Statement of Gregory G. Katsas

Partner, Jones Day

Former Assistant Attorney General, Civil Division, Department of Justice

Before the Subcommittee on Courts and Competition Policy

House Judiciary Committee

Federal Pleading Standards Under *Twombly* and *Iqbal*

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Chairman Johnson, Ranking Member Coble, Members of the Subcommittee: Thank you for the opportunity to testify about ongoing efforts to overrule the Supreme Court's recent decisions in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and *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 any bill that would overrule *Twombly* and *Iqbal* by statute, including the proposed Open Access to Courts 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 returned in November 2009. During my time at Jones Day, I have focused primarily on complex civil litigation, in the trial courts and the courts of appeals. I have represented both plaintiffs and defendants, and I have been 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. During my tenure as Assistant Attorney General, I also served as an *ex officio*

member of the Advisory Committee on the Federal Rules of Civil Procedure, which advises the Judicial Conference of the United States about possible amendments to those rules.

In my testimony below, I will first summarize the Supreme Court's decisions in *Twombly* and *Iqbal*, which permit the dismissal of conclusory or implausible claims on the pleadings. Next, I will explain why those decisions are correct and consistent with decades of prior law. I will also address the critically important interests served by *Twombly* and *Iqbal*, for civil litigants in general and for government officials in particular. I will also address the modest impact of *Twombly* and *Iqbal* in the lower courts to date. Finally, I will consider two pending legislative proposals to overrule *Twombly* and *Iqbal*, which seem to me both unwise and entirely unnecessary.

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, which would imply that even 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." *Id*. Instead, 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 562-63. And because *Conley's* "no set of facts" language had been "questioned, criticized, and explained away long enough," the *Twombly* Court 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 brought suit against 34 present and former federal officials, ranging

from the prison guards with whom he had had day-to-day contact all the way up the chain-of-command to the Director of the FBI and the Attorney General. As relevant here, Iqbal alleged that Attorney General Ashcroft and Director Mueller selected him for restrictive detention solely on account of his race, religion, and national origin. In an opinion by Justice Kennedy, the Court held Iqbal's allegations to be insufficient to state a claim against those high-ranking officials.

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 arbitrarily be 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" 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.

In dismissing the claims against Attorney General Ashcroft and Director Mueller, the Court did not prevent Iqbal from pursuing his claims against any other defendant in the case, as the court of appeals had permitted. See *id.* at 1952. Nor did the Court definitively foreclose Iqbal from proceeding even against Attorney General Ashcroft and Director Mueller; to the contrary, 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. *Hasty*, 574 F.3d 820 (2d Cir. 2009). Instead, the Court simply held that the complaint, as initially pleaded, was insufficient as to two of the 34 defendants in the case.

Four Justices dissented in *Iqbal*. However, the dissenters – who included two Justices from the *Twombly* majority, including the author of that opinion – did not

disavow the pleading standards discussed in *Twombly*, much less urge a literal application of *Conley*. Rather, the dissenters simply disagreed with the majority's *application* of the *Twombly* pleading standards to the complaint in *Iqbal*. 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 further agreed that Rule 8 incorporates a "'plausibility standard,'" but disagreed with the majority's application of that standard to the case at hand. See *id.* at 1959-60. Thus, in *Iqbal* itself, no Justice disputed the general proposition that conclusory and implausible claims should be dismissed, and no Justice expressed support for the recently-interred "no set of facts" language from *Conley*.

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). The text of Rule 8 thus strongly supports the Supreme Court's reasoning. As the Court twice 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 Supreme Court precedent. In the context of claims for securities fraud, the Supreme

Court, speaking unanimously through Justice Breyer, has held that an unadorned allegation of loss causation is insufficient to state a claim, 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, the Court 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 courts need not accept implausible inferences from well-pleaded facts; 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 that the "no set of facts" language from *Conley* cannot be literally construed apart from the detailed pleading actually at issue in *Conley* itself. Here is a partial, illustrative sample of that caselaw by circuit:

First Circuit: *Aponte-Torres* v. *University of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) ("We ought not * * * credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'") (citation omitted); *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* § 1357).

Second Circuit: *Cantor Fitzgerald, Inc.* v. *Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) ("'we 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"; thus, 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") (citation omitted).

Fourth Circuit: *Jordan* v. *Alternative Res. Corp.*, 458 F.3d 332, 345 (4th Cir. 2006) ("we have rejected reliance on * * * conclusory allegations" at the pleading stage); *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); *Estate Constr. Co.* v. *Miller & Smith Holding Co*., 14 F.3d 213, 220-21 (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: *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"); *Blackburn* v. *Fisk Univ*., 443 F.2d 121, 123 (6th Cir. 1971) ("we are not bound by allegations that are clearly unsupported and unsupportable").

Seventh Circuit: *Fries* v. *Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) ("mere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss."); *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) ("we are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the

form of factual allegations'") (citation omitted); *Wiles* v. *Capitol Indem. Corp*., 280 F.3d 868, 870 (8th Cir. 2002) (same).

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 General 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) ("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 resist dismissal for failure to state a claim).

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."); *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*).

Eleventh Circuit: *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."); *Oxford Asset Management, Ltd.* v. *Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (same).

District of Columbia Circuit: *Trudeau* v. *FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) ("'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'") (citations omitted); *Browning* v. *Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("we 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 Comm'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) (courts accept 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 * * * * ").

An exhaustive discussion of this pre-*Twombly* caselaw is beyond the scope of my testimony, so let me briefly elaborate on only two lower-court decisions applying these principles in contexts strikingly similar to those presented in *Twombly* and *Iqbal* respectively.

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.

Finally, prior to *Twombly* and *Iqbal*, prominent commentators had also recognized that the pleading requirements established by Rule 8, although generous to plaintiffs, are not entirely 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").

The *Twombly* and *Iqbal* decisions fit comfortably within this deeply-rooted body of precedent and represent a straightforward application of existing law.

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

Allowing conclusory and implausible claims to proceed to discovery would impose significant costs on the courts, on civil litigants, and on society at large. As the Supreme Court recognized in *Twombly*, "discovery accounts for as much as 90 percent of litigation costs when [it] is actively employed." 550 U.S. at 559 (citing Memrandum from Hon. Paul Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony Scirica, Chair, Standing Committee on Rules of Practice and Procedure (May 11, 1999). Imposing those costs may be justified only when the plaintiff has alleged a sufficiently specific and plausible claim. As Chief Judge Boudin has

explained, "the 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." *D.M. Research*, 170 F.3d at 56. Moreover, this principle applies despite the theoretical possibility of meritorious but implausible allegations:: "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." *Id.* 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"); see also *Intel Corp v. Advanced Micro Devices*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) ("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 Brookings Institute,

Justice For All: Reducing Costs and Delay in Civil Litigation, Report of a Task Force at 6-7 (1989). Of course, the same observation could be made with respect to securities litigation, putative class actions, and many other kinds of cases.

Several considerations magnify the potential burdens of discovery. To begin with, the Federal Rules of Civil Procedure permit exceedingly broad discovery: 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, in typical complex litigation, 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. Furthermore, 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). 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. As one court of appeals recently acknowledged, "the burdens and costs associated with electronic discovery, such as those seeking 'all email,' are by now well known." *Regan-Touhy* v. *Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008).

To be sure, not all federal cases involve huge discovery costs. But even in typical cases, discovery burdens are rarely insubstantial, and even relatively small discovery obligations may be quite burdensome on relatively small defendants such as individuals or small busineses. In any event, whatever the scope of discovery in any given case, there is simply no basis to subject defendants to it 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). Doing so would burden defendants with significant 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 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. Absent the Supreme Court's ruling in *Iqbal*, such litigation would only multiply: as Judge Cabranes explained, had Iqbal succeeded in obtaining discovery from the former Attorney General and FBI Director based on his conclusory and implausible allegations that they selected him for harsh treatment on account of his race and religion, "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." *Ibid.*

The threat posed by baseless litigation targeting high-ranking government officials is neither new nor confined to the 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. By contrast, overruling *Iqbal* would afford an unfortunate "blueprint" for even further litigation against those most responsible for protecting our national security.

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

Given the consistency of *Twombly* and *Iqbal* with prior precedent, it would be surprising if those decisions had worked a sea-change in the adjudication of motions to dismiss. In fact, the best available data indicate that *Twombly* and *Iqbal* have had at most a negligible impact on such motions. The responsible authorities within the Judicial Conference of the United States – who are actively studying the impact of *Twombly* and *Iqbal* – have reached essentially the same conclusion. And the lower courts have understood *Twombly* and *Iqbal* to be largely consistent with prior law. *Twombly* and *Iqbal* thus protect government officials and other defendants from the burdens of vexatious litigation, without imposing any significant impediment on the ability of plaintiffs to pursue legitimate claims.

1. The Judicial Conference of the United States is the body charged by Congress with monitoring implementation of, and proposing amendments to, the Federal Rules of Civil Procedure. Under the Rules Enabling Act, the Judicial Conference must establish a Standing Committee on Rules of Practice and Procedure, and it may establish further advisory committees, to assist the Conference in discharging its statutory responsibilities. See 28 U.S.C. § 2073(a)(2) & (b). The Standing Committee is presently chaired by United States District Judge Lee Rosenthal. The Conference has established an Advisory Committee on the Federal Rules of Civil Procedure, which is presently chaired by United States District Judge Mark Kravitz. Under the Rules Enabling Act, Congress has required these Committees to make recommendations about "rules of practice, procedure, and evidence" in the federal courts. See *id.* More generally, Congress has also provided

that the Judicial Conference "shall make a comprehensive survey of business in the courts of the United States."

In carrying out these various statutory responsibilities, both the Standing Committee and the Advisory Committee on Civil Rules have been actively engaged in studying the impact of *Twombly* and *Iqbal* in the lower federal courts. Judge Rosenthal and Judge Kravitz recently explained that their respective Committees are "dedicated to obtaining the type of reliable empirical information needed to enact rules that will serve the American justice system and will not produce unintended harmful consequences." See Letter from Hon. Lee Rosenthal & Hon. Mark Kravitz to Hon. Patrick Leahy at 1-2 (Dec. 9, 2009). Moreover, Judge Rosenthal and Judge Kravitz explained that their Committees "are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act," in monitoring the impact of *Twombly* and *Iqbal*. *Id.* at 2. As part of that work, the Committees have assembled – and posted on the Rules Committees' website – "[c]harts and graphs setting out preliminary data drawn from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal*." *Id.* at 2. Moreover, the Committees commissioned a comprehensive, 150-page memorandum – also posted on the website – exhaustively "describing the case law since *Iqbal* was decided." *Id.* at 2. These materials constitute the best available data on the impact of *Twombly* and *Iqbal*.

The Judicial Conference data (available at www.uscourts.gov/rules) have been collected electronically from docket entries from each of the 94 United States district courts. To date, the data already encompass the massive number of cases

filed in federal court – at a rate of almost 20,000 cases per month – from January 2007 through September 2009. According to that data, *Twombly* and *Iqbal* have had virtually no impact 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. Those figures show that, in the period just before *Twombly*, (1) motions to dismiss were filed in about 34 percent of all cases, and (2) courts granted about 38 percent of all such motions. By contrast, 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 show that, in the period just after *Iqbal* (and the latest period for which comprehensive data is presently available), (1) motions to dismiss were filed in about 36 percent of all cases, and (2) courts granted about 38 percent of all such motions. Based on the best presently available data, the systemic impact of *Twombly* and *Iqbal* thus appear to be negligible.

The data also rebuts a contention often made by opponents of *Twombly* and *Iqbal*: that those cases have imposed distinctive and unfair burdens on civil-rights plaintiffs. According to the data for civil-rights employment cases, in the four months before *Twombly*, motions to dismiss were filed in 51 percent of all cases, granted in 20 percent of all cases, and denied in 8 percent of all cases. By contrast, for civil-rights employment cases in the four months after *Iqbal*, motions to dismiss were filed in 44 percent of all cases, granted in 16 percent of all cases, and denied in 6.6 percent of all cases. A similar pattern emerges from data for other kinds of civil-rights cases: In the four months before *Twombly*, motions to dismiss were filed in

73 percent of all cases, granted in 26 percent of all cases, and denied in 6.4 percent of all cases. By contrast, in the four months after *Iqbal*, motions to dismiss were filed in 64 percent of all cases, granted in 25 percent of all cases, and denied in 8.6 percent of all cases.

The memorandum prepared for the Civil Rules Committee further addresses the question of how the lower courts have been interpreting *Twombly* and *Iqbal.* See Application of Pleading Standards Post-*Ashcroft* v. *Iqbal* " at 1 (Nov. 25, 2009) (available at www.uscourts.gov/rules). That 150-page memorandum summarizes each appellate decision that has examined or discussed *Iqbal,* as well as legions of district-court opinions that also have done so. The memorandum cautions that no definitive conclusion is possible "[a]t this early stage in the development of the case law discussing and applying the *Iqbal* pleading standards." *Id.* at 2. But based on the data presently available, the memorandum nonetheless concludes: "Overall, the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints." *Id.*; see also *id.* at 2-3 ("Many 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 3 ("Some of the post-*Iqbal* cases dismissing complaints note that the pleadings would not have survived before *Twombly* and *Iqbal*"); *id.* ("there are many cases supporting the proposition that pleading standards have not changed significantly"). 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).

Judge Kravitz, the chair of the Advisory Committee on Civil Rules, has reached similar conclusions. In a recent interview, he commented that judges are "'taking a fairly nuanced view of *Iqbal*,'" and that *Iqbal* 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). Similarly, Committee staff have also concluded that *Iqbal* has had "little or no impact" so far in the adjudication of motions to dismiss. See Business Insurance, *Congress Eyes Pleading Standard* (Nov. 9, 2009) (quoting John Rabiej).

2. Consistent with the statistics and general observations of Judge Kravitz, the courts of appeals have understood *Twombly* and *Iqbal* to effect at most incremental changes in federal pleading standards. The Third Circuit, in refusing to dismiss a claim of disability-based discrimination "not as rich with detail as some might prefer," stressed that a complaint "'may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable,'" and that a discrimination plaintiff "is not required to establish the elements of a *prima facie* case but instead, need only put forth allegations that 'raise a reasonable expectation that discovery will reveal evidence of the necessary element.'" *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) (quoting *Twombly*, 550 U.S. at 556). The

Seventh Circuit, in addressing post-*Iqbal* pleading standards in civil-rights cases, explained that Rule 8 still "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim,' rather than on technicalities that might keep plaintiffs out of court." *Brooks* v. *Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002)). The Eighth Circuit likewise has stressed that "Rule 8 does not * * * require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful." *Braden* v. *Wal-Mart Stores*, 2009 WL 4062105, *7 (8th Cir. Nov. 25, 2009).

District courts have recognized these same points. One district judge, in denying a motion to dismiss, 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 "[n]otice pleading * * * remains the rule in federal courts," and thus "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).

Consistent with these principles, courts routinely have denied motions to dismiss in all manner of cases, including among others: (1) cases involving damages claims against high-ranking government officials for actions undertaken in the

wartime defense of this country, 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); (2) cases involving motive-based constitutional claims, see, *e.g.*, *Hollis* v. *Mason*, 2009 WL 2365691 (E.D. Cal. July 31, 2009) (constitutional claim for retaliation); *Lange* v. *Miller*, 2009 WL 1841591 (D. Colo. June 25, 2009) (conspiracy to violate Fourth Amendment); *Oshop* v. *Tennessee Dep't of Children's Servs.*, 2009 WL 1651479 (M.D. Tenn. June 10, 2009) (bad-faith denial of substantive due process); (3) cases involving other kinds of civil-rights claims, see, *e.g.*, *Fowler*, 578 F.3d 203 (disability discrimination); *McGrath* v. *Dominican College of Blauvelt*, 2009 U.S. Dist. LEXIS 110122 (S.D.N.Y. Nov. 25, 2009) (sex discrimination); *Jacobeit* v. *Rich Twp. High School District 227*, 2009 U.S. Dist. LEXIS 110302 (N.D. Ill. Nov. 25, 2009) (race, age, and disability discrimination); *Kelley* 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) (race discrimination); *Glover* v. *Catholic Charities, Inc.*, 2009 WL 3297251 (D. Md. Oct. 8, 2009) (sex discrimination); *Garth* v. *City of Chicago*, 2009 WL 3229627 (N.D. Ill. Oct. 2, 2009) (race discrimination); *Weston* v. *Optima Commc'ns Sys., Inc.*, 2009 WL 3200653 (S.D.N.Y. Oct. 7, 2009) (employment retaliation); *Gillman* v. *Inner City Broad. Corp.*, 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009) (hostile-work-environment discrimination); *Bell* v. *Turner Recreation Comm'n*, 2009 WL 2914057 (D. Kan. Sept. 8, 2009) (race discrimination and retaliation); *Peterec-Tolino* v. *Commercial Elec. Contractors, Inc.*, 2009 WL 2591527 (S.D.N.Y. Aug. 19, 2009) (disability and age discrimination); and (4) cases involving antitrust and other kinds of commercial claims, see, *e.g.*, *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); *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).

Twombly and *Iqbal* have had at most a marginal impact on the adjudication of motions to dismiss in federal court, and have not prevented plaintiffs from pursuing potentially meritorious claims.

F. The Proposed Legislative Response Is Unnecessary And Unsound

This hearing addresses the proposed Open Access to Courts Act of 2009, which would overrule *Twombly* and *Iqbal* in significant respects. The proposed Notice Pleading Restoration Act of 2009 seeks to accomplish the same result through somewhat different language. Neither bill should be enacted.

1. The Open Access to Courts Act explicitly codifies *Conley*'s "no set of facts" language. Specifically, it 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). It further provides that a complaint, in order to survive a motion to dismiss, need not be "plausible" on its face, or even sufficient to support a "reasonable

inference that the defendant is liable for the alleged misconduct." *Ibid*. Moreover, by its terms, the Act would apply "except as otherwise expressly provided by an Act of Congress enacted after the date of [its] enactment" or as expressly provided by post-enactment amendments to the Federal Rules of Civil Procedure. *Ibid.* The Act is problematic in several respects.

First, as explained above, *Twombly* and *Iqbal* were correctly decided and are consistent with a longstanding body of precedent in the Supreme Court and the courts of appeals. Moreover, those decisions protect government officials from the burdens of defending against baseless civil litigation while attempting to protect the country from terrorist attacks and other threats. More generally, they protect civil defendants against the burdens of expensive and protracted discovery unless the plaintiff can articulate some reason to reasonably believe that he or she might actually have a claim. And they have not significantly changed how the federal courts adjudicate motions to dismiss – or otherwise interfered with the pursuit of potentially meritorious claims. For all of those reasons, overruling *Twombly* and *Iqbal* would be harmful and unnecessary.

Second, whatever disagreement might exist about the reasoning or results in *Twombly* and *Iqbal*, the Act seems to codify a literal understanding of the "no set of facts" language from *Conley*. For decades, however, courts and commentators have recognized that a literal application of that language makes no sense – and cannot be the law. See, *e.g.*, *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); *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th

Cir. 1989) (*Conley* "unfortunately provided conflicting guideposts"); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.) (*Conley's* "no set of facts" language "has never been taken literally"); *Gen-Probe, Inc.* v. *Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (*Conley*'s "no set of facts" language is not to be "taken literally") (citation omitted); 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) (*Conley*'s "no set of facts" language, "if taken literally, would foolishly protect from challenge complaints alleging that only that defendant wronged plaintiff or owes plaintiff a certain sum"); Hazard, *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."); 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 concluded in *Twombly*, *Conley*'s "no set of facts" language had "puzzle[ed]" the profession long enough." 550 U.S. at 563. It ought not be resurrected.

Third, the Act would expressly prevent courts from dismissing complaints based on a determination that the facts alleged "are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged." H.R. 4115, § 2. But as explained above, dozens of pre-*Twombly* cases establish that claims survive a motion to dismiss – and thus proceed to discovery – only where the facts alleged support a *reasonable* inference of liability. See, *e.g.*, *Eastern Food*

Services v. *Pontifical Catholic University*, 357 F.3d 1, 3 (1st Cir. 2004) (affirming dismissal where allegations did not state "a plausible antitrust case"); *City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998) (courts need not accept "'unwarranted inferences'" from facts alleged) (citation omitted); *Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("unwarranted deductions of fact are not admitted"); *Columbia Natural Resources, Inc.* v. *Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) ("liberal Rule 12(b)(6) review is not afforded * * * unwarranted factual inferences"); *Sneed* v. *Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998) (courts "not obliged to accept * * * unsupported conclusions of fact"); *Farm Credit Servs. of Am.* v. *American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (courts may reject "'unwarranted inferences'") (citation omitted); *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("unwarranted factual deductions * * * will not prevent dismissal."); *Bradley* v. *Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("unwarranted inferences of fact do not suffice"). The Act would replace these familiar formulations of black-letter law with the following, jarring alternative: "Courts must accept implausible, unreasonable, and unwarranted inferences from the facts alleged." With all due respect, I cannot imagine any fair justification for such a rule, even on a motion to dismiss.

Fourth, by imposing the "no set of facts" standard "except as otherwise provided by an Act of Congress enacted *after* the date of the enactment of this section," H.R. 4115, § 2 (emphasis added), the Act would appear to override numerous pleading requirements previously established in important *earlier* federal statutes. Such statutes include the Private Securities Litigation Reform Act, 15 U.S.C.

§ 78u-4(b)(1) and (2), and the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(c)(2), which established heightened pleading rules in areas where Congress responded to particularly clear patterns of abusive and vexatious litigation. By eliminating any threshold screen for conclusory or implausible allegations, the Act would invite such litigation across-the-board, in these areas and others. Likewise, the Act appears to override various pleading requirements in the Federal Rules of Civil Procedure other than those set forth in Rule 8. Such requirements include those set forth in Rule 9(b), which for more than seven decades has provided that, in order to plead a claim involving fraud or mistake, "a party must state with particularity the circumstances constituting the fraud or mistake."

Finally, the Act cannot be defended as an attempt merely to restore the pleading standards that prevailed prior to *Twombly* and *Iqbal.* On the day before *Twombly* was decided, *Conley*'s "no set of facts" language was not applied literally. To the contrary, as discussed above, the lower courts repeatedly had held that conclusory and implausible allegations were insufficient to state a claim. And seven Justices in *Twombly* rejected the "no set of facts" language not only as unworkable, see 550 U.S. at 561 ("focused an literal reading" of *Conley* would imply that "a wholly conclusory statement of claim would survive a motion to dismiss"), but also as inconsistent with then-existing law, see *id.* at 562 ("a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard"). By imposing that very standard, and foreclosing dismissals where the facts alleged support at most an unreasonable inference of liability, the Act would effect a radical change in the standards that had applied even before

Twombly. Such legislation would impose great costs on the courts, on defendants, an on society at large, by permitting baseless and implausible claims to proceed to discovery wholesale.

2. The proposed Notice Pleading Restoration Act of 2009 would use different language in responding to *Twombly* and *Iqbal*. Specifically, that 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*." To the extent that Act were construed to codify a literal understanding of the specific "no set of facts" statement from *Conley*, it would effect the same radical change in current and pre-*Twombly* law addressed above. Under such an interpretation, *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; decades of settled law would be overruled; and fishing expeditions would become permissible and therefore routine.

To be sure, the Notice Pleading Restoration Act is not entirely clear in codifying the "no set of facts" statement from *Conley*, but that lack of clarity itself raises concerns. If the Act does not codify the "no set of facts" statement, exactly what "standards set forth * * * in *Conley*" does it codify? And if the Act does not disapprove of *Twombly*'s rejection of a "focused and literal reading" of *Conley*'s "no set of facts" statement, see 550 U.S. at 561, exactly what aspects of *Twombly* and *Iqbal* does the Act intend to overrule? 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? How would the Act affect the enormous body of court-of-appeals caselaw holding – long before *Twombly* and *Iabal* – that conclusory and implausible allegations are insufficient to state a claim for relief? The answers to all of those questions remain a mystery.

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, for no good reason, on the overburdened federal courts and on the parties to all civil litigation.

G. Any Response To *Twombly* and *Iqbal* Should Occur Through the Judicial Rulemaking Process

Any concerns about *Twombly* and *Iqbal* should be addressed through the judicial rulemaking process established by Congress. The Rules Enabling Act sets forth a procedure for amending the Federal Rules of Civil Procedure in an orderly and measured fashion by those with expert knowledge of the Rules. Under that procedure, proposed amendments to the rules must be subjected to notice and public comment; consideration by appropriate advisory committees comprised of judges and lawyers who are experts in the area; consideration by the Standing

Committee, the Judicial Conference, and Supreme Court itself; and transmission to Congress at the end of this deliberative process. See 28 U.S.C. §§ 2072-2074; 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." 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 this process. As Judge Weinstein has explained, "[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."); *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 membership of the committees tasked with reviewing and

revising the Rules consists of "experienced judges, lawyers and law professors" with "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." Levin & 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 itself 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. As discussed above, the Advisory Committee on Civil Rules is already actively monitoring the caselaw applying *Twombly* and *Iqbal*. That 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 an ideal vantage point

to evaluate the situation and determine the extent of any necessary response. If the Advisory Committee should determine (contrary to initial data) that *Twombly* and *Iqbal* are having an adverse impact on civil litigation in the federal courts, it may craft an appropriate amendment through the time-honored judicial rulemaking process. There is no good reason for Congress to override that process.

* * * *

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