Statement of Gregory G. Katsas

Partner, Jones Day

Former Assistant Attorney General, Civil Division, Department of Justice

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

House Judiciary Committee

Federal Pleading Standards Under *Twombly* and *Iqbal*

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

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

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

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

A. The *Twombly* and *Iqbal* Decisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. The Proposed Notice Pleading Restoration Act Should Be Rejected

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

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

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

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

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

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

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

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

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

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