefore depends on potential litigants' ability to bring their claims to court, not just for their own sake, but to ensure the enforcement of legal rights, duties, and obligations more generally.

The quality of the civil litigation system depends on more than access to courts, however, though access is fundamental. A well working litigation system must also reliably distinguish weak and strong legal claims. That is, access to the courts is important only insofar as deserving litigants generally prevail, and undeserving litigants do not. And—crucially—the system must be able to distinguish strong and weak claims at a reasonable cost. For example, if defendants must spend inordinate resources to vindicate themselves against plaintiffs bringing claims lacking merit, then the system fails for that reason.

To put this point differently, courts must be accessible both to plaintiffs who would file claims in good faith, but also to defendants to allow them to avoid liability where the facts and law warrant, and at reasonable cost. If defendants cannot defeat weak claims at a reasonable cost, then *they* lack access to justice. In short, “access to courts” is a bilateral proposition. At the same time, though, ensuring that defendants also have access should not mean that good-faith plaintiffs are effectively prohibited from airing their claims in the first place. Discouraging meritless lawsuits should not come at the expense of discouraging legitimate suits by good-faith plaintiffs. Sensible balance is required. It is also feasible.

With that in mind, more can be said about what kinds of civil litigation should be discouraged and, where filed, stopped early in the litigation process. While access to justice is a necessary condition of a well-

working civil justice system, that does not mean that the more access, the better. For example, the litigation system should discourage “nuisance” suits—brought by plaintiffs in bad faith to extract undeserved settlements from defendants, where the costs of settlement are, given high litigation costs, lower than the cost defendants would likely incur were they to litigate and prevail. The system should also deter “lottery” litigation, brought by plaintiffs with knowingly weak claims who hope to prevail, notwithstanding the weakness of their claims, due to mistakes by courts and juries. The rules of procedure should discourage other types of bad-faith and frivolous litigation as well, again without simultaneously discouraging good-faith claims by those who reasonably believe they have suffered legal harm.

The Performance of the Civil Litigation System

According to influential images of the civil litigation system, the system is indeed overrun with nuisance cases, lottery litigation, and frivolous claims. It is a system, according to some, overpopulated by undeserving litigants, avaricious lawyers, unscrupulous experts, and unpredictable juries. Critics of civil litigation paint a picture also marked by excessive costs, long delays, and exorbitant damage awards. On this view, plaintiff’s lawyers frequently file meritless claims on behalf of clients who suffered no genuine legal harm, or grossly exaggerated harm, or even harm entirely of their own doing. They file such claims sometimes aiming to force defendants to settle rather than pay the high costs of defending the litigation, even though the defendants would almost certainly prevail—given the weakness of the lawsuit—were they to litigate all the way. Or, such bad-faith plaintiffs file hoping to fool juries, who may be unduly sympathetic to

an apparently injured plaintiff, and/or led to believe the plaintiff's claim has real merit thanks to testimony by a so-called "expert" who strains the truth.

All too often, according to conventional wisdom, this kind of litigation succeeds. Thus plaintiffs very frequently prevail in civil litigation, which has the effect of encouraging even more parties to file suit. In addition, juries routinely render high damage awards, often including punitive damages, not justified by any genuine harm. Given the frequency of unjustified awards to undeserving litigants, then, defendants have incentives to settle cases to avoid the risk of high damages. This state of affairs is not only unfair to civil defendants, which it is, but harmful to society at large. For excessive civil litigation ultimately leads to higher product prices, more expensive medical care, less innovation, and a drain on the U.S. economy. And although tort litigation is often mentioned as emblematic of what is wrong with the civil litigation system, this picture of litigation also extends to consumer suits, securities suits, civil rights litigation, environmental litigation, and intellectual property litigation, among other types of civil litigation.

If this familiar image of the civil litigation system truly reflects reality—if civil plaintiffs and their lawyers do routinely recover large and underserved damages—then there may be many reasons to restrict access to the courts, including through stricter pleading rules as adopted by *Twombly* and *Iqbal*. By the same token, if unscrupulous litigants routinely abuse the civil justice system by extracting undeserved settlements from defendants who settle bad claims in order to avoid the higher litigations costs necessary to defeat bad claims, then again reducing access through higher pleading standards may be a welcome reform. Better to limit access than to maintain pleading rules that reward the undeserving.

On the other hand, if common complaints about the excesses of civil litigation are grounded more in myth than in fact, then changes creating barriers to the courts are unjustified. Similarly, if some types of plaintiffs find too little access to the courts already, then across-the-board reforms further discouraging litigation may make bad matters worse. Sensible civil litigation reform thus requires careful consideration of what kinds of civil cases are in fact brought, how often, and with what results.

With that in mind, the available data about civil litigation do not vindicate the familiar view that the system is plagued by excessive litigation. Over recent years, the federal courts have seen between 253,000 and 282,000 annual cases, according to the Administrative Office of the U.S. Courts. Roughly 50,000 of those cases a year are torts cases, with significant annual variation, while 30,000 to 40,000 civil rights cases and some 2,000 to 3,000 annual class actions. The courts are not overrun.

Common claims about the frequency of plaintiff verdicts and high damage awards are not supported by available evidence either. First of all, claims about errant juries providing undeserved damage awards are not relevant to most litigation given that only approximately 3% of all civil cases are tried. By far most cases (in both federal as well as state courts) are resolved either by settlement (approximately 1/3), or by dismissal upon initial motion or at summary judgment (a majority), while a much smaller percentage are dismissed due to abandonment or default. There are variations across types of civil litigation. For example, in civil rights cases more than one-third settle, and a slightly higher percent—4% to 8%—are tried. But a trial rate of 2% to 4% is by many accounts a fair estimate across all types of civil litigation.

Moreover, in the rare cases that proceed to trial, plaintiffs lose about as often as they prevail, again with variation across type of civil case. Taking all types of civil cases together, among cases that proceed all the way to trial, plaintiffs prevail about 50% to 55% percent of the time, according to data provided by the Bureau of Justice Statistics.¹ In tort cases specifically, plaintiffs prevail about 50% of the time, a success rate stable over recent decades, whereas plaintiffs prevail 62-65% of the time in contracts cases (in which businesses rather than individuals are often plaintiffs) and 32-38% of the time in property cases. Plaintiff trial success rates vary according to type of tort or contracts case, however. Plaintiffs in automobile cases prevail about 60% of the time, and in intentional tort cases about 57% of the time. In products liability cases, in contrast, plaintiffs prevail at trial 38-39% of the time, and in medical malpractice cases 23-27% of the time. Looking at federal cases only, plaintiffs prevail about 27% of the time in products liability cases, and 40% of the time in medical malpractice cases according to the Federal Judicial Center Integrated Database. Among contracts cases, plaintiff sellers prevail 76-77% of the time, whereas plaintiff buyers prevail 57-62% of the time. Among all contracts plaintiffs, those bringing a mortgage foreclosure case are most likely to prevail, 73-85% of the time, and those bringing an employment discrimination claim sounding in contract the least likely, 41-44% of the time. According to the Administrative Office of the U.S. Courts, civil rights plaintiffs prevail less often than not, 26-35% of the time, with some minor variation depending upon the type of suit (employment versus housing versus voting).

¹ These percentages and those that follow are taken directly from the Bureau of Justice Statistics (BJS), including BJS's 1991, 1996, and 2001 Reports, unless indicated otherwise.

Although plaintiffs do not always prevail at trial, if they nevertheless typically see unjustifiably large verdicts when they do win, high verdicts could encourage excessive litigation even though plaintiffs often lose; the possibility of an exorbitant award might justify the costs and uncertainties of litigation even by parties with weak claims.

The evidence on damage awards shows, however, that awards are on the whole modest. For example, the median tort damage award in state courts for 2001 was \$27,000, while the median contracts award was \$45,000. Here again, there is substantial variation across type of case, though more across torts than across contracts cases. For instance, the median award for automobile cases was \$16,000, while that amount was \$60,000 for slip-and-fall cases, \$311,000 for products liability suits, and \$422,000 for medical malpractice claims. In federal courts, the median damage award among all tort plaintiffs is higher (as would be expected given amount-in-controversy jurisdictional limitations), but the median award for certain types of tort cases is lower in federal court as compared to state court. For example, in 1996 the median tort damage award in cases where plaintiffs prevailed (46% of the time that year in federal court versus 48% of the time in state court), was \$139,000 in the federal system versus \$31,000 in the state system, while the median medical malpractice award was \$252,000 in federal court versus \$286,000 in state court. Among civil rights plaintiffs, the Administrative Office of the U.S. Courts reports the median award for plaintiffs receiving any damages was, for example, \$155,000 for 2005 and \$150,000 for 2006 (for those same years, prevailing plaintiffs received damages, as opposed to only declaratory or injunctive relief, in 74% (2005) and 79% (2006) of cases). Over the past seventeen

years, median awards for civil rights plaintiffs that prevailed at trial and received damages ranged from \$62,000 to \$184,000.

These median figures include punitive damages, if any, awarded to civil plaintiffs. But again, the possibility of huge punitive damages might encourage excess litigation requiring defendants to incur socially wasteful litigation costs. That is, if some plaintiffs receive “blockbuster” punitive awards, that might motivate undesirable litigation (though blockbuster awards would raise median figures meaning that in cases with no punitive awards the median awards are less).

Yet, punitive damage awards are infrequent and, with rare exceptions, small. According to Bureau of Justice Statistics data, in 1992 punitive damages were awarded in only 6% of all cases in which plaintiffs prevailed at trial. The frequency of punitive awards in more recent years is comparable. For 2001, only 5.3% of all prevailing torts plaintiffs received a punitive award, while 5.8% of prevailing contracts plaintiffs and 2.0% of prevailing property plaintiffs received punitive damages. Within sub-categories of cases, however, the frequency of punitive awards varies as well. Prevailing plaintiffs in intentional torts cases received punitive damages over one-third of the time (36.4%), but only 2.0% of the time in products liability cases and 4.9% of the time in medical malpractice cases.

Nor are punitive damages on the whole high. For 2001 (BJS data), the median punitive award in all general civil cases, where a punitive award was made, was \$50,000. That figure was \$25,000 for all tort cases combined, and \$83,000 across all contracts cases. Among types of tort cases, the median punitive award in cases where punitive damages were awarded was \$150,000 for products liability cases and \$187,000 for medical malpractice cases. With respect to the variance of awards, among all

prevailing plaintiffs who received a punitive award, 24% received an award over \$250,000, while 12% received an award over \$1 million. These BJS data comport with other comprehensive studies of punitive damages (e.g., Daniels & Martin (1990); Koenig & Rustad (1993); Viscusi (2004)).

Improving the Civil Litigation System

While many of the most familiar criticisms of the civil justice system are not supported empirically by plaintiff success rates or damage awards, the system should not be idealized or romanticized. Sometimes damage awards seem disproportionate to the injury a party has suffered, and some lawsuits should never be brought. At the same time, however, plaintiffs are sometimes under-compensated, and some plaintiffs lack access to the courts even though they would have valid claims. The civil litigation system could therefore be improved, in the name of reducing litigation costs *and* providing greater access to courts. Further, policymakers should move beyond the trial-lawyers-versus-doctors debate. The question is not whether the system should be improved—it should—but rather in what ways and through which institutional channels.

Protecting access to the courts for good-faith litigants, while discouraging bad-faith or otherwise undeserving litigants, can be accomplished by placing more of the costs of litigation on those who knowingly advance weak claims (and defenses). In other words, sound civil litigation reform aims to filter bad-faith litigants, but only them, out of the system. Targeted reform is desirable. Wholesale change that makes litigation more difficult even for plaintiffs who bring claims in good-faith, and even in types of civil cases where there is little reason to worry about excess litigation, is undesirable. By impeding access to justice for deserving

and undeserving litigants alike, such reforms undermine enforcement of the law's obligations.

To substantiate (very briefly here) my suggestion that targeted rather than wholesale reform is achievable, courts can use Rule 11 of the Federal Rules of Civil Procedure to discourage frivolous claims and defenses. For another example, Rule 54 should be amended so that courts apply it more often (Rule 54 is currently under-utilized), but in cases where judges determine that, in the retrospective light of a given case, parties have litigated in bad faith. Rule 68 too could be amended to discourage parties from litigating beyond the point where the costs of litigation exceed the benefits. Rule 68 is also under-utilized, and should be available to plaintiffs as well as defendants, and should be available to defendants where plaintiffs lose outright at trial (rather than only when plaintiffs prevail at trial but recover less than the defendant's offer). For another example, Rule 12 should be amended to provide a new subsection allowing for early dismissal of facially frivolous cases. Beyond the rules of procedure, more structural reform is also feasible. Just for instance, federal courts (and state bars) should have frivolous litigation panels to sanction parties who bring claims or defenses in bad faith. The important point, however, is that there are many potential ways in which undeserving parties bringing baseless claims can be deterred from litigating, without imposing new pleading requirements that make litigation more difficult for plaintiffs across the board.

Bell Atlantic Corp. v. Twombly (2007) and Ashcroft v. Iqbal (2009)

The Supreme Court's decision in *Twombly*, as extended in *Iqbal*, instead adopted wholesale change in civil pleading rules, and without careful investigation of the necessity for across-the-board change. Rather, the Court

casually assumed that plaintiffs often state claims without factual basis, and that litigation subjects defendants especially to the burdens of civil discovery. Yet the premise that higher pleading requirements are necessary because plaintiffs regularly state claims without factual basis, and the idea that defendants but not plaintiffs bear most burdens of discovery, did not rest on or follow any study, report, or empirical finding concerning abusive or excessive litigation.

There is, moreover, an important flaw in the Court's implicit argument: Litigation costs, and the costs of discovery in particular, are not borne only or even primarily by defendants. Rather, plaintiffs (and their attorneys) bear them as well. Thus, if discovery is necessary to identify specific facts supporting an allegation, plaintiffs, as well as defendants, must and do incur the expenses of expert witnesses, depositions, document review, motion practice, and all the other costs associated with discovery. This is a burden that plaintiffs and their attorneys are likely to bear only when they believe that they have a substantial chance of success. Incurring the costs of litigation to advance a meritless claim is not rational (and irrational litigants are not likely to be discouraged by new pleading standards).

Nor do high litigation costs make it easy for plaintiffs to extract undeserved settlements. For plaintiffs cannot induce defendants to settle weak claims by threatening to litigate further, unless that threat is credible. But given that plaintiffs must bear high litigation costs too, it is not clear that the threat of litigating a weak claim is highly credible. Why would a defendant settle an obviously weak claim, when the bluffing plaintiff too faces the prospect of expensive discovery? Although the Bureau of Justice Statistics, the Administrative Office of the U.S. Courts, the National Center

for State Courts, and other bodies assemble useful data on cases litigated to trial, comparable settlement data are nowhere available, in part due to the confidentiality of many settlements. Thus, the frequency of nuisance settlements is not empirically substantiated.

Furthermore, defendants are just as capable of using the costs of litigation to force plaintiffs with strong claims to accept low settlements or bear the higher costs of litigating to the end. Thus the nuisance claim has an analogue in the “nuisance defense,” a defense stated by a defendant knowing that it has little merit but knowing that it will cost the plaintiff significantly to overcome it. Defendants as well as plaintiffs also engage in lottery litigation, defending the indefensible on the hopes of victory where the stakes are high. In short, the costs of discovery do not affect defendants alone. To the contrary, the high litigation costs also discourage plaintiffs from fully advancing good-faith and meritorious claims. Yet affirmative defenses can simply be pled in most abbreviated “conclusory” form, without being supported—again in the terms of *Twombly-Iqbal*—with “enough heft” to make them “plausible” on the surface. The justification for this asymmetry between the pleading requirements for plaintiffs and defendants is not apparent.

In any case, the global pleading reforms *Twombly* and *Iqbal* wrought cannot be justified on the grounds that so much litigation is unmerited and wasteful that all plaintiffs, in all types of civil cases, should be required to satisfy heightened pleading standards. As I have explained, the available empirical evidence shows that trials are rare, plaintiffs often lose, most damage awards are not exorbitant, and punitive damages are rare. Given the best available evidence about how most civil cases are resolved, there is no reason to believe that the litigation system is overrun with meritless suits.

To be sure, it is too early to say for certain how great the effects of the new *Twombly-Iqbal* standards will be. Although *Twombly* and *Iqbal* will make civil litigation more difficult for plaintiffs, the magnitude of that effect has yet to be measured. The point remains, however, that exacting pleading standards should not be viewed as a welcome development because the civil litigation system is plagued by meritless claims, or because defendants alone bear the costs of litigation, or because those costs work to the disadvantage of defendants and not plaintiffs.

A final point warrants consideration here. The pleading changes ushered by *Twombly* and *Iqbal* will, over time, likely manifest themselves in the state systems. That is to say, the development of state rules of civil procedure tends to follow the development of the federal rules. Thus, where these new standards result in undesirable barriers to good-faith litigation by deserving plaintiffs, that unfortunate result will be leveraged at the state level. That is another reason for cautious, targeted reform, and a strong argument against wholesale reform that rests on exaggerated critiques of the civil litigation system. At the least, the Supreme Court's incidental adoption of elements of a critical general picture of the civil justice system is not supported by the best relevant data about litigation outcomes. Thus the downside of ad hoc rather than evidence-based global reform.

* * *

Thank you again for the opportunity to provide testimony to the Committee.

Steven P. Croley
Professor of Law



Cornell University
Law School

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November 23, 2009

The Honorable Patrick J. Leahy, Chair
The Honorable Arlen Specter
The Honorable Sheldon Whitehouse
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Leahy, Specter, and Whitehouse:

I am writing regarding the hearing scheduled for December 2, 2009, on the following question: "Has the Supreme Court Limited Americans' Access to Courts?" The answer is clearly yes. The only real question is what Congress should do in response.

I have been teaching civil procedure and federal jurisdiction at the law schools of Rutgers University, Columbia University, and Cornell University for over seventeen years. During that time, I have also represented both paying and pro bono clients in federal court litigation. Based on my knowledge of and experience with the Federal Rules of Civil Procedure, I can say that the changes wrought by the recent two Supreme Court decisions that have occasioned the coming hearing--*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)--are nothing short of revolutionary. Since their adoption in 1938, the Federal Rules have been universally understood to establish a system of "notice pleading," in which pleadings simply serve to place opposing parties and the court on notice of the nature of the plaintiff's case, with merits decisions on questions of contested fact to follow discovery.

Although the Supreme Court's rulings in *Twombly* and *Iqbal* formally pay lip service to the notion of notice pleading, in substance they discard it. By requiring federal district judges to dismiss complaints that contain "conclusory" or "implausible" allegations, *Twombly* and *Iqbal* demand the impossible: Judges must now make determinations about what events are likely to have occurred before the parties have presented any evidence--indeed, before the parties have even had an opportunity to develop their evidence through discovery.

Let me be clear that I do not have a political ax to grind. I acknowledge that there are tradeoffs between a system of liberal notice pleading and a system of more demanding "fact pleading." Liberal notice pleading ensures that plaintiffs with meritorious, but difficult to prove, cases have an opportunity to avail themselves of discovery in order to obtain the evidence they need. However, notice pleading also permits some plaintiffs with non-meritorious or even frivolous claims to impose potentially large discovery costs on defendants, thus inducing some of those defendants to settle the litigation for its nuisance value. Conversely, the stricter regime of *Twombly* and *Iqbal* reduces the damage that can be done by frivolous suits, but it also prevents some plaintiffs with meritorious claims from ever having their day in court.

If Congress or the Rules Advisory Committee were writing on a clean slate, it would be appropriate to attempt to weigh the costs and benefits of looser or tighter pleading standards. However, for three inter-related reasons, that sort of *a priori* cost-benefit analysis is inappropriate here.

First, the Supreme Court lacked the legitimate authority to change the pleading standard. Under the Court's own precedents, when interpreting the Federal Rules, its job is to effectuate the language and policy of those Rules, rather than to substitute its own policy judgment. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Congress has sometimes made the policy judgment that the particular combination of costs and benefits in some area of law call for a heightened pleading standard, as in the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b)(1). But absent guidance from Congress, the Court has no business re-weighing the pros and cons of liberal versus restrictive pleading rules.

Second, no one—not the Court, the Rules Advisory Committee, or Congress—is writing on a clean slate. Notice pleading is simply one piece of the overall civil litigation system in the federal courts. It is designed to work with the rest of the rules, including Rule 11, governing sanctions for improper filings, and Rules 26 through 37, governing discovery. The Rules as a whole presume that merits decisions in cases of disputed facts will occur only after a fair opportunity for discovery. Even when Congress has supplanted the notice pleading default, as it did in the PSLRA, it has been careful to adopt a standard—the specificity of the factual allegations—that a court can apply from the face of a complaint. By contrast and as noted above, the Court's "plausibility" standard makes no sense for district judges who have not yet heard any evidence.

Third, if it ain't broke, don't fix it. Neither the Supreme Court in its recent decisions nor any credible commentator has cited evidence that the traditional regime of notice pleading has led to systematic abuses that cannot be handled through the Rules Advisory Committee process. Over the last three decades, the Rules Advisory Committee has repeatedly studied allegations of discovery abuse. It has responded forcefully with extensive changes that have been working well. The Rules Advisory Committee did not propose the changes wrought by *Twombly* and *Iqbal* because it did not think them necessary or useful.

Accordingly, I urge you to reinstate the notice pleading standard as it existed before *Twombly* and *Iqbal*. There are many different ways this can be accomplished. Perhaps the simplest would be a statute providing that neither a complaint nor an answer which otherwise satisfies the requirements of Rule 8 shall be dismissed on the ground that it is "conclusory" or makes "implausible" factual allegations. The supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072(b), would remain in effect so that the Rules Advisory Committee could, pending further study, tinker with the pleading standard should evidence emerge that the costs of notice pleading substantially outweigh the benefits.

Whether Congress uses the foregoing approach or one of the alternatives currently under consideration, the important thing is to roll back the illegitimate, incoherent, and ill-advised changes wrought by the Supreme Court in *Twombly* and *Iqbal*.

Respectfully yours,



Robert S. Stevens Professor of Law
Cornell University Law School

HEARING ON NOTICE PLEADING

Senate Committee on the Judiciary

December 2, 2009

**Empirical Evidence Concerning Performance of
the Civil Justice System**

Prepared Testimony of:

Theodore Eisenberg

Henry Allen Mark Professor of Law & Adjunct Profess of Statistical Sciences

Cornell University

Draft of December 2, 2009

I am the Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell University. A biographical sketch and a C.V. are appended as an Appendix at the end of this prepared testimony. I will address issues raised by the instant hearings. My conclusions are summarized as follows:

Summary of Testimony

- Judicially created pleading rules that appear intended to restrict access to courts have no substantial basis in empirical reality. The United States is not the most litigious country and, consistent with this result, tort filings have declined over substantial periods in recent times.
- Concerns about increasing amounts of awards appear unfounded. Neither tort awards nor large class action settlements have shown any long-term increase in real dollars.
- Litigation-related behavior by large businesses is inconsistent with some expressed concerns about our civil justice system or jury performance. Sophisticated businesses that could avoid the civil justice system through *ex ante* agreements to arbitrate employ such agreements in a small fraction of their large contracts. Similarly, only a small minority of large businesses agree *ex ante* to waive their right to jury trial.
- A case study of punitive damages suggests that much of the state legislative reform effort in this area has been based on serious misperceptions about the civil justice system. Over a decade of empirical research indicates that punitive damages are rare and in line with compensatory awards. The United States Supreme Court has recently acknowledged that claims about a perceived problem with punitive damages awards have been exaggerated.
- Estimates of tort system costs supplied to Congress and the media are deeply flawed and provide no basis for sound policymaking.
- Enactment of restrictions on punitive damages without persuasive empirical data suggests that judicial efforts to curtail access to courts, and legislative initiatives relating to courts, should be based on solid empirical evidence rather than on unsubstantiated perceptions about the civil justice system.

I. Misperceptions About the American Legal System

In recent years, judicial decisions and federal and state legislation have relied on a view of the United States being an overly litigious society, with large and ever-increasing damages awards. Furthermore, businesses often are portrayed as being fearful of our civil justice system and especially fearful of having their behavior assessed by lay juries. This picture has rather little to do with what serious empirical scholarship about the legal system shows. The United States is far less litigious than is commonly believed and neither tort awards nor class action awards are constantly increasing. In addition, available evidence is that large businesses do not shun our civil liability system or juries.

A. Litigiousness

The United States is not as litigious as most people believe. Professor Patricia Danzon and colleagues found that “at most 1 in 10 negligent injuries results in a claim.”¹ Professor Deborah Hensler and colleagues report a low rate of claiming for various accident types.² The Harvard Medical Practice Study estimates “that eight times as many patients suffer an injury from medical negligence as there are malpractice claims.”³

In overall litigiousness, the United States is far from the leading countries. Professor Herbert Kritzer provides a useful summary of the evidence:

On the litigiousness issue itself, patterns are not as clear as the popular perception might suggest. In his study of law and disputes in Morocco, Lawrence Rosen observed that “one seldom meets an American who has been involved in an actual lawsuit and almost no Moroccan who has not.” My own comparative work on propensity to sue suggests that broad statements about differences in propensity have to be conditioned by the type of issue involved. While it may be the case that persons in the United States are more likely to bring claims and suits for personal injury, Britons may be equally likely to seek redress for consumer problems and perhaps more likely to pursue claims related to employment and rental residences. Finally, the most comprehensive effort to compile cross-national data on litigation rates [see Table 1] shows that the United

¹ Patricia M. Danzon, *Medical Malpractice: Theory, Evidence, and Public Policy* 23-24 (1985).

² Deborah R. Hensler, M. Susan Marquis, Allan F. Abrahamse, Sandra H. Berry, Patricia A. Ebener, Elizabeth G. Lewis, E. Allen Lind, Robert J. MacCoun, Willard G. Manning, Jeannette A. Rogowski & Mary E. Vaiana, *Compensation for Accidental Injuries in the United States* 121 (1991).

³ Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* 7-1 (1990).

States is not the most litigious nation, nor is the United States all that different from England and Wales.⁴

Table 1. Cases Filed Per 1,000 of Population

Country	Cases per 1,000 Population
Germany	123.2
Sweden	111.2
Israel	96.8
Austria	95.9
U.S.A.	74.5
UK/England & Wales	64.4
Denmark	62.5
Hungary	52.4
Portugal	40.7
France	40.3

Source. Christian Wollschlager, Exploring Global Landscapes of Litigation Rates, in *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag 587-88* (Jurgen Brand and Dieter Stempel eds., 1998).

To the extent judicial decisions or tort reform proposals are based on some notion that the United States is markedly more litigious than other leading industrialized countries, the empirical evidence does not support tort reform.

B. Case Filing Trends

Some efforts to restrict access to courts, through pleading or other rules, may be based on perceptions of ever-increasing filings and a mass of frivolous civil lawsuits. Yet available evidence suggests no recent, systematic trend of increased filings. And, to my knowledge, no persuasive systematic evidence exists about a mass of, or increasing number of, frivolous lawsuits.

With respect to case filings over time, the best available evidence comes from the National Center for State Courts (NCSC). The NCSC data show that, from 1997 to 2006, tort caseloads *declined* by 21%.⁵ During the same time period, medical malpractice claims declined by 8% and products liability claims declined by 4%.⁶ While year-to-year

⁴ Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 *Tex. L. Rev.* 1943, 1981 (2002).

⁵ National Center for State Courts, *Court Statistics Project, Examining the Work of State Courts*, 2007, at 17.

⁶ *Id.*

fluctuations are to be expected, the bottom line is that areas of civil justice of most concern show no real growth for large periods of recent years. Judicial holdings governing pleading rules, that seem designed to restrict access to court out of fear of too much litigation, appear to have no basis in empirical reality.

C. Award Trends

Some premise concerns about litigation or the need for tort reform on the need to control perceived ever-increasing tort awards. But empirical studies of litigation undermine this questionable perception.

Nicholas Pace, Seth Seabury, and Robert Reville of the RAND Institute for Civil Justice used data assembled by RAND to study the long-term trend in tort awards in the two major locales for which such data were available—San Francisco and Cook County. They reached a remarkable conclusion, published in the first issue of the *Journal of Empirical Legal Studies*. Tort awards over a 40 year period had increased *less* than real income. They wrote:

Our results are striking. Not only do we show that real average awards have grown by less than real income over the 40 years in our sample, we also find that essentially all of this growth can be explained by changes in observable case characteristics and claimed economic losses (particularly claimed medical costs). However, focusing on the average award masks considerable heterogeneity in the growth rates for different kinds of cases. In particular, we find that the average award in automobile cases declined after controlling for claimed medical costs, offsetting persistent and unexplained growth in the average awards for other tort cases. *In general, though, the growth (or decline) does not appear substantial enough to support claims of radically changing jury behavior over the past 40 years.* Rising claimed medical costs appear to be one of the most important factors driving increases injury verdicts.⁷

In April 2004, the Bureau of Justice Statistics issued a report on trial outcomes in 2001 for 46 of the largest counties in the United States. The vast majority of the counties in the 2001 data were the object of a similar BJS study covering fiscal year 1992 and calendar year 1996. The BJS found that, in real dollars, median tort awards had substantially declined since 1992.⁸ The median total award was \$33,000. In October 2008, BJS issued a more recent report on trial outcomes in 46 of the largest counties as well as

⁷ Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, *Forty Years of Civil Jury Verdicts*, 1 J. Empirical Leg. Stud. 1, 3 (2004) (emphasis added).

⁸ Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 2001* (April 2004).

on 110 smaller counties.⁹ Its conclusions about time trends in damages awards in the largest counties are noteworthy and signify no significant, consistent long-term increase in damages awards.

When adjusted for inflation, the median damages awarded in general civil jury trials declined from \$72,000 in 1992 to \$43,000 in 2005, a decrease of 40% For tort jury trials, the median damages declined by about 50% from \$71,000 to \$33,000 during the 1992 to 2005 period. The reduction in jury awards for tort trials can be attributed mostly to the decline in median damage awards in automobile accident trial litigation. From 1992 to 2005, the median awards in automobile accident trials declined by almost 60%, from \$41,000 to \$17,000. Since automobile accident cases accounted for approximately 64% of tort jury trials with plaintiff winners, these cases drove the overall tort award trend . . .¹⁰

The BJS studies' findings are consistent with the major time-trend findings by the RAND researchers. A study of class actions also found no evidence that class recoveries have increased over a recent last decade.¹¹

D. Businesses Who Could Do So Not Shun Our Civil Justice System or Juries

Large sophisticated businesses, when transacting with one another, are generally regarded as free to opt out of our civil justice system through *ex ante* contractual agreement to arbitrate. If large businesses regard the civil justice system as unpredictable or especially burdensome, one expects to observe that contracts between large business regularly contain *ex ante* arbitration clauses. Such clauses effectively enable contracting parties to avoid the litigation system. Similarly, if large businesses regard juries as especially unreliable, they would agree *ex ante* by contract to waive jury trials. Yet available evidence is that large businesses do not systematically flee the civil justice system and do not often agree to waive jury trials.

A study of over 2800 contracts, filed with the Securities Exchange Commission (SEC) in 2002 by public firms, examined the contracts for the presence of contract terms requiring arbitration.¹² Because these contracts are associated with events deemed material to the financial condition of SEC-reporting firms, they likely are carefully negotiated by

⁹ Bureau of Justice Statistics, *Civil Bench and Jury Trials in State Courts, 2005* (October 2008).

¹⁰ *Id.* at 10.

¹¹ Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 *J. Empirical Leg. Stud.* 27 (2004).

¹² Theodore Eisenberg & Geoffrey Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts*, 56 *DePaul L. Rev.* 335 (2007).

sophisticated, well-informed parties and thus provide presumptive evidence about the value associated with the availability of jury trials. Little evidence was found to support the proposition that large businesses routinely regard arbitration clauses as efficient or otherwise desirable contract terms. The vast majority of contracts did not require arbitration, with only about 11% of the contracts using arbitration to opt out of the civil justice system.

In addition, a minority of contracts, about 20 percent, waived jury trials.¹³ An additional nine percent of contracts had arbitration clauses that effectively preclude jury trials though the reason for arbitration clauses need not specifically relate to juries. The results suggest that, contrary to a widespread perception about the alleged inadequacies of juries in complex business cases, sophisticated actors may perceive that juries add value to dispute resolution.

II. Punitive Damages: A Case Study in Legislation Based on Misperception

Social scientific study of punitive damages since the 1980s reveals a pattern of rational jury decisions. The social science consensus is that, with rare exceptions, the system operates reasonably and the United States Supreme Court has recently taken note of this regularity.

A. Juries Rarely Award Punitive Damages But Do So More Frequently in Intentional Tort Cases

Juries infrequently award punitive damages. This is the consistent finding of more than a dozen studies of jury punitive damages awards in actual cases, including several multistate studies by government agencies (the U.S. Justice Department's Bureau of Justice Statistics ("BJS") in 2004, 2000, and 1995¹⁴ and the U.S. General Accounting Office ("GAO")),¹⁵ by prestigious, non-partisan research institutions (the American Bar

¹³ Theodore Eisenberg & Geoffrey Miller, Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts, 4 J. Empirical Legal Stud. 539 (2007).

¹⁴ BJS 2004, *supra* note 8; U.S. Dept. of Justice BJS Bulletin, Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties (1996), p. 1 (August 2000) (about three percent of plaintiff winners in tort trials were awarded punitive damages; median award was \$38,000); BJS Special Report, Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties (1995), p.1 (about six percent of plaintiff winners received a punitive award; median award was \$50,000).

¹⁵ U.S. GAO, Product Liability Verdicts and Case Resolution in Five States, GAO/HRD-89-90 (Sept. 1989) 24, 29 (punitive damages awarded in 23 of 305 cases decided in five states).

Foundation¹⁶ and the RAND Institute of Civil Justice),¹⁷ by Judge Richard Posner and Professor William Landes,¹⁸ and others.¹⁹ The infrequency of punitive awards is also a principal finding of five individual state and county level studies.²⁰

These empirical studies of actual cases further show that juries award punitive damages especially rarely in products liability and medical malpractice cases. In contrast, juries award punitive damages more frequently in intentional tort cases. That is both appropriate and expected because, as Professor Cass R. Sunstein (the lead author of the recently published compilation of some Exxon-funded research articles²¹) and numerous other scholars have noted, intentional torts merit greater punishment than unintentional

¹⁶ Stephen Daniels & Joanne Martin, *Civil Juries and the Politics of Reform* 214 (1995) (“punitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards”).

¹⁷ James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (RAND 1988) (“punitive damages were not paid on any of the 2,198 closed cases”); Erik Moller, *Trends in Civil Jury Verdicts Since 1985* 33 (RAND 1996) (“punitive damages are awarded very rarely”); Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (RAND 1987) (fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984).

¹⁸ William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 304-07 (1987) (“insignificance of punitive damages in our sample is evidence that they are not being routinely awarded”).

¹⁹ Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 *J. Legal Stud.* 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 *Cornell L. Rev.* 743, 745 (2002) [hereinafter “Eisenberg et al., *Juries & Judges*”]; Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 *Justice System J.* 21 (1993); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 *Rutgers L. Rev.* 975, 981-92 (1995) [hereinafter “Rustad & Koenig, *Reconceptualizing*”] (punitive damages rarely awarded in medical malpractice cases).

²⁰ For example, a recent Georgia study concludes, “punitive damages currently are not a significant factor in personal injury litigation in Georgia.” Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 *Ga. L. Rev.* 1049, 1094 (2000). A Florida study finds the frequency of punitive damages awards to be “strikingly low.” Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorum and in Reality*, 38 *Harv. J. Legis.* 487, 487 (2001). See also Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 *Minn. L. Rev.* 1 (1990) (two counties); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 *Ohio St. L.J.* 315, 388 (1999) (no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Neil Vidmar, *Medical Malpractice and the American Jury* 254 (1995) (two punitive awards in 1,300 North Carolina medical malpractice cases).

²¹ Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, *Punitive Damages: How Juries Decide* (2002).

torts and thus “provide particularly appropriate cases for punitive damages awards.”²² In summary, a broad social science consensus shows “a picture of reality quite different than the one portrayed” in tort reform proponents discussions.²³

B. Punitive Damages Awards Strongly Correlate With Compensatory Awards

On the infrequent occasions when juries do award punitive damages, the overwhelming evidence is that most such awards strongly correlate with compensatory damages in the same case. BJS data, GAO data, RAND data, and other data all reveal this correlation.

C. Independent Reviews of Punitive Awards Find Them to Have Been Appropriately Awarded

Independent analysts who review individual cases of punitive damages rarely find such damages to have been inappropriately awarded. Rustad and Koenig reviewed hundreds of medical malpractice cases covering three decades and concluded that “punitive damages were awarded in only the most egregious cases involving healthcare practitioners.”²⁴ These egregious cases not infrequently involve sexual contact between medical providers and their patients, including “predatory sexual assaults and abuses of transference techniques by medical personnel.”²⁵

Judge Posner and Professor Landes reached a similar conclusion after reviewing actual products liability punitive awards. They found “evidence of gross negligence or recklessness is plain” in eleven of thirteen cases surveyed²⁶ and concluded that “the cases as a whole are generally congruent with the formal legal standard for awarding punitive damages.”²⁷ Eisenberg et al., reviewing the most “disproportionate” punitive awards in the BJS data, found the awards to be warranted.²⁸ Thus, “extreme” awards should be studied

²² Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 *Yale L.J.* 2071, 2084 (1998). See, e.g., Landes & Posner, *supra* note 18, at 209; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869, 909 n.120 (1998).

²³ Daniels & Martin, *supra* note 16, at 238.

²⁴ Rustad & Koenig, *Reconceptualizing*, *supra* note 19, at 1027.

²⁵ *Id.* at 1034-35 (footnotes omitted).

²⁶ Landes & Posner, *supra* note 18, at 185.

²⁷ *Id.*

²⁸ Eisenberg et al., *Juries & Judges*, *supra* note 19, at 756.

and not simply dismissed as pathological: “[f]ollow-up study of the most extreme punitive-compensatory ratios suggests the distortion introduced by relying on extreme awards without further inquiry.”²⁹ Merely relying on headline-grabbing awards, without follow-up, to portray juries as erratic is not scientifically defensible.

D. The Supreme Court Recognizes the Empirical Consensus About Punitive Damages

In *Exxon Shipping Co. v. Baker*,³⁰ the Supreme Court acknowledged what virtually all methodologically sound punitive damages research shows. The Supreme Court that empirical studies undercut the most audible criticism of punitive damages and that no mass of runaway punitive awards existed.³¹

III. Questionable Estimates of the Cost of the Tort System

Congress and the media are regularly supplied with estimates of the cost of an important aspect of the litigation system, the tort system. Some reports (the “*Tort Cost Reports*”) seem to have strong publicity campaigns.³² But these reports provide no basis for sound congressional policymaking. Since the *Tort Cost Reports* make no effort to quantify the benefits of the tort or litigation systems, it is impossible for rational policymakers to act on the basis of the reports’ analyses even if its analysis of costs were correct. Even without considering the benefits of the tort system, however, the reports’ analysis of the tort system’s costs is sufficiently questionable to preclude reliance on them by Congress. The reports attribute a wide range of insurance costs fully to the tort system, mischaracterize what should count as true economic costs, and, as noted, fail to account at all for the tort system’s benefits.

A. The Unstated Premise: Tort Reform Will Reduce Insurance Rates

Perhaps most importantly, one of the *Tort Cost Reports*, that by Pendell and Hinton, bases its estimates of the tort system’s costs in part on the cost of insurance premiums.³³

²⁹ *Id.* at 755-56 (footnote omitted). For example, one case involved sexual abuse of a child by a sports coach. Similar examples were found by Vidmar & Rose, *supra* note 20, at 500-05.

³⁰ 128 S.Ct. 2605 (2008).

³¹ *Id.* at 2624.

³² Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update; Judith W. Pendell & Paul J. Hinton, Liability Costs for Small Business.

³³ Pendell & Hinton, *supra* note 32, at 9.

Yet the report provides no insight into the relation between the insurance industry's investment cycle and insurance premium costs. It is well known that insurance premiums respond in part to the yield on insurance companies' investments. In periods of declining interest rates, premiums may increase to offset reduced investment yields. The key point is that insurance premiums can increase for reasons other than increased loss claims. By measuring tort costs through insurance premiums, Pendell and Hinton are assigning to the tort system costs that need to be differently accounted for.

This is especially important because the *Tort Cost Reports* are interpreted by some to mean that tort reform promises reduced insurance rates. As noted, insurance rates fluctuate with investment yields. And, although some evidence links tort reform and declining insurance rates,³⁴ one also has reason to be skeptical.³⁵ For example, when Florida's insurance industry was offered a legislative package in which tort reform would be tied to forced reductions in insurance rates, it claimed that the tort reform law would reduce general liability insurance premiums by only one percent.³⁶ My study of tort reform provisions with Professor James Henderson shows little linkage between tort reform laws and declining awards.³⁷ And in the midst of yet another insurance crisis atmosphere, the director of government affairs for the Risk and Insurance Management Society, which generally supports tort reform, expressed concern about linking an insurance availability crisis and tort reform legislation.³⁸

B. Erroneously Attributing Insurance Payments to the Tort System

Pendell and Hinton attribute all insurance payments from a range of lines of insurance to the tort system. This approach assumes that all payouts under the insurance lines studied are attributable to the tort system. Under this view, no business or person would purchase insurance absent the tort system. This is questionable. The single largest

³⁴ Blackmon & Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks, in Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* 272 (P. Schuck ed. 1991); Moore, *Premium Problem*, *Nat'l L. J.*, Feb. 14, 1987, at 366, 368 (significant tort reform reduced insurance rates).

³⁵ Kriz, *Liability Lobbying*, *Nat'l J.*, Jan. 23, 1988, at 191, 192 (insurance officials say tort reform will not lower insurance rates); Moore, *supra* note 34, at 368 (When reform statutes were enacted, states wanted to know what rate reductions to expect. Insurers' answers were "at best incomprehensible and were never accompanied by any data."). Given the dominance of asbestos cases in products litigation, it would be helpful to see insurance company losses, volume, premiums, and profits stated with and without their asbestos experience.

³⁶ Moore, *supra* note 34, at 368.

³⁷ Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 *UCLA L. Rev.* 731-810 (1992) (figures 12, 13)

³⁸ Wasilewski, *Tort Reform: Courting Public Opinion*, 87 *Best's Rev. Prop.-Casualty Ins. ed.*, June 1986.

component of tort system awards is automobile cases, which account for an astonishing 61 percent of the total compensation paid in all tort claims, with and without lawsuits.³⁹ States *require* that drivers be insured. They do not require such insurance simply because a tort system exists. They require it primarily so that losses will be compensated, whether or not lawsuits are filed. Indeed, in the automobile field, two-thirds of the compensation paid is paid without the filing of a lawsuit.⁴⁰ To attribute this massive component of insurance payments to the tort system is questionable. There will be automobile insurance, or some similar mechanism with substantial costs, whether or not tort reform occurs.

Erroneously attributing the single largest component of insurance payouts to the tort system undermines the *Tort Cost Reports* accounting in another important respect. The reports attributes all insurance company overhead to the tort system. Yet the tort system is obviously not responsible for much of that overhead. There would be insurance companies without the tort system. This overhead charge to the tort system comprises about one-fifth to one-quarter of the tort cost estimates. Somehow the tort system is to be held responsible for the full compensation of insurance executives, many of whom would have to be paid even if the tort system were radically changed.

C. Misunderstanding the Tort System's Costs

The *Tort Cost Reports* cannot purport to be an accurate assessment of the tort system's costs because they treat all tort payments as costs to society. The substantial portion of every payment that goes to compensate losses is not a cost to society. It is a transfer payment by or on behalf of a wrongdoer to the victim. If a criminal defendant makes a restitution payment to a victim, no one would think of labeling that as a cost to society. The payment simply makes whole the loss to the victim. If a tortfeasor pays a wrongfully injured victim, that is not a cost to society. Nor is it viewed as a gain to the victim. Simple personal injury recoveries are not even taxed. There has been no accretion to wealth. Professor Marc Galanter has pointed out that "a significant portion of the wealth that flows through the litigation system is delivered to creditors and wronged parties who are entitled to compensation under the existing rules."⁴¹

Other studies suggest that liability insurance costs are modest. According to one study, the cost of products liability insurance premiums in 1993 was 13.5 cents per \$100 of retail sales, a nearly 50 percent reduction from 25.9 cents in 1987.⁴² A 1995 study of

³⁹ James S. Kakalik & Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation 36 (RAND 1986).

⁴⁰ *Id.*

⁴¹ Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 U. Md. L. Rev. 1093, 1141-42 (1996).

⁴² J. Robert Hunter, Product Liability Insurance Experience 1984-1993: A Report of the Insurance Group of the Consumer Federation of America (1995) (Exhibit A, col. N).

U.S. corporations found that total liability costs comprised 0.255% of total revenue or 25.5 cents of every \$100 dollars of revenue. The National Association of Insurance Commissioners similarly found that liability costs constituted 0.16% of retail sales in 1995.⁴³

D. The Failure to Account for the Benefits of the Tort System

While clearly getting the costs of the system wrong, the *Tort Cost Reports* do not even bother addressing the benefits of the tort system. While difficult to quantify, such benefits undoubtedly exist and are widely recognized.

American products thrive in international markets in part because of their reputation for quality and safety. That reputation is a consequence of many factors, including the legal environment in which American companies operate. That environment includes the deterrent effect of the American tort system. The system discourages negligent behavior and filters out unsafe products. Conservative law-and-economics scholar and federal appellate Judge Richard Posner has noted that although “there has been little systematic study of the deterrent effects of tort law, . . . what empirical evidence there is indicates that tort law likewise deters.”⁴⁴

Automobile Safety. Automobile safety is especially important because of the number of automobile accidents and the dominance of automobile cases in the tort system. Consumers have clearly seen tort-related safety benefits in the automobile industry. The tort system, coupled with consumer safety efforts and increased regulation, has led to the withdrawal of unsafe cars, such as the Corvair, and to the development, and subsequent improvement, of new safety devices.

In analyzing the impact of products liability on automobile safety, John D. Graham of Harvard University found that, while liability was not the sole factor leading to safety improvements in cars, it may act as a catalyst and quicken the process “and sometimes result in more rapid safety improvements than would occur in the absence of liability.”⁴⁵ Graham notes, for instance, that “the installation of rear-seat shoulder belts and the phaseout of belt tension relievers may have been hastened by liability considerations.”⁴⁶ Liability risk may have been enough to spark safety improvements even when other

⁴³ Daniel J. Capra, “An Accident and a Dream”: Misinformation, Misstatement, and Misunderstandings About the Civil Justice System 6 (Jan. 29, 1999) (An independent study prepared for the New York State Bar Association).

⁴⁴ Landes & Posner, *supra* note 18, at 10.

⁴⁵ John D. Graham, Product Liability and Motor Vehicle Safety, in Peter W. Huber & Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 119, 181 (Brookings Inst. 1991).

⁴⁶ *Id.* at 181.

important factors, such as consumer demand, regulation, and professional responsibility, were not on their own sufficient.⁴⁷ Graham documents that liability considerations were a sufficient condition or a contributing factor to at least fourteen important auto safety improvements, including inadvertent vehicle movement, fuel tank design, occupant restraints, and all-terrain vehicle restrictions.⁴⁸

Graham also finds that liability concerns do not impose an undue financial burden on manufacturers. The cost of liability was not all that important to industry: "The direct financial costs of liability are usually a relatively minor factor, at least from the perspective of large manufacturers."⁴⁹ Manufacturers are much more fearful of the adverse publicity that accompanies product liability suits, which may lessen consumer demand for unsafe products.⁵⁰

Other Industries. The chemical industry has made significant safety improvements as a result of liability exposure.⁵¹ MIT scholars Nicholas A. Ashford and Robert F. Stone found that the tort system has not only stimulated the development of safer products and processes, but also credit it with spurring significant technological innovations that have resulted in the reduction of chemical hazards.⁵² Ashford and Stone conclude that the reforms suggested by traditional tort reformers are misplaced. In the chemical industry, recoveries should be made easier not more difficult.

[T]he recent demands for widespread tort reform, while directing attention to dissatisfaction with the tort system, tend to miss their mark, since significant under deterrence in the system already exists. Thus proposals that damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected. On the contrary, the revisions of the tort system should include relaxing the evidentiary requirements for recovery, shifting the basis of recovery to subclinical effects of chemicals, and establishing clear causes of action where evidence of exposure exists in the absence of manifest disease.⁵³

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id. at 182.

⁵⁰ Id. at 181, 182.

⁵¹ See Nicholas A. Ashford & Robert F. Stone, *Liability, Innovation, and Safety in the Chemical Industry*, in Huber & Litan, *supra* note 45, at 367.

⁵² Id. at 368.

⁵³ Id. at 419.

Another scholar, Rollin B. Johnson of Harvard University, argues that the current liability system may provide incentives for safety and innovation, and that attempts to change the system may do more harm than good:

It would be difficult to argue that the uncertainty and unpredictability of the tort system does not affect business planning to some degree. And some risk-averse companies may decide to abandon certain lines of research and development because of concern over liability, leaving those areas open to foreign competitors. But such actions arguably increase the average safety of products, while preserving opportunities for American competitors willing to assume the risk and creating incentives for producers to innovate to make alternative and even safer products.

On the whole, it is difficult to evaluate the magnitude of the disadvantages of the present system and even more difficult to weigh them against the advantages of the deterrence they provide against the introduction of truly hazardous products. Furthermore, the possibility of an occasional "excessive" award may provide greater deterrent value at lower net cost to society than universally applicable regulations do. . . . The liability system might benefit from some fine-tuning to make the system more responsive, less expensive, and more equitable. But such attempts may actually make it less effective.⁵⁴

Johnson concludes, "The claim that the product liability system unduly compromises the chemical industry is not well supported by the evidence."⁵⁵

Experience in the pharmaceutical industry accords with these conclusions.⁵⁶ Pharmaceutical company attorneys credit the product liability system with providing a deterrent which has, in turn, led to safety improvements. One company attorney interviewed regarded the liability crisis as largely a myth.

"For certain classes of drugs, liability concerns have probably led to safer products, in conjunction with FDA requirements. . . . I personally don't think that the litigation threat is that serious except for DES-type products where potentially significant risks are discovered well after the drug has been introduced. I believe--though it's heretical--that the liability crisis is largely a myth when one looks at the available information such as the actual number of cases."⁵⁷

⁵⁴ Rollin B. Johnson, *The Impact of Liability on Innovation in the Chemical Industry*, in Huber & Litan *supra* note 45, at 450.

⁵⁵ *Id.* at 452.

⁵⁶ Judith P. Swazey, *Prescription Drug Safety and Product Liability*, in Huber & Litan, *supra* note 45, at 291.

⁵⁷ *Id.* at 297.

Tellingly, this industry attorney concluded that tort reform proposals go way beyond what may be needed to fix the system. "Other than DES-type cases, the tort system for drug product liability 'ain't broke,' and the tort reform proposals go way beyond what is needed to fix it."⁵⁸ Another products liability attorney working for a pharmaceutical company agreed, "Overall, I think liability has had a deterrent effect for industry with respect to drug safety; safety has been improved as a result of causes of action under negligence."⁵⁹

Risk Managers Agree That Tort Law Deters. Risk managers should have a useful perspective on whether or not tort law deters. They are responsible for reducing liability exposure for companies, associations, governments, and other organizations. In an effort to determine whether tort law deters, the late Professor Gary Schwartz of UCLA Law School interviewed risk managers for several public agencies in California, including managers from a city, the state motor vehicle department, and the UCLA Medical Center. He asked them about the impact of liability on their safety efforts, or whether the impetus to improve safety was simply a desire to do the right thing. He found that "[a]ll of them emphasized that their efforts were due to the combination of both. A risk manager starts with the idea that accident avoidance is a good for its own sake. But the prospect of tort liability provides an important reinforcement as well as an essential way to sell the risk manager's proposals to others in the organization."⁶⁰ In fact, this need to sell to others in an organization itself can be a function of the search for cost savings. As one Los Angeles city manager explained to Schwartz, "officials are not much affected by abstract appeals to safety. Indeed, funding will generally be denied 'unless we can tie it in to cost savings for the City.'"⁶¹ Schwartz found that one risk manager started his job with considerable skepticism over whether the tort system effectively deterred, but his job experiences led him to believe that "tort liability exerts a significant influence."⁶²

Similar results were obtained in a survey of risk managers for major corporations by the business-oriented Conference Board, which "found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial."⁶³ The survey noted that, of 232 major corporations, concerns about products liability encouraged approximately twenty-two percent to improve manufacturing procedures, thirty-two percent to improve the safety design of products, and

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. Rev. 377, 415-416 (1994).

⁶¹ Id. at 416 n. 196.

⁶² Id. at 416.

⁶³ Id. at 409.

thirty-seven percent to improve labeling.”⁶⁴ The appearance of the first survey, which countered tort reformers’ arguments that the liability system was ruining American businesses, prompted a second survey of 2,000 corporate CEOs, a third of whom, despite decrying the anticipated effects of the tort system and having a self-interest in promoting tort reform, admitted that they had improved the safety of products and nearly one-half of whom improved their product warnings.⁶⁵

Schwartz himself attempted a cost-benefit analysis of tort liability, focusing on the medical malpractice system. By comparing the cost of medical malpractice insurance and the estimated cost of practice changes due to liability, with the Harvard study estimate that the malpractice system reduces medical injuries by eleven percent and the number of medically negligent injuries by twenty-nine percent, Schwartz concluded,

Given the \$130 billion total for actual medical injuries in 1984, the malpractice system can be understood as having reduced the cost of injuries by \$19.5 billion. Since this estimated safety benefit is considerably higher than the \$15 billion estimated costs of the medical malpractice regime, that regime seems to have been cost justified.⁶⁶

The empirical evidence thus demonstrates substantial benefits that outweigh the costs that may legitimately be charged to the tort system. A sober, business-oriented magazine published abroad voices envy of the American system. *The Economist* has observed:

So much fury is leveled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly.⁶⁷

E. The *Tort Cost Reports* Fail to Reconcile Their Inflated Estimates of the Tort System’s Costs with More Sober Estimates

It takes no economic training to recognize that the *Tort Cost Reports* failure to account for the benefits of the tort system is questionable. But even on the incredible assumption that one can focus only on costs, the *Tort Cost Reports* fail to test the figures most essential to their analysis, their estimates of the cost of the tort system. In particular,

⁶⁴ Id. at 408-09.

⁶⁵ Id. at 409.

⁶⁶ Id. at 440.

⁶⁷ *The Way Those Crazy Americans Do It*, *The Economist*, Jan. 14, 1995, at 29 (British ed.).

they fail to explain why their figures differ so drastically from figures used by more neutral observers.

Reconciling the *Tort Cost Reports*' figures with one notable study of the tort system is especially important. In 1986 the RAND's Institute for Civil Justice published a more refined estimate of national tort system costs. Unlike the *Tort Cost Reports*, the RAND researchers actually studied tort litigation payments. And they used two complementary methods to estimate tort litigation payments. One method rested on insurance industry data; the other on individual lawsuit survey data.⁶⁸ The researchers, Kakalik and Pace, noted that the two different methods of estimation of litigation payments yielded similar results. Excluding automobile torts, nationwide in 1985, they estimated the total compensation paid in all tort claims with and without lawsuits to be \$17.4 billion in 1984 dollars.⁶⁹ The RAND researchers estimated national expenditures for tort litigation in 1985 to be \$29 to \$36 billion.⁷⁰ One of the *Tort Cost Reports* estimates of tort expenditures for 1985 is \$83.7 billion,⁷¹ approximately three times the methodologically more precise RAND estimate.

Why the vastly different estimates? The *Tort Cost Reports* took into account no actual aspects of tort litigation; they look only to external measures of costs, such as insurance payments. The basic flaws in this methodology are described above. In contrast, the RAND study actually studied the tort system.

Furthermore, the RAND study reveals what the *Tort Cost Reports* mask—of the total expenditures in the tort system, a large fraction constitute reimbursement for losses, not true economic costs. Well over half the amounts transferred, 56 percent, constitute payments to injured victims.⁷² The true costs of the tort system, are a small fraction of the *Tort Cost Reports* estimates and likely are outweighed by the benefits the *Tort Cost Reports* ignore.

IV. Conclusion

When courts or legislatures enact rules relating to civil litigation, they should do so, whenever possible, based on solid information about how the civil justice system in fact operates. Information about the system's operation is available from improving data about case filings, about award trends, about businesses' contractual practices as evidenced in

⁶⁸ *Id.* at 35.

⁶⁹ Kakalik & Pace, *supra* note 39, at 36 (Table 3.5).

⁷⁰ Kakalik & Pace, *supra* note 39.

⁷¹ Tillinghast-Towers Perrin, *supra* note 32, at Appendix 1a, p. 1.

⁷² Kakalik & Pace, *supra* note 39, at 70.

their contracts' dispute resolution clauses, and about patterns of punitive damages. Together this body of information counsels in favor of caution in accepting or maintaining judicial efforts to curtail access to courts through pleading or other rules. Judicial and legislative initiatives relating to courts should be based on solid empirical evidence rather than on unsubstantiated perceptions about the civil justice system, perceptions often created by special interest groups.

Senate Judiciary Committee
Hearing on “Has the Supreme Court Limited Americans’ Access to Courts?”
Wednesday, December 2, 2009

Statement of U.S. Senator Russell D. Feingold

Access to the courts is critical to the fairness and integrity of our judicial system; it helps ensure that meritorious lawsuits are heard and litigants receive their day in court. Unfortunately, two recent decisions by the Supreme Court – *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* – have limited Americans’ access to the courts by inappropriately raising the pleading standard for civil lawsuits. The Notice Pleading Restoration Act of 2009 fixes this problem by restoring the traditional pleading standard used in federal courts since the adoption of the Federal Rules of Civil Procedure in 1938 and detailed by the Supreme Court in *Conley v. Gibson*.

In *Twombly*, the Supreme Court held that a plaintiff must allege sufficient facts to state a “plausible” claim for relief in a civil complaint. This pleading standard is a significant change from *Conley*’s well-established rule and places a serious burden on plaintiffs. In *Iqbal*, the Court further heightened the pleading standard by requiring courts to separate legal conclusions from factual allegations in a complaint before determining whether the factual allegations state a plausible claim for relief. This convoluted analysis grants too much discretion to trial judges and undermines the “short and plain statement of the claim” pleading standard created by the Federal Rules.

Together, *Twombly* and *Iqbal* have had an adverse impact on our civil justice system. The decisions shifted the responsibility for screening frivolous claims from the discovery and summary judgment stages of litigation to the pleading stage. While it is important for courts to dispose of cases efficiently and identify frivolous lawsuits, this objective can still be served using the traditional pleading standard. The heightened pleading standard established by *Twombly* and *Iqbal* permits dismissal of lawsuits that may prove meritorious, undermining our commitment to providing compensation for injury and equal access to justice.

In addition, these decisions obstruct the enforcement of federal law through private civil litigation. Private lawsuits are vital to our justice system because we cannot rely on the government alone to enforce environmental laws, civil rights laws, and other constitutional and statutory mandates. In order to proceed, these lawsuits often require plaintiffs to gain access to evidence in the possession of large, institutional defendants. This crucial evidence is only available through the discovery process. By dismissing these claims at the pleading stage under *Twombly* and *Iqbal* and barring access to discovery, courts are inhibiting the enforcement of public law and preventing the protection of basic basic statutory and constitutional rights.

Furthermore, these *Twombly* and *Iqbal* decisions represent a circumvention of the legislative process. The Rules Enabling Act established a comprehensive process for amending the Federal Rules. If a change in the procedure for determining the adequacy of a complaint is needed, that amendment process should be used. When it decided to raise the pleading standard in *Twombly* and *Iqbal*, the Supreme Court sidestepped the amendment process.

The effects of this change have been widespread. Since *Iqbal* was decided in May, it has been cited more than 2,700 times by federal courts examining the adequacy of plaintiffs' complaints. States with rules of procedure based on the Federal Rules are beginning to incorporate *Iqbal* into their procedural analysis. Multiple civil rights cases have been dismissed using the heightened pleading standard established by *Twombly* and *Iqbal*.

I am proud to co-sponsor Sen. Specter's bill, the Notice Pleading Restoration Act, because I believe that it is critical to restore the pre-*Twombly* pleading standards. I am very open to alternative legislative approaches to accomplish the goal of this bill and look forward to hearing what the witnesses recommend. I want to thank the Chairman for holding this important hearing, and I look forward to working with the Committee on this issue.

STATEMENT OF GREGORY G. GARRE

Partner, Latham & Watkins LLP

**Former Solicitor General of the United States,
United States Department of Justice**

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Evaluating The Supreme Court's Decisions In *Twombly* and *Iqbal*

PRESENTED ON DECEMBER 2, 2009

STATEMENT OF GREGORY G. GARREEvaluating The Supreme Court's Decisions In *Twombly* and *Iqbal*

December 2, 2009

Chairman Leahy, Ranking Member Sessions, and Members of the Committee on the Judiciary, it is an honor to appear before you today and participate in this important discussion on the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which followed and applied *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

By way of introduction, I am a partner in the Washington, D.C. office of Latham & Watkins LLP and global chair of the firm's Supreme Court and Appellate Practice Group. Before joining Latham & Watkins, I served as the 44th Solicitor General of the United States and, in that capacity, argued the *Iqbal* case before the Supreme Court on behalf of former Attorney General John Ashcroft and FBI Director Robert Mueller, the petitioners in the case. I previously served as Acting Solicitor General (2008), Principal Deputy Solicitor General (2005-2008), and Assistant to the Solicitor General (2000-2004). I have served in the Department of Justice under both Democratic and Republican Administrations and as a career lawyer as well as a political appointee. As Solicitor General, I also served as an ex-officio member of the Advisory Committee on Appellate Rules. In addition, prior to my government service, I was a partner and associate for more than eight years at the law firm of Hogan & Hartson LLP, where, in 2004-2005, I succeeded John G. Roberts, Jr., as head of the firm's Supreme Court and Appellate Practice Group. My practice has focused on complex civil litigation in the Supreme Court and federal courts of appeals, but I have also handled litigation in the federal trial courts. I have represented plaintiffs as well as defendants, and individuals as well as corporations, trade associations, and governments. I have also served for nearly ten years as both a visiting and

adjunct professor of law at the George Washington University Law School, where this past spring I taught the *Iqbal* case as part of my class on the Constitution and the Supreme Court.

In my testimony today, I will summarize the Supreme Court's decisions in the *Twombly* and *Iqbal* cases; discuss the deep body of Supreme Court and appellate case law on which those decisions are grounded; consider the impact of *Twombly* and *Iqbal* in the lower courts; evaluate the enormous costs of allowing conclusory and implausible claims to proceed to discovery, especially with respect to claims against government officials carrying out their duties; and consider the legislation that has been proposed to override *Twombly* and *Iqbal*. In my judgment, the *Twombly* and *Iqbal* decisions are unquestionably important and in line with decades' worth of precedent at both the Supreme Court and appellate level. It is too soon to say what impact they will have on civil litigation in the federal courts, but they have yet to lead to the wholesale dismissal of claims and are more likely to have an effect on a case-by-case basis. Any legislative effort to override these decisions at this time would be precipitous and unwise, especially insofar as the suggestion is to set a standard in terms of *Conley v. Gibson*, 355 U.S. 41 (1957). *Conley* has generated enormous confusion over the last 50 years and virtually all agree that the decision's "no set of facts" language cannot mean what it says. The sounder course is to permit the Judicial Conference of the United States to continue to monitor the situation and respond if need be through the time-honored judicial rulemaking process established by Congress.

I. THE TWOMBLY AND IQBAL DECISIONS

Let me begin by summarizing the Supreme Court's decisions in *Twombly* and *Iqbal*. The cases arose in different contexts, but both applied the same "working principles" (*Iqbal*, 129 S. Ct. at 1949) to determine whether the underlying complaints adequately stated a claim upon which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. *Twombly*

Twombly arose in the antitrust context. It involved a putative class action brought by consumers against major telecommunications providers alleging that the providers had conspired to restrain trade in violation of Section 1 of the Sherman Act by engaging in parallel conduct intended to prevent the growth of upstart providers and by agreeing to refrain from competing against one another. By a 7-2 vote, the Supreme Court – in an opinion written by Justice Souter – held that the complaint failed to state a claim upon which relief could be granted.

In reaching that result, the Court addressed the gateway requirement in Rule 8(a)(2) of the Federal Rules of Civil Procedure that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” First, the Court reiterated that the factual allegations in a complaint are assumed to be true at the dismissal stage. 550 U.S. at 555 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002)). Second, the Court held that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions” and that “a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (alteration in original)). Third, the Court held that, while presumed to be true, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, at 235-236 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”). As the Court explained, “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [actionable conduct] reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” *Id.* at 557 (alteration in original).

The Court rejected the suggestion that “a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management.’” *Id.* at 559. The Court recognized that “the success of judicial supervision in checking discovery abuse has been on the modest side.” *Id.* And it concluded that the only way “to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’” is to “tak[e] care to require allegations that reach the level suggesting” illegal conduct. *Id.* (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (alteration in original). Likewise, the Court rejected the notion that the use of “phased” or “limited” discovery could serve as an adequate safeguard, explaining that “the hope of effective judicial supervision is slim.” *Id.* at 560 n.6.

The Court also rejected the plaintiff’s reliance on the Court’s previous statement 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 which would entitle him to relief.” (Emphasis added.) As the Court explained, *Conley*’s “no set of facts” language cannot be taken “literal[ly],” because it would mean that “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” 550 U.S. at 561 (alteration in original). But that has never been the standard. Rather, the Court explained that the “no set of facts” language was best “understood in light of the opinion’s preceding summary of the complaint’s concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief.” *Id.* at 562-563. And, given that *Conley*’s “no set of facts” language has been “questioned, criticized, and explained away long enough,” the Court held that it was “best forgotten as an incomplete,

negative gloss on an accepted pleading standard: *once a claim has been stated adequately*, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 563 (emphasis added).

Finally, the Court stressed that it was “not requir[ing] heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. Likewise, the Court observed that a plaintiff need not “set out *in detail* the facts upon which he bases his claim,” *id.* at 555 n.3 (quoting *Conley*, 355 U.S. at 47 (emphasis added in *Twombly*)), but need only make some “showing,” rather than a blanket assertion, of entitlement to relief,” *id.* (quoting Fed. R. Civ. P. 8(a)(2)). In addition, the Court explained that “[a]sking for plausible grounds to infer an [illegal] 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.

Applying those principles, the Court held that the complaint at issue in *Twombly* failed to state a claim. First, the Court explained that the plaintiff’s assertion of an unlawful agreement was a “legal conclusion,” and therefore was not entitled to the assumption of truth. *Id.* at 555. Next, the Court concluded that the bare allegation of parallel behavior was not sufficient to cross the line from the possible to the plausible, since parallel conduct was compatible with – if not more likely explained by – lawful free market choices. See *id.* at 566-567.

Twombly was decided by a 7-2 vote that transcended the Court’s ideological fault line. The Court’s decision was written by Justice Souter and joined by the Chief Justice and Justices Scalia, Kennedy, Thomas, Breyer, and Alito. And it upheld the decision of then-District Judge Gerald Lynch – whom President Obama later nominated, and the Senate overwhelmingly confirmed, to the Court of Appeals for the Second Circuit – holding that the complaint at issue

failed to state an adequate claim for relief. Finally, it is worth emphasizing that the Court did not *overrule* the *Conley* decision in *Twombly*. It simply clarified that a particular *phrase* in *Conley* – the “no set of facts” language – was “an incomplete, negative gloss on an accepted pleading standard.” *Id.* at 563. In doing so, the Court in *Twombly* observed that the civil rights complaint in *Conley* “amply” stated a claim under the proper pleading standard, making the “no set of facts” language an unnecessary part of the Court’s decision. *Id.*

B. *Iqbal*

Iqbal arose in the national security context. It involved a constitutional tort action brought by a Pakistani, *Iqbal*, who was arrested in New York in the wake of the September 11 attacks on criminal charges to which he pleaded guilty and held in a special federal detention facility after he was determined by the FBI to be “of high interest” to the investigation into the September 11 attacks. After *Iqbal* was cleared of involvement in the attacks and had returned to his country of origin, he brought suit against 34 current and former federal officials ranging from the prison guards with whom he had day-to-day contact all the way up the chain to the Director of the FBI and the Attorney General of the United States, alleging that he was discriminated against on the basis of race, religion, and national origin. The only question before the Supreme Court was whether *Iqbal* had adequately pleaded claims against former Attorney General Ashcroft and Director Mueller, who asserted qualified immunity from suit. See 129 S. Ct. at 1952 (“[W]e express no opinion concerning the sufficiency of [*Iqbal*]’s complaint against the defendants who are not before us.”). The Court – in a 5-4 opinion written by Justice Kennedy – held that *Iqbal*’s pleadings as to those high-ranking officials were insufficient.

In reaching that conclusion, the Court applied the same two “working principles” underlying *Twombly*. *Id.* at 1949. First, the Court reiterated, “the tenet that a court must accept

as true all of the allegations contained in a complaint is inapplicable to *legal conclusions*.” *Id.* (citing *Twombly*, 550 U.S. at 555) (emphasis added). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” and, therefore, a plaintiff may “not unlock the doors of discovery . . . armed with nothing more than conclusions.” *Id.* at 1949-50. And, second, the Court continued, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1950 (citing *Twombly*, 550 U.S. at 556). To state a plausible claim, a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. “[W]here 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.’” *Id.* at 1950 (quoting Fed. R. Civ. Proc. 8(a)(2)). At the same time, the Court reiterated that the Rule 8 pleading threshold “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Id.*

Applying those principles, the Court held that Iqbal failed to state a claim against former Attorney General Ashcroft and Director Mueller. First, the Court separated out the allegations in the complaint that amounted to “nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim,” and thus were too “conclusory” to merit “the assumption of truth.” *Id.* at 1951. Next, the Court considered whether the remaining factual allegations – to the effect that the Attorney General and FBI Director discriminatorily approved of the detention of “thousands of Arab Muslim men” in the wake of the September 11 attacks – plausibly suggested an entitlement to relief. Accepting those allegations as true, the Court concluded that unlawful discrimination “is not a plausible conclusion” given the “‘obvious alternative explanation’”: that the investigation into the September 11 attacks “would produce a disparate, incidental

impact on Arab Muslims,” given that the attacks “were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda.” *Id.* at 1951-52.

Finally, the Court rejected Iqbal’s efforts to circumvent the settled pleading requirements. First, it rejected Iqbal’s argument that *Twombly* was limited to “pleadings made in the context of an antitrust dispute,” explaining that Rule 8 by its terms applies to “‘all civil actions,’” and that the Court’s interpretation of Rule 8 therefore could not be arbitrarily limited to particular types of actions. *Id.* at 1953 (emphasis added). Second, it rejected the argument that Iqbal should be permitted discovery to attempt to develop his claims, explaining that experience shows that judicial supervision has failed to check discovery abuses. *Id.* Moreover, the Court stressed that a managed-discovery approach is particularly inappropriate in suits against government officials given the “heavy costs” that such litigation can have on diverting the attention of such officials from carrying out their duties, especially when it comes to national security. *Id.* (citing *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). Third, the Court rejected Iqbal’s argument that he was entitled to allege discriminatory intent “generally,” reiterating that “the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.” *Id.* at 1954.

Four Justices dissented in *Iqbal*. Importantly, however, the dissenters – two of whom had joined the majority in *Twombly*, and one of whom had written *Twombly* – did not disavow the pleading standards discussed in *Twombly*, nor did they argue that the Court should insist on a literal application of *Conley*’s “no set of facts” language. Rather, the dissenters simply disagreed with the majority’s *application* of those pleading standards to Iqbal’s complaint. See *id.* at 1955 (“The majority ... *misapplies* the pleading standard under [*Twombly*] to conclude that the complaint fails to state a claim.”) (emphasis added). Moreover, the dissenters agreed that Rule 8

incorporates a “plausibility standard,” but concluded that the majority had overlooked certain allegations in determining whether Iqbal’s complaint crossed that threshold. *Id.* at 1959-60.

A few other points about *Iqbal*. First, Iqbal did not suffer from lack of information about the events in question in framing his complaint. They were the subject of a 200-page report by the Office of the Inspector General within the Department of Justice. Yet Iqbal was still unable adequately to plead claims against the former Attorney General and FBI Director. Second, while the Supreme Court held that Iqbal had failed adequately to plead claims against those high-ranking officials, it did not disturb the lower courts’ rulings that his claims against the lower-level defendants could go forward. *Id.* at 1952. And, finally, even as to the former Attorney General and FBI Director, the case was remanded to the district court to permit Iqbal to seek leave to “amend his deficient complaint.” *Id.* at 1954; see *Iqbal v. Ashcroft*, 574 F.3d 820 (2d Cir. 2009). So, as his case goes forward against the other defendants, Iqbal may again seek to plead claims against the former Attorney General and FBI Director. And of course, as is always the case in civil litigation, as Iqbal seeks to develop his case through appropriate discovery obtained from the defendants against which he has pleaded *adequate* claims, it is conceivable that new information will come to light that may bear on his case.

* * * * *

One other case bears mention in understanding the Court’s decisions in *Twombly* and *Iqbal*. In *Erickson v. Pardus*, 551 U.S. 89 (2007), the Court summarily reversed the dismissal for failure to state a claim of a prisoner’s complaint alleging a violation of his Eighth Amendment rights based on the alleged termination of a medical treatment program. The case was decided just two weeks after *Twombly* and therefore presumably with *Twombly* in mind. The Court held that it was “error for the Court of Appeals to conclude that the allegations in

question . . . were too conclusory” to state a claim. *Id.* at 93. The Court explained that the complaint adequately alleged under Rule 8(a)(2) the circumstances surrounding the termination of medical treatment at issue, and that the prisoner “bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings.” *Id.* at 94. Moreover, the Court stressed that *pro se* complaints must be “liberally construed” and are “held to less stringent standards than formal pleadings drafted by lawyers.” *Id.* That was an easy enough decision for the Court that it decided the case without merits briefing or argument. *Erickson* thus underscores that the Court has not adopted a new pleading standard for *pro se* filings.

C. The Upshot

The Supreme Court’s decisions in *Twombly* and *Iqbal* clarify the gateway standards for pleading an adequate claim under the Federal Rules of Civil Procedure. The Court reiterated that “the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’” but it held that Rule 8 “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949. The *Twombly* and *Iqbal* decisions provide two “working principles” (*id.*) for determining whether a complaint is adequate. First, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” and, therefore, a plaintiff may “not unlock the doors of discovery . . . armed with nothing more than conclusions.” *Id.* at 1949-50. And, second, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1950. To state a plausible claim, a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. “[W]here 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.” *Id.* (quoting Fed. R. Civ. Proc. 8(a)(2)).

Accordingly, such a complaint is not entitled to proceed under the Federal Rules.

II. TWOMBLY AND IQBAL WERE CORRECTLY DECIDED AND HAVE DEEP ROOTS IN PRE-EXISTING CASE LAW

While unquestionably important, the Supreme Court’s decisions in *Twombly* and *Iqbal* were hardly bolts from the blue. To the contrary, they are firmly grounded in decades of prior precedent at both the Supreme Court and federal appellate court level concerning the pleading standards under Rule 8 of the Federal Rules of Civil Procedure. Indeed, what would have been truly remarkable in light of this well-settled precedent is if the Supreme Court had decided that either the complaint in *Twombly* or *Iqbal* were sufficient to proceed past Rule 12(b)(6).

A. Prior Supreme Court Precedent

The Supreme Court has on a number of prior occasions emphasized that, while the notice-pleading regime established by the Federal Rules of Civil Procedure is generous, it is not without limit. The Court has been particularly sensitive to ensuring that the pleading requirements are met before discovery is allowed in complex civil actions where proceeding beyond the Rule 12(b)(6) stage can have enormous practical and financial consequences for litigants given the burdens typically imposed by the discovery process in such cases.

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005), for example, the Court unanimously held – in an opinion by Justice Breyer – that an allegation that the plaintiffs had “‘paid artificially inflated price for [a stock] . . . and suffered ‘damage[s]’ thereby” failed adequately to plead the element of “loss causation” in a federal securities fraud action. *Id.* at 340 (quoting complaint; alteration in original). As the Court explained, while Rule 8(a) of the Federal Rules of Civil Procedure does not impose any “special . . . requirement in respect to the pleading” of such matters, “the ‘short and plain statement’ [that the Rule does require] must

provide the defendant with ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” *Id.* at 346 (quoting *Conley*, 355 U.S. at 47). Moreover, the Court stressed that overlooking that important requirement “would permit a plaintiff ‘with a largely groundless claim to simply take up the time of a number 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.’” *Id.* at 347 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (alteration by the Court in *Dura*)). The Court further observed that relaxing that requirement would lead the very sort of “harm” that Congress has sought to avoid, namely “‘abusive’ practices” such as “‘the routine filing of lawsuits . . . with only [a] faint hope that the discovery process might lead eventually to some plausible cause of action.’” *Id.* (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995) (alterations in original)).

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) – decided more than 25 years before *Iqbal* – is to the same effect. In that case, the Court, by an 8-1 vote, held that a complaint brought by a union against a contractors’ association failed to sufficiently alleged a violation of the antitrust laws. The Court – in an opinion written by Justice Stevens – held that the district court erred in failing to require the union “to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss.” *Id.* at 528 n.17. Furthermore, after recognizing *Conley*, the Court stressed that, “[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id.* See also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (“Although [Rule 8] encourages brevity, the complaint must say enough to give the defendant ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”) (quoting *Dura*,

544 U.S. at 346) (private securities fraud action) (Opinion by Ginsburg, J.); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-459 (2006) (holding that complaint failed adequately to allege proximate causation for RICO violation; refusing to accept as sufficient conclusory allegation that plaintiff had “suffered its own harms” as a result of the defendant’s actions).

The Court has invoked the same requirements outside the commercial sphere in cases presenting civil rights claims. In *Papasan v. Allain*, 478 U.S. 265 (1986), for example, the Court – in an opinion by Justice White – held that a complaint brought by local school children and school officials against state officials challenging a State’s distribution of public school land funds under the Equal Protection Clause failed to state a claim upon which relief could be granted. In so holding, the Court stressed that, “[a]lthough for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a *legal conclusion* couched as a factual allegation.” *Id.* at 286 (emphasis added) (citing *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff’d on other grounds*, 460 U.S. 325 (1983); 2 A J. Moore & J. Lucas, *Moore’s Federal Practice* ¶12.07, at 12-64 & n.6 (1985)). Thus, where the complaint did not make any specific underlying factual allegations (such as that school children “are not taught to read or write,” or “receive no instruction on even the educational basics”), the Court held that “we are not bound to credit and may disregard the allegation that the [plaintiffs] have been denied a minimally adequate education.” *Id.*

The Supreme Court has also recognized that a proper application of the pleading rules is critical in the context of personal damages claims against government officials who enjoy qualified immunity for actions taken while performing their public duties. The qualified immunity doctrine is designed to promote “the effective functioning of government,” *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) (citation omitted), by ensuring that litigation targeting those

who do the Nation's business does not "diver[t] . . . official energy from pressing public issues," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), and deter officials' "willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240. The policies underlying the qualified immunity doctrine are especially important when it comes to "matters of national security and foreign policy" and with respect to Cabinet-level and other high-ranking officials, such as the Supreme Court petitioners – former Attorney General Ashcroft and Director Mueller – in the *Iqbal* case, who are "easily identifiable [targets] for suits for civil damages." *Mitchell v. Forsyth*, 472 U.S. 511, 541-542 (1985) (Stevens, J., concurring in the judgment) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)).

Long before *Iqbal*, the Court recognized that use of overly permissive pleading standards to evaluate complaints against government officials would undermine the important purposes served by qualified immunity doctrine and called for a "firm application of the Federal Rules of Civil Procedure" to such claims. *Butz v. Economou*, 438 U.S. 478, 508 (1978). The Court has also recognized that a "firm application" of the Federal Rules is especially important where, as in *Iqbal*, an unconstitutional motive is an element of the alleged illegality. Such cases present a "potentially serious problem" because "an official's state of mind is easy to allege and hard to disprove, [and] insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El v. Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks omitted). As a result, the Court has instructed trial courts to "insist" that a plaintiff "put forward specific, nonconclusory factual allegations" that establish . . . cognizable injury" before allowing a suit "to survive a pre-discovery motion for dismissal or summary judgment." *Id.* at 598 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

B. Prior Court of Appeals Precedent

Given this body of Supreme Court precedent, it is not surprising to find a legion of case law in the lower federal courts recognizing similar requirements in testing the sufficiency of pleadings under Rule 8. Indeed, there is ample case law within the federal circuits supporting the basic propositions on which *Twombly* and *Iqbal* were decided, including that conclusory pleadings and formulaic recitations of the elements of a claim are insufficient; that courts need not assume implausible or speculative inferences from pleaded facts; that discovery is not warranted to permit a plaintiff to attempt to develop adequate pleadings; and that *Conley*'s "no set of facts" language cannot be given its literal reach. To cite only a few examples:

First Circuit: *Aponte-Torres v. University of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) ("We ought not * * * credit 'bald assertions, unsupported conclusions, periphrastic circumlocutions, and the like.'" (citation omitted); *Eastern Food Servs. v. Pontifical Catholic Univ.*, 357 F.3d 1, 3 (1st Cir. 2004) (dismissing antitrust claim for lack of plausibility); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003) (court is not bound to credit "'bald assertions'" or "'unsupported conclusions'" (citation omitted); *DM Research v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (complaint must set forth "a *factual* predicate concrete enough to warrant further proceedings"; sufficient factual predicate is "the price of entry, even to discovery"); *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* § 1357)).

Second Circuit: *Cantor Fitzgerald, Inc. v. Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) ("'[W]e give no credence to plaintiff's conclusory allegations.'" (citation omitted); *Virtual*

Countries, Inc. v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir. 2002) (“bald assertions” of harm are not sufficient); *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (*Conley* qualified by *Associated Gen. Contractors*); *Heart Disease Research Found. 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.”).

Third Circuit: *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998) (“We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner”; courts need not accept “‘unsupported conclusions and unwarranted inferences.’”) (citation omitted); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (“[A] court need not credit a complaint’s ‘bald assertions’ or ‘legal conclusions’ when deciding a motion to dismiss.”).

Fourth Circuit: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 345 (4th Cir. 2006) (stating that “we have rejected reliance on . . . conclusory allegations” at the pleading stage), *cert. denied*, 549 U.S. 1362 (2007); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002) (“[A]llegations must be stated in terms that are neither vague nor conclusory.”) (citation omitted); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220-221 (4th Cir. 1994) (same).

Fifth Circuit: *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 654 (5th Cir. 2004) (“legal conclusions” are not sufficient); *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); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) (“Conclusory allegations and unwarranted deductions of fact are not admitted as true . . .”).

Sixth Circuit: *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (legal conclusions not sufficient), *cert. denied*, 547 U.S. 1111 (2006); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (“liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences”; “[i]n practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory”) (internal quotation marks, citations, emphasis and alterations omitted); *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971) (“[W]e are not bound by allegations that are clearly unsupported and unupportable.”).

Seventh Circuit: *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir.) (“[M]ere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss.”), *cert. denied*, 525 U.S. 930 (1998); *Kyle v. Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (*Conley*’s “no set of facts” language “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”).

Eighth Circuit: *Farm Credit Servs. of Am. v. American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (“[W]e are ‘free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.’”) (quoting *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002)).

Ninth Circuit: *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (“no set of facts” language limited by *Associated Gen. Contractors*, qualified immunity doctrine, and standing requirements; “conclusory allegations without more are insufficient to defeat a motion to dismiss”) (citation omitted); *Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989) (stating that “conclusory allegations that [defendants] conspired do not

support a claim”); *Jackson v. Nelson*, 405 F.2d 872, 873 (9th Cir. 1968) (per curiam) (“a series of broad conclusory statements unsupported, for the most part, by specific allegations of fact” are insufficient to withstand a motion to dismiss under Rule 12(b)(6)).

Tenth Circuit: *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) (“Bare bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim.”), *cert. denied*, 549 U.S. 1209 (2007); *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 Gen. Contractors*); *Ryan v. Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957) (refusing to credit “unwarranted inferences drawn from the facts or footless conclusion of law predicated upon them”).

Eleventh Circuit: *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir.) (“[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal.”), *cert. denied*, 540 U.S. 1016 (2003); *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (same), *cert. denied*, 540 U.S. 872 (2003).

District of Columbia Circuit: *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) (“although ‘[i]n considering the claims dismissed pursuant to Rule 12(b)(6), we must treat the complaint’s factual allegations as true [and] must grant plaintiff the benefit of all reasonable inferences from the facts alleged,’ ‘we are not bound to accept as true a legal conclusion couched as a factual allegation,’ or to ‘accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint.’”) (brackets in original; citations omitted); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (“[W]e accept neither ‘inferences

drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations.'") (citation omitted); *Kowal v. MCI Commc 'ns Corp.*, 15 F.3d 1271, 1276 (D.C. Cir. 1994) (despite *Conley*, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." (citing *Papasan*, 478 U.S. at 286)).

Federal Circuit: *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (the court accepts as true only "non-conclusory allegations of fact"); *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice . . .").

C. Commentary

Finally, it is worth noting that well-known commentators had also recognized prior to *Twombly* and *Iqbal* that, while generous, the gateway pleading requirements established by Federal Rules of Civil Procedure are not toothless. For example, Professors Wright and Miller had observed that "the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, at 236 (3d ed. 2004). See also *id.* § 1216, at 220-227 (complaint "must contain allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial"); *id.* § 1216, at 233-234 (when the allegations do not state a claim for relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court") (quoting *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953)).

The *Twombly* and *Iqbal* decisions fit comfortably within that deeply-rooted body of precedent and represent a natural application of existing law. To be sure, the cases clarified the applicable pleading standards under the Federal Rules of Civil Procedure and provide important guidance to the lower courts in evaluating the sufficiency of pleadings. But they represent a natural outgrowth of decades' worth of settled pleading law.

III. IT IS TOO SOON TO DECIDE THE IMPACT OF *TWOMBLY* AND *IQBAL*

Given the staggering number of suits filed in federal court each year – 250,000, by one authoritative estimate, see U.S. Courts, U.S. District Courts–Civil Cases Commenced, Terminated, and Pending During the 12-month Periods Ending June 30, 2007 and 2008, Table C, available at <http://www.uscourts.gov/stat/june08/C001Jun08.pdf> – and the number of motions to dismiss filed each year, it is not surprising that the *Twombly* and *Iqbal* cases have been cited with enormous frequency by the lower courts. As of November 30, 2009, the *Iqbal* decision alone has been cited nearly 3500 times. But that figure itself says little about the substantive impact that *Twombly* and *Iqbal* have had in the lower courts. Rather, the figure simply represents the number of times that a lower court has referenced *Iqbal*, and reflects that *Twombly* and *Iqbal* concern a gateway determination made frequently by the lower courts given the huge numbers of civil actions pending nationwide. To evaluate the impact of *Twombly* and *Iqbal*, it is necessary to consider how the lower courts are actually using the guidance provided by those decisions – for example, to assess whether or to what extent lower courts are relying on *Twombly* and *Iqbal* to dismiss complaints that would otherwise have survived a Rule 12(b)(6) motion to dismiss.

The most comprehensive study of which I am aware on the impact of *Twombly* and *Iqbal* is being performed by Advisory Committee on Civil Rules (Advisory Committee) within the

Judicial Conference of the United States, which is chaired by United States District Judge Mark R. Kravitz. The Advisory Committee oversees the Federal Rules of Civil Procedure in carrying out the judicial supervision and rulemaking process authorized by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2072-2074. One of the Advisory Committee's statutory directives as part of the Judicial Conference of the United States is to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. And in carrying out that statutory obligation, the Advisory Committee is currently "examining the effect of [the *Twombly* and *Iqbal* decisions] on the way in which courts consider motions to dismiss, and analyzing whether courts are interpreting these recent pronouncements by the Supreme Court as a significant change in the pleading requirements." November 25, 2009 Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee Concerning the "Application of Pleading Standards Post-*Ashcroft v. Iqbal*" at 1 (Kuperman Mem.), available at <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20Nov30.pdf>. (Ms. Kuperman is the Rules Law Clerk for the Honorable Lee H. Rosenthal, Chair of the Standing Committee on the Federal Rules of Practice and Procedure. An earlier version of this memorandum was publicly distributed at the October 9-10, 2009, meeting of the Advisory Committee in Washington, D.C.) The Advisory Committee's research is embodied in a 150-page memorandum from Ms. Kuperman to the Standing Rules Committee and Civil Rules Committee discussing *Twombly* and *Iqbal* and summarizing each appellate decision that has been issued since *Iqbal* that has "examined" or "discussed" *Iqbal*.

This memorandum explains that, "[a]t this early stage in the development of the case law discussing and applying the *Iqbal* pleading standards, it is difficult to draw many generalized conclusions as to how the courts are interpreting and applying that decision." Kuperman Mem.

at 2. “Overall,” the memorandum concludes, “the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints.” *Id.* The memorandum explains that “[m]any courts have emphasized that notice pleading remains intact and continue to rely on pre-*Twombly* case law to support some of the propositions at the heart of *Twombly* and *Iqbal* – that legal conclusions need not be accepted as true and that at least some factual averments are necessary to survive the pleadings stage.” *Id.* at 2-3. At the same time, the memorandum further explains that, “[w]hile it seems likely that *Twombly* and *Iqbal* have resulted in screening out some claims that might have survived before those cases, it is much more difficult to determine whether *meritorious* claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those cases that have no plausible basis for proceeding.” *Id.* at 3-4 (emphasis added). These conclusions square with the observations of Judge Kravitz, the chair of the Advisory Committee, who recently commented that judges are ““taking a fairly nuanced view of *Iqbal*,”” and that *Iqbal* has not thus far proven to be a ““blockbuster that gets rid of any case that is filed.”” Tony Mauro, *Plaintiffs’ Groups Mount Effort to Undo Iqbal*, *National Law Journal*, Sept. 21, 2009 (quoting Judge Kravitz).

However one characterizes the *Twombly* and *Iqbal* decisions, it is clear that they have not led to the wholesale dismissal of complaints. Indeed, despite the dire predictions of some of the decision’s critics, the fact remains that courts have denied motions to dismiss for failure to state a claim after *Twombly* and *Iqbal* in cases involving claims against government officials for actions undertaken in defending the country against terrorist attack, see, e.g., *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009); *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), as well as in cases involving commercial claims and motive-based constitutional claims, see, e.g., *Hollis v. Mason*, No. Civ. 5-08-1094, 2009 WL 2365691 (E.D. Cal. July 31, 2009) (constitutional claim

for retaliation); *Executive Risk Indemnity, Inc. v. Charleston Area Medical Center*, No. 2:08-cv-00810, 2009 WL 2357114 (S.D. W.Va. July 30, 2009) (breach of contract); *Consumer Protection Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694 (D. Ariz. July 16, 2009) (claim under Telephone Consumer Protection Act); *Intellectual Capital Partner v. Institutional Credit Partners LLC*, No. 08 Civ. 10580 (DC), 2009 WL 1974392 (S.D.N.Y. July 8, 2009) (breach of contract); *Lange v. Miller*, No. 09-cv-00435-LTB, 2009 WL 1841591 (D. Colo. June 25, 2009) (conspiracy to violate Fourth Amendment); *Oshop v. Tennessee Dep't of Children's Servs.*, No. 3:09-CV-0063, 2009 WL 1651479 (M.D. Tenn. June 10, 2009) (bad-faith denial of substantive due process); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 587 F. Supp. 2d 27 (D.D.C. 2008) (antitrust conspiracy); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 580 F. Supp. 2d 896 (N.D. Cal. 2008) (same).

Likewise, numerous complaints alleging civil rights claims have survived dismissal in the wake of *Twombly* and *Iqbal* as well. See, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009) (disability discrimination); *McGrath v. Dominican College of Blauvelt*, No. 07 Civ. 11279, 2009 U.S. Dist. LEXIS 110122 (S.D.N.Y. Nov. 25, 2009) (sexual discrimination); *Jacobeit v. Rich Twp. High School District 227*, No. 09 C 1924, 2009 U.S. Dist. LEXIS 110302 (N.D. Ill. Nov. 25, 2009) (racial, age, and disability discrimination); *Kelley v. 7-Eleven Inc.*, No. 09-CV-1376, 2009 WL 3388379 (S.D. Cal. Oct. 20, 2009) (disability discrimination); *Montano-Perez v. Durrett Cheese Sales, Inc.*, No. 3:08-1015, 2009 WL 3295021 (M.D. Tenn. Oct. 13, 2009) (racial discrimination); *Glover v. Catholic Charities, Inc.*, No. L-09-1390, 2009 WL 3297251 (D. Md. Oct. 8, 2009) (sex discrimination); *Garth v. City of Chicago*, No. 08 C 5870, 2009 WL 3229627 (N.D. Ill. Oct. 2, 2009) (racial discrimination); *Weston v. Optima Commc'ns Sys., Inc.*, No. 09 Civ. 3732 (DC), 2009 WL 3200653 (S.D.N.Y. Oct. 7, 2009) (employment

retaliation); *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909(LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009) (sexual hostile work environment discrimination); *Bell v. Turner Recreation Comm'n*, No. 09-2097-JWL, 2009 WL 2914057 (D. Kan. Sept. 8, 2009) (racial discrimination and retaliation); *Peterec-Tolino v. Commercial Elec. Contractors, Inc.*, No. 08 Civ. 0891 (RMB)(KNF), 2009 WL 2591527 (S.D.N.Y. Aug. 19, 2009) (disability and age discrimination); *Chao v. Ballista*, 630 F. Supp. 2d 170 (D. Mass. 2009) (§ 1983 claim).

To be sure, litigants are now engaged in an active and, no doubt in many instances, intense debate over the impact of *Twombly* and *Iqbal* in particular cases. And the impact of those decisions – and the precedents on which they are grounded – may well vary from one case to the next. See *Iqbal*, 129 S. Ct. at 1950 (“[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task”). For example, consistent with the Supreme Court’s prior precedents in cases like *Dura Pharmaceuticals* and *Associated General Contractors*, courts are particularly careful in evaluating the pleadings in complex civil cases where simply sanctioning discovery and the like can have an “in terrorem” effect. *Dura Pharm.*, 544 U.S. at 347. But at this point, less than six months after *Iqbal* was decided by the Supreme Court, it is simply too early to say what impact *Twombly* and *Iqbal* have had on civil litigation in general in the United States.

IV. ALLOWING CONCLUSORY AND IMPLAUSIBLE CLAIMS TO GO FORWARD WOULD EXACT ENORMOUS COSTS

In evaluating *Twombly* and *Iqbal*, it is also constructive to consider the alternative – *i.e.*, a system in which courts permitted conclusory and implausible claims to go forward, at least for the purpose of allowing plaintiffs an opportunity to attempt to develop claims through discovery “fishing expeditions.” The potential adverse consequences of such a regime are enormous.

A. The Potentially Devastating Costs For Government Officials

The consequences of relaxing the pleading standards recognized in *Twombly* and *Iqbal* would be particularly harmful for government officials who face suit for actions allegedly carried out in the course of their duties. Indeed, in the *Iqbal* case, a bipartisan group of former Attorneys General and a former Director of the FBI who served in five different Administrations – William P. Barr, Griffin Bell, Benjamin Civiletti, Edwin Meese, William Sessions, and Richard Thornburgh – filed a brief urging the Court to hold that the complaint failed to state a claim against the former Attorney General and FBI Director, and explaining the “disruptive effects” that allowing conclusory allegations to proceed would “have on the ability of high-level officials to carry out their missions effectively.” Amicus Br. for William P. Barr *et al.* at 6.

As explained above, the qualified immunity doctrine is designed to protect government officials who are sued in their individual capacity from the burdens of civil litigation, including not only the prospect of crippling personal damages liability but also the “burdens of broad-ranging discovery.” *Mitchell*, 472 U.S. at 526; see *id.* (“[E]ven such pretrial matters as discovery are to be avoided if possible, as [inquiries] of this kind can be peculiarly disruptive of effective government.”) (citation omitted); see also *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) (“[A]voidance of disruptive discovery is one of the very purposes of the official immunity doctrine . . .”). These concerns are particularly acute with respect to high-ranking government officials like the Attorney General of the United States, who are prime targets for litigation given the number of individuals affected by their policies and the fact that many of the individuals affected by their policies often have axes to grind with the government (making them more likely to invoke the judicial process for abusive or vexatious litigation). In order for our government to function, such officials must be able “to perform their sensitive duties with

decisiveness and without potentially ruinous hesitation.” *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment). And, as discussed, one of the important ways that the Supreme Court has sought to ensure that the critical policies underlying the qualified immunity doctrine are given effect is by insisting on a “firm application of the Federal Rules of Civil Procedure” in evaluating the sufficiency of claims raised against government officials. *Butz*, 438 U.S. at 507.

These concerns were starkly presented in *Iqbal*. As Second Circuit Judge Jose A. Cabranes recognized, *Iqbal* was seeking to force the former Attorney General and Director of the FBI “to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the [FBI] and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic.” *Iqbal*, 490 F.3d 143, 179 (concurring). Moreover, as Judge Cabranes further observed, if *Iqbal* were successful in obtaining discovery from the former Attorney General and FBI Director based on his bare-bones complaint, then “little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.” *Id.* Fortunately, however, that “blueprint” will not work today thanks to the Supreme Court’s decision in *Iqbal*. In refusing to endorse that “blueprint,” the Supreme Court specifically recognized these grave concerns relating to the effective functioning of our government. See 129 S. Ct. at 1953 (“Litigation, though necessary to ensure that officials comply with the law, exacts 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, as Judge Cabranes aptly put it, ‘a national and international security emergency unprecedented in the history of the American Republic.’”) (quoting *Iqbal*, 490 F.3d at 179).

The threat posed by baseless litigation targeting high-ranking public officials is not new, and it is not confined to the prior Administration. For example, former Attorney General Reno, Deputy Attorney General Holder, and other high-ranking officials were subjected to personal damages claims based on conclusory allegations of their alleged personal involvement with respect to actions purportedly carried by lower-level law-enforcement officers during the 2000 raid in which agents of the former Immigration and Naturalization Service (INS) seized Elian Gonzalez from his Miami relatives in order to remove him to Cuba. The courts, however, held that plaintiffs had failed adequately to plead “specific, non-conclusory allegations of fact” establishing that those high-ranking officials were personally involved in the alleged violation of clearly established constitutional rights and thus dismissed th claims. See *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003); see *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004).

Similarly, Attorney General Edward Levi – who held that office for 24 months 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. Yet, 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”). To say the least, the threat of baseless litigation against high-ranking officials has not lessened in the 30 years since Attorney General Levi held his position in the Department of Justice.

If allegations like those at issue in *Iqbal* were allowed to proceed to discovery against the Attorney General and other high-ranking officials, then there would be virtually no limit on the type of conclusory and bare-bone allegations that could subject such officials to the burdens of civil litigation. To take just one example, in the wake of the court of appeals' decision in *Iqbal* allowing the claims to proceed against the former Attorney General and FBI Director, one district court – pointing to the Second Circuit's decision in *Iqbal* – refused to dismiss a prisoner's "conclusory allegation" that Attorney General Ashcroft and other federal officials were personally involved in a decision to transfer him from a federal prison in Illinois to a state prison in Connecticut purportedly as part of a conspiracy to retaliate against the prisoner for filing various lawsuits and grievances. *Twitty v. Ashcroft*, No. 3:04-CV-410 (RNC), 2008 WL 346124, at *1 (D. Conn. Feb. 4, 2008). The result was to allow "some discovery on the issue of personal involvement" against the federal defendants. *Id.* If that kind of claim is sufficient, then virtually any prisoner or individual who claims he was subjected to government action by the Department of Justice would be entitled to get "some discovery" – a deposition, interrogatories, and document production, or combination thereof – against the Attorney General of the United States and other high-ranking officials simply by making a "conclusory allegation" that such officials were personally involved in the matter. Even if the discovery were limited or tailored in every individual case, such a regime would impose a crippling burden on the already daunting demands and duties of the Attorney General and other high-ranking officials.

In the wake of the September 11 attacks, the Attorney General and other high-ranking government officers – in the current Administration as well as the prior one – have had to make innumerable difficult decisions in seeking to protect the Nation from further terrorist attack. In return, they have been hit – and in all likelihood will continue to be hit – with litigation

challenging their decisions and the decisions or actions of lower-level officials carrying out law-enforcement policies and programs. In *Iqbal*, the Supreme Court correctly rejected the notion that any individual allegedly affected by such a decision could subject the Attorney General or other high-ranking official to the demands of civil discovery, if not a full-blown trial, simply by making a conclusory allegation that the Attorney General or other official was personally involved in, or knew of and condoned, the specific action at issue, and that the action was undertaken with an unconstitutional motive. A contrary regime would gravely undermine “the national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.” *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment).

As the country continues to prosecute two wars abroad and seeks to prevent further terrorist attacks at home, it has never been more important to ensure that our officials are making the difficult decisions necessary to protect Americans from attack free from concerns about the costs and burdens of litigation targeting such officials for carrying out their vital duties. In *Iqbal*, the Supreme Court appropriately recognized those concerns in reiterating that bare-bones allegations of the supervisory involvement of high-ranking officials in the alleged actions carried out by others do not open the door to discovery against such officials. See 129 S. Ct. at 1953.

B. The Enormous Costs For Civil Defendants And Society At Large

Allowing conclusory and implausible claims to proceed to discovery would also impose added costs on civil defendants and society at large. As the Supreme Court recognized in *Twombly*, it has been reported that “discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed.” 550 U.S. at 559 (citing Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair,

Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)). In our system, a litigant is required to cross the minimum pleading threshold set forth in Rule 8(a) before he may level discovery demands; litigants are not entitled to discovery to fish around for an adequate claim in the first place. *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (“[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome.”) (Boudin, J.). To be sure, “[o]ccasionally, an implausible conclusory assertion may turn out to be true.” *Id.* at 56. But it is well-settled that “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.” *Id.*

As courts have recognized, the costs and burdens of civil discovery are often significant, especially in complex civil cases. See, e.g., *Twombly*, 550 U.S. at 558; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (observing that “discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes”) (citing The Brookings Institution, *Justice For All: Reducing Costs and Delay in Civil Litigation*, Report of a Task Force, at 6-7 (1989)); *Car Carriers Inc. v. Ford Motor Company*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“[T]he 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) (“[S]ome 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.”); see also *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) (“discovery is very expensive and time consuming and easily permits substantial abuse”). Indeed, Congress has amended the securities laws “to protect defendants from the costs of discovery and trial in unmeritorious cases.” *Tellabs, Inc.*, 551 U.S. at 335-336 (Stevens, J., dissenting) (referring to PLSRA’s pleading requirements).

Several factors magnify the potential costs of discovery. First, generally speaking, the discovery authorized by the Federal Rules of Civil Procedure is quite broad: a party may 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). Second, in complex civil actions, defendants are often large entities with vast amounts of potentially discoverable information. As a result, responding to even a relatively simple discovery request can be extremely time-consuming and expensive. Third, the universe of potentially discoverable material has grown exponentially because 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. 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). The cost is surely much greater in larger complex litigation. See *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) (“the burdens and costs associated with electronic discovery, such as those seeking ‘all email,’ are by now well known”).

To be sure, not all federal cases entail huge discovery costs. But in those cases that do generate significant discovery – typically complex civil cases against larger defendants – the expense and burden of discovery is invariably great. And, regardless of the scope of discovery in any given case, there is no basis to subject defendants to discovery 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 alleged.” *Iqbal*, 129 S. Ct. at 1949. See, e.g., *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1070 (D. Colo. 1991) (“The heavy cost of modern antitrust litigation militates against launching litigants into massive and expensive discovery when there is no reasonable prospect that the plaintiff could formulate a viable cause of action from the facts narrated in the complaint.”), *aff’d sub nom. TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992). Doing so would burden defendants with litigation costs for no good reason, would flood the system with meritless or (at best) highly dubious litigation, and would compel “cost-conscious defendants to settle even anemic cases” (*Twombly*, 550 U.S. at 559), to avoid the considerable time and expense of protracted discovery in complex cases. See *Dura*, 544 U.S. at 347. And

interpreting the Federal Rules to allow for such “fishing expeditions” would directly contravene the first rule of the Federal Rules of Civil Procedure – 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.” Fed. R. Civ. Proc. 1. Moreover, if conclusory and implausible allegations were sufficient to entitle a plaintiff to discovery, then it is likely that more non-meritorious suits will be filed in federal court by plaintiffs either seeking to use the machinery of discovery as a means of attempting to *find* a claim or, even worse, seeking to use discovery demands to harass a defendant or extract an *in terrorem* settlement.

Ultimately, like anything else, the costs of discovery are passed on by defendants and borne by society as a whole. Permitting conclusory and implausible claims to proceed to discovery would increase the already significant costs of civil litigation borne by many and exact a toll on Americans and American businesses in a time of widespread economic unrest.

V. THE PROPOSED LEGISLATIVE RESPONSE IS UNNECESSARY AND UNSOUND

In the Senate, a bill (S. 1504) has been introduced that would provide: “Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).” S. 1504, 111th Cong. § 2 (2009). Respectfully, this proposed bill – which seems intended to override the Court’s decisions in *Twombly* and *Iqbal* – should not be enacted.

First, as explained above, the *Twombly* and *Iqbal* cases were correctly decided and are in accord with a longstanding body of precedent in the Supreme Court and courts of appeals. Any effort to override that precedent would be unwarranted and unsound. In particular, as discussed,

doing so would have potentially devastating consequences for the proper functioning of our government by exposing government officials to the burdens of defending against baseless civil litigation while attempting to protect the country from terrorist attacks and other threats. Moreover, less than six months have passed since *Iqbal* was decided. The most comprehensive study to date – conducted under the auspices of the Advisory Committee on Civil Rules – concludes that there is no evidence of a “drastic change” in pleading practice across the country in the wake of *Twombly* and *Iqbal*. Kuperman Mem. at 2. Accordingly, it is far too soon to say whether any legislative response is necessary, much less what response is warranted.

Second, the proposed bill would create significant uncertainty – and therefore more litigation – with respect to the gateway standards for evaluating the sufficiency of pleadings. For example, it is not clear what it means to be governed by “the standards set forth . . . in *Conley*.” There are at least three possible interpretations:

(a) The bill could mean *Conley*, as clarified by the Supreme Court’s decisions in *Twombly* and *Iqbal* clarified the Court’s decision in *Conley*. But does not seem to be the intent of the legislation, since it apparently seeks to override the *Twombly* and *Iqbal* decisions.

(b) The bill could require a court to apply *Conley*’s “no set of facts” language literally. But courts and commentators have recognized for decades that a literal application of *Conley*’s “no set of facts” language makes no sense. See, e.g., *Kyle v. Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (the *Conley* “no set of facts” standard “has never been taken literally”) (citation omitted); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (explaining that *Conley* “unfortunately provided conflicting guideposts”); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.) (the “no set of facts” language in *Conley* “has never been taken literally”); *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961

(S.D. Cal. 1996) (noting that *Conley*'s "no set of facts" language is not to be "taken literally") (citation omitted); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. Rev. 1023, 1028 n.44 (1989) (noting that *Conley*'s "no set of facts" "statement, if taken literally, would foolishly protect from challenge complaints alleging that only that defendant wronged plaintiff or owes plaintiff a certain sum"); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998) ("Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1769 (1998) ("if courts hewed rigidly to the line laid down in *Conley v. Gibson*, pleading practice would probably have vanished."). As a broad coalition of seven Justices – led by Justice Souter – concluded in *Twombly*, *Conley*'s "no set of facts" language had "puzzle[ed]" the profession long enough. 550 U.S. at 563; see *id.* at 563 n.8 (explaining that the Court's reading of *Conley*'s squared with the Court's prior cases).

And (c) the bill could require some other, non-literal interpretation of *Conley*. But it is not clear what that interpretation would be. One of the reasons that the Supreme Court had to revisit this area of law in *Twombly* and *Iqbal* is the confusion and uncertainty that *Conley*'s "no set of facts" language had created over time. See 550 U.S. at 562-563 (explaining that *Conley*'s "no set of facts" language "has been questioned, criticized, and explained away long enough," and that "after puzzling the profession for 50 years, this famous observation has earned its retirement"); see *id.* at 562 (citing cases); see also, e.g., *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (6th Cir. 1988); *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976). The proposed bill would invite further conflict and confusion over what interpretation to

give *Conley*'s "no set of facts" language. Moreover, regardless of what interpretation of *Conley* governs (or is determined by the courts to govern), courts will have to sort out the impact of the legislation on the enormous body of case law discussed above holding – long before *Iqbal* – that conclusory and implausible allegations are insufficient to state a claim for relief.

A bill proposed in the House of Representatives (H.R. 4115) explicitly invokes *Conley*'s "no set of facts" language and provides that "[a] court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." H.R. 4115, 111th Cong. § 2 (2009). The legislation further provides that a complaint need not be "plausible" on its face, or sufficient even to support a "reasonable inference that the defendant is liable for the alleged misconduct," to pass the federal pleading threshold. *Id.* That legislation would apparently call for a literal interpretation of *Conley*'s "no set of facts" language, even though, as noted, the consensus among courts and commentators before *Twombly* and *Iqbal* was that *Conley* could not be taken literally. In addition, it would mandate that complaints stating *implausible* claims be allowed to proceed to discovery. If enacted, that legislation would dramatically lower the federal pleading standards and suffer from the other flaws discussed herein with respect to the proposed Senate bill.

Third, and more generally, to the extent that the proposed bill is premised on the notion that it is possible simply to "reset" the law to where it was before *Twombly* and *Iqbal* by invoking *Conley*, that is incorrect. On the day before *Twombly* was decided, the law governing pleading was in a much more nuanced state. *Conley*'s "no set of facts" language was not taken literally. If it had been, then far fewer cases would have been dismissed at the pleading stage. Moreover, as discussed above, far from reading *Conley* literally, the lower courts had repeatedly

held that conclusory and implausible allegations were insufficient to state a claim. As a result, if the new law actually required a literal application of *Conley*, enacting the proposed legislation would do far more than simply “reset” the law to where it was pre-*Twombly*, it would dramatically *change* the law by significantly liberalizing the pleading requirements that existed for decades before *Twombly* and *Iqbal*. Some groups – plaintiffs’ lawyers come to mind – may well desire such a result. But such legislation would impose great costs on defendants and society at large by permitting baseless and implausible claims to proceed to discovery.

Fourth, the proposed bill would appear to override or, at a minimum, cast doubt on statutory pleading and dismissal requirements such as those adopted by the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b)(1) and (2), and Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(c)(2), enacted by Congress in an effort to eliminate abusive and vexatious litigation, see, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81-83 (2006) (discussing litigation abuses that led to enactment of the PSLRA), because the bill’s opening “Except as provided” clause appears to wipe out all prior legislative enactments concerning pleading requirements. Likewise, the bill appears to override or, at a minimum, cast doubt on other pleading requirements set forth in the Federal Rules of Civil Procedure, including the heightened pleading requirement in Rule 9(b) for “fraud or mistake.” Fed. R. Civ. P. 9(b).

And finally, because of the uncertainties discussed above, the proposed bill is likely to generate significant litigation over a threshold determination – whether a complaint satisfies the gateway standards for pleading an adequate claim for relief – that must be made in every federal case and should be governed by a clear set of rules. The *Twombly* and *Iqbal* decisions have brought greater clarity to this important area of law. If enacted, the proposed legislation would unsettle the rules in this area and create enormous uncertainty and unpredictability.

VI. ANY NECESSARY RESPONSE SHOULD BE ADDRESSED THROUGH THE STATUTORILY-AUTHORIZED JUDICIAL RULEMAKING PROCESS

To the extent Congress is concerned about the Supreme Court's decisions in *Twombly* and *Iqbal*, there is a superior process for addressing the matter: the judicial rulemaking process established by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2072-2074. The Rules Enabling Act establishes a procedure for amending the Federal Rules of Civil Procedure that ensures that any changes to the Federal Rules take place in an orderly and measured fashion by those who have expert knowledge of the Federal Rules. Proposed amendments to the Rules undergo a rigorous process that minimizes the risk of unintended consequences, including consideration by advisory committees comprised of judges and lawyers who are experts in the area, notice and public comment, consideration by the Standing Committee and the Judicial Conference, consideration by the Supreme Court, and transmission to Congress for consideration. See U.S. Courts, *Federal Rulemaking: A Summary for the Bench and Bar*, available at <http://www.uscourts.gov/rules/newrules3.html>.

“The ideal of nationally uniform procedural rules promulgated by the Supreme Court after consideration by expert committees – commonly known as ‘court rulemaking’ – has been the cornerstone of civil rulemaking in the federal courts since adoption of the Rules Enabling Act in 1934.” Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 *Geo. L.J.* 887, 888 (1999). There are enormous institutional advantages to the judicial rulemaking process. As Judge Jack B. Weinstein has explained, under the procedure established by the Rules Enabling Act, “[r]ulemaking is delegated so that Congress may profit from the expertise of courts and specialists in areas of litigation procedure with which they are far more conversant than Congress.” *Reform of Federal Court Rulemaking Procedures*, 76 *Colum. L. Rev.* 905, 929 (1976), quoted in *Rules Enabling*

Act of 1985: Hearing before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 99th Cong. 307-08 (1985); see also *id.* at 930 (“The effectiveness of the rulemaking mechanism under a delegation system depends heavily on the wisdom of Congress in exercising a considered restraint; absent this, the expertise of the various advisory committees will be almost valueless.”); see also *Oversight and H.R. 4144, Rules Enabling Act: Hearings before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 4 (1983-1984) (statement of Judge Edward T. Gignoux) (noting that the membership of the committees tasked with reviewing and revising the Rules consists of “experienced judges, lawyers and law professors” who have “expertise in procedural matters,” and explaining that “[t]he advisory committees and their reporters are the heart of the rulemaking process” provided for under the Rules Enabling Act). By contrast, “legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems.” A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem In Constitutional Revision*, 107 U. Pa. L. Rev. 1, 10 (1958), quoted in *Oversight and H.R. 4144 Rules Enabling Act: Hearings before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 300 (1983-1984).

As Congress has recognized, “[f]ederal national or supervisory rulemaking since 1934 has generally been a story of successful implementation of the Congressional plan for creating a uniform and consistent set of rules of practice and procedure. This rulemaking process has worked, in part, because Congress has granted the judicial branch a high degree of deference due to that branch’s intimate working knowledge of problems of practice and procedure.” H.R. Rep.

No. 99-422, at 7 (1985). And that process is ideally suited for monitoring the situation in the lower courts in the wake of *Twombly* and *Iqbal* and responding if need be. Indeed, as discussed, the Advisory Committee on Civil Rules has already begun actively monitoring the case law applying and discussing the *Twombly* and *Iqbal* decisions. The Advisory Committee – which is comprised of judges and practitioners who are intimately familiar with the Federal Rules of Civil Procedure and decisions in this area – occupies a better vantage point than this Committee to evaluate the situation and determine whether any amendment to the Federal Rules of Civil Procedure is necessary. The Advisory Committee is currently examining the impact of *Twombly* and *Iqbal* on motions to dismiss for failure to state a claim, the number of new complaints filed each year, and the grant of leave to amend pursuant to Federal Rule of Civil Procedure 15 where claims have been dismissed. If the Advisory Committee determines that *Twombly* and *Iqbal* have had an adverse impact on civil litigation, it may craft an appropriate amendment to the Federal Rules of Civil Procedure through the judicial rulemaking process.

There is no reason for Congress to override the time-honored judicial rulemaking process when it comes to evaluating or addressing the *Twombly* and *Iqbal* decisions. Indeed, the threshold nature of pleading standards and the interaction between Rule 8 of the Federal Rules of Civil Procedure and other rules (*e.g.*, Rule 12(b)(6) and Rule 15) make this an issue that is particularly well-suited for the expertise and deliberative attention of the Judicial Conference of the United States in carrying out its statutory duty to engage in “a continuous study of the operation and effect of the general rules of practice and procedure.” 28 U.S.C. § 331.

* * * * *

Thank you, Mr. Chairman for the opportunity to testify on these important matters. I look forward to answering the Committee’s questions.

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December 2, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

RE: Has the Supreme Court Limited Americans' Access to Courts?

Dear Senators Leahy, Specter, and Whitehouse,

I offer these comments for inclusion in the record for the Committee's hearing, "Has the Supreme Court Limited Americans' Access to Courts?" I am grateful for your leadership in holding this hearing to consider this very important issue.

I strongly support legislation that would repair the damage done by the Supreme Court's decisions in *Twombly* and *Iqbal*. The question posed today—whether the Supreme Court has limited access to the courts by imposing a stringent pleading standard found nowhere in the Federal Rules—is an important one that goes to the heart of our civil justice system. Although many of my comments and examples arise from antitrust litigation, the threat that these decisions pose to access to justice is much, much broader.

As an initial matter, I agree completely with the premise of this hearing: *Twombly* and *Iqbal* have already, in their short tenure, limited access to courts for far too many Americans. Timely legislative action is paramount. No doubt the Committee has already received lengthy histories of the civil pleading standard and detailed examples of *Conley*, *Twombly*, and *Iqbal* at work; the aim of these comments is merely to identify a few of the many problems that litigants and trial courts now face.

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As many district courts have already acknowledged, *Twombly*'s "plausibility" standard is murky at best.¹ Though there may well be disagreement about the *Conley* standard, there can be no question that plaintiffs, defendants, and courts alike understood the "no set of facts" standard—and understood it well. In contrast, *Twombly* and *Iqbal* have sowed confusion with their command that the plausibility standard "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 an illegal agreement."² Compounding judicial confusion is *Iqbal*'s suggestion that the trial court draw on "judicial experience and common sense" in determining whether a complaint states a claim for relief.³ Of course, plausibility, reasonable expectations, judicial experience, and common sense vary greatly from one trial judge to the next. Indeed, *Twombly* and *Iqbal*'s instructions have led to disparate, inconsistent results where uniformity was once the norm. Some district courts now demand that every complaint be suffused with specific fact allegations, while others maintain essentially that *Conley* is still good law. Litigants, meanwhile, can only speculate about what to expect from each district court.

Recent antitrust decisions illustrate the confusion. In the immediate wake of *Twombly*, many courts recognized the demise of *Conley* but nevertheless understood Rule 8 to have endured, distinguishing *Twombly* by limiting its holding to conscious parallelism in antitrust cases.⁴ Since *Twombly*, numerous district courts have upheld complaints alleging

¹ E.g., Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts after Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 851-868 (2008).

² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added).

³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

⁴ E.g., *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 900 (N.D. Cal. 2008) ("SRAM") (complaint need only present a short and plain statement of the claim; no detailed factual recitations are needed); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F.Supp.2d 363, 370 (M.D. Pa. 2008) (Rule 8 pleading standards continue to apply after *Twombly*; no heightened pleading standard is applied to antitrust complaints); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 582 (E.D. Pa. 2008) (denying motion to dismiss complaint alleging parallel conduct and plus factors that tend to negate independent action); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F.Supp.2d 404, 408 n.2 (D. Del. 2007) (reading *Twombly* liberally in declining to dismiss certain indirect purchaser antitrust claims); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 5 (D.D.C. 2008) ("a complaint need not be dismissed where it does not 'exclude the possibility of independent business action.' . . . Such a requirement at this stage in the litigation would be counter to Rule 8's requirement of a short, plain statement with 'enough heft to 'sho[w] that the pleader is entitled to relief'"); *In re Flash Memory Antitrust Litig.*, 643 F.Supp.2d 1133, 1141 (N.D. Cal. 2009) ("*Flash Memory*") (specific factual allegations are unnecessary; the statement in a complaint need only give the defendants fair notice of what the claim is and the grounds upon which it rests); *Fair Isaac Corp. v. Equifax, Inc.*, No. 06-4112 ADM/JSM, 2008 WL 623120, at *6 (D. Minn. Mar. 4, 2008) (*Twombly* does not require specific pleading of the evidentiary details of a conspiracy); *Flying J Inc. v. TA Operating Corp.*, No. 1:06CV00030, 2007 WL 3254765, at *1 (D. Utah Nov. 2, 2007), *interlocutory appeal denied*, 2007 WL 4165749, at *2 (D. Utah Nov. 20, 2007) (*Twombly* imposed no heightened pleading standard; a short and plain statement of a claim is still all that is needed); *Trans World Technologies, Inc. v. Raytheon Co.*, No. 06-

(Continued ...)

multi-year antitrust conspiracies with many actors, although in each case the complaint contained more factual detail than in *Twombly* or *Iqbal*.⁵

(... Continued)

5012 (RMB), 2007 WL 3243941, at * 4 (D.N.J. Nov. 1, 2007) (“[a]s long as the complaint alleges that the alleged co-conspirators had a plausible reason to participate in the conspiracy, the complaint is sufficient”); *Hyland v. Homeservices of America, Inc.*, No. 3:05-CV-612-R, 2007 WL 2407233, at *3 (W.D. Ky. Aug. 17, 2007) (complaint sufficed if “[p]laintiffs had alleged more than parallel business conduct and a ‘bare’ assertion of a ‘belief’ of a conspiracy”); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *3 (E.D. Pa. Aug. 6, 2007) (in denying a motion to dismiss a price-fixing conspiracy claim, “[p]laintiffs situate these allegations of parallel conduct in a context that suggests preceding agreement”); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-CV-1602 (JL/CCC), 2007 WL 1959225, at *6, *8 (D.N.J. June 29, 2007) (liberal antitrust pleading standards apply after *Twombly*; allegations of anticompetitive exclusive dealing arrangements stated a claim under § 1 of the Sherman Act).

⁵ In *Flash Memory*, for example, the court, in a ruling issued after *Twombly* but before *Iqbal*, upheld a complaint alleging a conspiracy against thirteen defendants to fix prices for NAND Flash memory and products containing such memory that lasted from 1999 to February of 2008. 643 F.Supp.2d at 1140, 1164. Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F.Supp.2d 1179, 1193 (N.D. Cal. 2009), the court upheld a complaint alleging a conspiracy among 26 defendants to fix prices for TFT-LCD panels and products containing them from 1996 through late 2006. And in *SRAM*, another post-*Twombly*, pre-*Iqbal* decision, the court upheld a complaint alleging a conspiracy among 24 defendants to fix prices for various types of SRAM from 1996 through 2005. See 580 F.Supp.2d at 899 & nn. 2 & 4, 910.

In yet another post-*Twombly*, pre-*Iqbal* example, the court in *In re Chocolate Confectionary Prods. Antitrust Litig.*, 602 F.Supp.2d 538, 574-77 (E.D. Pa. 2009), upheld a complaint alleging that members of four corporate families fixed prices for a variety of chocolate confectionary products over a five-year period. Likewise, in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F.Supp.2d 27, 33 (D.D.C. 2008), again decided after *Twombly* but before *Iqbal*, the court upheld a complaint against railroads who controlled 90% of freight traffic in the United States and allegedly entered into a conspiracy dating back to 2003 to fix fuel surcharges. *Id.* at 29, 37. Similarly, in *Standard Iron Works v. Arcelormittal*, No. 08 C 5315, 639 F.Supp.2d 877 (N.D. Ill. 2009), rendered after *Iqbal*, the court upheld a complaint alleging a multi-year output-restriction conspiracy by United States steel producers. 639 F.Supp.2d at 879-82, 902-03.

In a similar vein, the court in *In re ATM Fee Antitrust Litig.*, No. 04-02676 CRB, 2009 U.S. Dist. LEXIS 83199, at *22-25 (N.D. Cal. Sept. 4, 2009), another post-*Iqbal* case, the court ruled, in response to motions to dismiss by eleven banking entities accused of fixing interchange fees, that the amended complaint alleged a plausible conspiracy. And in *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP) (E.D.N.Y. Aug. 21, 2009), yet another post-*Iqbal* ruling, the district court reversed the ruling of a magistrate judge granting motions to dismiss for failure to plead a plausible conspiracy by 34 airlines accused of participating in an international conspiracy to fix air cargo fuel surcharges. See also *In re Southeastern Milk Antitrust Litig.*, 555 F.Supp.2d 934, 942-43 (E.D. Tenn. 2008) (denying motion to dismiss in antitrust conspiracy case).

Other federal courts, meanwhile, have taken a hard line after *Twombly*, dismissing even detailed complaints alleging antitrust conspiracies.⁶ In a recent dissenting opinion in *In re Travel Agent Commission Antitrust Litigation*, an appeal to the Sixth Circuit affirming dismissal of an antitrust complaint, Judge Gilbert Merritt lamented the widespread misapplication of the new plausibility standard. Judge Merritt observed that “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.”⁷ “The uniformity needed for the rule of law and equal justice to prevail is lacking,” Judge Merritt explained.⁸ “This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims.”⁹

As the dissent in *Travel Agent* makes clear, a restrictive interpretation of *Twombly* and *Iqbal* is at odds with the goals of private antitrust enforcement under the Sherman Act. Price-fixing conspiracies are self-concealing by nature and difficult if not impossible to uncover in any detail at the initial pleading stage.¹⁰ Specific facts about the nature, scope, and duration of any given conspiracy are only known or knowable at the outset—before formal discovery or detailed public disclosure (arising from, e.g., investigative reporting or governmental indictment)—if one has access to inside information. This “information asymmetry” between plaintiffs and defendants erodes *Twombly*’s assumption that the plausibility standard will bar only complaints that have no “reasonably founded hope” of yielding relevant evidence in discovery.¹¹

Because no one can be sure what the Court intended by *Twombly* and *Iqbal*, the decisions could be used to dismiss meritorious cases that aim to advance the law through

⁶ See, e.g., *Kendall v. Visa U.S.A. Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007); *In re Travel Agent Com’n Antitrust Litig.*, 583 F.3d 896 (6th Cir. Oct. 2, 2009) (“*Travel Agent*”); *Hinds County, Miss. v. Wachovia Bank, N.A.* 620 F.Supp.2d 499 (S.D.N.Y. 2009) (“*Hinds*”); *Arista Records LLC v. Lime Group LLC*, 532 F.Supp.2d 556 (S.D.N.Y. 2007); *In re California Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025 (N.D.Cal. May 21, 2009); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D.Wash. Aug. 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D.Del. May 31, 2009); *In re Less-Than-Truckload Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219 (N.D. Ga. 2009); *In re Digital Music Antitrust Litig.*, 592 F.Supp.2d 435 (S.D.N.Y. 2008); *In re Insurance Brokerage Antitrust Litig.*, No. 04-5184 & 05-1079, 2007 WL 2533989 (D.N.J. Aug. 31, 2007).

⁷ *Travel Agent*, 583 F.3d at 914 (Merritt, J., dissenting).

⁸ *Id.*

⁹ *Id.*

¹⁰ Scott Dodson, *Pleading Standards after Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. “In Brief” 135 (2007), available at www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf.

¹¹ *Twombly*, 550 U.S. at 556 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

the use of novel legal theories. Indeed, under a “plausibility” regime, many landmark historical decisions might never have made it past the pleading stage. For example, *Brown v. Bd. of Education*¹² might be susceptible to attack under *Twombly*. Some, like the civil procedure professors amici in *Iqbal*,¹³ have parsed *Twombly* to require plausibility of particular allegations; plausibility of inferences drawn from otherwise plausible allegations; and plausibility of entitlement to relief. But that last category, mixing “plausibility” and “relief,” is dangerous: as subsequent lower courts use loose language, a requirement of ‘plausible relief’ begins to take shape.¹⁴ *Brown*, of course, is remarkable (among other reasons) because the relief that ultimately resulted was *highly* improbable. No contemporary trial court could have envisioned Chief Justice Warren’s instructions to the district courts to retain jurisdiction and supervise the desegregation of this nation’s schools. And in the absence of plausible relief, *Brown* might not today survive *Twombly*, at least as interpreted by the lower courts.

Twombly and *Iqbal* have also, perhaps to some extent unwittingly, emboldened defendants as they seek to extinguish litigation long before any consideration of the merits. Armed with this new weapon, many defendants have redoubled their costly “motion practice” at the earliest possible stage of litigation, even where the allegations are supported by specific facts and are undoubtedly “plausible.” For example, I have seen questions of plausibility arise in civil antitrust litigation filed *after* guilty pleas in a parallel criminal proceeding. In *In re Air Cargo Antitrust Litigation*,¹⁵ seven large airline defendants pleaded guilty to participating in a global conspiracy to fix prices for air cargo rates. Despite their indictments and subsequent guilty pleas, all seven moved to dismiss the civil complaint for failure to state a plausible claim under *Twombly*. And the magistrate judge recommended dismissal because, he wrote, plaintiffs’ claims are “insufficient to raise a plausible inference of an agreement.”¹⁶ Almost a year later, however, the district judge rejected the recommendation, reasoning that now, with 15 guilty pleas, plausibility was firmly established.¹⁷

The guilty-plea situation is particularly alarming. Where a company has acknowledged guilt by receiving conditional leniency from the United States Department of Justice, or has actually pleaded guilty to participation in a criminal conspiracy, there can be no question whether a complementary civil complaint is “plausible” in theory or fact.

¹² 347 U.S. 483 (1954).

¹³ See Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents in *Ashcroft v. Iqbal*, No. 07-1015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299191.

¹⁴ E.g., *Segal v. Geisha NYC LLC*, 517 F.3d 501 (7th Cir. 2008) (“a complaint that satisfies Rule 8(a)’s pleading requirements might still warrant dismissal under Rule 12(b)(6) if the facts pled cannot result in any plausible relief”).

¹⁵ *In re Air Cargo Antitrust Litigation*, No. MD 06-1775 (JG) (VVP) (E.D.N.Y.).

¹⁶ *In re Air Cargo Antitrust Litigation*, No. MD 06-1775 (JG) (VVP), 2008 WL 5958061 at *7 (E.D.N.Y. Sept. 26, 2008).

¹⁷ *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP) (E.D.N.Y. Aug. 21, 2009 order).

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These situations cry out for some opportunity for plaintiffs—the actual victims of the conspiracy admitted to—to discover missing information. Indeed, plaintiffs often lack certain details that might illuminate their civil pleadings because that information is under the control of the public enforcement agency. Whether by plea or amnesty, the government, pursuant to its investigatory authority, has possession of the essential information relating to the conspiracies. Citing the need to protect the prosecutorial process, agencies often refuse to share information until completion of their investigations or trials, leaving plaintiffs with little recourse before the courts.¹⁸

Finally, and perhaps most troubling, is the way in which the Supreme Court altered a long-settled procedural rule. Even assuming that *Twombly* raised questions meriting further exploration, a formal amendment to Rule 8, reached after informed deliberation, would have at least yielded Committee Notes to guide future courts and litigants. Instead, however, the court purported to leave intact Rule 8(a)(2), all the while radically transforming the pleading standard with little explanation of the new standard or the reason for the change.

These are, of course, only a few of the problems posed by *Twombly* and *Iqbal*. One can expect—and my partners and I have already seen—that an aggressive (and unpredictable) pre-discovery dismissal regime will lead to fewer meritorious cases filed, more meritorious cases dismissed, and less deterrence and redress of unlawful conduct.¹⁹ But our civil litigation system requires a clear and uniform pleading standard. Anything less will impede justice. Unfortunately, the Supreme Court has replaced *Conley*, which satisfied both criteria, with *Twombly* and *Iqbal*, which satisfy neither.

Sincerely,



Michael D. Hausfeld
Chairman
Hausfeld LLP

¹⁸ Civil defendants routinely request stays of discovery pending disposition of their motions to dismiss pursuant to *Twombly/Iqbal* motions.

¹⁹ See Posting of Professor Scott Dodson to Civil Procedure Prof Blog, <http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html> (last visited November 30, 2009).

Statement of Senator Kyl
Senate Judiciary Committee
“Has the Supreme Court Limited Americans’ Access to Courts?”

The assumption driving today’s hearing is that the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² represent a sea change in how courts decide whether to dismiss a civil lawsuit under the Federal Rules of Civil Procedure. Critics of these recent decisions want to “return” to a standard articulated in *Conley v. Gibson*³ over 50 years ago. Under that standard, a federal court could not dismiss a civil complaint “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.”⁴ But the assertion that *Twombly* and *Iqbal* were a dramatic departure from how courts have actually interpreted and applied *Conley* is simply an inaccurate characterization of those cases.

As former Solicitor General Garre points out in his testimony, the truth is that *Conley*’s “no set of facts” standard was the source of much confusion, since it would seem, taken literally, to never permit the dismissal of a civil claim. It is almost always possible to imagine some set of facts that could, however implausible, support a cause of action. Justice Souter described the “no set of facts” standard this way: “The 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 showing any set of facts consistent with the allegations in the complaint.”⁵

What did courts do in the face of this “incomplete” and confusing standard? They adopted a number of principles to help weed frivolous claims from potentially meritorious ones. For instance, courts have long refused to entertain complaints based on “bald assertions,” “unwarranted inferences,” and the like. The Supreme Court’s recent decisions simply reflect this reality and explicitly state what most already knew—that a plaintiff’s claim should be “plausible on its face.”

¹ 550 U.S. 554 (2007).

² 129 S. Ct. 1937 (2009).

³ 355 U.S. 41 (1957).

⁴ *Id.* at 46.

⁵ *Twombly*, 550 U.S. at 562-63.

It is, frankly, astounding that there are those who want to jettison this common-sense approach and return to a “standard” that gave courts precious little guidance and that was applied inconsistently from one court to another. I am very concerned that this effort, if successful, would encourage frivolous lawsuits in which lawyers use the discovery process to go on a fishing expedition. At a time when our nation is reeling from the loss of jobs and high unemployment, it is irresponsible for us to even consider passing legislation that could substantially increase the amount of money that businesses would need to spend to fend off frivolous litigation. The result would be even more lost jobs.

There would also be national security implications with legislatively overturning the Supreme Court’s recent decisions, as demonstrated by *Iqbal*. That case involved a Pakistani Muslim who had been charged with immigration-related crimes and detained in the immediate aftermath of 9/11. After he was convicted, served a sentence, and was deported, he filed a civil lawsuit against the Attorney General and FBI Director, claiming he had been discriminated against because of his religion. In its decision dismissing the plaintiff’s claims, the Supreme Court noted that discovery in cases involving government officials “exact[s] 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.”⁶ I agree. This is especially true in a national security context—those officials responsible for keeping us safe should not have to spend their limited time and departmental resources responding to the discovery requests of a plaintiff whose claims, like those in *Iqbal*, are implausible.

Finally, it is important to mention that this legislation is not only unwise, it is also premature. The Judicial Conference is conducting a thorough review of how courts are applying the *Twombly* and *Iqbal* decisions. If the Judicial Conference determines that courts are applying the cases in a way that is unfair to plaintiffs, it may, pursuant to the Rules Enabling Act, propose amendments to the federal rules to rectify the situation. But the legislation that has been introduced in this Congress would short circuit that process. Any effort to change existing law should at least be put on hold until the review has taken place and the Judicial Conference is permitted to make a recommendation.

⁶ 129 S. Ct. at 1953.

**Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Has The Supreme Court Limited Americans' Access To Courts?"
December 2, 2009**

This morning we will examine the impact two recent Supreme Court decisions have had on Americans' access to the Nation's court system.

A few years ago, a slim majority of the Supreme Court undercut the landmark precedent of *Brown v. Board of Education* and its guarantee of equal justice. At that time, Justice Breyer observed that "it is not often in the law, that so few, have so quickly, changed so much." That comment reflects the power that a mere five justices on the Supreme Court can have in our democracy. Their actions need not be unanimous. They do not need consensus. In the very year a justice is confirmed, he or she can be the deciding vote to overturn precedent and settled law.

This is now our fifth hearing in 18 months held to highlight cases where literally five justices -- the slimmest majority -- have changed the legal landscape by overturning precedent and undermining legislation passed by Congress. Today's hearing is yet another reminder about how just one vote on the Supreme Court can impact the rights and liberties of millions of Americans.

Today, we focus on how a thin majority of the Supreme Court has changed pleading standards. This issue sounds abstract, but the ability of Americans to seek redress in their court system is fundamental. In a pair of divided decisions, the Court restricted a petitioner's ability to bring suit against those accused of wrongdoing. The Court essentially made it more difficult for victims to proceed in litigation before they get to uncover evidence in discovery. I fear that this is just the latest example of conservative judicial activism.

For more than 50 years, judges around the Nation enforced longstanding precedent designed to open courthouse doors for all Americans. In the 1957 decision of *Conley v. Gibson*, the Supreme Court held that a plaintiff's complaint will not be dismissed if it sets out a short and plain statement of the claim, giving "the defendant fair notice of what the claim is and the grounds upon which it rests." This precedent reflected the intent behind the Federal Rules of Civil Procedure, which Congress adopted over 70 years ago, to set pleading standards to allow litigants their day in court. Lawyers call this "notice pleading" and distinguish it from specific fact pleading. The underlying intent has been to allow people their day in court and not to require them to know everything or have all the evidence that they will use to prove their claims at the outset. Much of that evidence may be in the hands of the defendant accused of wrongdoing, after all. Allowing the case to begin with a good faith claim permits the parties to engage in evidence gathering. Of course to prevail a party needs to establish a claim by a preponderance of the evidence so by the end of the case, the claim of wrongdoing will be fairly tested.

In two cases, *Iqbal* and *Twombly*, the Supreme Court abandoned the 50-year-old precedent established in *Conley*. Now, the Court requires that prior to discovery, a judge must assess the "plausibility" of the facts of an allegation. In his dissent, Justice Stevens called *Twombly* a "dramatic departure from settled procedural law" and "a stark break from precedent." He predicted that this decision would "rewrite the Nation's civil procedure textbooks" because it

“marks a fundamental – and unjustified – change in the character of pretrial practice.” Justice Souter, the author of the *Twombly* decision, dissented in *Iqbal* because he believed the five justice majority created a new rule that was “unfair” to plaintiffs because it denied them a “fair chance to be heard.”

These activist decisions do more than ignore precedent – they also pose additional burdens on litigants seeking to remedy wrongdoing. As a result of this judge-made law, litigants could be denied access to the facts necessary to prove wrongdoing. As this Committee learned last year from the testimony of Lilly Ledbetter, employees are often at a disadvantage because they do not have access to the evidence to prove their employer’s illegitimate conduct. I fear that her civil rights claim would not have survived a motion to dismiss under the new standard. Our justice system cannot ignore the reality that a defendant often holds the keys to critical information which a litigant needs to prove unlawful conduct.

By making the initial pleading standard much tougher for plaintiffs to reach, the conservative majority on the Supreme Court is making it more difficult to hold perpetrators of wrongdoing accountable. I fear that this new heightened pleading standard will result in wrongdoers avoiding accountability under our laws. Of course, wealthy corporate defendants and powerful government defendants would prefer never to be sued and never to be held accountable. These new judge-made rules will result in prematurely closing the courthouse doors on ordinary Americans seeking the meaningful day in court that our justice system has provided.

As we will hear from our witnesses today, the impact of the *Twombly* and *Iqbal* decisions has been immediate and expansive. According to the *National Law Journal*, four months after *Iqbal*, more than 1,600 cases before lower Federal courts have cited the ruling. This precedent has the potential to deny justice to thousands of current and future litigants who seek to root out corporate and governmental wrongdoing.

It has been said that a right without a remedy is no right at all. That is what is at stake here. I fear that *Twombly* and *Iqbal* are not isolated rulings, but rather part of a larger agenda by conservative judicial activists to undermine Americans’ fundamental rights. The Seventh Amendment to the Constitution guarantees the right of every American to a jury trial. That guarantee is undermined if the rules for getting into court are so restrictive that they end up closing the courthouse doors before a fair inquiry can be made.

I thank Senator Whitehouse, the Chairman of the Subcommittee on Administrative Oversight and the Courts, for working with me to hold this hearing and for sharing the responsibility for chairing it. I also thank the distinguished witnesses for coming. I look forward to hearing their testimony.

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December 9, 2009

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The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

Not long ago, the Mexican American Legal Defense and Educational Fund (MALDEF) signed on to a coalition letter submitted for the record on October 26, 2009 encouraging committee members to support legislation that will restore the legal standards for notice pleading in federal civil cases. On behalf of MALDEF, I submit this letter for the record to underscore the paramount importance of S. 1504, introduced by Senator Arlen Specter and co-sponsored by Senator Russell D. Feingold, that will restore pleadings standards to those the Supreme Court enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957).

As you are aware, the Supreme Court recently decided two cases, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, _____ U.S. _____ (May 18, 2009), in a manner that severely abridges litigants' ability to plead a case. Under these decisions, in order to survive the pleadings stage of a suit, a plaintiff must state "plausible" facts to prevail over a motion to dismiss. Under *Conley*, a defendant had to prove that the plaintiff could not prevail under any set of facts in support of a claim and upon which the plaintiff was entitled to relief.

The Federal Rules of Civil Procedure sets forth pleading requirements: a plaintiff may proffer a short and plain statement asserting that she is entitled to relief, and, when alleging fraud or mistake, may make a general allegation as to a defendant's state of mind (malice, intent, etc.). The Rules also provide for a discovery process through which a plaintiff may investigate and uncover the facts necessary to prove a claim at trial. Pleadings standards must be broadly interpreted and applied to permit a plaintiff to avail herself of this federally prescribed process and to discover facts to support a claim. Requiring greater specificity leads to the dismissal of meritorious suits. It could also lead plaintiffs to resort to unsupervised and potentially chaotic means of uncovering factual evidence.

Advancing Latino Civil Rights for 40 Years
www.maldef.org

MALDEF engages in civil rights impact litigation throughout the country in the areas of education, employment, voting rights and immigrant's rights. For instance, in employment discrimination cases, a low-income worker's ability to pursue a claim might be impossible under the new standard. On the other hand, the previous standard permitted a plaintiff to allege in good faith unlawful conduct without being required to obtain evidence outside of his control before the discovery process begins. Such was the case in our recent lawsuit successfully challenging the wage and hour violations of a Fortune 200 company, in the largest class action on behalf of Latino construction workers in the State of California.

Similarly, in education and voting rights cases alleging intentional discrimination under the Fourteenth Amendment to the U.S. Constitution, plaintiffs often are able to allege facts supporting discrimination claims at the outset of a case but require the discovery process in order to ultimately prove a case. For example, in 2006 MALDEF brought suit against a principal for intentionally segregating minority students in classrooms on the basis of race. The plaintiffs had some facts supporting their intentional discrimination claim when they first filed, but they were able to acquire more compelling evidence only through the discovery process—evidence that ultimately helped prove their case and put an end to the racial segregation of elementary schoolchildren. *Santamaria v. Dallas Indep. Sch. Dist.*, 2006 U.S. Dist. LEXIS 83417 (N.D. Tex. Nov. 16, 2006).

The new and fundamental changes overturning more than half a century of legal precedent will have a real-world impact on MALDEF's work as well as the ability of our clients to have their day in court in the pursuit of equality and justice. We therefore join many other civil rights organizations in urging the Committee and Congress to expeditiously remedy this problem and usher through S. 1504 before the courthouse doors are closed on untold numbers of legitimate legal claims.

Sincerely,



Claudine Karasik
Legislative Staff Attorney



THE CATHOLIC UNIVERSITY OF AMERICA

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December 9, 2009

Matthew L. Wiener
General Counsel
Senator Arlen Specter
Committee on the Judiciary
United States Senate
Washington, DC
matt_wiener@judiciary-dem.senate.gov
(202) 224-6598

Re: Notice Pleading Restoration Act of 2009

Dear Counsel Wiener:

At the invitation of the Staff of the United States Senate Judiciary Committee, I am submitting the following in support of the Notice Pleading Restoration Act of 2009 and for submission into the record for the "Hearing on Whether the Supreme Court has Limited Americans' Access to Court," held on December 2, 2009.

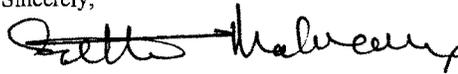
I am an Associate Professor of Law at the Columbus School of Law, at The Catholic University of America. I have been teaching Civil Procedure, Complex Litigation, and Civil Rights for seven years and am co-author of the casebook, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION; CASES AND MATERIALS, 2d edition, West Group (2006). My scholarship focuses on the intersection of civil procedure and

civil rights. Prior to academia, I litigated for eight years in the private sector and non-profit arena as a class action specialist, tackling complex legal matters in federal civil rights cases.

The attached abstract below is a summary of my upcoming article that will be published in the LEWIS & CLARK LAW REVIEW special symposium issue on the impact of *Ashcroft v. Iqbal* in the spring. My paper was also selected by the American Association of Law Schools (AALS) Civil Procedure Section in response to a nationwide call-for-papers to be presented at its annual conference on January 8, 2010. My article discusses the potentially detrimental impact of *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly* on civil rights and other cases involving informational inequities, and argues that the federal courts should permit plaintiffs to have access to pre-dismissal discovery to preserve court access, in the absence of legislation.

Please do not hesitate to contact me should you have any questions or would like additional information.

Sincerely,



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ABSTRACT

While the Federal Rules of Civil Procedure are trans-substantive, their impact is not. The impact of the Rules on the outcome of civil litigation depends on the substantive claim at issue. Specifically, the confluence of Rule 8(a)(2)'s pleading requirements and Rule 12(b)(6)'s dismissal criteria – as recently interpreted by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) -- has a distinct impact on civil rights cases alleging intentional discrimination. Application of these Rules, under the Court's new plausibility pleading standard, is more outcome determinative for civil rights cases because of the informational inequities that exists among substantive claims.

Civil rights cases alleging intentional discrimination face a number of evidentiary hurdles specific to the underlying cause of action. First, factual allegations lend themselves to theories both consistent and inconsistent with an illegal discriminatory motive. At the pleading stage – where alternative theories of liability and mixed motives are often pled – a court may dismiss the case as implausible, a premature conclusion prior to the discovery process. Second, plaintiffs alleging intentional discrimination are at a distinct evidentiary disadvantage pre-discovery because of the difficulty in uncovering facts sufficient to demonstrate illegal motive. Unearthing discrimination has become more difficult over time because of the more subtle and institutional forms it takes. Moreover, such evidence is often in the exclusive possession of the defendant. Third, the plausibility standard's highly subjective nature increases the risk of bias in the Rule 12(b)(6) dismissal determination. Skepticism over whether intentional discrimination

continues to exist – a particularly acute controversy in an alleged “post-racial” Obama society – may impermissibly come into play at this early stage of the litigation. All of these factors make civil rights claims more vulnerable to premature dismissal under the modern pleading regime.

By making the pleading standard more rigorous, the Supreme Court sought to spare litigants from costly and complex discovery in *Twombly*'s anti-trust class action, and to spare national security government officials from distracting and time consuming discovery in *Iqbal*. Rather than diminishing – if not eliminating – potentially expensive and onerous discovery via the new *Twombly* and *Iqbal* standards, however, the Supreme Court may have merely necessitated the lower courts' *shifting* discovery to earlier in the litigation process, and *increasing* its gate-keeping function.

The plausibility pleading standard may require that parties be able to take some limited, preliminary discovery to overcome the informational inequity that exists among various substantive claims. While courts should continue to guard against “fishing expeditions,” they should also be open, upon receipt of a Rule 12(b)(6) motion, to allowing plaintiffs some initial discovery focused on those discrete facts necessary to show a plausible claim. This way, discovery would be loaded towards the front end of the lawsuit, and would be doing heavy lifting of a different kind – determining the lawsuit's *viability* rather than uncovering its underlying *merits*.

Using targeted, pre-merits discovery to resolve threshold issues is not uncommon. The courts are already frontloading discovery and demanding that it do heavy lifting to determine class certification, qualified immunity and jurisdiction. While these models

are imperfect, they demonstrate that courts are able and willing to use discovery in this manner.

Post-*Twombly* and *Iqbal*, front loading and heavy lifting may also be the discovery approach needed at the pleading stage of civil rights and other cases vulnerable to informational inequities. In the face of expensive and time consuming merits discovery, the Supreme Court is right to try to explore ways in which cases can be evaluated more efficiently, without a gross expenditure of resources and time. But the question is not whether discovery will be diminished or eliminated altogether, under certain circumstances, as *Twombly* and *Iqbal* might suggest, but what will be discovered and when. In keeping with an efficient and just trans-substantive process, discovery must evolve to meet the challenges of contemporary civil rights litigation.

My article is divided into three parts. Part I sets forth the evolution of the Supreme Court's pleading standard, with particular emphasis on civil rights cases. Part II critiques the Supreme Court's new pleading standard, as set forth in *Iqbal*. This part describes the problems of the plausibility pleadings regime generally and for civil rights cases in particular. Part III explores the utility of targeted, early discovery at the pleadings stage (plausibility discovery). This part first examines the utility of other pre-merits discovery models. It then sets forth arguments parties are likely to make in cases involving informational inequities post-*Iqbal*, and how the courts can respond so as to properly balance those competing interests. This part may be used by parties and courts as a roadmap for managing such litigation. Finally, my article concludes that lower courts can and should consider narrow, discrete discovery at the pleadings stage to insure

that the trans-substantive application of the Rules do not work an injustice against civil rights cases and others involving informational inequities.


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Arthur R. Miller
University Professor

December 1, 2009

VIA ELECTRONIC MAIL

 Sen. Patrick Leahy
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 Sen. Arlen Specter
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 Sen. Sheldon Whitehouse
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 United States Senate
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Statement of Arthur R. Miller re: Senate hearing of December 2, 2009 entitled "Has the Supreme Court Limited Americans' Access to the Courts?"

Dear Senators Leahy, Specter and Whitehouse:

Let me introduce myself. I am a University Professor at New York University. Before that I was the Bruce Bromley Professor of Law at Harvard Law School for 35 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 I served as a member of the Committee and as the Reporter for the American Law Institute's Project on Complex Litigation. I have maintained an active practice in

the federal courts and have argued cases involving issues of federal procedure in every United States Court of Appeals and in the United States Supreme Court. Finally, I am the senior co-author of the multivolume treatise *Federal Practice and Procedure*.

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* 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*, our citizens' access to civil justice in our national courts is being seriously impaired.

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 the pretrial process. Although the so-called notice pleading established by the Supreme Court more than fifty years ago in *Conley v. Gibson* allowed a wide swath of cases into the system, discovery and summary judgment operated to expose and separate the meritorious from the meritless.

Beneath the surface of these broad procedural concepts lay several significant policy 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. The availability of private lawsuits has dispersed regulatory authority, achieved greater transparency, provided a source of oversight and governance, and led to leaner government involvement.

In recent decades judicial shifts in interpreting the Rules and the erection of other barriers have impaired the meaningful day in court Americans deserve. Three illustrations: Two decades before the recent pleading decisions, a 1986 trilogy of Supreme Court summary judgment cases 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." 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. 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.

Yet, until *Twombly* in 2007, the Supreme Court repeatedly stood firm in its commitment to the access principle at the pleading stage. With the advent of that case's "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.

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 and Constitutional principles through various changes that benefit certain economic interests.

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 various 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." Judges were to accept all factual allegations as true and draw all inferences in favor of the pleader. Judges 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*. 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. Now, *Twombly* and *Iqbal* may have transformed the well-understood limited purpose of the motion to dismiss as a way of testing the legal sufficiency of the complaint into a potentially Draconian method of foreclosing access based solely on an evaluation of the challenged pleading's factual presentation. The transmutation of this threshold procedure has pushed the motion to dismiss far from its historical function and, in my view, beyond its permissible scope.

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. 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. 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,” highly subjective concepts largely devoid of accepted—let alone universal—meaning. 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.

The expanded use of the motion to dismiss made possible by the Supreme Court’s decisions in *Twombly* and *Iqbal* is dangerous. It runs the risk of decisions based on ideological bias, 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 a jury of one’s peers.

Twombly and *Iqbal* have swung the pendulum away from the prior emphasis on access for potentially meritorious claims. 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, defendants 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 available only to the defendants? Plausibility pleading may shut the doors of discovery on the very litigants who most need the information gathering resources the Federal Rules have made available in the past. Indeed, *Twombly-Iqbal* can be seen as the latest element of the long-running trend in the lower courts toward constricting the private enforcement of important statutory and Constitutional rights in many contexts—a far cry from Congress’s intent when it created them.

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 to decide whether there is a more likely innocent explanation. Plausibility pleading probably will become the courts’ primary vehicle for achieving pretrial disposition, moving the gatekeeping function to the very beginning of the case, in many instances denying plaintiffs any ability to gain access to critical information

Although, few empirical studies documenting a greater frequency of dismissal under *Twombly-Iqbal* than under *Conley* are available because plausibility pleading is a very recent phenomenon, two useful studies indicate a disturbing increase in dismissals. They 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 surveyed a significant number of cases and concludes that there is a rather clear increase in Rule 12(b)(6) dismissals in important areas of federal law—for example, civil rights—since *Twombly* and especially since *Iqbal*. As the study reveals, this increase is in addition to an already high dismissal rate that existed prior to *Twombly-Iqbal* resulting from a number of courts applying fact pleading rather than notice pleading principles despite the 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*. (Both the frequency of summary judgment motions and the frequency of their grant also have increased over the years.)

The Court's move to plausibility pleading was motivated in significant part by a desire to filter out hypothesized frivolous litigation, to deter abusive practices, and to contain costs. Indeed, assumptions—but precious little evidence—about the prevalence of these phenomena have led to other dramatic restraints on 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 pushing a square peg into a round hole. 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.

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 appropriate 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 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.

Until *Twombly*, the Supreme Court consistently sanctioned the efficacy of case management as a way of containing costs and identifying unmeritorious cases.

Unexpectedly, in that case, the Court radically shifted its attitude. Based largely on an outdated and largely theoretical 1989 law review article, the Court questioned the ability of district judges to control pretrial procedures to limit costs and delays. 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. The *Iqbal* majority extended this line of thinking to government defendants.

This sudden change in viewpoint is extremely questionable given the dearth of meaningful information about the nature and scope of cost and delay. The picture generally portrayed is incomplete and distorted. Despite the lack of definition and empirical data, there is an abundance of assertion that often reflects ideology or economic self-interest. Indeed, what evidence exists is to the contrary.

The Federal Judicial Center (FJC) recently completed a preliminary study regarding attorneys' experiences with discovery and related matters. 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. These numbers certainly are not the litigant-crushing figures *Twombly* indicated they 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* has stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them. 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. Nor is there evidence as to its frequency. By leaving the notions of abusive discovery and frivolous litigation undefined in *Twombly* and *Iqbal* while simultaneously encouraging judges to factor in concerns about them when measuring the sufficiency 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 provide any real evidence for its conclusions, it also limited its concerns over costs to those borne by the defendant. 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. 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. Moreover, because 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 might produce.

The Supreme Court's amendment of the Federal Rules by judicial dictate lacks the democratic accountability provided by either the legislative or the 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 Court is not equipped to gather the needed empirical data, and lacks the practical trial litigation experience necessary for evaluating the pleading standard. What has happened seems inconsistent with many of the historic objectives of our federal civil justice system.

A legislative restoration of notice pleading and a moratorium 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.

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 pleading standard and motions to dismiss. Moreover, as things now stand the Advisory Committee must work in the face of two Supreme Court 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, 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 its apparent acceptance of unsubstantiated assertions about alleged frivolous litigation. Moreover, its observations about excessive costs, really do not apply to the vast majority of federal court cases now subjected to *Twombly-Iqbal*.

Returning the pleading standard to its pre-*Twombly-Iqbal* status would provide some impetus for prompt study, the development of much needed 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.

There always has been a sense that the Federal Rules and their application should achieve balance and proportionality among the three fundamental objectives Rule 1 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.

I hope these observations are of some value to your work. If I can be of any further assistance, I would be happy to be of service.

Sincerely yours,



Arthur R. Miller

November 30, 2009

WRITTEN STATEMENT OF ALAN B. MORRISON
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATE SENATE
DECEMBER 2, 2009

Mr. Chairman and Members of the Committee. Thank you for offering me the opportunity to express my views concerning the impact of the two recent decisions of the United States Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Although the majority opinions in both cases purport to be applying Rule 8 of the Federal Rules of Civil Procedure, virtually no one considers them to be anything less than a major departure from the meaning of Rule 8 that has been understood by lawyers, academics, and lower court judges since the Rule was enacted in 1938. For that reason and for the other reasons set forth below, I wholly support the proposals to halt the application of *Twombly* and *Iqbal* to all pending cases, in order to allow the Committee on Civil Rules to review Rule 8 and other Rules of Civil Procedure, to make whatever recommendations it considers appropriate, and then to complete the process specifically provided for in the Rules Enabling Act, 28 U.S.C. §§ 2071-74.

I am currently the Lerner Family Associate Dean for Public Interest and Public Service at the George Washington University Law School. I have spent most of my legal career litigating cases, mainly on behalf of plaintiffs, in the federal courts. I served for almost four years as Assistant United States Attorney in the Southern District of New York, doing mainly civil cases, with my last two years spent as Assistant Chief of the Civil Division. I then founded the Public Citizen Litigation Group with Ralph Nader in 1972, where I was director for most of the 32 years I spent there. Both while at the

Litigation Group and then subsequent to it, I taught civil procedure and other litigation courses at several law schools before coming to GW, where I am teaching civil procedure this semester. In the interest of full disclosure, I assisted counsel for the plaintiff in *Iqbal*, who is a former student of mine, in the preparation of his brief and the presentation of oral argument in the Supreme Court.

Regardless of one's position on what the proper rules regarding pleadings should be, there should be no debate about how any changes should be made: through the carefully constructed, very open process under the Rules Enabling Act, not through Supreme Court fiat, as was done first in *Twombly* and then in *Iqbal*. It had been settled law that the norm in the federal courts and now in most states courts is that under Rule 8 complaints need only give general notice of the plaintiff's claims sufficient to enable the defendant to begin to prepare its defense and that it is left to other rules to provide greater specificity to the claims and to provide evidentiary support for them. Plaintiffs are not required to provide details in their complaint, although they often do, and, most significantly for these cases, their allegations were never considered to have been required to rise to any level of plausibility, let alone the plateau that the Supreme Court required in both cases. Save for pro se complaints that can be dismissed as frivolous, 28 U.S.C. §1915 (e)(2)(B)(i), plausibility is a determination that is left for juries, or at most to be confronted on a motion for summary judgment, once the parties have had an opportunity to take discovery. As for the Court's dismissal of various allegations in the complaint in *Iqbal* as "conclusory," that has never been thought to be a defect, as evidenced by Form 11 which uses the conclusory term that the defendant drove his car

“negligently” with no greater specificity, yet under Rule 84, the Forms are specifically stated to “suffice” to satisfy the Rule to which they are relevant.

Second, there is an existing exception in Rule 9(b) that requires that allegations of fraud or mistake be pled “with particularity,” which demonstrates that the writers of the Rules know how to require more than notice pleading, yet did not do so for the antitrust claim in *Twombly* or the constitutional claim in *Iqbal*. Indeed, Chief Justice Rehnquist for a unanimous Court in *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), roundly rejected a lower court ruling that had set a heightened pleading requirement for the civil rights claim at issue there, reminding the lower courts that such changes should be made through the rulemaking process, not by judicial decision. Congress has also stepped in, as it has the recognized power to do, and provided in the Private Securities Litigation Reform Act of 1995, for a form of heightened pleading in cases covered by that law, as interpreted by the Court in the recent case of *Tellabs, Inc. v. Makor Issues & Rights, Inc.*, 551 U.S. 208 (2007). Furthermore, for those plaintiffs who are not in possession of facts necessary to support their allegations when they file their complaints, Rule 11(b)(3) specifically authorizes them to make factual allegations on information and belief, provided that they identify them as such, where they believe that they can gather the necessary facts in discovery, a right that is fundamentally inconsistent with the Court’s interpretation of Rule 8 to require such information be included in the complaint when it is filed. Each of these Rules and statutes is wholly inconsistent with the notion, adopted by the Court, that Rule 8 as currently written embodies a greater degree of specificity than the notice pleading that has been the law since 1938.

Third, although there are many similarities between *Twombly* and *Iqbal*, there are some significant differences that make the outcome in *Iqbal* even less justified. The majority in both cases seemed very concerned, from a policy perspective, about the potential for vast discovery and unfairness to the defendants from allowing the claims to proceed even to discovery, and that concern was translated into a reading of Rule 8 far stricter than the Supreme Court had previously adopted. In my view, and that of many others who have expressed concern about these two decisions, that kind of policy choice should only be made through the Rules Enabling process, not by the Court in cases in which only a limited number of parties are participating and where the full impact of such rulings on the rest of the litigation process under the Rules was not and could not be fully explored.

But even if such policy considerations were relevant to the outcome in these cases, *Iqbal* was not a case that remotely justified that kind of intervention. *Iqbal* had sued a number of defendants in an individual, not a class action, including the persons at the detention center who mistreated him, their immediate supervisors, the regional officials in charge of the center, and Attorney General John Ashcroft and FBI Director Robert Mueller, who were alleged to have approved the policy to subject certain ethnic and racial minorities to special detention if they were arrested for any crime whatsoever. Of great significance is the fact that the case before the Supreme Court dealt only with the claims against Ashcroft and Mueller. Thus, no matter what the Court held, *Iqbal*'s case against all of the other defendants would continue, including full discovery against them. The lower courts were fully aware of the potential of discovery against Ashcroft and Mueller, and all discovery against them directly was stayed until the plaintiff was

able to produce some direct evidence connecting them to the injuries that he sustained. Another detainee had sued the same defendants, and his case had already settled. But Ashcroft and Mueller wanted to get out of the litigation entirely, even though it was no current burden on them, nor would there be any burden unless a witness or a document confirmed that one or both of them had actually approved the orders directing harsh treatment of Iqbal and others similarly situated.

One might sensibly ask, why did Ashcroft and Mueller care enough to ask the Solicitor General to file a cert petition on their behalf, given the essentially non-existent burden the lawsuit had on them at this time? The most likely answer is that they were concerned that incriminating evidence would turn up and then their problems would be real. However, if the case were dismissed now, and the evidence came to light later, it would be too late to sue them because the statute of limitations would have run. And given the great difficulty that Iqbal's lawyers had in obtaining even the most limited discovery from the other defendants, the statute of limitations problem is a very real one.

One solution in situations like Iqbal's would be a rule change that would condition a dismissal on the defendant agreeing to toll the statute of limitations while the other discovery took place, which would mean that the dismissed defendants would be in potential jeopardy while the rest of the case was pending, but would free of actual burdens until then. That, in essence, is what the lower courts ordered in *Iqbal*, but that was apparently not enough for either the defendants or the Court majority. Moreover, in future similar cases, a lawyer might risk sanctions under Rule 11 by filing a claim without more factual details, yet given the refusal of the Government to provide further information even through formal discovery, there would be no realistic possibility of

obtaining such information before filing suit, which means that the statute of limitations will be a major hurdle for plaintiffs and an unreasonable shield for high ranking officials who issue orders that violate the constitutional rights of those against whom they are directed.¹

While, as a practical matter the problem in *Iqbal*-type situations can be solved by extending the statute of limitations and using discovery against other defendants to gather needed evidence, in many (and perhaps most) cases in which Rule 8 will now present a major new barrier, the lack of specific evidence problem will apply to all defendants, which will result in the entire case being dismissed. Moreover, viewed as cases in which the Court thought it was acting to foreclose massive discovery against defendants who asserted that they were not liable at all, that was a much more likely scenario in *Twombly*, which was an antitrust class action, than in *Iqbal*, where there were likely to be only a few documents linking Ashcroft and Mueller to the detention policy, and even if they were to be deposed, the depositions would be over quickly – unless they had actually done what the plaintiff alleged. Even the possibility of extensive discovery against the defendants can not justify the decision in *Twombly* because the Court had no business getting into those kinds of policy issues outside the rulemaking process. But even if policy were relevant, it is hard to see how the Court could have found the burdens to the defendants in *Iqbal* to be anything out of the ordinary for officials who are sued every day for some decision or other.

¹ Because there is no federal statute of limitations for these claims, the Court has ruled that the most analogous state statute should apply. As a result, there is no clear time deadline for all such cases against federal officers, although in general the times run between one and three years, plus whatever tolling periods an individual state might provide. The matter is further complicated in this case because the conduct of Ashcroft and Mueller alleged to violate *Iqbal*'s rights probably took place in Washington, even though he was detained in New York.

There is another difference between the cases that is worth considering. In *Iqbal*, the Court seems to have insisted that the plaintiff be more specific in the details of his complaint, perhaps requiring him to say whether the policy adopted was in writing, on what date it was adopted, and how it was communicated to those who were to implement it. For the reasons given above, that was impossible, even after some discovery was obtained from other defendants, let alone could it happen before the complaint was filed. In *Twombly*, however, the pleading problem may have been that the complaint focused largely on the parallel conduct of the defendants that the Court concluded could also be consistent with lawful as well as unlawful conduct. Thus, even though the plaintiff in *Twombly* alleged that the defendants entered into an agreement of the kind that would violate the antitrust laws, the majority opinion can be read as saying that the plaintiff needed to be clearer when making such allegations and that the complaint might be amended on remand to cure this defect, perhaps relying on the use of allegations based on information and belief and a good faith belief that discovery would support their claims, as specifically authorized by Rule 11(b)(3). On the other hand, the same can be said of *Iqbal*, where there was no innocent explanation, and where the same lack of evidence problem was present. The more likely understanding of both cases is that the Court has now changed the rules so that a plaintiff must, in effect, be able to prove his case before he files a complaint and not just, as has been the case since 1938, by the time that discovery is completed, and either a motion for summary judgment is made or a trial is scheduled.

What should be done by Congress to respond to these decisions? At a recent Civil Rules Committee meeting, the committee chair stated that, if the committee decided

to amend Rule 8 to address these decisions, it would be at least three years and probably four before any change could be implemented. Given the nature of the rulemaking process, including the opportunities for public comment and several levels of review, that prognosis seems entirely accurate, or perhaps optimistic. But it also means that in the interim – and the interim could be much longer, or no change might be forthcoming since any change would have to be approved by the Supreme Court – countless plaintiffs will have their cases dismissed under the *Twombly/Iqbal* approach to Rule 8, whereas before they would have been given an opportunity to prove their claims. That is intolerable, especially given the radical change that the Court imposed on litigants and the lower courts. Congress must step in and restore the *status quo ante* until the rulemaking process can be completed by a law superceding those decisions.

There are a number of ways that such a place-holding law could be written, and I am happy to work with this committee in drafting it. Such a law should provide that it will remain in effect until an amendment to Rule 8, made through the Rules Enabling Act process becomes effective, at which time the law would be automatically superceded. Finally, the law should specifically be made applicable to any case that is pending on the date of enactment unless there has been a final judgment of dismissal that is no longer subject to appeal or other review by a higher court.

National Senior Citizens Law Center

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STATEMENT OF THE NATIONAL SENIOR CITIZENS LAW CENTER

Hearing Before the Committee on the Judiciary of the United States Senate "Has the Supreme Court Limited Americans' Access to the Courts?"

Wednesday, December 2, 10:00 AM
Dirksen Senate Office Building Room 226

The National Senior Citizens Law Center (NSCLC) commends the Senate Judiciary Committee for holding this important hearing. The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* threaten fundamental interests of older Americans and all Americans. We welcome the opportunity to briefly delineate this threat, and the need for Congress to swiftly correct the mischief wrought by the Court's decisions.

NSCLC advocates nationwide before courts, legislatures, and executive agencies to promote the independence and well-being of low-income elderly and disabled Americans. No sector of the nation's citizens has a greater stake than older Americans in the effectiveness of federal benefit, civil rights, consumer, and other programs, such as Medicaid, the Age Discrimination in Employment Act (ADEA), the Employee Retirement and Income Security Act (ERISA), the Americans with Disabilities Act (ADA), and myriad consumer protection laws. The Court's *Twombly* and *Iqbal* decisions could strip beneficiaries of the practical ability to enforce their rights in court, thereby draining these and other landmark initiatives of much or all of their real-world value to the populations and individuals they were enacted to serve.

Over the past quarter century, the Supreme Court, often by narrow 5-4 votes, has persistently narrowed and obstructed the enforceability of virtually all these people-friendly laws and programs. Chairman Leahy, Senator Specter, and Senator Whitehouse deserve particular recognition, along with other committee members, for spotlighting this trend in this and other recent hearings and for responding with proposed remedial legislation.

In the 2009 *Iqbal* decision, the Court instructed trial judges to dismiss cases outright unless plaintiffs come to court pre-armed with "plausible" evidence of a defendant's liability. In practice, this Catch-22 rule will trigger dismissal of complaints when critical defendant-controlled information can be obtained only through post-complaint discovery. The impact of this perverse rule will be felt with particular severity on legal protections which make liability turn on the defendant's intent, as for example, in cases involving workplace discrimination. Always a matter of vital importance to older workers, safeguards against age bias have become even more crucial in the current economic downturn. Numerous surveys show that the current financial crisis has forced older workers at all economic levels to shelve plans for retirement, and attempt to stay in, or re-enter the job market. One survey, published in March 2009, reported that 60 percent of workers over 60 have made that decision. 75 percent of the \$2.8 trillion that

vanished from group (401[k]) and individual (IRA) account assets during late 2007 and 2008 belonged to persons over 50. In addition to the disproportionate impact of this implosion of retirement assets, declining house values and rising health costs have seriously exacerbated the financial squeeze on older workers, and intensified pressure to continue to work.

Or hope to. When recession strikes, employers often target veteran employees in force reductions (RIFs), and disfavor older candidates for whatever new positions they may need to fill. As management expert Professor Michael Campion testified before the Equal Employment Opportunity Commission (EEOC) on July 15, 2009, "common negative stereotypes about older workers," which the ADEA was passed in 1967 to eliminate, have proven regrettably resilient. ADEA claims submitted to the Equal Employment Opportunity Commission (EEOC) spiked nearly 30% in June 2009 compared with the same month a year earlier.

In the few months since *Iqbal* was decided, the threat it and *Twombly* pose to older workers has become crystal clear. Prior to these decisions, pleading standards for employment discrimination cases were governed by a unanimous and universally accepted Supreme court decision in a 2002 age discrimination case, *Swierkiewicz v. Sorema*. In this case, the Court held that a complaint alleging workplace discrimination need only set forth factual and legal allegations sufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Citing a 1957 decision, *Conley v. Gibson*, the Court held that in discrimination cases no less than all others, a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Specifically, in its 2002 *Swierkiewicz* decision, the unanimous Supreme Court held it adequate that the complaint "detailed the events leading to his termination, provided relevant dates, and included the ages . . . of at least some of the relevant persons involved with his termination."

Of course, while this recitation of facts was sufficient for a valid complaint, only discovery could yield evidence showing whether the adverse actions taken against the plaintiff were motivated by illegal discriminatory reasons. But now it appears that plaintiffs such as Mr. Swierkiewicz will never get the chance to demonstrate that they were fired illegally. Already, the Third Circuit Court of Appeals has ruled that the *Swierkiewicz* standard is no longer the law, because *Twombly-Iqbal* overruled it. The Third Circuit held:

"The Supreme court in *Swierkiewicz* expressly adhered to [the] then prevailing 'no set of facts standard [set forth in 1957 in *Conley v. Gibson*] . . . which the Supreme Court [in *Swierkiewicz*] cited for the proposition that Rule 8 [which prescribes the elements of a valid complaint] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. *We have to conclude, therefore*, that because *Conley* has been specifically repudiated by . . . *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*" (Emphasis added)

In this concise passage, the impact of *Twombly-Iqbal* on employment discrimination claims is described with precision by the only court of appeals that has yet to rule on the question: in the Third Circuit's view, *Twombly-Iqbal* has replaced the common-sense fairness of the *Swierkiewicz* rule with a perverse regime that will trap many, quite likely most victims of unlawful bias on the job, and leave employers with little or no incentive to respect half-century old guarantees of equal opportunity.

Accordingly, it is not credible to suggest, as business organizations mobilizing to block legislation to restore notice pleading have suggested, that *Twombly-Iqbal* made no significant changes in the law, and will not, if left standing, limit court access for victims of unlawful conduct who deserve to have their claims heard.

Much as older Americans need effective equal economic opportunity guarantees, employment discrimination is by no means the only area in which this decision threatens seniors' well-being and security. Older Americans are disproportionately frequent victims of consumer fraud, and the consequences can be devastating. The National Crime Prevention Council recently noted that "senior citizens are more at risk to be targeted by telemarketing scams than other age groups, and fraudulent telemarketers direct anywhere from 56 to 80 percent of their calls at older Americans." *Iqbal's* "plausibility" requirement is likely to result in fraud victims having their complaints thrown out before they can use discovery to find the facts that would clinch their case – or, more likely, to discourage lawyers from bringing such cases. To take a regrettably timely example, remedies for predatory lending abuses are most frequently sought under one or more laws Congress has passed – the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), or the Home Owners Equity and Protection Act (HOEPA). *Twombly-Iqbal* will make many such claims vulnerable to motions to dismiss, along with fraud claims based on many other federal statutes, or for that matter, state statutory or common law claims brought in federal court.

Twombly-Iqbal will also hamper the efforts of older Americans to hold public officials accountable for lawfully implementing vital programs. NSCLC often represents plaintiffs in cases challenging government agency action in which the harm is clear, but obtaining evidence showing the chain of causation necessary to establish government liability may be initially difficult. For instance, in 2003, Congress established the Medicare prescription drug benefit program, and provided that henceforth the more than six million low-income elder and disabled individuals who were "dually eligible" for both Medicaid and Medicare would receive their prescription drug coverage exclusively from the new Medicare program, not anymore from Medicaid. But, after enrolling in the new Medicare Part D program, and losing their Medicaid prescription drug coverage, tens of thousands of low-income seniors and individuals with disabilities were nevertheless denied access to the prescription drug coverage and subsidized prices to which they were entitled as dual eligible Medicaid and Medicare recipients. As reported by the New York Times, several states declared health emergencies, and many were obliged to step in and pay for prescriptions that the federal law required Medicare to pay for. To correct this failure, we filed a lawsuit in 2006 on behalf of beneficiaries whose benefits had unlawfully been cut off. The government responded with a motion to dismiss, but that motion was denied. Through discovery, attorneys for the plaintiffs were able to piece together the internal, multi-agency mechanisms causing the loss of benefits.

Eventually, we were able to reach a negotiated settlement, under which the Department of Health and Human Services was required to upgrade its information systems to recognize the status of dual eligibles more promptly, and to develop new safety nets to catch those whose information was not loaded in a timely manner.

Only through post-complaint discovery could we have established that responsibility for stranding the tens of thousands of desperately needy citizens represented in our suit lay with the federal government – and not, as the government alleged, with state governments or private insurers. Our case was filed before *Twombly* and *Iqbal* were decided, and it is problematic whether it, or cases like it that seek to ensure agency compliance with similar Congressional mandates, could still survive a motion to dismiss.

In addition to correcting the harm inflicted by these two courthouse door-closing decisions, it is important to respond because they are part of a pattern of what Justice John Paul Stevens, dissenting from a June 2009 5-4 decision that radically tightened evidentiary requirements for age discrimination plaintiffs, termed “unabashed judicial law-making.” (*Gross v. FBL Services*, 129 S. Ct. 2343, 2358) Over the past several decades, Congress has passed many important laws to meet basic needs of ordinary Americans, such as equal employment opportunity, access to health care, retirement security, consumer fairness, and product safety. But, as Chairman Leahy observed in one of several hearings the Committee has held to spotlight this dangerous trend, “In many cases, the Supreme Court has ignored the intent of Congress in passing these measures, oftentimes turning these laws on their heads, and making them protections for big business rather than for ordinary citizens.” In most of these Congress- and consumer-unfriendly decisions, such as *Gross v. FBL Services*, the Court’s technique has been to obstruct or eliminate citizens’ ability to enforce particular laws in court – an approach broadened in *Iqbal* to obstruct citizen enforcement of *all* statutory protections, as well as Constitutional protections.

Congress urgently needs to return the Court to consistent and faithful application of laws to protect the citizens Congress enacted them to serve. Overturning *Twombly* and *Iqbal*, and restoring notice pleading in courtrooms across the nation, is an excellent place to start.

If the Committee decides to move forward with such legislation, careful attention will need to be paid to drafting so as to maximally ensure that Congress’ intent will actually be implemented by the Supreme Court and the lower federal courts. As several scholars have documented, and the Committee is itself well aware, the Court has often narrowly interpreted or effectively marginalized the quite substantial number of “fixes” passed by Congress over the past two decades to overrule cramped statutory misinterpretations, especially concerning civil rights laws. Toward that end, NSCLC will be pleased to provide such research or drafting assistance as the Committee may find useful.

Thank you for the opportunity to submit this statement.

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NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Testimony of John Payton
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.
Before the United States Senate Committee on the Judiciary
Hearing on
“Has the Supreme Court Limited Americans’
Access to Courts?”
Dirksen Senate Office Building
Room 226
December 2, 2009

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

INTRODUCTION

Good morning, Chairman Leahy, Ranking Member Sessions, and Members of the Judiciary Committee. My name is John Payton. I am President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (LDF). I am pleased to testify today on the important topic raised by today's hearing: *Has the Supreme Court Limited Americans' Access to the Courts?* LDF's Litigation Director, Debo Adegbile, testified last month before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties on the same subject.

The brief answer to the question posed by this hearing is: "Yes." Two of the Supreme Court's recent cases have severely heightened the pleading standard for federal cases and thus substantially impaired Americans' access to justice. We urge Congress to respond immediately to this serious problem and restore that access.

The Legal Defense Fund was founded in 1940—just as the Federal Rules were adopted. We have used those rules to great effect. Relying on the Constitution and laws which Congress began to enact during the civil rights movement, we have brought civil rights and human rights cases on behalf of African Americans, Hispanic Americans, Asian Americans and white Americans, men and women, straight and gay. We have helped create an anti-discrimination principle that applies to employment, public accommodations, education, housing, union representation, police treatment, the vote and economic justice.

The ability to enforce rights created power in the people who were the victims of discrimination. When an aggrieved person—an African American who is denied the low mortgage rate that is offered to a white person, for example—can assert rights in court, it empowers that individual. Those rights can be asserted against the government, from the local to

the federal. Those rights can also be asserted against private parties, from individuals to a large corporation.

For those rights to be real, they must be enforceable. That enforceability requires access to the courts. One of the critical elements of our system of justice is its open access. If that access is curtailed, the power of victims of discrimination to redress wrongdoing is also curtailed.

This fundamental principle of open access is now threatened in very real terms by two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*.² Although *Iqbal* was decided just this year, these decisions already are constricting severely the pursuit of civil rights claims in our nation's federal courts. By suddenly imposing new pleading requirements that are far more stringent than the longstanding standard set forth in the Federal Rules of Civil Procedure, the Supreme Court has erected a significant barrier that operates to deny victims of discrimination their day in court. This is nothing short of an assault on our democratic principles. As United States District Judge Jack Weinstein recently commented about the detrimental impact of this heightened pleading standard, "[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."³

We believe that Congress should act immediately to prevent the Supreme Court's rulings in *Iqbal* and *Twombly* from further undermining access to courts for victims of discrimination. Given the important policy objectives behind our nation's civil rights laws and the hard-fought

¹ 550 U.S. 544 (2007).

² ___ U.S. ___, 129 S. Ct. 1937 (2009).

³ 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).

battles to secure their passage, Congress has a substantial interest in robust enforcement of civil rights laws. It should treat seriously threats that can, as one court warned, “chill” the pursuit of civil rights claims. Congress should take steps to ensure that persons can enter the courthouse door when seeking protection under civil rights statutes.

Congressional action in this context would be entirely consistent with earlier actions spearheaded by members of this Committee to promote access to the courts for civil rights litigants—for example, through the creation of private rights of action and fee shifting statutes to encourage legal representation. We urge Congress to address this new and dangerous shift in the pleading standard that now threatens to undermine enforcement of our civil rights laws.

NOTICE PLEADING IN THE CIVIL RIGHTS CONTEXT

The Federal Rules of Civil Procedure set forth the liberal pleading standard that shaped litigation for decades. Rule 8(a)(2) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” The Federal Rules were designed to ensure that meritorious claims were not foreclosed by procedural obstacles at the commencement of a case.

In 1957, during the early years of the civil rights movement, the Supreme Court recognized that a liberal pleading standard was essential to civil rights litigation. In *Conley v. Gibson*,⁴ African-American members of the Brotherhood of Railway and Steamship Clerks sued the union for violating its duty of fair representation under the Railway Labor Act. After they were demoted or discharged and replaced mostly by white employees, the plaintiffs alleged that the union discriminated against them by failing to protect them on the same basis as white

⁴ 355 U.S. 41 (1957).

railway employees. The case was part of a larger civil rights strategy, led by Charles Hamilton Houston, to ensure that unions treated all of their members fairly, without regard to race.

The Court allowed the employees' complaint to proceed. It unanimously held 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."⁵ The Court noted that if the allegations were proven, there was a "manifest breach" of the union's duty "to represent fairly and without hostile discrimination all of the employees in the bargaining unit."⁶

Significantly, the Court addressed and rejected the union's argument that the African-American workers' complaint failed to identify specific facts to support their "general allegations" of discrimination. The *Conley* Court held that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim," but instead require only "a short and plain statement of the claim" that will afford the defendant fair notice of the claim and the grounds therefore.⁷ According to the Court, notice pleading was sufficient because discovery and other pretrial procedures were appropriate mechanisms to reveal the precise nature of claims and narrow the disputed facts and issues prior to trial.⁸ As discussed below, under *Twombly* and *Iqbal*, defendants now might succeed in the type of attack on plaintiffs' "generalized pleading" that *Conley* rejected.

Conley affirmed that the purpose of the Federal Rules' liberal pleading standard was to eliminate procedural traps at the beginning of litigation that could prove fatal to a claim: "The

⁵ *Id.* at 45-46.

⁶ *Id.* at 46.

⁷ *Id.* at 47.

⁸ *Id.* at 47-48.

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 Placed in the civil rights context—*Conley* was decided in 1957—these liberal pleading standards were a critical prerequisite to ensure that victims of discrimination could take full advantage of the emerging federal substantive law on civil rights. When combined with appropriate discovery and other pretrial procedures, these liberal pleading standards guaranteed that civil rights litigants were afforded the opportunity to adjudicate their claims on the merits. It is not an overstatement to say that the key successes of civil rights litigation in the last half century are due, in part, to the pleading standard set forth in the Federal Rules and reinforced by the Court in its seminal decision in *Conley*.

CONSEQUENCES OF *TWOMBLY* AND *IQBAL* FOR CIVIL RIGHTS CASES

The Supreme Court’s decisions in *Twombly* and *Iqbal* drastically altered *Conley*’s pleading requirements, upon which all types of litigants consistently relied for over fifty years. In *Twombly*, the Court held that the no-set-of-facts “notice” pleading standard articulated in *Conley* should not apply to the plaintiff’s anti-trust claims. Instead, the Court enunciated a far stricter “plausibility” standard whereby a plaintiff in anti-trust litigation is required to plead “enough facts to state a claim to relief that is plausible on its face.”¹⁰ Two years later, the Court in *Iqbal* extended application of that stricter standard to all civil cases.¹¹ *Iqbal* defined “plausibility” as requiring more than the mere possibility of misconduct.”¹² Instead, the plaintiff

⁹ *Id.* at 48.

¹⁰ 550 U.S. at 570.

¹¹ 129 S. Ct. at 1953.

¹² *Id.* at 1950.

must provide enough “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹³

Although *Iqbal* was issued only six months ago, its harm is already palpable. Without intervention by Congress to return to the liberal pleading standard under *Conley*, there is a real danger that many more meritorious civil rights cases will be dismissed. The substitution of plausibility pleading for notice pleading has grave consequences for most types of civil rights litigation. Indeed, it is doubtful today that the discrimination complaint in *Conley* itself would have survived a motion to dismiss under the new Supreme Court framework.

The plausibility standard created by the Supreme Court allows reliance on a procedural tool to achieve a substantive result. Cases can now be dismissed at first glance, for reasons having to do solely with procedural deficiency and without the benefit of any careful and meaningful fact-finding. Moreover, in a number of civil rights cases, courts have applied *Twombly* and *Iqbal* to dismiss cases with prejudice, thereby foreclosing any opportunity to amend the complaint once more information is acquired.¹⁴ This outcome is fundamentally at odds with Congress’s intent to provide effective enforcement of our nation’s civil rights laws. Short-circuiting litigation through artificial barriers undermines our national interest in robust and expansive application of these laws.

As several observers have noted, the imposition of a heightened standard at the pleading stage effectively converts a motion to dismiss into one for summary judgment.¹⁵ In determining

¹³ *Id.* at 1949.

¹⁴ See, e.g., *Vallejo v. City of Tuscon*, No. CV-08-500 TUC DCB, 2009 WL 1835155, at *2-4 (D. Ariz. June 26, 2009).

¹⁵ Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS AND CLARK L.REV., ____ (forthcoming 2010) (special symposium issue on *Iqbal*),

whether a claim is plausible, a judge must now assume the role of fact-finder. Courts must sift through the complaint, first distinguishing factual allegations from legal conclusions and then assessing the strength of the factual “showing” of each claim in order to determine whether the plaintiff is plausibly entitled to relief.¹⁶ Appraisal of the facts at the pleading stage deprives plaintiffs of the tools later available through pretrial procedures and comes dangerously close to supplanting adjudication on the merits by jury trial.

Most significantly, the heightened pleading standard institutionalizes a disadvantage for plaintiffs when it comes to discovery. Plaintiffs are placed squarely in a no-win situation. Typically, most of the information relevant to a civil rights case is within the exclusive province of the defendant—through its agents, employees, records and/or documents. In order to prosecute claims on the merits, civil rights litigants must necessarily take full advantage of opportunities for discovery permitted by the Federal Rules of Civil Procedure. Prior to the commencement of discovery, it is extremely costly, difficult and often impossible for plaintiffs to conduct extensive factual development. The stricter pleading standard set forth in *Iqbal* and *Twombly* therefore deprives plaintiffs of facts known only to the defendant precisely when they are necessary to respond to a dispositive motion—a potentially fatal blow to plaintiffs when operating under the new standard.

These obstacles to discovery are further compounded in civil rights cases which often turn on questions of intent. In *Iqbal*, the Court rejected the plaintiff’s complaint because he did

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494683; 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).

¹⁶ *Iqbal*, 129 S. Ct. at 1949-50.

not plead facts “sufficient to plausibly suggest [the defendants’] discriminatory state of mind.”¹⁷
 The court considered whether it was more plausible that lawful intent or discriminatory intent motivated the defendants and found the former was more “likely.”¹⁸

In an upcoming article, Professor Robert Bone emphasizes the difficulty of establishing intent in civil rights cases based on limited information available at the pleading stage:

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.¹⁹

In civil rights cases today, proof of intentional discrimination is often accomplished through various means, including but not limited to reliance on circumstantial evidence. Fortunately, in the twenty-first century, there are relatively fewer instances of overt examples of discrimination—“smoking guns” or statements laced with expressly racist overtones. Discrimination today is more subtle, more sophisticated and therefore not immediately detectable. It is usually difficult to set forth at the pleading stage the complete set of facts and circumstances that may ultimately convince a factfinder that discrimination occurred. The Third Circuit has noted this dilemma:

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

¹⁷ *Iqbal*, 129 S. Ct. at 1952.

¹⁸ *Id.* at 1951-2.

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.

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."²⁰

Even disparate impact claims, where proof of intentional discrimination is not required, are substantially more difficult under *Iqbal* and *Twombly* because they often turn on analysis of data and other information that usually is under the exclusive control of defendants.

Moreover, *Iqbal* added another even more pernicious factor to the equation. Under *Iqbal*, the assessment of whether facts plausibly suggest a discriminatory state of mind is a "context-specific task," in which a court must "draw on its judicial experience and common sense."²¹ This framework represents a further departure from the historical standard in which legal sufficiency was determined within the four corners of the complaint. It reinforces the highly subjective nature of the Court's newly fashioned plausibility analysis; and it potentially injects bias and inconsistency into the process because judges are instructed to draw on their own personal experience, as well as on common sense, which defies legal definition. Significantly, these judgments are virtually unreviewable because trial courts are granted wide discretion under *Iqbal* and *Twombly* to conclude that a claim is implausible and thus dismiss a complaint without permitting critical factual development of discrimination allegations.

²⁰ *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)).

²¹ *Iqbal*, 129 S. Ct. at 1950.

Given the great risk of dismissing potentially meritorious claims, the Court's newly heightened pleading standard is simply not the proper vehicle for eliminating frivolous or unfounded claims from our federal court system. The Federal Rules of Civil Procedure provide other ample opportunities to dispose of insufficient claims at various stages of litigation. For instance, Rule 11 requires certain representations, subject to sanction, about the legitimacy of claims and the likely evidentiary support which will follow from discovery. Rule 12(e) provides defendants an opportunity to file a motion for a more definite statement when a plaintiff's complaint is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Federal judges have also developed extensive case management tools such as "phased discovery" and multiple status conferences to monitor the pretrial process and establish a framework for settlement discussions. And of course, Rule 56 remains available to parties who wish to seek dismissal of a case prior to expending the resources and costs associated with taking a case to trial. Litigants have successfully employed these devices for decades. Congress should be loath to allow an end-run around these established procedures, particularly one that jeopardizes its longstanding legislative goal of robust enforcement of civil rights laws.

IMPACT OF *TWOMBLY* AND *IQBAL* ON SPECIFIC CIVIL RIGHTS CLAIMS

In the months since *Iqbal* was decided, federal courts around the country have relied on *Iqbal* and *Twombly* to dismiss claims arising under several civil rights statutes as well as the Constitution itself.²² In some of these cases, courts acknowledged that the complaint could have survived a motion to dismiss under *Conley*, but nonetheless determined that the heightened

²² See, e.g., Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009) (demonstrating that, even before *Iqbal*, *Twombly* prompted a surge of dismissals of employment discrimination claims).

pleading standard under *Iqbal* and *Twombly* required dismissal. One court even referred to the “chilling effect” of the new heightened pleading standard on civil rights enforcement.²³ The message emanating from these cases, which will undoubtedly grow in volume, is that no substantive area of civil rights is beyond the reach of *Iqbal* and *Twombly*. As a result, plaintiffs with potentially meritorious cases are being and will be denied their day in court, absent prompt intervention from Congress.

Voting Rights: In *Vallejo v. City of Tucson*, a court dismissed a complaint by a Latino voter who raised a claim under the Voting Rights Act. The plaintiff had attempted to vote in a city election, but he was turned away for lack of sufficient identification and not provided with a provisional ballot as required. The plaintiff alleged in the complaint that a city official had informed him that he was wrongfully denied his right to vote and that he should have been afforded a provisional ballot. Nevertheless, the court dismissed the complaint in reliance on *Twombly*. The court concluded the allegations were insufficient to show that the electoral process was not equally open to participation by racial minorities in violation of the Voting Rights Act. Thus, at the earliest stage of the case and without the benefit of any discovery, the court summarily resolved a contested factual issue and concluded that the failure to issue a provisional ballot “was an isolated incident and in no way affected the standard, practice, or procedure of the election.”²⁴

Housing Discrimination: In *Avenue 6E Investments v. City of Yuma*, one of the nation’s most prominent fair housing attorneys filed a classic zoning discrimination complaint. The complaint challenged a Arizona municipality’s denial of a zoning application to use undeveloped

²³ See *Ocasio-Hernandez v. Fortuno-Burset*, 639 F.Supp.2d 217, 226 n.4 (D. Puerto Rico 2009).

²⁴ No. CV-08-500 TUC DCB, 2009 WL 1835155, at *3 (D. Ariz. June 26, 2009).

land to build homes for low to moderate income families in a predominately white high-income neighborhood. The application was submitted by a developer with a history of building affordable housing primarily for Hispanic purchasers. Relying on *Twombly* and *Iqbal*, the federal district court dismissed the developer's Fair Housing Act claims. The court held that the developer did not plausibly allege discriminatory intent on the part of the city, even though the complaint asserted that, based on the developer's distinctive reputation for serving Hispanic clients, the city treated the developer's rezoning application differently than those it had approved for several surrounding properties. The complaint further alleged that the city council members had overruled the municipality's planning commission and denied the zoning application to further the interests of surrounding landowners who favored racial segregation. The court also dismissed the developer's disparate impact claim based on the dubious reasoning that the city had approved other projects' requests for high-density use rezoning, even though those projects were undertaken by developers that did not have the same track record of providing affordable housing to minorities.²⁵

Age Discrimination in Employment:²⁶ In *Adams v. Lafayette College*, a fifty-one-year-old man claimed under the Age Discrimination in Employment Act that he was disciplined differently from younger employees and treated differently from younger employees with respect to promotions, training, and job assignments. In response to the defendant's motion to dismiss, the plaintiff argued that dismissal would "improperly limit a plaintiff's ability to raise a

²⁵ No. 2:09-cv00297 JWS, (D. Ariz. July 2, 2009).

²⁶ In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Supreme Court rejected a heightened pleading standard for employment discrimination cases. Although this decision remains good law and was expressly affirmed in *Twombly*, 550 U.S. at 569-70, some courts have held that *Twombly* and *Iqbal* have overruled *Swierkiewicz*. See, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

discrimination claim by requiring the plaintiff to muster the crucial evidence, which is most often in the defendant's hands."²⁷ Nevertheless, the court effectively resolved a factual issue by summarily concluding that the disciplinary action in question was just as easily explained by non-discrimination. The court noted that "[t]he absence of factual allegations indicating a closer, causal link between the suspension decision and [the plaintiff's] age as opposed to an employer's general disciplinary concerns leave the claim at the conceivable stage."²⁸

Discrimination on the Basis of Disability: In *Logan v. Sectek*, a security officer was injured on the job. After he was cleared to return to duty, he applied for a similar position with the company that had assumed his employer's contract for the security job. In his complaint, the plaintiff alleged that the new employer refused to hire him, despite his qualification for the job, because it perceived him to be disabled. The complaint stated that a managerial employee informed the plaintiff that he would not be hired because he had been out of work due to injury. Nevertheless, the court dismissed the complaint under *Iqbal*, finding the allegations insufficient to take the claim from "the realm of possibility to plausibility."²⁹ Specifically, the court found that the manager's statement did not indicate whether he perceived the injury to substantially limit the plaintiff's ability to work.³⁰

Racially Segregated Prison Conditions: In *Kyle v. Holinka*, an African-American prisoner challenged racial segregation in cell assignments. The plaintiff alleged numerous statements by federal prison officials acknowledging a segregation policy, including one by a

²⁷ No. 09-3008, 2009 WL 2777312, at *4 (E.D. Pa. Aug. 31, 2009).

²⁸ *Id.* at *3.

²⁹ 632 F. Supp. 2d 179, 184 (D. Conn. 2009).

³⁰ *Id.* at 183.

manager who stated, “This is the way we do it here.”³¹ The court first allowed the plaintiff’s claims against regional and national prison officials, but it subsequently reversed its ruling in light of *Iqbal*, which, according to the court, “implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion.”³² At the same time, the court also dismissed the claim against the prison warden on the ground that the plaintiff failed to allege any facts showing the warden implemented a discriminatory policy.³³

Discrimination Based on Political Affiliation: In *Ocasio-Hernandez v. Fortunato-Burset*, employees of the Puerto Rico governor’s mansion claimed they were terminated due to their political affiliation two months after the governing party assumed office and replaced them with employees of that party. The court dismissed the claims on the ground that the plaintiffs had not alleged sufficient facts showing that defendants knew of their political affiliation or that a casual connection existed between their affiliation and their termination.³⁴ The court wrote that its ruling was mandated by *Iqbal*, “although draconianly harsh to say the least.” It noted that defense counsel, who was experienced in political discrimination litigation, had not filed a motion to dismiss under the pre-*Iqbal* standard and that the case had been fast-tracked for trial before *Iqbal* was decided. The court lamented:

[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

³¹ No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009).

³² *Id.*

³³ *Id.* at *2.

³⁴ 639 F. Supp. 2d 217 (D. Puerto Rico 2009).

evidence needed to sustain the First Amendment allegations. ... Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.³⁵

Civil rights cases are not the only cases in danger of unwarranted dismissal under the heightened pleading standard. The *Iqbal* Court's expansion of *Twombly* to all civil cases places in jeopardy innumerable personal injury and consumer cases, most of which require full development of the facts before facing a dispositive motion.³⁶ 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."³⁷ As would be plainly evident to even a non-lawyer, a plaintiff typically has no means of uncovering most of this information absent at least limited discovery—which *Iqbal* effectively denies.

As litigators, we understand only too well how effective use of discovery and other pretrial procedures can make all the difference in the adjudication of the merits of a case. A powerful example comes from one of LDF's seminal school desegregation cases, *Swann v. Charlotte-Mecklenburg Board of Education*. In a rather remarkable passage, the district court judge acknowledged how the litigation process had changed his understanding of the discrimination experienced by the African-American students:

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

³⁵ *Id.* at 226 n. 4.

³⁶ For an empirical study 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.

³⁷ *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009).

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. The plaintiffs, making extensive use of [discovery], demonstrated that segregation in Charlotte was no accident and that it was still the systemic practice of the school administration and the community at large. These and other facts ... produced a reversal in the original attitude of the district court.³⁸

The danger of *Iqbal* is that it will deny victims of discrimination the opportunity to challenge the preconceptions of judges and the broader public by exposing entrenched and pernicious impediments to justice and equal opportunity.

CONCLUSION

At the core of our democratic principles is the ability to participate equally in our civic institutions. Equal access to our system of justice has to be a top priority. The decisions in *Twombly* and *Iqbal* now threaten that access by effectively barring litigants from the courthouse through a procedural ruse that had previously been rejected by courts, including the Supreme Court over fifty years ago. We are hopeful that Congress will recognize the manifest unfairness rendered by these opinions and take immediate steps to reaffirm in the clearest terms that, as Rule 8(e) emphasizes, “[p]leadings must be construed so as to do justice.”

³⁸ 60 F.R.D. 483, 484-85 (W.D.N.C. 1975).

December 2, 2009

Dear Mr. Wiener:

I write in response to your letter of November 24. In that letter you report that today, Wednesday, December 2, the Senate Judiciary Committee will be holding a hearing “to address whether Congress should overturn the Supreme Court’s pleading decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 547 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).” In your letter you invite me to submit a statement expressing my views. As you of course understand, it is, as a matter of general judicial practice, not thought to be appropriate for a judge of what the Constitution denominates an “inferior” federal court to volunteer advice to Congress on the merits of decisions of the Supreme Court. However, when Congress solicits a judge’s advice, different considerations govern. Under such circumstances it would appear to be not inappropriate for a judge to furnish advice (provided that the requested advice does not touch on pending litigation, or seek an advisory opinion, or in some other fashion impinge on the separateness of the judicial branch). Accordingly, I will in the paragraphs that follow undertake to present a summary statement of my views:

1. Prior to the decision in *Twombly*, my understanding of the genesis and broad thrust of the pleading rules -- most particularly Rule 8 of the Federal Rules of Civil Procedure -- that had governed the sufficiency of a complaint for half a century -- coincided with Justice Stevens’s assessment of the matter in his *Twombly* dissent:

The plaintiffs [in *Conley v. Gibson* 355 U.S. 41 (1957)] were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing for a unanimous Court, Justice Black rejected the union’s claim as foreclosed by the language of Rule 8. *Id.*, at 47-48. In the course of doing so, he articulated the formulation the Court rejects today: “In appraising the sufficiency of the complaint we follow, of course, 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.” *Id.*, at 45-46.

Consistent with the design of the Federal Rules, *Conley*’s “no set of facts” formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process.

550 U.S. at 576-77.

2. Pursuing his discussion of *Conley*, Justice Stevens in his *Twombly* dissent noted that *Conley* had in the intervening fifty years “been cited as authority [by the Court] in a dozen opinions.” 550 U.S. at 577. Not that *Conley* has stood alone. The subsequent case law qualified it, elaborated on it, built upon it. But without discarding the post-*Conley* case law, the opinion of the Court in *Twombly* discarded Justice Black’s “no set of facts” phrase. The demise of the phrase meant the end, insofar as a majority of the Justices were concerned, of the shelf-life of a particular piece of judicial rhetoric. Whether it meant more – whether it signaled a new and more stringent approach to measuring the sufficiency of a complaint – was not immediately clear. On a verbal level, there was a not insubstantial reason to suppose that the old order had given way to a new one. The Court’s opinion proffered a new vocabulary for measuring a complaint’s sufficiency – namely, were the allegations “plausible”?

3. In short, it was apparent that *Twombly* could portend a sea change. But it was not clear that it had to, or was meant to. And then came *Iqbal*. Iqbal, an Arab Muslim, was one of a very large number of Arab Muslims arrested by the FBI after 9/11 and thereafter detained for weeks or even months until “cleared.” Alleging, *inter alia*, denials of procedural due process together with practices of religious and racial discrimination, Iqbal brought a *Bivens* suit against numerous FBI and Bureau of Prisons personnel. Also charged as defendants were former Attorney General John Ashcroft, who was alleged to be the “principal architect” of the complained-of policy, and FBI Director Robert Mueller, who was alleged to have been “instrumental in [the policy’s] adoption, promulgation and implementation.” As the case made its way to the Court of Appeals for the Second Circuit, en route to the Supreme Court, the former Attorney General and the Director of the FBI sought reversal of the district court’s denial of their motions to dismiss the complaint. The Court of Appeals, in order to determine what pleading standard should be applied, examined *Twombly* and its antecedents at length. The court, speaking through Judge Newman in a characteristically penetrating and thoughtful opinion, concluded that, “[a]fter careful consideration of the [Supreme] Court’s [*Twombly*] opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is requiring a flexible ‘plausibility standard’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” Proceeding on that basis the Court of Appeals ruled that the procedural due process and racial/religious discrimination claims were adequately pled: “As with the procedural due process claim, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated ‘of high interest’ in the aftermath of 9/11.” The Supreme Court disagreed: “Taken as true, [the] allegations against [Ashcroft and Mueller] are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose....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, *Twombly* [550 U.S. at 567], and the purposeful, invidious

discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” 129 S.Ct. at 1951-52.

4. Reading the Court’s opinion in *Iqbal* against Judge Newman’s opinion below goes far to establish that the five Justices comprising the *Iqbal* majority understand *Twombly*’s plausibility standard to be a pleading standard substantially more demanding than the standard prevailing prior to *Twombly*. But not all the Justices who comprised the *Twombly* majority appear to have understood *Twombly* in that way. Justice Souter, the author of the *Twombly* opinion, and Justice Breyer, also a member of the *Twombly* majority, dissented in *Iqbal*.

5. In my view, the principal problem *Iqbal* presents is that it may well be treated by district and circuit courts as demanding far more specificity of complaints filed in cases in which, as in *Iqbal*, the bulk of the pertinent facts are in the hands of the defendants and to which a plaintiff cannot hope to get access to without discovery. The cases I have in mind make up a major portion of the civil side of the docket. There are cases which, like *Iqbal*, are *Bivens* suits challenging acts or failures to act of federal officials. Comparable suits, far more numerous, are those brought against state and local officials under 42 U.S.C. Section 1983. And similar obstacles can be expected to confront plaintiffs in the very large number of anti-discrimination suits arising under the 1964 Civil Rights Acts and the several federal anti-discrimination statutes enacted in the wake of the 1964 Act. Accordingly I think it behooves Congress to take a close look at *Iqbal*, with a view to repairing its present deleterious impact and to insuring that in the future the Federal Rules of Civil Procedure are not judicially amended, with significant substantive impact, in a manner and with results that Congress has not acquiesced in. *Twombly* should also be examined; but it may well be that, shorn of *Iqbal*, *Twombly* would turn out to be unproblematic.

Sincerely,

Louis H. Pollak



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December 1, 2009

VIA ELECTRONIC MAIL

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Sen. Sheldon Whitehouse
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Statement of J. Douglas Richards re: Senate hearing of December 2, 2009
entitled "Has the Supreme Court Limited Americans' Access to the Courts?"

Dear Senators Leahy, Specter and Whitehouse:

I am managing partner of the New York office of Cohen Milstein Sellers & Toll, PLLC. I argued the motion to dismiss on behalf of the plaintiffs in the *Twombly* case in the District Court, the Second Circuit and the United States Supreme Court. I have principally represented plaintiffs in antitrust class actions for the last ten years. Prior to moving to the plaintiffs' side of antitrust class actions I served as Deputy General Counsel of the Commodity Futures Trading Commission for more than two years, where I managed all litigation by and against that agency as well as its appellate adjudicatory function, and was the recipient of a Special Act or Service Award for reducing that agency's adjudicatory backlog and successfully defending the agency's opinions in the United States Courts of Appeals. Before that I was a partner for more than eight years in the law firm that subsequently merged into O'Melveny & Myers in 2002 and had been engaged for more than fifteen years representing plaintiffs and defendants in a wide variety of general commercial litigation, including employment discrimination, tender offer litigation, intellectual property, corporate fiduciary duty, partnership, insurance, reinsurance, RICO, bankruptcy and contract litigation. I have successfully defended antitrust cases and class actions. I respectfully submit this letter in support of ongoing legislative efforts to overturn the

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Supreme Court's decisions in *Twombly* and *Iqbal*. Subsequent to that reversal, I believe it would be reasonable for the Judicial Conference of the United States, through its standard committee procedures, to study and make recommendations concerning whether and to what extent any modification to pleading standards may be justified or desirable.

I have read the written testimony submitted by the witnesses at the House Judiciary Committee hearing on October 27, 2009, and I was present at the hearing. I agree with substantially all statements and testimony by the majority witnesses. I disagree with much of the statement and testimony by the minority witness, Mr. Katsas. I submit this letter to respond to eight aspects of Mr. Katsas's statement ("Katsas St.") which reflect emerging themes in opposition to the proposed legislation that I believe are unfounded and incorrect.

First, Mr. Katsas argues, based principally on *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) and *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC"), that *Iqbal* and *Twombly* are "consistent with the vast bulk of prior precedent" in the Supreme Court. Katsas St. at 1, 9-10, 25-26. These cases do not genuinely support Mr. Katsas's argument. Instead, like the majority opinion in *Twombly*, Mr. Katsas seizes upon short, out-of-context quotes from these cases in a forced effort to portray them as saying something that, viewed in their true context, they simply do not say.

As Mr. Katsas recognizes, the phrase that he relies upon from *Dura* – that a motion to dismiss can be granted absent a "reasonably founded hope that the [discovery] process will reveal relevant evidence" – was merely a quotation from the much earlier decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975). Katsas St. at 9. No case law in the three decades between *Blue Chip Stamps* (in 1975) and *Dura* (in 2005) professed to find anything in that phrase that was inconsistent with *Conley v. Gibson*, 355 U.S. 41 (1957). All that this language required on its face was a reasonable "hope" that "relevant evidence" might be uncovered – not, as in *Twombly* and *Iqbal*, the much more demanding requirement of a "reasonable expectation that discovery will reveal evidence of" unlawful conduct. If there were no reasonable "hope" that "relevant" evidence could even be uncovered, then, to use the language of *Conley*, it would appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley*, 355 U.S. at 45-46. These standards are not inconsistent. A reasonable and demonstrated "expectation" that the plaintiff's claim "will" in fact be established is unquestionably a much higher standard. Mr. Katsas' reliance on *Dura* is therefore misplaced.

Mr. Katsas's reliance on *AGC* is also unfounded. The *AGC* opinion was authored by Justice Stevens, who strenuously dissented in *Twombly* and joined the dissent in *Iqbal*. The first quote from *AGC* upon which Mr. Katsas relies is that "[a] court should not assume that the



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[plaintiff] can prove facts that it has not alleged.” Katsas St. at 9. In that portion of his opinion in *AGC*, Justice Stevens was merely distinguishing what the plaintiff in fact had alleged – a “conspiracy” merely to *include* non-union contractors in competitive bidding – from an entirely different supposed conspiracy to include *only* non-union contractors. The former would involve no substantial restraint of trade and no antitrust violation, while the latter would involve serious anticompetitive conduct which had not been alleged. The distinction that Justice Stevens was drawing in *AGC*, between what had been pleaded and “facts that [plaintiff] has not alleged,” has nothing to do with the legal standards adopted in *Twombly* and *Iqbal*. Mr. Katsas’s second quote from *AGC* is that a district court may insist on “some specificity in pleading” before allowing a complex case to proceed to discovery. Katsas St. at 9, 26. That quote comes from footnote 17 in *AGC*, in which Justice Stevens was referring to the district court’s power to require a “more definite statement” of the plaintiffs’ claims under Rule 12(e) – not dismissal of the plaintiff’s claim under Rule 12(b)(6). Neither of the quotes upon which Mr. Katsas relies from *AGC* is germane to the new standards articulated in *Twombly* and *Iqbal* for motions to dismiss under Rule 12(b)(6).

Second, Mr. Katsas relies upon lower court decisions, such as the First Circuit’s decisions in *Eastern Food Services v. Pontifical Catholic University*, 357 F.3d 1 (1st Cir. 2004) and *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999). However, as Mr. Katsas’s own quotations from *Eastern Food* demonstrate, the First Circuit dismissed that case because the theory of the case was considered “highly ‘improbable’” and indeed “hopeless.” Katsas St. at 12. Likewise, in *DM Research*, the court found that there was no imaginable motive for the alleged conspirators to participate in a conspiracy of the type alleged. *DM Research*, 170 F.3d at 56. Under such extreme circumstances, to use the language of *Conley*, it appeared “beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Conley*, 355 U.S. at 45-46. That is a far cry from the conclusions reached in *Twombly* and *Iqbal*, where claims were dismissed merely because the Court was able to imagine lawful explanations of the facts alleged that it considered to be equally or perhaps somewhat more “likely.” Neither in *Twombly* nor in *Iqbal* did the Court purport to find the plaintiffs’ allegations to be “highly improbable” or “hopeless,” nor could it reasonably have done so. Indeed, in his brief to the Supreme Court in *Twombly*, the Solicitor General repeatedly opined that whether the allegations in the case satisfied even the heightened pleading standard that the Solicitor General had advocated was a “close question.” Brief for the United States as *Amicus Curiae* at 8, 26, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Clearly, under the traditional pleading standards embodied in *Conley*, such “close questions” were not to be resolved against plaintiffs through dismissal of their complaints under Rule 12(b)(6) prior to discovery.



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Third, lacking genuine support in pre-*Twombly* case law, Mr. Katsas relies upon the word “showing” in Federal Rule of Civil Procedure 8(a), which has provided since its adoption in 1938 that a complaint shall contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Katsas St. at 8-9. Prior to *Twombly* and *Iqbal*, however, no court had ever interpreted the word “showing” to require the kind of detailed exposition that *Twombly* and *Iqbal* would require in a complaint in order to survive a motion to dismiss. Mr. Katsas has not cited and cannot cite even one case, decided prior to *Twombly* and *Iqbal*, that ever invested the word “showing” with that meaning in the context of Rule 8(a). If the single word “showing” in Rule 8(a) were in fact “directly controlling” as to pleading standards, as Mr. Katsas contends (Katsas St. at 8), surely at least one case in the seventy years that elapsed between promulgation of Rule 8(a) and the *Twombly* opinion would have made note of it. In reality, this is just another threadbare effort at revisionist history to obfuscate the degree to which *Twombly* and *Iqbal* depart radically from established precedent.

Fourth, Mr. Katsas emphasizes that *Twombly* was decided 7-2 and that it upheld the trial court decision of Judge Lynch, who has since been confirmed for appointment to the Second Circuit. Katsas St. at 5. Mr. Katsas neglects to mention, however, that: (i) Justice Souter, who authored the opinion in *Twombly*, wrote a forceful dissent joined in by Justice Breyer in *Iqbal*, where he concludes by characterizing the 5-4 majority’s opinion in *Iqbal* as having “no principled basis”; and (ii) a Second Circuit panel unanimously reversed Judge Lynch’s dismissal of the *Twombly* complaint, finding itself obligated to do so by the established legal standards set forth in *Conley*.

Fifth, Mr. Katsas plays the “fear card” by contending that the prospect of mere discovery into actions of Cabinet-level officials in cases such as *Iqbal* “would be paralyzing if not deadly.” Katsas St. at 2. The Supreme Court, however, solved this problem long ago with its recognition of the state secrets privilege. The state secrets privilege provides broad protection of national security concerns stemming from mere discovery in civil suits. Even if cases do occur where sensitive discovery is available in the face of the state secrets privilege, all that is at issue on a threshold motion to dismiss is the mere availability of that discovery. To the extent necessary, that availability can be limited by protective orders calculated to protect reasonable national security concerns. In addition, government officials are broadly protected by the doctrine of qualified immunity, under which cases against government officials are often dismissed prior to discovery unless a violation of the plaintiff’s clearly established rights has been clearly alleged. The state secrets privilege and qualified immunity doctrine provide adequate protection to government officials. Even if additional protection for national security issues were needed, it would make more sense to tailor those doctrines to deal in a better calibrated way with those unique issues than to address national security concerns through sweeping changes to general pleading standards. It makes no sense to broadly undermine basic rights to discovery across all



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civil suits based on supposed concerns about national security that apply to only an infinitesimal fraction of cases, when the overwhelming majority of civil suits raise no national security issues of any kind.

Sixth, Mr. Katsas asserts that one study “found an average of \$3.5 million of e-discovery litigation costs for a typical lawsuit.” Katsas St. at 17. As already pointed out by Professor Miller in his Statement, however, a recently completed preliminary study by the Federal Judicial Center regarding attorneys’ experiences with discovery and related matters found that expenditures for discovery, including attorneys’ fees, in fact amounted to only between 1.6 and 3.3% of the total values at stake. *See* Statement of Arthur R. Miller before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary Committee, United States House of Representatives, Oct. 27, 2009, at 17.

Seventh, Mr. Katsas asserts without any empirical analysis, just as the Supreme Court did in *Twombly*, that conventional pleading standards should be abandoned because they “compel ‘cost-conscious defendants to settle even anemic cases’ . . . just to avoid the considerable time and expense of protracted discovery.” Katsas St. at 17. However, careful study and analysis by the American Antitrust Institute has shown that the notion that there has been widespread frivolous antitrust litigation is a myth, and that “there is simply no empirical or theoretical support for the critics’ overblown claims about antitrust class actions.” American Antitrust Institute, *The Next Antitrust Agenda, the American Antitrust Institute’s Transition Report on Competition Policy to the 44th President*, at 231 (2008), available at www.antitrustinstitute.org. Whether any genuine problem of discovery cost warrants a change to operative pleading standards is far better considered by the Federal Rules Committee or by Congress than by the courts, in individual cases, without the benefit of meaningful analysis or study. *See* K. Davis and R. Pierce, *Administrative Law Treatise*, § 6.7 at 260-61 (3d ed. 1994)(“Over the years, commentators, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process over the process of making ‘rules’ through case-by-case adjudication.”).

Finally, Mr. Katsas decries the possibility of “fishing expeditions” for discovery. However, ever since *Hickman v. Taylor*, 329 U.S. 495 (1947), it has been the law that “the deposition-discovery rules are to be accorded a broad and liberal treatment” and that “[n]o longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.” *Id.* at 507. Mr. Katsas’s attempted justification of *Twombly* and *Iqbal* based on overblown concerns about “fishing expeditions” merely dramatizes the extreme degree to which the reasoning of *Twombly* and *Iqbal* depart from long-established principles. As the Supreme Court had recognized repeatedly prior to *Twombly*, even if modification to the established principles embodied in the Federal Rules of Civil Procedure could be justified, such changes should “be obtained by the process of amending the Federal



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Rules, and not by judicial interpretation.” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *see also Crawford-El v. Britton*, 523 U.S. 574, 595 (1998)(“Questions regarding pleading, discovery, and summary judgment are most frequently and effectively resolved either by the rulemaking process or the legislative process”). The Federal Rules Committee is well equipped to consider whether such changes are necessary or appropriate, and has already commenced a project to consider those very questions. Unless and until the Federal Rules Committee finds a genuine need for changes to the Federal Rules of Civil Procedure, the *status quo* concerning rules of pleading should be preserved as it existed prior to the radical departure from established principles that is represented by the Supreme Court’s decisions in *Twombly* and *Iqbal*. Otherwise, meritorious claims will be dismissed and injustices will go unremedied, especially in vitally important fields such as employment discrimination and antitrust conspiracy, where the Supreme Court has recognized that “dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly” because “the proof is largely in the hands of the alleged conspirators.” *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976).

Respectfully submitted,

J. Douglas Richards

JDR.Tao

WRITTEN STATEMENT OF PROFESSOR JOSEPH A. SEINER
University of South Carolina School of Law

**“Has the Supreme Court Limited Americans’ Access to Courts”
Hearing of the United States Senate Committee on the Judiciary
December 2, 2009**

My name is Joseph A. Seiner, and I am an assistant professor of law at the University of South Carolina School of Law. I am writing in response to the invitation that you graciously extended to me to prepare a written statement on the need for legislation in light of the Supreme Court’s recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). I want to thank the Committee for taking the time to address this important issue, and for giving me the opportunity to share my views with you. I would like to be clear from the outset that I do believe that legislation should be passed to address the concerns I raise below.

As a law professor, I have performed a great deal of research on the issue currently before the Committee, and I have written numerous law review articles on this topic.¹ As you are aware, the primary concern with the *Twombly* and *Iqbal* decisions is the Supreme Court’s new articulation of the pleading standard in civil cases. The Court has replaced the more relaxed standard from *Conley v. Gibson*, 355 U.S. 41 (1957), that a claim should not be dismissed “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,”² with an arguably more rigorous test that litigants must plead

¹ See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011; *Pleading Disability*, 51 B.C. L. Rev. __ (forthcoming 2010); *After Iqbal*, 45 Wake Forest L. Rev. __ (2010) (forthcoming). These papers are all available online at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1122675.

² 355 U.S. at 45-46.

enough facts to state a *plausible* claim.³ While *Twombly* arose in the antitrust context, the *Iqbal* decision makes completely clear that this plausibility standard will apply to *all* civil cases.⁴

My research on this issue has focused on the topic of how the plausibility standard has specifically impacted *employment discrimination* cases. As part of my research, I examined hundreds of district court opinions addressing a motion to dismiss in the context of Title VII of the Civil Rights Act of 1964, which protects workers from discrimination on the basis of race, color, sex, national origin and religion.⁵ I compared those federal district court decisions issued the year before *Twombly* that relied on the *Conley* case to those decisions issued the year after *Twombly* that relied on the *Twombly* decision.⁶ Though not meant to be an exhaustive study, my research revealed a higher percentage of decisions granting a motion to dismiss in the Title VII context when the district courts relied on the *Twombly* decision.⁷ In a separate study, I compared those federal district court decisions addressing a motion to dismiss in the *disability* discrimination context that were issued the year before *Twombly* that relied on the *Conley* case to those decisions issued the year after *Twombly* that relied on the *Twombly* decision. Again, my research revealed a higher percentage of decisions granting a motion to dismiss in the disability context when the district courts relied on the *Twombly* decision.⁸ Thus, my research suggests that a higher percentage of decisions are granting a motion to dismiss in both the Title VII and disability discrimination context when the district courts cite the *Twombly* case.

³ See generally *Twombly*, 550 U.S. 544 (2007); *Iqbal*, 129 S. Ct. 1937 (2009).

⁴ *Id.*

⁵ See generally *The Trouble with Twombly*, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ See generally *Pleading Disability*, *supra* note 1. This study looked exclusively at employment discrimination cases brought pursuant to the Americans with Disabilities Act. *Id.*

Though the methodology, implications and limitations of these studies are more fully set out in my papers, I wanted to also briefly highlight my review of individual cases on this issue. This review revealed that some courts are undoubtedly using the plausibility standard, in my view, to inappropriately dismiss employment discrimination claims.⁹ As an example, I point to the case of *Mangum v. Town of Holly Springs*, 551 F. Supp. 2d 439 (E.D.N.C. 2008), which arose in federal district court in the Eastern District of North Carolina. In that case, the plaintiff, an employee of a city fire department, maintained that she had heard that male firefighters did not want to work with her because of her sex.¹⁰ She further alleged that she was subjected to extremely vulgar language, and that she was informed that she should “watch her back.”¹¹ Despite concerns for her personal safety, and her allegations of workplace vulgarities, the district court dismissed the plaintiff’s hostile work environment claim which the court – applying the *Twombly* standard – found to be implausible.¹² What is most troubling about this case is that despite the chilling allegations set forth by the plaintiff, the hostile work environment allegation was thrown out *on a motion to dismiss*.¹³ At a minimum, the plaintiff should have been permitted to more fully develop the record on this claim through the use of discovery. The *Twombly* plausibility standard, however, was used by the district court to prevent this claim from proceeding to that stage of the litigation. My research details other cases where the plausibility standard has been used to reject workplace claims.¹⁴ And, other research also highlights the problems that *Twombly* and *Iqbal* may cause in the employment discrimination context.¹⁵

⁹ See generally *The Trouble with Twombly*, *supra* note 1; *Pleading Disability*, *supra* note 1.

¹⁰ See *The Trouble with Twombly*, *supra* note 1, at 1036 (citing *Mangum* decision).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Other claims in the case were permitted to proceed. *Id.*

¹⁴ See generally *The Trouble with Twombly*, *supra* note 1; *Pleading Disability*, *supra* note 1.

¹⁵ See generally Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494683.

My research thus suggests that the *Iqbal* and *Twombly* decisions have created significant difficulties for employment discrimination plaintiffs.¹⁶ In my view, one of the primary problems with the Court's new plausibility standard is the subjective nature by which this standard can be applied – what is plausible to one federal judge may not be plausible to another. Given the subjective nature of the plausibility test, this standard also provides a basis for courts that are inclined against particular cases to improperly dismiss the complaints in those matters, even if the allegations satisfy the standards of the federal rules. I believe that employment discrimination cases, which are often controversial by nature, are particularly vulnerable in this context. While there may be concern about the filing of frivolous workplace claims in response to a lower pleading standard, there are mechanisms to deal with many of these suits, such as careful case management and sanctioning the parties involved.¹⁷ Moreover, there are studies showing that employment discrimination continues to be a substantial problem in our society, and we should thus be hesitant to put in place a heightened barrier that would inappropriately prevent individuals with valid workplace claims from accessing the use of discovery for their cases.¹⁸

Additionally, it is worth noting that the recent Supreme Court decisions have in many ways discarded fifty years of pleading precedent from *Conley* and its progeny, and replaced that well-developed body of case law with an ambiguous plausibility standard. This new standard confuses the pleading process, and makes it difficult for employment discrimination litigants to identify exactly what must be alleged in the complaint. In my scholarship, I have proposed unified analytical pleading frameworks which could be adopted by the courts and parties to

¹⁶ See *supra* note 1.

¹⁷ See generally *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

¹⁸ See *After Iqbal*, *supra* note 1.

provide some clarity to this area of the law.¹⁹ I believe that by establishing a framework for workplace claims, the courts and parties would have a much clearer understanding of what is expected in the complaint, which could help streamline the entire process.

Similarly, Congress could act to provide a significant amount of clarity to the pleading process. By passing legislation that would effectively return federal pleading law to the *Conley* standard, Congress could restore the precedent which was largely vacated by the Supreme Court. If effectively written, this legislation could remove much of the ambiguity which currently exists when pleading federal civil claims. And, from my perspective, this would be particularly beneficial to civil litigants attempting to plead employment discrimination cases.

In conclusion, I would respectfully direct the Committee to my work on this issue, which I believe extensively examines the impact of the *Iqbal* and *Twombly* decisions on employment discrimination claims. I again express my support for legislation that would effectively return the law to the previous *Conley* standard, and I welcome any questions or comments that this Committee might have. I would be happy to address any specific written questions on these issues, and would be willing to appear before the Committee as a witness on this topic. Thus, if I can be of any further assistance, please do not hesitate to contact me. Thank you again for inviting my views on this issue, and for addressing this important topic.

¹⁹ See generally *The Trouble with Twombly*, *supra* note 1; *Pleading Disability*, *supra* note 1; *After Iqbal*, *supra* note 1.

From: [David Shapiro](#)
To: [Wiener, Matt \(Judiciary-Dem\)](#)
Subject: RE: Hearing on Twombly and Iqbal
Date: Monday, November 23, 2009 12:40:38 PM

Dear Mr. Wiener:

I am writing in response to your e-mail invitation to express my views on the need for legislation to overturn the Twombly and Iqbal decisions of the Supreme Court, as they relate to the standard for testing the sufficiency of a complaint filed in a civil action in a federal district court. I understand that the Senate Judiciary Committee has scheduled a hearing on this subject for December 2.

Having practiced law for eight years (three as Deputy Solicitor General), and having taught and written about Civil Procedure, among other related subjects, for over 40 years at Harvard Law School, I am familiar with both the history and application of the federal pleading rules since their inception in 1938. And against this background, I have been deeply distressed by the rulings in the Twombly and Iqbal cases. Not only do they run counter to the explicit purposes of the Federal Rules to simplify the pleading stage of litigation and to provide a reasonable degree of predictability and uniformity in federal practice across the lines of substantive law, but they rest, in my view, on untested and unwarranted empirical assumptions about the need to block access to the federal courts at the gate in order to stem the tide of meritless lawsuits. Moreover, by effectively rejecting strong and consistent Supreme Court precedent over several decades, they have caused confusion both among litigators and in the lower courts by substituting a confusing, almost unfathomable standard of sufficiency for the standards established by the Federal Rules and generally accepted by the bench and bar.

I realize, of course, that no standard for testing the sufficiency of a pleading can satisfy everyone or achieve perfection in fulfilling all the goals of a fair and efficient system of procedure. But I firmly believe that the present state of the law in this area constitutes a giant step in the wrong direction and is sorely in need of change. And change is, at this point, unlikely to emerge from the rulemaking process, with the Supreme Court itself serving as the final authority before any proposal is submitted to Congress. I therefore strongly favor direct legislative action to restore, as closely as possible, the state of the law before the Twombly and Iqbal decisions. While I do not think that the bill just introduced in the House of Representatives is the best approach to the problem, I recognize the difficulty of finding the best legislative formulation for achieving the desired objective, and am sure there will be full opportunity for discussion. At this point, it is more important, I believe, to establish a consensus on the need for legislative action.

Sincerely,

David L. Shapiro
William Nelson Cromwell Professor of Law, Emeritus
Harvard Law School

Prof. A. Benjamin Spencer
Washington & Lee University School of Law
Lexington, VA 22942

November 27, 2009

Sen. Patrick Leahy
Sen. Arlen Specter
Sen. Sheldon Whitehouse
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy, Specter, and Whitehouse:

I write in support of legislation to overturn the *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* decisions of the Supreme Court. The Supreme Court's recent jurisprudence on pleading has been completely at odds with the original vision of the drafters of the Federal Rules of Civil Procedure and inconsistent with the open access model of courts that it was the aim of those Rules to promote.

All Americans have a right to petition their government for a redress of grievances, a right that finds its greatest and most common expression in litigants bringing their claims to a court in search of a remedy for various wrongs. The Supreme Court's decisions in *Twombly* and *Iqbal* completely undermine the ability of many litigants to present their cases to a court. These decisions require plaintiffs to allege facts, many of which they may not possess at the outset of litigation, and then empowers judges to use their "experience and common sense" to evaluate the plausibility of the asserted claims. This introduction of a subjective evaluation of plaintiffs' claims is a total violation of our traditions, which have assumed the truth of a plaintiff's allegations at the pleading stage, withholding greater scrutiny until the discovery and summary judgment phases of litigation.

It is unquestionable that these decisions will have the greatest impact on litigants asserting civil rights, employment discrimination, and antitrust claims, as those claims depend on facts that plaintiffs typically lack access to prior to litigation. The proposed legislation will ensure that these litigants will be able to get into court and given a chance to support their claims with facts during the discovery phase. Judges should not be able to eliminate these claims based on a plausibility assessment of the plaintiff's complaint, with no facts and no response from defendants, based solely on judges' "experience and common sense." That standard undermines the traditional role of the jury as the arbiter of a claim's credibility and puts up too high a hurdle to litigants' access to justice.

I attach a brief article that I've written that offers a more extensive critique of these decisions and I commend it for your review.

Best,

A. Benjamin Spencer

IQBAL AND THE SLIDE TOWARD
RESTRICTIVE PROCEDURE

*A. Benjamin Spencer**

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* Associate Professor of Law (with tenure), Washington & Lee University School of Law. Copyright © 2009 A. Benjamin Spencer. I would like to thank Washington & Lee for generous grant assistance that enabled this research. I would also like to thank those who were able to give helpful comments on the piece. Finally, thanks to Erica Haggard and John Thomas, who provided valuable research assistance.

IQBAL AND THE SLIDE TOWARD RESTRICTIVE PROCEDURE

Last Term, in Ashcroft v. Iqbal, the Supreme Court affirmed its commitment to more stringent pleading standards in the ordinary federal civil case. Although the decision is not a watershed since it merely underscores the substantial changes to pleading doctrine wrought in Bell Atlantic Corp. v. Twombly, Iqbal is disconcerting for at least two reasons. First, the Court treated Iqbal's factual allegations in a manner that further erodes the assumption-of-truth rule that has been the cornerstone of modern federal civil pleading practice. The result is an approach to pleading that is governed by a subjective, malleable standard that permits judges to reject pleadings based on their own predilections or "experience and common sense." Such an approach undermines consistency and predictability in the pleading area and supplants in no small measure the traditional fact-finding role of the jury. Second, the Court struck a blow against the liberal ethos in civil procedure by endorsing pleading standards that will make it increasingly difficult for members of societal out-groups to challenge the unlawful practices of dominant interests such as employers, government officials, or major corporations. Thus, although Iqbal ultimately does not go much farther than Twombly in reshaping civil pleading standards, the decision is an important milestone in the steady slide toward restrictiveness that has characterized procedural doctrine in recent years.

INTRODUCTION

In 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*,¹ a case that portended significant alterations to federal civil pleading standards under Rule 8.² Specifically, *Twombly* did away with the “no set of facts” standard of *Conley v. Gibson*³ and introduced the notion that Rule 8 requires a claimant to plead facts showing plausible entitlement to relief in order to survive a motion to dismiss.⁴ Thus was born plausibility pleading.⁵ However, after *Twombly* there was some uncertainty regarding whether the case signaled a new era in pleading similar to the seismic shift in how courts approached pleading before and after the advent of the Federal Rules of Civil Procedure in 1938. Many observers argued that *Twombly* did not represent a major change in pleading doctrine and in any event merely reflected the approach to pleading that was prevalent among the lower federal courts.⁶ Others, including this writer,⁷ suggested that *Twombly* was much more

¹ 550 U.S. 544 (2007).

² FED. R. CIV. P. 8(a).

³ 355 U.S. 41 (1957).

⁴ *Twombly*, 550 U.S. at 570.

⁵ A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008).

⁶ See, e.g., Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1098 (2009).

⁷ Spencer, *Plausibility Pleading*, *supra* note ___ at 441.

consequential than the Court itself was letting on,⁸ at least from a doctrinal perspective if not also from a practical perspective.⁹

That debate has been settled. Last Term, in *Ashcroft v. Iqbal*,¹⁰ the Supreme Court made it abundantly clear that we are indeed in a new era of pleading by ruling that in a civil complaint, so-called well-pleaded (read: non-conclusory), substantiating facts are essential to support allegations of wrongdoing and convince a judge of the plausibility of claims contained therein.¹¹ One thing that is remarkable about this case is the Court's decision to permit judges to disregard certain alleged facts and use their "experience and common sense" to evaluate the plausibility of a claim,¹² rather than holding them to the traditional and more objective approach of determining whether the alleged facts, taken as true, entitle the pleader to relief.¹³ Another remarkable aspect of the decision is the Court's blatant departure from the role of neutral arbiter to that of a pro-defendant gatekeeper, at least in the civil context. Both of these developments are troubling because they foster an environment that is increasingly hostile to civil claimants, particularly those seeking to challenge the unlawful conduct of societal elites such as government officials, large corporations, or employers. Below, this Article briefly looks at the road to *Iqbal*, followed by a discussion of some of the unfortunate legal developments that follow in *Iqbal*'s wake.

I. PLEADING DOCTRINE THROUGH *IQBAL*

The history of federal civil pleading standards has been told too many times to be repeated here.¹⁴ Suffice it to say that the 1938 Federal Rules of Civil Procedure, coupled with the Court's decision in *Conley v. Gibson*¹⁵ that a claim may not be dismissed unless there were "no set of

⁸ See, e.g., *Pleading Standards*, 121 HARV. L. REV. 305, 310–11 (2007); Posting of Michael Dorf to Dorf on Law, <http://michaeldorf.org/2007/05/end-of-notice-pleading.html> (May 24, 2007, 7:35 AM) ("[Twombly] will likely do great damage in the lower courts."); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 137 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

⁹ A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 157 (2008).

¹⁰ 129 S. Ct. 1937 (2009).

¹¹ *Id.* at 1950.

¹² *Id.*

¹³ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002) ("Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint.")

¹⁴ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439–40, 445–52 (1986); Spencer, *Plausibility Pleading*, *supra* note ___, at 434–38.

¹⁵ 355 U.S. 41 (1957).

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facts” that the plaintiff could offer to prove its claim,¹⁶ established a system referred to as “notice pleading” in federal civil cases.¹⁷ Under notice pleading, a claimant was not required “to set out in detail the facts upon which he bases his claim,”¹⁸ all of the claimant’s factual allegations were to be accepted as true at the pleading stage,¹⁹ and the plaintiff was entitled to all reasonable inferences that could be drawn from the picture presented by those facts.²⁰ Further, as the Court most recently affirmed in *Swierkiewicz v. Sorema*,²¹ requiring particularized pleading as some lower courts at times had been doing was not only inconsistent with the official forms appended to the rules²² and the fact that the Rules expressly provided for such heightened pleading for fraud cases.²³ It was also inconsistent with the established process for changing the substance of the Federal Rules, which was to be through rulemaking amendments and not judicial interpretation.²⁴

Then came the *Twombly* decision. The Court in *Twombly* abrogated the “no set of facts” language in *Conley* and presented a new interpretation of Rule 8’s pleading standard that seemed to undo much of what was previously understood about pleading doctrine. Instead of disclaiming the need to plead detailed facts, the *Twombly* Court indicated that stating a claim “requires a complaint with enough factual matter (taken as true) to suggest” that the allegations of wrongdoing are true²⁵ and that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”²⁶ The Court spoke of “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with)” liability, pushing the claim past “the line between possibility and

¹⁶ *Id.* at 45–46.

¹⁷ *Id.* at 47 (“To the contrary, 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.”). I have previously remarked that notice truly has little to do with determining whether a statement of a claim is sufficient. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 19 (2009).

¹⁸ *Conley*, 355 U.S. at 47.

¹⁹ *Swierkiewicz*, 534 U.S. at 508 n.1.

²⁰ *Cal. Pub. Employees’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (“A motion to dismiss pursuant to [Federal Rule 12(b)(6)] may be granted only if, accepting all well pleaded allegations in the complaint as true, and drawing all reasonable factual inferences in favor of the plaintiff, it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would warrant relief.”).

²¹ 534 U.S. 506 (2002).

²² *Id.* at 513 & n.4.

²³ *Id.* at 513.

²⁴ *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

²⁵ *Twombly*, 550 U.S. at 556.

²⁶ *Id.* at 555.

plausibility.”²⁷ As I have written elsewhere, offering such facts before discovery begins seems particularly problematic for claimants alleging concealed wrongdoing²⁸ and there may be some evidence to that effect.²⁹ Ironically, the tightening of pleading standards in *Twombly* was motivated by a desire to prevent plaintiffs with unsubstantiated claims from accessing the discovery process and its attendant costs,³⁰ even though such discovery is the very thing that might enable plaintiffs to adduce facts that support their legal claims.³¹ Ultimately, notwithstanding a subsequent seeming nod to the continuing vitality of notice pleading³² and the effort of many scholars to downplay *Twombly*’s significance,³³ *Twombly* was a landmark decision that signaled a turn away from the liberal ethos that simplified pleading was meant to reflect, toward a more restrictive sentiment that saw access to court as something that needed to be constrained for some number of plaintiffs.³⁴

With the arrival of *Iqbal*, we now have our first opportunity to see how the Court interprets and applies what it wrought in *Twombly*. *Iqbal* involved an action by a Pakistani national and member of the Muslim faith who was arrested in the wake of the attacks of September 11, 2001, and subsequently detained and designated as a “person of high interest” to the federal government’s investigation of the attacks.³⁵ *Iqbal* alleged that his designation and subsequent harsh treatment while in detention were unconstitutionally discriminatory and that then-Attorney General John Ashcroft and FBI Director Robert Mueller were personally and overtly complicit in developing and imposing the policy underlying his treatment:

The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part

²⁷ *Id.* at 557.

²⁸ Spencer, *Plausibility Pleading*, *supra* note ___ at 482.

²⁹ Spencer, *Pleading Civil Rights Claims*, *supra* note ___ at 102, 141; Kendall W. Hannon, *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) (“[T]he one area in which this study does show a significant departure from previous dismissal practice is the civil rights field.”).

³⁰ *Twombly*, 550 U.S. at 558–59.

³¹ *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence.”).

³² *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007).

³³ *See supra*, note 6.

³⁴ A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, ___ GEO. WASH. L. REV. ___ (Forthcoming 2009); Spencer, *Plausibility Pleading*, *supra* note ___ at 433.

³⁵ *Iqbal*, 129 S. Ct. at 1943.

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of its investigation of the events of September 11.” It further alleges that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” Lastly, the complaint posits that petitioners “each knew of, condoned, and willfully and maliciously agreed to subject” respondent 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.” The pleading names Ashcroft as the “principal architect” of the policy and identifies Mueller as “instrumental in [its] adoption, promulgation, and implementation.”³⁶

Ashcroft and Mueller, who, as high-level government officials, were entitled to raise the defense of qualified immunity, moved to dismiss these claims on the ground that Iqbal had failed to offer sufficient allegations establishing their personal involvement in clearly unconstitutional conduct.³⁷

The district court rejected their motion, but did so based on the *Conley* “no set of facts” standard that was subsequently repudiated by the Supreme Court in *Twombly*.³⁸ The Second Circuit thus had to resolve whether the motion to dismiss should be granted under the revised pleading standards articulated in *Twombly*. The circuit court upheld the rejection of the motion, finding that Iqbal did offer direct factual allegations of Ashcroft’s and Mueller’s personal assent to the discriminatory policy and added:

[T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated “of high interest” in the aftermath of 9/11.³⁹

In other words, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination was a factual allegation and it was plausible because these officials are likely to have been involved with the formulation of that policy if such a policy is indeed shown to have existed.

The Supreme Court reversed, holding that Iqbal had failed to satisfy the pleading burden described in *Twombly*. The Court embraced the core components of *Twombly* that established plausibility pleading, to wit:

³⁶ *Id.* at 1944 (internal citations omitted).

³⁷ *Id.*

³⁸ *Elmaghraby v. Ashcroft*, 2005 WL 2375202, *29 (E.D.N.Y. 2005).

³⁹ *Iqbal v. Hasty*, 490 F.3d 143, 175–76 (2d Cir. 2007).

- [T]he pleading standard Rule 8 announces does not require “detailed factual allegations,” but it 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 a cause of action will not do.” Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”
- To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.”
- 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.
- The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.
- 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.’”⁴⁰

In this manner, the new statements that will now comprise the prelude to any federal civil pleading analysis were recited and enshrined.

The *Iqbal* opinion then turned to setting forth the components of the “two-pronged approach” of *Twombly*. First, only “well-pleaded factual allegations” are entitled to the assumption of truth.⁴¹ Such allegations, said the court, are to be contrasted with “legal conclusions” or “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” which a court is free to disregard.⁴² Thus, the initial step in the *Twombly* analysis is for the court to identify those allegations that are not well-pleaded and set them to the side.⁴³ Second, the court then determines whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. How are courts to make this latter determination? The Court explained:

Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the

⁴⁰ *Iqbal*, 129 S. Ct. at 1949.

⁴¹ *Id.* at 1950.

⁴² *Id.* at 1949.

⁴³ *Id.* at 1950 (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”).

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mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”⁴⁴

Applying the first prong of this test to Iqbal’s complaint, the Court determined that the following allegations were not “well-pleaded”: that Ashcroft and Mueller “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”⁴⁵ and that “Ashcroft was the ‘principal architect’ of this invidious policy and . . . Mueller was ‘instrumental’ in adopting and executing it.”⁴⁶ In the Court’s view, these were “bare assertions” that “amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”⁴⁷ Thus, the Court concluded, “the allegations are conclusory and not entitled to be assumed true.”⁴⁸

Having disposed of Iqbal’s core allegations personally connecting Ashcroft and Mueller with the alleged unlawful policy, the Court turned to the matter of whether Iqbal’s remaining allegations plausibly showed entitlement to relief. Those remaining allegations that the Court accepted as “well-pleaded” were as follows: “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11” and “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”⁴⁹ The Court found these allegations to be merely consistent with—rather than suggestive of—wrongdoing by Ashcroft and Mueller, since in its view there were “more likely explanations” for the disparate impact of the law enforcement actions Iqbal challenged in his complaint. Thus, the Court concluded that Iqbal “has not ‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”⁵⁰

⁴⁴ *Id.* at 1950 (internal citations omitted).

⁴⁵ *Id.* at 1951.

⁴⁶ *Id.* (internal citations omitted).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

II. FACT SKEPTICISM: ACCEPTING ONLY PLAUSIBLE FACTUAL ALLEGATIONS AS TRUE

Although *Iqbal* involves the application of pleading standards developed previously in *Twombly*, the *Iqbal* Court's rejection of *Iqbal*'s core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism. *Twombly* resulted in many changes to federal civil pleading standards, including the retirement of *Conley*'s "no set of facts" standard, the revival of the need to plead substantiating facts that show entitlement to relief, and the formulation of plausibility as the relevant measure of a complaint's sufficiency.⁵¹ But it did not cast aside the assumption-of-truth rule, which holds that a claimant's factual allegations are entitled to be believed and accepted at the pleading stage,⁵² though it arguably opened the door for a weakening of that rule.⁵³

Iqbal is a clear challenge to the continuing vitality of the assumption-of-truth rule given the Court's poorly explained rejection of what were undeniably allegations that were non-conclusory and factual in nature. After detailing a discriminatory policy that the FBI was alleged to have adopted and implemented, *Iqbal* asserted that it was Ashcroft who was the "principal architect" of the policy and he claims that Mueller was "instrumental in [its] adoption, promulgation, and implementation," adding that both "approved" and "agreed to" the policy.⁵⁴ These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say "Mr. Smith was the 'principal architect' of the Chrysler building," that would be a non-conclusory factual claim, as would the statement that "Ms. Smith 'approved' the design plans for the Chrysler building." These statements are factual because they make claims about what transpired and who took certain actions. Thus, the Court had no problem accepting as factual and non-conclusory *Iqbal*'s allegation that "[t]he policy of holding post-September-11th detainees in highly

⁵¹ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007).

⁵² *Id.* at 555–56. ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact.") (citations omitted).

⁵³ Spencer, *Understanding Pleading Doctrine*, *supra* note ___ at 8–9 (discussing cases suggesting that "the *Twombly* Court's statements regarding plausibility have given some courts a basis for applying more skepticism to factual allegations than the assumption-of-truth principle would seem to allow.").

⁵⁴ First Amended Complaint and Jury Demand at 4–5, 17–18, 33, *Elmaghraby v. Ashcroft*, 2005 WL 2375202, No. 04 CV 01809 JG SMG (E.D.N.Y. Sept. 27, 2005).

restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER.”⁵⁵

To see through the Court’s attempt to classify Iqbal’s allegations about Ashcroft and Mueller’s relationship with the alleged discriminatory policy as conclusory, we need to have a clear sense of what a conclusory or “bald” allegation is. A conclusory claim is one that uses legal terminology to describe conduct rather than factual statements. That is, rather than describing what happened from a reporter’s perspective—the who, what, when, where, and how—a conclusory assertion takes the desired legal conclusion one wants attached to the occurrence and uses it to describe the occurrence itself. For example, a conclusory way to allege that “the defendant crossed over the yellow line and collided with my vehicle, causing the plaintiff various injuries” would be assert that “the defendant negligently caused injury to the plaintiff.”⁵⁶ In the discrimination context, a conclusory assertion might be that “the defendant discriminates in hiring decisions” rather than “the defendant systematically rejects Hispanic applicants with similar qualifications of non-Hispanic applicants that it hires.” The latter statement reports facts; the former statement substitutes a legal characterization of those facts and dispenses with factual reportage. Non-conclusory factual claims make assertions about what happened without regard to the legal characterization or consequences of those occurrences or omissions: The defendant “purchased” this product; the defendant “did not attempt to assist the plaintiff”; the defendant “fired” the plaintiff, et cetera. In other words allegations comprised of subjects and verbs, not just legal adjectives and adverbs.

The question for one scrutinizing *Iqbal* is whether an assertion that a person “agreed” to do something or “approved” of something is conclusory or factual. If those terms are used to report the fact that the individual in question gave her assent, there would not appear a more specific, non-conclusory way to communicate such information other than to use the terms common to that purpose, such as “approval” or “agreement.” Allying a defendant “approved” something is non-conclusory because it does not make a claim about the legal character or consequences of the defendant’s assent but rather simply reports its presence. Thus, again, when the *Iqbal* majority accepts Iqbal’s allegation that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI

⁵⁵ Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

⁵⁶ Form 11, which sufficiently alleges a simple negligence claim, goes beyond this by describing how the defendant injured the plaintiff: by hitting him with a vehicle. FED. R. CIV. P. FORM 11 (“On date, at place, the defendant negligently drove a motor vehicle against plaintiff.”).

was *approved* by Defendants ASHCROFT and MUELLER,”⁵⁷ it is acknowledging that claims of approval are not conclusory per se.

How then should we understand the Court’s prior rejection of Iqbal’s allegations connecting Ashcroft and Mueller to the discriminatory policy⁵⁸ given the use of similar terms of “agreement” or equally factual and non-conclusory terms such as “principal architect” or being “instrumental” in the policy’s development and implementation? It cannot be, as the Court claims, that these statements are too “bald” and conclusory to be accepted as true given that the allegations describe what is alleged to have occurred in similar fashion as the accepted allegation that those defendants “approved” the policy of holding detainees in highly restrictive conditions.⁵⁹ In other words, the statement “the defendants approved the policy of holding post-September-11th detainees in highly restrictive conditions of confinement” and the statement “the defendants approved the policy of subjecting defendants to harsh conditions of confinement solely based on their race, religion, and/or national origin” are offered at equal levels of specificity; one cannot be deemed too bald and conclusory and the other as well-pleaded based on any sensible understanding of those concepts given the statements’ common reliance on the term “approved.”⁶⁰

Since the conclusory label cannot credibly be applied to Iqbal’s rejected allegations as a valid rationale for discarding them, something else must be at play. I submit that what the Court is revealing in its rejection of Iqbal’s factual allegations regarding the involvement of Ashcroft and Mueller in shaping the policy is that it wants to know

⁵⁷ *Iqbal*, 129 S. Ct. at 1951 (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ This is the point made by Justice Souter in his *Iqbal* dissent when he wrote:

[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” . . . If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when Iqbal alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of “‘high interest’” “because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees’ involvement in supporting terrorist activity,” and (2) Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed” to that discrimination. By my lights, there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.

Id. at 1961 (Souter, J., dissenting) (citations omitted).

Iqbal's basis for making such factual claims about those two officials.⁶¹ That is, the Court is seeking evidence to substantiate the factual assertion of their design of and assent to the discriminatory policy; had Iqbal made allegations identical to those that the Court rejected but also referred to and attached a memo to the complaint from Mueller describing and imposing the discriminatory policy, the Court certainly would not have still treated Iqbal's allegations as inadequate.⁶² Indeed, a recent Ninth Circuit opinion applying *Iqbal* demonstrates as much, noting that Iqbal's complaint failed because "Iqbal's complaint contained no factual allegations detailing statements made by Muller and Ashcroft regarding discrimination."⁶³ The *Iqbal* majority is thus not using "conclusory" to mean legalistic allegations lacking factual content but rather has defined a conclusory assertion as one that lacks evidence under circumstances in which the Court feels that such evidence is required.

This is where context comes into play. In certain contexts, the Court does not feel additional evidence is required because the factual assertion is either not controversial, it is expected, or it is self-evident from the perspective of the Court.⁶⁴ Conversely, when the factual assertion is

⁶¹ Justice Scalia vocalized this interest during oral argument of *Iqbal*, stating, "I don't know on what basis any of these allegations against the high-level officials are made." Transcript of Oral Argument at 39, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

⁶² Clearly, plaintiffs would not have access to such "smoking gun" document prior to discovery absent a whistleblower or leak of the document to the press or the public. Indeed, it is plaintiffs facing such information asymmetry who will be burdened most significantly by the fact skepticism endorsed in *Iqbal*.

⁶³ *Al-Kidd v. Ashcroft*, No. 06-36059, 2009 WL 2836448, at *22 (9th Cir. Sept. 4, 2009):

Here, unlike Iqbal's allegations, al-Kidd's complaint "plausibly suggest[s]" unlawful conduct, and does more than contain bare allegations of an impermissible policy. While the complaint similarly alleges that Ashcroft is the "principal architect" of the policy, the complaint in this case contains specific statements that Ashcroft himself made regarding the post-September 11th use of the material witness statute. Ashcroft stated that enhanced tactics, such as the use of the material witness statute, "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street," and that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." Other top DOJ officials candidly admitted that the material witness statute was viewed as an important "investigative tool" where they could obtain "evidence" about the witness. The complaint also contains reference to congressional testimony from FBI Director Mueller, stating that al-Kidd's arrest was one of the government's anti-terrorism successes-without any caveat that al-Kidd was arrested only as a witness. Comparatively, Iqbal's complaint contained no factual allegations detailing statements made by Muller and Ashcroft regarding discrimination. The specific allegations in al-Kidd's complaint plausibly suggest something more than just bare allegations of improper purpose; they demonstrate that the Attorney General purposefully used the material witness statute to detain suspects whom he wished to investigate and detain preventatively, and that al-Kidd was subjected to this policy.

⁶⁴ See Spencer, *Understanding Pleading Doctrine*, supra note __, at __ (explaining how presumptions of propriety or impropriety attach to various factual circumstances based on their consonance with our ordinary understandings about such occurrences).

thought to be “unrealistic,” “nonsensical,” or “extravagantly fanciful,”⁶⁵ more evidentiary facts must be offered to make the factual assertion in question believable or “plausible.” Thus, when the *Iqbal* majority accepts the allegation that Mueller “approved” the policy of holding post-September-11th detainees in highly restrictive conditions of confinement but rejects the allegation that Ashcroft and Mueller “approved” the discriminatory policy, the former assertion is consistent with the *Iqbal* majority’s understanding about what the FBI Director and Attorney General would approve while the latter is inconsistent with their settled expectations. As such, the latter assertion requires additional evidence to be taken seriously and accepted as true.

At bottom, then, the Court’s rejection of certain factual allegations as too conclusory is really a statement that (1) the allegations are factual claims that assert the unexpected, particularly about certain kinds of defendants—government officials (*Iqbal*) or major corporations (*Twombly*) for example; (2) as such the allegations require additional evidence to be believed; and (3) such evidence is lacking in the claimant’s statement of his claim. Needless to say, this attitude towards factual allegations is inappropriate; rejecting facts because they report occurrences that members of the Court would find to be out-of-step with their expectations regarding an official’s behavior is a complete violation of the assumption-of-truth rule. The whole point of the rule is to obligate courts to accept factual claims regardless of how fanciful or far-fetched they might be,⁶⁶ and then make an assessment of whether the defendant is entitled to relief if what he says happened, happened; there will be subsequent opportunities to put the plaintiff to proof.⁶⁷ Lawsuits are all about claiming the unexpected and seeking redress for deviations from legal norms and acceptable standards of conduct. A pleading standard

⁶⁵ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). It is interesting that the Court felt the need to expressly clarify that it was not discarding *Iqbal*’s claims on the basis that they were “unrealistic,” “nonsensical,” or “extravagantly fanciful,” suggesting that some insecurity on their part regarding the credibility of their stated rationale.

⁶⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))).

⁶⁷ *See, e.g.*, FED. R. CIV. P. 56 (permitting litigants to seek judgment on claims that lack factual support after the opportunity for discovery). *See also Twombly*, 550 U.S. at 575 (Stevens, J., dissenting) (“Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial.”); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 512–23 (2002) (“This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.”) (citations and internal quotation marks omitted).

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that permits courts to disbelieve factual claims because they are felt to be extremely atypical deviations is fundamentally at odds with our norms regarding access to court and presents a cruel and seemingly insurmountable obstacle to certain claimants the outset of litigation.

By making the ultimate plausibility of a claim depend in part on the credibility of underlying factual allegations, the *Iqbal* Court is also treading on the traditional province of the jury. One of the bases for the assumption-of-truth rule is that it is for the jury to determine questions of fact, including making determinations about which facts to believe and which factual claims to discredit, based on the evidence presented at trial. By permitting courts to refuse to accept factual allegations by labeling them conclusory simply because they lack additional evidentiary details that would render them more believable, the Court empowers judges to preempt the jury's assessment and substitute their own judgments regarding the credibility of factual claims. This is not consistent with the jury right, as Professor Thomas has argued elsewhere.⁶⁸

III. PATRICIAN BIAS: *IQBAL* AND THE RESTRICTIVE ETHOS IN CIVIL PROCEDURE

Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority's new fact skepticism is problematic because it derives from and gives voice to what appears to be the institutional biases of the Justices as elite insiders with various presumptions about the conduct and motives of other fellow societal elites. This bias reveals itself when plaintiffs draw factual inferences that the Justices feel are less likely explanations than inferences that their own experience would suggest. For example, in *Iqbal*, although the majority acknowledges that the alleged facts are consistent with "petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin," they assert that there are "more likely explanations" of the officials' conduct.⁶⁹ The *Iqbal*

⁶⁸ See Stuja Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1882 (2008):

Where the Court first strays from the requirements of the Seventh Amendment in *Twombly* . . . is where it permits courts to consider only plausible inferences from the facts that favor the plaintiff. This determination necessarily permits a court to assess the plausibility of the inferences that arise from the facts alleged by the plaintiff. This was not permitted under the common law. Next, the Court also strays from the Seventh Amendment's command when it has told the courts to also review plausible inferences that favor the defendant and weigh those against plausible inferences that favor the plaintiff. These were all decisions that were reserved for the jury at common law.

⁶⁹ *Iqbal*, 129 S. Ct. at 1951.

majority goes on to explain that the “obvious alternative explanation” for the challenged arrests is that because the perpetrators of the 9/11 attacks were “Arab Muslim hijackers,” the arrests “were likely lawful and justified by [Mueller’s] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts” and that “[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 a disparate, incidental impact on Arab Muslims. . . .”⁷⁰

Beyond the fact that Iqbal is Pakistani, not Arab—a distinction the Court does not bother to notice—what makes this alternative explanation “obvious” and “more likely”? Does the Court actually know that Director Mueller had a “nondiscriminatory intent” as it asserts in Iqbal? Clearly the Court is drawing on its “experience and common sense” as it indicated would be necessary.⁷¹ But what needs to be understood is that the Court’s “experience and common sense” is not universal but rather is shaped by their perspective and biases as societal elites who suppose that such discrimination is rare.⁷²

This insider or patrician bias has revealed itself in other cases as well. In *Twombly*, although the Court accepted that the facts described were consistent with the presence of an unlawful agreement to restrain trade, its perspective led it to prefer the alternate possibility that “natural” market forces explained the behavior,⁷³ or as the *Iqbal* Court put it, “unchoreographed free-market behavior” was the “more likely” explanation.⁷⁴ *Scott v. Harris*⁷⁵ presents another example of this bias. There, the Court sidestepped the traditional requirement of accepting the plaintiff’s versions of the facts in the context of a defendant’s motion for summary judgment by ruling that its own view of the record conclusively

⁷⁰ *Id.*

⁷¹ *Id.* at 1950.

⁷² See Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1154 (2008) (“[T]he courts tend to reflect the insider view that discrimination is rare and that most claims are meritless, rather than the opposing view that discrimination is pervasive.”); Wendy Parker, Lessons in Losing: Race Discrimination in Employment, 81 NOTRE DAME L. REV. 889, 937 (2006) (“[I]n addition to deference and a commitment to employment at will, courts also have an ideology that discounts the possibility of discrimination in race and national origin cases.”).

⁷³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566–68 (2007).

⁷⁴ *Iqbal*, 129 S. Ct. at 1950. The Court also betrayed similar pro-corporate presumptions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), when it endorsed the following sentiment: “The predation-recoupment story . . . does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition.” *Id.* at 591 n.15 (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 26–27 (1984)).

⁷⁵ 550 U.S. 372 (2007).

demonstrated the falsity of the plaintiff's factual claims.⁷⁶ Specifically, the *Scott* majority said that a factual dispute is not "genuine" if the plaintiff's version of the facts "is blatantly contradicted by the record so that no reasonable jury could believe it. . . ."⁷⁷ The majority went on to base its rejection of the plaintiff's claim that he was not driving in a manner that endangered human life on its interpretation of a videotape that captured a police chase involving the plaintiff.⁷⁸ Taking up Justice Breyer's invitation to view the tape and judge Scott's conduct for themselves,⁷⁹ three researchers conducted a study in which 1350 diverse members of the public were asked to view the tape and share their perspectives.⁸⁰ Not surprisingly, although a majority of respondents reached similar conclusions as the *Scott* majority after viewing the tape, others reached conflicting conclusions, with respondents' interpretation of the videotape tending to vary according to an array of demographic and personal characteristics including race, socio-economic status, and political party identification.⁸¹

What we see in these opinions is the Justices' willingness to prefer their own interpretation of facts over other interpretations, leaving no room for the possibility that other understandings may have validity. Further, these Justices appear to be not cognizant of⁸² (or concerned with) the fact that their own views are connected to the biases they have as relatively well-to-do societal elites⁸³ who lack the diversity and experiences that a civil jury might better represent. Indeed, an important

⁷⁶ *Id.* at 380–81.

⁷⁷ *Id.* at 380.

⁷⁸ *Id.*

⁷⁹ *Id.* at 387 (Breyer, J., concurring).

⁸⁰ 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, 841 (2009).

⁸¹ *Id.* at 865–66.

⁸² I should note that at least Justice Scalia has seemed to acknowledge the elite bias of the Court: "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn." *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

⁸³ As one scholar has noted, "All nine of the Justices of the late Rehnquist Court were graduates of elite schools with either little practice experience or practice experience largely limited to constitutional litigation or defense-side civil litigation." Andrew M. Siegel, *The Court against the Courts: Hostility to Litigation As an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1117, n.66 (2006). Others have similarly commented. *See, e.g.*, Michael Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145, 146, 188–92 (1998) ("[J]udicial review is systematically biased in favor of culturally elite values. . . . Justices of the United States Supreme Court, indeed of any state or federal appellate court, are overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities.").

function of the jury is to screen out this institutional bias,⁸⁴ making it even more disconcerting that the *Iqbal* decision gave judges more power to scrutinize facts at the pleading stage.

This insider bias and its affirmation in *Iqbal* are quite dangerous and alarming developments in the civil justice arena. In previous writings, I have suggested that the *Twombly* decision reflected a shift toward a restrictive ethos in civil procedure,⁸⁵ meaning an ethos oriented more towards protecting the interests of defendants—particularly those from the dominant or commercial class—against the civil claims of members of societal outgroups.⁸⁶ For example, employees who may have suffered unlawful discrimination will find it more difficult to state a claim under *Twombly* when the facts needed to satisfy the plausibility standard are unavailable to them. The circumstance is similar for putative plaintiffs seeking to pursue conspiracy claims if they lack particulars that might substantiate the claim of an agreement. Put simply, the *Twombly* approach to pleading represents a move in a restrictive direction because it makes it more difficult for claimants to get their claims into court.

Iqbal ratifies the Court's commitment to a more restrictive approach to pleading but it also portends something darker and more ominous. *Iqbal* reflects a certain judicial mood toward litigation, an attitude of hostility and skepticism toward supplicants with alleged grievances against the government or against the powerful who make up the dominant class.⁸⁷ Increasingly, members of the Court in cases like *Iqbal* and *Twombly* appear to see allegations not through the lens of detached, impartial observers but rather through the eyes of conforming social elites. Thus, corporations are presumed to operate in legitimate ways motivated only by the quest for lawful profit; law enforcement and other government officials are presumed to operate by-the-book in a focused

⁸⁴ Alexandra Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 590 (2008) ("The jury trial . . . helps avoid the systemic bias that might develop if all cases were decided by professional judges. . . . [T]he introduction of democratic decisionmakers avoids the bias of an entrenched judicial elite.").

⁸⁵ Spencer, *Restrictive Ethos*, *supra* note __, at __; Spencer, *Plausibility Pleading*, *supra* note __, at __.

⁸⁶ Spencer, *Restrictive Ethos*, *supra* note __, at __.

⁸⁷ Professor Siegel, in a study of the Court's hostility to litigation during the Rehnquist era, made the following observation:

In myriad ways, the Court has made life very difficult for civil plaintiffs. To take but a few examples, the Court has narrowly construed statutes and case law to reduce and eliminate remedial options. It has protected governments and governmental officials from financial liability through expansive immunity doctrines and cramped interpretations of the federal fee-shifting statutes. It has consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs. And it has birthed novel constitutional limitations on the scope of recoverable damages.

Siegel, *supra* note __, at 1117–18.

mission to protect innocents from the multitude of deviants; and employers are presumed to make hiring, firing, and promotion or transfer decisions based wholly on merit rather than on prejudice against members of various protected classes. Such a perspective ends up favoring civil defendants, at least when they are arrayed as adversaries against members of various societal out-groups.⁸⁸ Such a perspective is also inappropriately naïve about the very real existence of corporate and official misconduct that has existed in the past⁸⁹ and that may be reflected in some of the complaints the Court's stricter pleading standard will tend to reject.

CONCLUSION

The charges of bias leveled against the *Iqbal* Court herein will certainly be decried and denied by most. But it seems apparent that the Court is treating clearly factual allegations as conclusory solely on the ground that it does not believe them absent additional supporting information. Further, the Court's skepticism with respect to certain factual allegations derives from their worldview and perspective as societal elites with various presumptions regarding the conduct of other members of the dominant or governing class, particularly when opposed by members of social outgroups. Beyond that, *Iqbal* also gives us a whiff of the duplicity of the Justices in the *Iqbal* majority and their true approach to judging at the Supreme Court level. Popular myth regarding the role of Supreme Court Justices holds that they are to be like umpires, simply calling balls and strikes and not making the rules. "Judges should interpret the law, not make the law" is the partisan mantra offered in supposed contradistinction to the notion of the "activist" judge who

⁸⁸ See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. Ill. L. Rev. 947, 949:

Appellate courts are indeed more favorable to defendants than are trial judges and juries. . . . the defendants' advantage grew as the case better fit the format of little victim against big defendant, just as it grew when the case had been decided by a jury. We found these tendencies in personal injury cases, as well as in cases involving nongovernmental, noncorporate, nonforeign, and in-state plaintiffs. These tendencies supported our theory that the appellate courts were striving to undo trial level favoritism toward plaintiffs, which the appellate judges were imagining.

See Harry T. Edwards and Linda Elliot, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 Wash. U. L.Q. 723, 723 (2002), for a contrary view.

⁸⁹ See, e.g., Karen Blumenthal, *How I Got Burned by Beanie Babies*, The Wall Street Journal, Wednesday, Aug. 26, 2009 ("More than three years after the crash of 1929, a Senate investigation unveiled one jaw-dropping misbehavior after another. The head of Chase National Bank had been selling his own bank's stock short while publicly urging others to buy. The former chief of National City Bank—now Citigroup—was secretly receiving a huge annual salary in retirement. Senate investigator Ferdinand Pecora called it "a shocking disclosure of low standards in high places."").

molds the law as she sees fit to suit her own substantive aspirational ends. Well, in *Iqbal* we see the Justices offering their own version of activism in service of what can only be surmised to be their own hostility to litigation in general and challenges to government authority in particular. That is unfortunate, but not new. But so long as decisions like *Iqbal* are recognized for what they are—subversions of law to achieve the restrictive ends of societal elites—there is some hope that the complete slide toward restrictive procedure can be abated and avoided.

November 30, 2009

Statement of Stephen N. Subrin, Professor, Northeastern University School of Law, for the Senate Committee on the Judiciary Hearing Entitled "Has the Supreme Court Limited Americans' Access to Courts?," scheduled for Wednesday, December 2, 2009.

This is a statement in support of legislation to overturn the new pleading requirements articulated in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*².

My professional life has revolved around civil procedure and civil litigation for forty-seven years, first as a civil trial lawyer, and since 1970, as a professor at Northeastern University School of Law. I have taught a combination of civil procedure, complex litigation, federal courts, evidence, and related courses at Northeastern Law School every year for the past forty, except when on sabbatical or teaching elsewhere. I have also taught similar courses at Harvard Law School, Yale Law School, Renmin University in Beijing, and the Cornell Summer International Institute in Paris. I have co-authored a casebook on civil procedure³ and a book entitled "Litigating in America"⁴. I was Reporter to the Massachusetts Supreme Judicial Court Standing Advisory Committee on Rules of Civil Procedure from 1982 to 1994 and Consultant to the Reporter of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States from 1986 to 1990. I have researched and written about the historical background of the Federal Rules of Civil Procedure⁵ and the 1848 Field Code⁶.

I write of my previous experience in civil procedure and civil litigation because I have spent my adult professional life thinking about procedural rules, their impact on the ground, and how such rules are and should be made. *Twombly* and *Iqbal* reversed seventy years of fixed procedure in the United States. The Court made this radical change by substituting for what was called "notice pleading" a new grant of power to each federal district court judge to exclude what he or she thinks are legal conclusions in a complaint and to then dismiss the case entirely for "failure to state a claim" if the judge finds the claim lacks "plausibility." And this new rule requires rigorous pleading in complaints before any discovery, discovery which many meritorious plaintiffs need to prove illegal defendant behavior.

In preparing this statement I have drawn upon my essay that will be published in the Denver Law Review in 2010, *The Limitations of Transsubstantive Procedure – An Essay on Adjusting the "One Shoe Fits All" Assumption*, and Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy* (manuscript).

¹ 550 U.S. 544 (2007).

² 129 S. Ct. 1937 (2009).

³ Stephen N. Subrin, Martha L. Minow, Mark S. Brodin & Thomas Main, *Civil Procedure – Doctrine, Practice, and Context* (Aspen Publishers, 3rd ed., 2008).

⁴ Stephen N. Subrin & Margaret Y.K. Woo, *Litigating in America – Civil Procedure in Context* (Aspen Publishers, 2006).

⁵ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987) (hereafter, Subrin, *Equity*); Charles E. Clark and His Procedural Outlook: *The Disciplined Champion of Undisciplined Rules*, a chapter in Judge Charles E. Clark, New York University School of Law Ingram Documents in Legal History (P. Petruck, ed. 1991). *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery rules*, 39 B.C. L. Rev. 691 (1998)

⁶ David Dudley Field and the Field Code: *A Historical Analysis of an Earlier Procedural Vision*, 6 Law and Hist. Rev. 311 (1988).

This startling Supreme Court shift of previously fixed pleading principle diminishes democracy in the United States in three critical ways and results in denying realistic access to the federal courts for countless plaintiffs with suits of merit. The two decisions place what are in practice essentially two undefined concepts into the hands of judges – “legal conclusion” and “plausible” – thus replacing the Seventh Amendment right to jury trial with judicial discretion to dismiss. The two decisions eliminate discovery needed to enforce congressionally mandated rights granted to citizens in statutes; many of these statutes show congressional intent for rigorous enforcement by providing for multiple damages and a shift of attorneys fees to victorious plaintiffs. The two decisions trample on the carefully constructed Enabling Act⁷ process for amending the Federal Rules of Civil Procedure. I explain each of these incursions on democracy below.

First, this new test for the survival of complaints puts the Seventh Amendment right to jury trial, or to any trial, in jeopardy. The Supreme Court stated in *Conley v. Gibson*⁸, which was approved law until *Twombly*: “In appraising the sufficiency of the complaint we follow, of course, 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.”⁹ The approved forms, attached to the Federal Rules, emphasized the simplicity and lack of specificity required in pleadings.¹⁰ Charles Clark, the main draftsman of the Federal Rules, thought that pleading was largely a waste of time and that lawyers would needlessly argue about technicalities.¹¹ He was convinced that the line between facts, evidence, and legal conclusions was impossible to draw in a coherent manner. Clark was impressed with the work of Walter Wheeler Cook, who in 1921 had observed that “there is no logical distinction between statements which are grouped by the courts under the phrases ‘statements of fact’ and ‘conclusions of law’.”¹² Clark had argued for years against the fact pleading requirement of the nineteenth century Field Code because it led to unproductive disputes about what was a fact, evidence, or legal conclusion. The drafters of the Federal Rules of Civil Procedure purposely avoided using the word “fact” in the pleading rules.¹³

The majority in *Twombly* insist they are not applying “any ‘heightened’ pleading standard”¹⁴ and in *Iqbal* they attempt to distinguish their new pleading requirement of “plausibility” from nineteenth century Code Pleading by calling the latter “the hyper-technical, code-pleading regime of a

⁷ The process for promulgating and amending Federal Rules of Civil Procedure are currently found in 28 U.S.C §§ 2071, 2072, 2073, 2074, 2077.

⁸ 355 U.S. 41 (1957).

⁹ 355 U.S. 45-46.

¹⁰ American Bar Association, Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C. and of Symposium at New York City, 241, 308 (1938).

¹¹ I have described Clark’s views in detail in Subrin, *supra* note 5, at 961-966.

¹² Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 Colum. L. Rev. 416, 417 (1921), cited in the *Twombly* dissent by Justice Stevens, joined by Justice Ginsburg, 550 U.S. 574. For Clark’s indebtedness to Cook, see Subrin, *Equity*, *supra* note 5, at 966, ft. note. 966.

¹³ *Id.* at 976. See, also, 5 C. Wright & A. Miller, Federal Practice and Procedure Sec. 1216, p. 207, (3d ed. 2004), cited in the dissenting opinion in *Twombly*, 550 U.S. 544, at 575.

¹⁴ 550 U.S. 569, ft. note 14.

prior era.”¹⁵ In fact, *Twombly* and *Iqbal* when considered together take the worst aspect of Code Pleading – the impossible task of logically determining the line between “fact” and “legal conclusion” – and add to it a requirement, not in the Field Code, of trying to determine “plausibility.” In this respect, the new tests are more stringent than the fact-pleading of the nineteenth century and consequently harsher on potentially meritorious plaintiffs.

Judges are now instructed to eliminate “legal conclusions” from complaints; given the plasticity of the term, this is a highly subjective test. As Justice Souter concluded in his dissent in *Iqbal*, “By my lights, there is no principled basis for the majority’s disregard”¹⁶ of some allegations and regard of others. The district court judge is then to measure “plausibility,” another subjective test. This cannot help but place the fortunes of plaintiffs in the hands of judges who, because of their concern about the cost of discovery or the number of cases on their docket, or because of their predilections about types of cases they disfavor, will inevitably be swayed by their own inner sense of what are sufficiently precise allegations. In the words of the majority in *Iqbal*, referring to an observation of the Court of Appeals, “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.”¹⁷

This is neither a test providing any degree of predictability nor promoting impartiality, particularly for plaintiffs in federal court civil rights cases, who already have been disproportionately burdened by high rates of dismissals before trial.¹⁸ I am by no means claiming that federal judges are consciously prejudiced; the opposite is true. Justice Benjamin Cardozo put it this way:

Of the power or favor of prejudice in any sordid or vulgar or evil sense I have found no trace, not even the faintest among judges I have known. But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as is revealed in each of us, is too often only the spirit of the group in which accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of mind will overthrow utterly or at all times the empire of these subconscious loyalties.¹⁹

¹⁵ 129 S.Ct. 1949.

¹⁶ 129 S.Ct. 1960. Justice Souter was joined in this dissent by Justices Stevens, Ginsburg, and Breyer.

¹⁷ 129 S.Ct. 1949.

¹⁸ This is true as a result of both dismissals for “failure to state a claim upon which relief can be granted” (Fed. R. Civ. P. 12(b)(6)) and at summary judgment (Fed. R. Civ. P. 56). See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?* (October 12, 2009), Am. U. L. Rev. (forthcoming) (available at <http://ssrn.com/abstract=1487764>); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Emp. Leg. Stud. 429 (2004); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court From Bad to Worse?*, 3 Harv. L. & Pol’y Rev. 1 (2009); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rut. L. Rev. 705 (2007).

¹⁹ Benjamin N. Cardozo, *The Nature of the Judicial Process* 174, 175 (Yale Paperbound, 1961, 1st ed. 1921).

That federal judges under *Twombly and Iqbal* are given this discretionary power to determine what they, with no guidance except their own “judicial experience and common sense,” deem a “conclusion of law” or “implausible,” inevitably leads to the dismissal of some cases which after discovery would result in plaintiffs’ verdicts. Thereby, *Twombly and Iqbal* materially diminish the right to the Seventh Amendment right to trial by jury in civil cases, a cornerstone of American democracy.

In addition, the pleading standard suddenly pronounced by the Supreme Court undercuts the effectiveness of Congress in passing statutes providing citizen rights. For decades, Congress has had the legitimate expectation that discovery will permit plaintiffs to amass the evidence necessary to prove illegal conduct. This is no small matter in our democracy, in which our elected members of Congress have frequently chosen lawyers as private attorneys general to help enforce citizen rights. Professor Paul Carrington, former Reporter to the Federal Advisory Committee on Civil Rules, explained the point this way:

We should keep clearly in mind that discovery is the American alternative to the administrative state ... Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accomplished by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish disincentives for lawless behavior across a wide spectrum of forbidden conduct.²⁰

Professor Geoffrey Hazard, former Director of the American Law Institute, put it succinctly in explaining that civil claims are “an integral part of law enforcement in our country. .. [T]he scope of discovery determines the scope of effective law enforcement in many fields regulated by law.”²¹ Judge Patrick Higginbotham, former Chairman of the Federal Advisory Committee on Civil Rules, has also emphasized the symbiotic relationship of discovery to the ability to enforce Congressional statutes in many areas of law:

Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights, and more. In the main, the plaintiff in these suits

²⁰ Paul D. Carrington, *Renovating Discovery*, 49 Ala. L. Rev. 51,54 (1997).

²¹ Report of the Conference on the Federal Rules of Civil Procedure 3 (March 3, 30,31, 1995) (co-sponsored by the Southwestern Legal Foundation and the Southern Methodist University School of Law (Geoffrey C. Hazard, Jr., reporter)).

must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.²²

By dismissing the claims of potentially meritorious plaintiffs at the pleading stage, prior to any discovery, the Supreme Court in *Twombly* and *Iqbal* has severely hampered the opportunity to enforce congressional statutes through private enforcement. This is particularly ironic since the drafters of the Federal Rules had emphatically reduced the importance of pleadings, and largely left the disposition of cases to post-discovery settlement, summary judgment, or trial. To put it another way, the notice pleading requirement and the right to discovery were intermeshed in the entire Federal Rule structure. By altering the pleading rule, the Supreme Court has eliminated discovery for potentially meritorious cases and thwarted congressional intent.

This leads to the third way in which *Twombly* and *Iqbal* diminish democracy. In some ways it is the most egregious. Congress granted the Supreme Court the power to promulgate Federal Rules of Civil Procedure through the Enabling Act of 1934, which explicitly said that if those rules were to cover both law and equity cases, they must be presented to Congress before they became law.²³ The Supreme Court chose to merge the law and equity rules, and ever since amendments to the Rules were to be accomplished by presentation to Congress, with the opportunity for veto or change. Since that time, Congress has mandated a number of additional steps that must be taken before such amendments become law.²⁴ These steps insure that there is opportunity for public comment and debate before the Advisory Committee presents suggested amendments to a Standing Committee on Rules, which in turn, if they approve, present the amendments to the Federal Judicial Conference, and with their approval, the amendments are then presented to the Supreme Court, which then, if the Court chooses, presents them to Congress.

What the Supreme Court did in *Twombly* and *Iqbal* is not just an interpretation of a Rule. It replaces notice pleading under Rule 8(a), and in turn under the motion to dismiss for failure to state a claim, Rule 12(b)(6), with something close to the nineteenth century Code "fact pleading rule," or worse, because it introduces a new "plausibility" test in addition to stating underlying facts. In *Iqbal*, the Supreme Court has also eliminated, in one paragraph, and with no cite to prior case law, Federal Rule

²² Patrick Higginbotham, *Foreword*, 49 Ala. L. Rev. 1, 4, 5 (1997).

²³ Act of June 19, 1934, Pub. L. No. 73-415, 48 stat. 1064. "Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

²⁴ These additions to the process can now be found in 28 U.S.C. §§ 2071, 2073, 2077.

9(b)'s clear language that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."²⁵ This drastic change, like the Rule 8(a) and Rule 12(b)(6) changes, substantially adds to the plaintiff's pleading burden in employment discrimination and other civil rights cases, in which the "intent" or "knowledge" of the defendant is difficult or impossible to discover, absent discovery.

By changing the pleading requirements, the Supreme Court has simultaneously replaced notice pleading and the opportunity for discovery, the very hallmarks of the Federal Rules, with a modified version of "fact pleading" and no discovery at all, if one judge determines a lack of "plausibility" after eliminating what he or she finds to be conclusions of law. Such a change in the pleading rule is precisely what the Supreme Court told lower courts could not be done except by Congress or by amendment of Rule 9, when some district courts tried to introduce rigorous pleading requirements for certain types of cases.²⁶ In *Twombly* and *Iqbal*, the Supreme Court side-stepped not only Congressional approval, but the entire rule-making process that Congress legislated, including multiple steps and public comment. And the Supreme Court has done this for all civil cases.

The new pleading requirements in *Twombly* and *Iqbal* should be promptly reversed by Congress. The diminution of the Seventh Amendment right to trial by jury, the thwarting of the Congressional expectation that its laws will be enforced in the way that has been done for the past seventy years, and the stark attempt to avoid the entire legislatively mandated Enabling Act process warrant such action. If Congress later finds that some issue, such as the qualified immunity defense that was at play in *Iqbal*, or the question of conspiracy in anti-trust cases that was central to *Twombly*, requires more stringent pleading requirements, then this should be done through the congressional process for making law.²⁷ If some judges, lawyers, legislators, or interest groups think that the pleading rules must be changed for all cases, then such an amendment should go through the legislatively mandated Enabling Act process. These are the ways – Congressional action or the Enabling Act process – in which our democracy has long since decided to handle such controversial questions about civil procedure and civil litigation.

²⁵ 129 S.Ct. 1954.

²⁶ See, e.g., *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

²⁷ As was done for securities and prisoner litigation. For procedural provisions of the Private Securities Litigation Reform Act of 1995, see 15 U.S.C. §78. For procedural provisions of the Prison Litigation Reform Act, see 42 U.S.C. §§ 1915, 1997.

WRITTEN STATEMENT OF PROFESSOR SUJA A. THOMAS
University of Illinois College of Law

**“Has the Supreme Court Limited Americans’ Access to Courts”
Hearing of the United States Senate Committee on the Judiciary
December 2, 2009**

My name is Suja Thomas, and I thank you for extending me the privilege to submit this statement for this hearing on access to courts. In my work as a Professor of Law and as the Mildred Van Voorhis Jones Scholar at the University of Illinois College of Law, I study and teach in the areas of federal courts, civil procedure, and employment discrimination.

Americans’ access to courts has been severely curtailed by the Supreme Court’s decisions in *Ashcroft v. Iqbal*¹ and *Bell Atlantic Corp. v. Twombly*.² Now, after a complaint has been filed, a judge can dismiss the complaint if he decides that the alleged claim is “implausible.” This standard is a highly subjective inquiry that effectively makes judges fact-finders.³ Indeed, a judge is supposed to “draw on [his] judicial experience and common sense” in deciding whether a complaint should be dismissed under this new plausibility standard.⁴ In determining whether a claim is plausible, a judge examines the complaint for non-conclusory allegations and for the inferences that he deems *favours the defendant* in addition to those inferences that he deems favors the plaintiff. If a judge decides that the plaintiff has pled facts that are consistent with the allegations, the complaint still may be dismissed because a claim is not plausible unless there are facts that show more than consistency with the allegations.

Thus far, the empirical data on this new standard shows that judges are indeed becoming subjective fact-finders at the pleading stage, and that this judicial fact-finding is limiting access to the courts. Several studies have found that more cases are being dismissed under the new standard

¹ 129 S. Ct. 1937 (2009).

² 550 U.S. 544 (2007).

³ Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS AND CLARK L. REV. ___ (forthcoming 2010) (special symposium issue on *Iqbal*), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494683.

⁴ 129 S. Ct. 1937.

than the old standard. As an example, I will use the data in employment discrimination cases, an area where judges are significantly using the new standard to dismiss claims. Presently, the data includes both dismissals with and without prejudice. Professor Patricia Hatamyar studied the grants of motions to dismiss in a random set of cases in the two-year period before and after *Twombly* and in the period after *Iqbal* from May to August 2009.⁵ She found that “[t]he rate of granting 12(b)(6) motions in Title VII cases went from 42% granted under *Conley* to 54% granted under *Twombly* to 53% granted under *Iqbal*.”⁶ Professor Joseph Seiner previously had studied the effect of *Twombly* on employment discrimination cases before *Iqbal* was decided, and he demonstrated a substantial effect on disability cases such that in the year prior to *Twombly*, 54.2% of the motions were granted and in the year after *Twombly*, 64.6% of the motions were granted.⁷ Professor Hatamyar’s study and another study by Kendall Hannon also include claims in other areas of the law and show some increases in the grants of motions to dismiss following *Iqbal* and *Twombly*.⁸

Americans are in this position of subjective fact-finding by judges and thus limited access to courts, because the Supreme Court changed five decades of precedent. The old standard under *Conley v. Gibson*⁹ – that the “plaintiff can prove no set of facts in support of his claim which would entitle him to relief” – was consistent with notice pleading under Federal Rules of Civil Procedure 8 and 12(b)(6). The Supreme Court radically changed this standard in *Iqbal* and *Twombly* when the court “retire[d]” the *Conley* standard and held that a plaintiff must plead a “plausible” claim to survive a motion to dismiss. Indeed, *Conley*, a case decided in 1957, in

⁵ Patricia Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically*, 59 AM. U. L. REV. ____ (forthcoming 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764, at 21-24 & n.168.

⁶ *Id.* at 38.

⁷ Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. ____ (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372296, at 30; see also *Guirguis v. Mover Specialty Services, Inc.*, 2009 WL 3041992 (3rd Cir. Sept. 24, 2009) (affirming grant of motion to dismiss with prejudice of national origin employment discrimination claim).

⁸ Hatamyar, *supra* note 5; Kendall W. Hannon, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

⁹ 355 U.S. 41 (1957).

which the plaintiffs alleged discrimination by their employer and union, likely would be decided differently and be dismissed today under the new standard. Thus, a by-product of the Court's decisions is the loss of congressionally-created rights such as civil rights. These improper changes to the motion to dismiss, including the change to judges as subjective fact-finders at the pleading stage, lead me to conclude that Congress should overturn the cases and return to a standard something like *Conley*, which was consistent with Rule 8.

My other research on *Iqbal* and *Twombly* also leads me to the same conclusion. I have found two fundamental problems with the new standard. First, the new standard to dismiss a claim at the pleading stage is inappropriately the same as the standard to dismiss a claim under summary judgment.¹⁰ Second, the new standard violates the Seventh Amendment right to a civil jury trial.¹¹

First, "the motion to dismiss is the new summary judgment motion."¹² In *Iqbal* and *Twombly*, the Supreme Court borrowed the "plausibility" language from the Supreme Court's summary judgment case of *Matsushita*, one of the 1986 trilogy. Many believe that the trilogy widely expanded the use of summary judgment in the courts, and not surprisingly, the new motion to dismiss standard now based on this summary judgment standard may greatly expand the use of the motion to dismiss.¹³

The standards should not be the same, however. Most obviously, the same information is not available for the motions. A judge considers only facts in the complaint under the motion to dismiss while a judge often considers stacks of discovery upon a summary judgment motion. A result of this difference is a judge may dismiss a claim upon a motion to dismiss even though the

¹⁰ Thomas, *supra* note 3.

¹¹ Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

¹² Thomas, *supra* note 3. I also argued that the motion to dismiss is the new summary judgment motion in effect, including the effect on the dismissal of employment discrimination cases, some of which is discussed *supra*.

¹³ Also, under both the motion to dismiss and summary judgment, a judge examines inferences favoring the plaintiff and inferences favoring the defendant. Finally, under both motions, judges use their own opinions of the facts and evidence to decide the motions.

same claim may survive a motion for summary judgment because of additional information that would have been gathered in discovery.

In addition to informational differences, the justifications for the motions should be viewed differently, and thus the standards should not be the same. While both motions have been justified on the grounds of cost to the defendant, there are different costs to the defendant under the motions. If a judge does not grant summary judgment, the defendant must pay to go to trial or will settle. If a judge does not grant a motion to dismiss, the cost is less. The defendant will pay for discovery but has another opportunity to request that the judge dismiss the case before trial upon a motion for summary judgment. As an aside, the cost of individual employment discrimination cases pale in comparison to cases such as class action antitrust cases, and thus, the same cost justification that has been offered by the Supreme Court for the summary judgment and the motion to dismiss standards in class action antitrust cases (*Twombly*) seems particularly inappropriate for much less costly individual employment discrimination cases. I would also add that review of complaints at the pleading stage, many of which now will be thirty or more pages, will occupy significant court resources, resources which already were taxed by motions for summary judgment.

In addition to differences in information and cost, the motions are dissimilar based on the role of the courts, and thus the standards should not be the same. Courts wield more power in relationship to Congress under the motion to dismiss than under summary judgment. Now, using the plausibility standard in *Iqbal* and *Twombly*, courts will likely dismiss at the pleading stage more cases based on Congressional statutes. For example, now, it may be that some claims of employment discrimination, created under Congress's legislative authority, will be dismissed on motions to dismiss (some of which may not have been dismissed upon summary judgment).

In addition to my findings that the motion to dismiss and summary judgment standards are inappropriately similar and therefore Congressional action to overturn *Iqbal* and *Twombly* should be taken, I have also found that the new standard violates the Seventh Amendment right to

a jury trial.¹⁴ The Seventh Amendment provides that “[i]n Suits at *common law*, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the *common law*.” The Seventh Amendment is the only place in the Constitution that refers to common law, and the Supreme Court has recognized that common law in the Seventh Amendment is the English common law in 1791, the date when the Seventh Amendment was adopted. I have found that under the common law, a judge would not perform a plausibility determination at the pleading stage, including assessing whether the allegations were conclusory and considering inferences that favored the defendant. A judge would take the facts only as true, including any inferences that favored the plaintiff. A claim would be dismissed only if no legal claim existed under those facts. Thus, because common law judges did not have the power to conduct the analysis that occurs now at the pleading stage, I conclude that the *Iqbal/Twombly* standard violates the Seventh Amendment civil jury trial right.

As a result of my research on the similarity of the motion to dismiss and summary judgment standards, as well as my research on the Seventh Amendment, I conclude that Congress should enact legislation that takes a general approach back towards the standard in *Conley*, which is consistent with Rules 8 and 12(b)(6). This conclusion is consistent with my discussion above that the old *Conley* standard is consistent with Rules 8 and 12(b)(6) and the *Iqbal/Twombly* change has caused judges improperly to become subjective fact-finders at the pleading stage.¹⁵

¹⁴ Thomas, *supra* note 11.

¹⁵ See *supra*.

**Statement of Senator Sheldon Whitehouse
Hearing, "Has the Supreme Court Limited Americans' Access to Courts?"
December 2, 2009**

Thank you, Chairman Leahy, for holding this hearing and for being a tireless defender of access to justice. And thank you also to Senator Specter for your leadership on the need to restore notice pleading after the Supreme Court's decisions in *Bell Atlantic v. Twombly* and *Iqbal v. Ashcroft*. I look forward to working with you both.

I think that two points are worth particular consideration as we look at this crucial issue.

First, as dry and technical as this issue may seem, the decisions in *Twombly* and *Iqbal* impose real economic costs on ordinary Americans. Consider the employment discrimination victim who – because the discriminator hides the reason for her firing behind a veil that only discovery can penetrate – can only allege in conclusory terms that her employer fired her for discriminatory reasons. Under the new rules of *Twombly* and *Iqbal*, that plaintiff, with a meritorious case, never will get the chance to find the smoking gun email that proves her claim. In creating this courthouse Catch-22, *Iqbal* and *Twombly* overturned decades of Supreme Court precedent, and regular Americans lost out.

Second, we may hear today that overruling *Twombly* and *Iqbal* would pose a threat to national security. I've been sued enough to agree that meritless civil litigation should not distract government officials from their weighty responsibilities, but I have yet to see meaningful evidence that lawsuits were putting an undue burden on government officials before the conservative activists on the Supreme Court rewrote the law: a 5-4 Court changed the rules of civil procedure by judicial fiat. Nor do concerns about national security justify restricting access to justice for every type of plaintiff: closing the courthouse doors to employment discrimination plaintiffs does not advance national security even if it does satisfy big corporations' political agenda.

Congress gave the Courts a clear process, subject to congressional approval, for changing the Federal Rules of Civil Procedure. The Supreme Court ignored that process, not to mention its own precedents, and "legislated from the bench." We must correct their error.

Thank you.



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Tobias Barrington Wolff
Professor of Law

December 1, 2009

United States Senate
Committee on the Judiciary
226 Dirksen Senate Office Building
Constitution Avenue and 1st Street, NE
Washington, D.C. 20002

**Re: December 2, 2009 hearing,
"Has the Supreme Court Limited Americans' Access to Courts?"**

Members of the Senate Judiciary Committee:

My name is Tobias Barrington Wolff. I am a Professor of Law at the University of Pennsylvania Law School and the Jesse Climenko Visiting Professor of Law at Harvard Law School. I have been a law professor for ten years, during which time one of my primary areas of focus has been Civil Procedure and the jurisdiction of the federal courts. I am the co-author of a textbook in Procedure and the author of articles and essays in Procedure and related fields, and I am a member of the American Law Institute.

I write at the Committee's invitation to endorse the effort to craft appropriate legislation to overturn the decisions of the Supreme Court of the United States in *Iqbal v. Ashcroft* and *Bell Atlantic v. Twombly*. Those decisions have disrupted the balance of policies that govern civil litigation in the federal courts, and they have done so without the benefit of reliable data or the opportunity for public participation and a politically accountable process. The law of pleading in the federal courts should be returned to the status quo that existed prior to *Twombly* until a more thorough examination of the standards for pleading in civil actions can be undertaken.

Other experts have explained the radical departure from the prior law of pleading that the Court's recent decisions represent. I will focus my remarks on two other, related features of *Iqbal* and *Twombly*: (1) the network of provisions in the Federal Rules of Civil Procedure that those decisions have disrupted; and (2) the unstable nature of the Court's newly created standard.

I. Pleading and the Federal Rules of Civil Procedure

Much of the discussion surrounding *Iqbal* and *Twombly* has focused upon two provisions of the Federal Rules of Civil Procedure: Rule 8, which governs the general standard of pleading

in the federal courts, and Rule 12(b)(6), the tool used for dismissing a complaint that fails to state a claim upon which relief can be granted. The Court framed its opinions in those cases around the implicit assumption that a motion to dismiss is the only barrier that stands between a flawed complaint and the burdens of discovery, and much of the commentary and criticism has followed the Court's lead.

This narrowness of focus has resulted in an underestimation of the disruptive impact of *Iqbal* and *Twombly* upon the Federal Rules. There is a network of provisions in the rules that are designed to prevent plaintiffs who file weak or problematic complaints from gaining immediate access to the tools of discovery. Those provisions have been undermined or circumvented by the *Iqbal* and *Twombly* decisions.

Evidentiary Support and the Motion for Sanctions. The first provision relates to the evidentiary support that a plaintiff must possess before making allegations in a complaint. Rule 11(b)(3) requires that "the factual contentions [in the plaintiff's complaint] have evidentiary support." If a plaintiff's complaint contains allegations that lack evidentiary support, the defendant can pursue sanctions against the plaintiff or the plaintiff's attorney, demanding that the complaint be withdrawn and, if it is not, seeking a penalty that can range from the imposition of attorney's fees to the striking of unsupported allegations or dismissal of the entire complaint.

In *Iqbal*, the Court singled out two allegations relating to Attorney General Ashcroft and FBI Director Mueller, labeling them "conclusory" and hence not entitled to any presumption of truth: (i) that General Ashcroft was the "principal architect" of a set of arrest and detention policies that targeted the plaintiff for discrimination and abuse, and (ii) that Director Mueller was "instrumental in the adoption, promulgation, and implementation" of those discriminatory policies. After issuing a substantive ruling on the doctrine of supervisory liability in which it held that Ashcroft and Mueller could be held liable only if they had acted with intentional discrimination, the Court found the allegation that they had done so to be inherently "implausible" and thus dismissed the complaint under Rule 12(b)(6).

The *Iqbal* Court's treatment of these allegations seemed to indicate that the real problem was the Court's belief — as dictated by its "judicial experience and common sense" — that the allegations of intentional discrimination against General Ashcroft and Director Mueller lacked any basis in evidence. After all, whether or not one agrees with the Court's characterization of these allegations as "conclusory" in nature, it would be difficult to justify dismissing the complaint if the allegations were in fact supported by reliable evidence. Nonetheless, Ashcroft and Mueller did not demand that the plaintiffs withdraw their complaint or make a motion for sanctions under Rule 11(b)(3), and the Court did not discuss these options in its analysis, even though federal district courts have the power to invoke Rule 11 on their own initiative. *See* Fed. R. Civ. Proc. 11(c)(3). Rather, the Court channeled its skepticism about the plausibility of these allegations of intentional discrimination — and hence their basis in evidence — through its expanded and more aggressive interpretation of Rule 12(b)(6).

This new approach to the motion to dismiss under *Iqbal* and *Twombly* is an inferior method for identifying complaints that lack evidentiary support. Put simply, allegations that might seem "implausible" as a general matter may be true in particular cases, and the defendant is always in a better position than the court to know whether a given lawsuit is one of those unusual cases. When a defendant invokes Rule 11(b)(3) to test a complaint, it invites a focused

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inquiry into the evidentiary support for the contested allegations, including the likelihood that the allegations will “have evidentiary support after a reasonable opportunity for further investigation or discovery.” If the defendant knows that the allegations do in fact have some basis in evidence — that this is the unusual case in which a claim that might appear “implausible” to an outside observer in fact has a core of truth — then that information will likely come to light in the Rule 11 hearing. Indeed, a defendant who files a Rule 11(b)(3) motion while knowing that the allegations actually have a basis in evidence may elicit Rule 11 sanctions upon himself in return.

When a defendant files a motion to dismiss under Rule 12(b)(6), however, he need not make any representation to the court about the truth or falsity of the allegations. A defendant may know perfectly well that the allegations are true, or at least that they have a firm basis in evidence. But if the defendant can convince the court that the allegations are conclusory and implausible under the *Iqbal* / *Twombly* standard, he will escape responsibility even so.

The importance of this difference between Rule 12(b)(6) and Rule 11(b)(3) cannot be overstated. A defendant who knows that a complaint has merit still has every incentive to file a motion to dismiss following *Iqbal* in hopes of convincing the court that the allegations appear implausible to an outside observer. But if the only tool available for challenging a complaint’s basis in evidence is Rule 11(b)(3), as the Rules provide, then most defendants will only raise such a challenge if they actually believe that the complaint is unsupported.

Seemingly implausible events sometimes happen. It is the defendant, not the court, who is in the best position to know whether a seemingly implausible complaint is without merit or in fact has a basis in evidence. Rule 11(b)(3) places the onus upon the defendant to make that assessment before issuing a challenge to a complaint. Following *Iqbal* and *Twombly*, however, Rule 12(b)(6) leaves the defendant free to challenge an “implausible” complaint even when he knows that the allegations against him in fact have a basis in evidence.

Motion for a More Definite Statement. A second provision relates to the plaintiff’s obligation during the pleading stage of litigation to give the defendant adequate notice of the facts and circumstances that form the basis of the allegations in the complaint. Under Rule 12(e), when the plaintiff fails to satisfy that obligation by filing a complaint that “is so vague or ambiguous that the party cannot reasonably prepare a response,” the defendant may ask that the plaintiff be required to make a more definite statement of her allegations, identifying with specificity the additional details that are needed. Since the defendant must comply with Rule 11 when filing his answer, this requirement is particularly important for the ethical lawyer who cannot submit a general denial without a clear understanding of what his client is denying.

In *Twombly*, the Court identified the open-ended nature of the antitrust conspiracy pled by the plaintiff — a conspiracy that allegedly spanned seven years and multiple markets but for which the plaintiff had made no specific allegations about when, where or between whom an agreement had been formed — as one of the principal infirmities in the complaint. Yet the defendant apparently did not move for a more definite statement of the circumstances surrounding the supposed conspiracy, and the Court did not discuss Rule 12(e) as a tool by which the problem of vagueness could be addressed.

Unlike the ruling in *Twombly*, which lumps potential problems of vagueness together with an overall assessment of a complaint’s “plausibility,” the motion for a more definite

statement under Rule 12(e) focuses the attention of the parties and the court on whether the plaintiff's complaint gives the defendant enough information to craft a response. Requiring the defendant to employ Rule 12(e) to address problems of vagueness, rather than a Rule 12(b)(6) motion to dismiss, allows the court to enter into a dialogue with the parties in which the likelihood is increased that a plaintiff can rehabilitate a complaint that has potential merit and, if rehabilitation proves impossible, that a dismissal on vagueness grounds is fully warranted.

Twombly invites defendants to circumvent Rule 12(e) altogether, framing objections to the vagueness of a complaint in terms of "conclusory" allegations and implausible inferences and then permitting dismissal on these lumped together grounds. It thereby undermines Rule 12(e), rendering that precision tool largely otiose.

Reply to an Answer and Motion for Judgment on the Pleadings. Finally, when a defendant issues a denial, makes a counter-allegation, or asserts a defense in his answer that places the merits of the plaintiff's complaint in serious and immediate question, the court has the option, under Rule 7(a)(7), to order the plaintiff to file a reply to the answer. Such an order may call upon the plaintiff to admit or deny a counter-allegation or to respond to an affirmative defense that appears to foreclose relief altogether. If the plaintiff's reply exposes the plaintiff's inability to recover, then the defendant has the option before discovery even begins to move for judgment on the pleadings under Rule 12(c) and ask that the complaint be dismissed. In cases where the defendant knows that plaintiff is in possession of information clearly establishing that no recovery is possible, these rules facilitate streamlined dismissal.

In short, there are numerous tools available to a defendant and a district court to test the sufficiency of a complaint before the defendant will ever be subjected to the burdens of discovery. If the defendant knows that a complaint has no basis in evidence, he can employ Rule 11(b)(3) to demand that the complaint be withdrawn or dismissed. If the complaint is so vague as to leave the defendant unsure how to respond, Rule 12(e) is available to focus the court and the parties on that problem and strike the complaint if it cannot be rehabilitated. And if the defendant's answer raises serious and immediate questions about the merits of the complaint, a court-ordered reply under Rule 7(a)(7) followed by a Rule 12(c) motion for judgment on the pleadings can lay bare those infirmities and protect the defendant from further exposure.

Iqbal and *Twombly* disregard, circumvent and undermine this careful network of limitations on the pleading phase of litigation.

II. **Plausibility and Provability under *Iqbal* and *Twombly***

The new plausibility doctrine that the Court has used to cut a swath through this network of the Federal Rules is not a stable one. Although the Court reiterated in *Iqbal* and *Twombly* that plaintiffs need not convince a judge during pleading that they will be able to prove the truth of their allegations, the "plausible inference" requirement amounts to the same thing. The Court has taken a mode of analysis that was designed to scrutinize factual and evidentiary records and applied it to a context in which there are no facts and no evidence to review. The resulting

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standard effects a massive transfer of power into the hands of federal judges at the same time that it calls for an inquiry that is, by its nature, impossible to administer objectively.

When parties debate the meaning of evidence in the later stages of a lawsuit, there is no sharp distinction between “plausibility” and the ability of the plaintiff to “prove” her case. Both refer to the same basic question: whether the plaintiff has produced evidence from which the finder of fact may legitimately conclude (or “infer”) that the plaintiff is entitled to relief. When a plaintiff fails to produce evidence during discovery or trial that can support a plausible inference in her favor, the “implausibility” of her claim is another way of saying that she has failed to prove her case. In deciding whether the plaintiff’s claim is “plausible” at this point, the judge and the jury have an evidentiary record that they can hold onto in conducting their analysis.

The pleading stage of a lawsuit is entirely different. There is no evidence at the pleading stage — only a sketch of what the plaintiff will later prove. Under a notice pleading system, the plaintiff is neither required nor expected to include any evidence with her complaint, and a skeptical court cannot dismiss the complaint “even if it appears that a recovery is very remote and unlikely.”¹ A plaintiff who asserts an implausible sounding claim that survives the other constraints on pleading described above will be put to the test of her proof during discovery or trial. But at the pleading stage, what is the distinction between a claim that strikes the court as “unlikely to be proven true” (which is not supposed to be a basis for dismissal) and a claim that sounds “implausible” (which is now a basis for dismissal under *Iqbal* and *Twombly*)?

In *Twombly*, the Court gave an answer to that question that relied entirely upon the substantive context in which the claim arose: federal antitrust law. In an earlier case, *Matsushita Electrical Indus. v. Zenith Radio*, the Court had spoken about the minimum evidence required to get past summary judgment in a claim under § 1 of the Sherman Act.² *Matsushita* held that evidence of parallel behavior among participants in a market, without more, is insufficient as a matter of antitrust law to proceed to trial on a claim of illegal conspiracy. Divorced from its legal context, this would be a surprising result. As a general matter, we would not call a jury irrational if it treated the fact that multiple people were acting in parallel as evidence that those people had agreed to coordinate their actions. But *Matsushita* was a ruling on the substantive policy of federal antitrust law, not merely the generic standards for summary judgment. As the Court explained, “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.”³ Antitrust law involves an unavoidable tension between encouraging vigorous competitive behavior and preventing the abuse of market power. Distinguishing between an illegal agreement and healthy competition can be difficult, and the *Matsushita* Court insisted upon a more aggressive review of the discovery record in such a case, explaining that “mistaken inferences in [§ 1] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”⁴ Even in this special context, the four dissenters in *Matsushita* criticized this usurpation of the jury’s function in which judges were allowed to decide which inferences are plausible, and the majority emphasized its careful review of record evidence spanning “two decades” in the case before it to justify its approach.

¹ *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

² *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574 (1986). *See also* *Monsanto v. Spray-Rite Serv.*, 465 U.S. 752 (1984) (addressing a similar issue on directed verdict).

³ *Matsushita*, 475 U.S. at 588.

⁴ *Id.* at 590 (citing *Monsanto* 465 U.S. at 763–64).

Many courts and commentators initially concluded that *Twombly* was best understood as another antitrust ruling. Although the language that it used was recklessly broad, the Court's opinion could be understood as a substantive decision about the demands of antitrust law at the pleading stage, with the talk of "retiring" *Conley v. Gibson* merely a clumsy way of removing a potential obstacle to that substantive result. That is essentially how the four dissenters in *Iqbal* characterized *Twombly's* analysis, led by Justice Souter (*Twombly's* author) and joined by Justice Breyer (who was in the *Twombly* majority).

But the *Iqbal* majority gave free rein to that reckless language and expanded upon it further. In doing so, the majority introduced two elements of instability into the law of pleading.

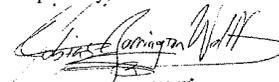
First, the *Iqbal* majority severed the connection between this aggressive approach to pleading and the underlying substantive law. Whereas *Twombly* could possibly have found some justification as an expression of antitrust policy, *Iqbal* ignored the fact that it was "antitrust law [that] limit[ed] the range of permissible inferences" in that case and replaced expressions of substantive policy by Congress with "judicial experience and common sense." The majority thereby effected a massive transfer of authority into the hands of federal judges, who are now explicitly invited to rely upon their own instincts, unguided by legislative policy goals, in deciding what allegations are worthy of discovery.

Second, the *Iqbal* majority codified and magnified *Twombly's* greatest weakness: its transfer of the "plausible inference" standard from summary judgment, where the judge decides what inferences are supported by the evidentiary record, to the motion to dismiss, where the judge must now decide what inferences are supported by mere allegations. Perversely, by continuing to insist that the plaintiff need not convince the judge that she is likely to be able to prove her case on the facts once discovery begins, *Iqbal* and *Twombly* increase the arbitrariness of the plausibility standard by severing it from its evidentiary moorings.

* * *

The Federal Rules of Civil Procedure provide powerful tools for protecting defendants from the burden and expense of discovery when faced with a flawed or suspect complaint. If defense advocates believe that the threat of discovery is still excessive in high-stakes cases, the solution is to secure good data on discovery and determine whether further reform of those rules is needed. The extensive and repeated revisions to the discovery rules over the last three decades make it clear that such reform is entirely feasible. *Iqbal* and *Twombly* are not the answer. They have introduced instability and arbitrariness throughout the civil litigation system. Congress should act to restore the status quo that existed prior to those rulings.

Respectfully,



Tobias Barrington Wolff

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