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BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Evaluating The Supreme Court's Decisions In *Twombly* and *Iqbal*

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Chairman Leahy, Ranking Member Sessions, and Members of the Committee on the Judiciary, it is an honor to appear before you today and participate in this important discussion on the Supreme Court's recent decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), which followed and applied *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007).

By way of introduction, I am a partner in the Washington, D.C. office of Latham & Watkins LLP and global chair of the firm's Supreme Court and Appellate Practice Group. Before joining Latham & Watkins, I served as the 44th Solicitor General of the United States and, in that capacity, argued the *Iqbal* case before the Supreme Court on behalf of former Attorney General John Ashcroft and FBI Director Robert Mueller, the petitioners in the case. I previously served as Acting Solicitor General (2008), Principal Deputy Solicitor General (2005-2008), and Assistant to the Solicitor General (2000-2004). I have served in the Department of Justice under both Democratic and Republican Administrations and as a career lawyer as well as a political appointee. As Solicitor General, I also served as an ex-officio member of the Advisory Committee on Appellate Rules. In addition, prior to my government service, I was a partner and associate for more than eight years at the law firm of Hogan & Hartson LLP, where, in 2004-2005, I succeeded John G. Roberts, Jr., as head of the firm's Supreme Court and Appellate Practice Group. My practice has focused on complex civil litigation in the Supreme Court and federal courts of appeals, but I have also handled litigation in the federal trial courts. I have represented plaintiffs as well as defendants, and individuals as well as corporations, trade associations, and governments. I have also served for nearly ten years as both a visiting and

adjunct professor of law at the George Washington University Law School, where this past spring I taught the *Iqbal* case as part of my class on the Constitution and the Supreme Court.

In my testimony today, I will summarize the Supreme Court's decisions in the *Twombly* and *Iqbal* cases; discuss the deep body of Supreme Court and appellate case law on which those decisions are grounded; consider the impact of *Twombly* and *Iqbal* in the lower courts; evaluate the enormous costs of allowing conclusory and implausible claims to proceed to discovery, especially with respect to claims against government officials carrying out their duties; and consider the legislation that has been proposed to override *Twombly* and *Iqbal*. In my judgment, the *Twombly* and *Iqbal* decisions are unquestionably important and in line with decades' worth of precedent at both the Supreme Court and appellate level. It is too soon to say what impact they will have on civil litigation in the federal courts, but they have yet to lead to the wholesale dismissal of claims and are more likely to have an effect on a case-by-case basis. Any legislative effort to override these decisions at this time would be precipitous and unwise, especially insofar as the suggestion is to set a standard in terms of *Conley* v. *Gibson*, 355 U.S. 41 (1957). *Conley* has generated enormous confusion over the last 50 years and virtually all agree that the decision's "no set of facts" language cannot mean what it says. The sounder course is to permit the Judicial Conference of the United States to continue to monitor the situation and respond if need be through the time-honored judicial rulemaking process established by Congress.

I. THE *TWOMBLY* AND *IQBAL* DECISIONS

Let me begin by summarizing the Supreme Court's decisions in *Twombly* and *Iqbal*. The cases arose in different contexts, but both applied the same "working principles" (*Iqbal*, 129 S. Ct. at 1949) to determine whether the underlying complaints adequately stated a claim upon which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. *Twombly*

Twombly arose in the antitrust context. It involved a putative class action brought by consumers against major telecommunications providers alleging that the providers had conspired to restrain trade in violation of Section 1 of the Sherman Act by engaging in parallel conduct intended to prevent the growth of upstart providers and by agreeing to refrain from competing against one another. By a 7-2 vote, the Supreme Court – in an opinion written by Justice Souter – held that the complaint failed to state a claim upon which relief could be granted.

In reaching that result, the Court addressed the gateway requirement in Rule 8(a)(2) of the Federal Rules of Civil Procedure that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." First, the Court reiterated that the factual allegations in a complaint are assumed to be true at the dismissal stage. 550 U.S. at 555 (citing *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002)). Second, the Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions" and that "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (quoting *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (alteration in original)). Third, the Court held that, while presumed to be true, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, at 235-236 (3d ed. 2004) ("[T]he pleading must contain something more … than … a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")). As the Court explained, "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [actionable conduct] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id*. at 557 (alteration in original).

The Court rejected the suggestion that "a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Id*. at 559. The Court recognized that "the success of judicial supervision in checking discovery abuse has been on the modest side." *Id.* And it concluded that the only way "to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence'" is to "tak[e] care to require allegations that reach the level suggesting" illegal conduct. *Id.* (quoting *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005)) (alteration in original). Likewise, the Court rejected the notion that the use of "phased" or "limited" discovery could serve as an adequate safeguard, explaining that "the hope of effective judicial supervision is slim." *Id.* at 560 n.6.

The Court also rejected the plaintiff's reliance on the Court's previous statement in *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." (Emphasis added.) As the Court explained, *Conley*'s "no set of facts" language cannot be taken "literal[ly]," because it would mean that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." 550 U.S. at 561 (alteration in original). But that has never been the standard. Rather, the Court explained that the "no set of facts" language was best "understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief." *Id*. at 562-563. And, given that *Conley*'s "no set of facts" language has been "questioned, criticized, and explained away long enough," the Court held that it was "best forgotten as an incomplete,

negative gloss on an accepted pleading standard: *once a claim has been stated adequately*, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563 (emphasis added).

Finally, the Court stressed that it was "not requir[ing] heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Likewise, the Court observed that a plaintiff need not "'set out *in detail* the facts upon which he bases his claim," *id.* at 555 n.3 (quoting *Conley*, 355 U.S. at 47 (emphasis added in *Twombly*)), but need only make some "'showing,' rather than a blanket assertion, of entitlement to relief," *id.* (quoting Fed. R. Civ. P. 8(a)(2)). In addition, the Court explained that "[a]sking for plausible grounds to infer an [illegal] agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556.

Applying those principles, the Court held that the complaint at issue in *Twombly* failed to state a claim. First, the Court explained that the plaintiff's assertion of an unlawful agreement was a "legal conclusion," and therefore was not entitled to the assumption of truth. *Id.* at 555. Next, the Court concluded that the bare allegation of parallel behavior was not sufficient to cross the line from the possible to the plausible, since parallel conduct was compatible with – if not more likely explained by – lawful free market choices. See *id.* at 566-567.

Twombly was decided by a 7-2 vote that transcended the Court's ideological fault line. The Court's decision was written by Justice Souter and joined by the Chief Justice and Justices Scalia, Kennedy, Thomas, Breyer, and Alito. And it upheld the decision of then-District Judge Gerald Lynch – whom President Obama later nominated, and the Senate overwhelmingly confirmed, to the Court of Appeals for the Second Circuit – holding that the complaint at issue

failed to state an adequate claim for relief. Finally, it is worth emphasizing that the Court did not *overrule* the *Conley* decision in *Twombly*. It simply clarified that a particular *phrase* in *Conley* – the "no set of facts" language – was "an incomplete, negative gloss on an accepted pleading standard." *Id.* at 563. In doing so, the Court in *Twombly* observed that the civil rights complaint in *Conley* "amply" stated a claim under the proper pleading standard, making the "no set of facts" language an unnecessary part of the Court's decision. *Id.*

B. *Iqbal*

Iqbal arose in the national security context. It involved a constitutional tort action brought by a Pakistani, Iqbal, who was arrested in New York in the wake of the September 11 attacks on criminal charges to which he pleaded guilty and held in a special federal detention facility after he was determined by the FBI to be "of high interest" to the investigation into the September 11 attacks. After Iqbal was cleared of involvement in the attacks and had returned to his country of origin, he brought suit against 34 current and former federal officials ranging from the prison guards with whom he had day-to-day contact all the way up the chain to the Director of the FBI and the Attorney General of the United States, alleging that he was discriminated against on the basis of race, religion, and national origin. The only question before the Supreme Court was whether Iqbal had adequately pleaded claims against former Attorney General Ashcroft and Director Mueller, who asserted qualified immunity from suit. See 129 S. Ct. at 1952 ("[W]e express no opinion concerning the sufficiency of [Iqbal]'s complaint against the defendants who are not before us."). The Court – in a 5-4 opinion written by Justice Kennedy – held that Iqbal's pleadings as to those high-ranking officials were insufficient.

In reaching that conclusion, the Court applied the same two "working principles" underlying *Twombly*. *Id.* at 1949. First, the Court reiterated, "the tenet that a court must accept

as true all of the allegations contained in a complaint is inapplicable to *legal* conclusions." *Id.* (citing *Twombly*, 550 U.S. at 555) (emphasis added). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and, therefore, a plaintiff may "not unlock the doors of discovery . . . armed with nothing more than conclusions." *Id.* at 1949-50. And, second, the Court continued, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950 (citing *Twombly*, 550 U.S. at 556). To state a plausible claim, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 1950 (quoting Fed. R. Civ. Proc. 8(a)(2)). At the same time, the Court reiterated that the Rule 8 pleading threshold "does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.*

Applying those principles, the Court held that Iqbal failed to state a claim against former Attorney General Ashcroft and Director Mueller. First, the Court separated out the allegations in the complaint that amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," and thus were too "conclusory" to merit "the assumption of truth." *Id.* at 1951. Next, the Court considered whether the remaining factual allegations – to the effect that the Attorney General and FBI Director discriminatorily approved of the detention of "thousands of Arab Muslim men" in the wake of the September 11 attacks – plausibly suggested an entitlement to relief. Accepting those allegations as true, the Court concluded that unlawful discrimination "is not a plausible conclusion" given the "'obvious alternative explanation'": that the investigation into the September 11 attacks "would produce a disparate, incidental

impact on Arab Muslims," given that the attacks "were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda." *Id.* at 1951-52.

Finally, the Court rejected Iqbal's efforts to circumvent the settled pleading requirements. First, it rejected Iqbal's argument that *Twombly* was limited to "pleadings made in the context of an antitrust dispute," explaining that Rule 8 by its terms applies to "'*all* civil actions,'" and that the Court's interpretation of Rule 8 therefore could not be arbitrarily limited to particular types of actions. *Id.* at 1953 (emphasis added). Second, it rejected the argument that Iqbal should be permitted discovery to attempt to develop his claims, explaining that experience shows that judicial supervision has failed to check discovery abuses. *Id.* Moreover, the Court stressed that a managed-discovery approach is particularly inappropriate in suits against government officials given the "heavy costs" that such litigation can have on diverting the attention of such officials from carrying out their duties, especially when it comes to national security. *Id.* (citing *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). Third, the Court rejected Iqbal's argument that he was entitled to allege discriminatory intent "generally," reiterating that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.* at 1954.

Four Justices dissented in *Iqbal*. Importantly, however, the dissenters – two of whom had joined the majority in *Twombly*, and one of whom had written *Twombly* – did not disavow the pleading standards discussed in *Twombly*, nor did they argue that the Court should insist on a literal application of *Conley*'s "no set of facts" language. Rather, the dissenters simply disagreed with the majority's *application* of those pleading standards to Iqbal's complaint. See *id.* at 1955 ("The majority … *misapplies* the pleading standard under [*Twombly*] to conclude that the complaint fails to state a claim.") (emphasis added). Moreover, the dissenters agreed that Rule 8

incorporates a "plausibility standard,'" but concluded that the majority had overlooked certain allegations in determining whether Iqbal's complaint crossed that threshold. *Id.* at 1959-60.

A few other points about *Iqbal*. First, Iqbal did not suffer from lack of information about the events in question in framing his complaint. They were the subject of a 200-page report by the Office of the Inspector General within the Department of Justice. Yet Iqbal was still unable adequately to plead claims against the former Attorney General and FBI Director. Second, while the Supreme Court held that Iqbal had failed adequately to plead claims against those high-ranking officials, it did not disturb the lower courts' rulings that his claims against the lower-level defendants could go forward. *Id.* at 1952. And, finally, even as to the former Attorney General and FBI Director, the case was remanded to the district court to permit Iqbal to seek leave to "amend his deficient complaint." *Id*. at 1954; see *Iqbal* v. *Ashcroft*, 574 F.3d 820 (2d Cir. 2009). So, as his case goes forward against the other defendants, Iqbal may again seek to plead claims against the former Attorney General and FBI Director. And of course, as is always the case in civil litigation, as Iqbal seeks to develop his case through appropriate discovery obtained from the defendants against which he has pleaded *adequate* claims, it is conceivable that new information will come to light that may bear on his case.

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One other case bears mention in understanding the Court's decisions in *Twombly* and *Iqbal*. In *Erickson* v. *Pardus*, 551 U.S. 89 (2007), the Court summarily reversed the dismissal for failure to state a claim of a prisoner's complaint alleging a violation of his Eighth Amendment rights based on the alleged termination of a medical treatment program. The case was decided just two weeks after *Twombly* and therefore presumably with *Twombly* in mind. The Court held that it was "error for the Court of Appeals to conclude that the allegations in

question . . . were too conclusory" to state a claim. *Id.* at 93. The Court explained that the complaint adequately alleged under Rule 8(a)(2) the circumstances surrounding the termination of medical treatment at issue, and that the prisoner "bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings." *Id.* at 94. Moreover, the Court stressed that *pro se* complaints must be "liberally construed" and are "held to less stringent standards than formal pleadings drafted by lawyers." *Id.* That was an easy enough decision for the Court that it decided the case without merits briefing or argument. *Erickson* thus underscores that the Court has not adopted a new pleading standard for *pro se* filings.

C. The Upshot

The Supreme Court's decisions in *Twombly* and *Iqbal* clarify the gateway standards for pleading an adequate claim under the Federal Rules of Civil Procedure. The Court reiterated that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,'" but it held that Rule 8 "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. The *Twombly* and *Iqbal* decisions provide two "working principles" (*id.*) for determining whether a complaint is adequate. First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and, therefore, a plaintiff may "not unlock the doors of discovery . . . armed with nothing more than conclusions." *Id.* at 1949-50. And, second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. To state a plausible claim, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it

has not 'show[n]' – that the pleader is entitled to relief." *Id.* (quoting Fed. R. Civ. Proc. 8(a)(2)). Accordingly, such a complaint is not entitled to proceed under the Federal Rules.

II. *TWOMBLY* AND *IQBAL* WERE CORRECTLY DECIDED AND HAVE DEEP ROOTS IN PRE-EXISTING CASE LAW

While unquestionably important, the Supreme Court's decisions in *Twombly* and *Iqbal* were hardly bolts from the blue. To the contrary, they are firmly grounded in decades of prior precedent at both the Supreme Court and federal appellate court level concerning the pleading standards under Rule 8 of the Federal Rules of Civil Procedure. Indeed, what would have been truly remarkable in light of this well-settled precedent is if the Supreme Court had decided that either the complaint in *Twombly* or *Iqbal* were sufficient to proceed past Rule 12(b)(6).

A. Prior Supreme Court Precedent

The Supreme Court has on a number of prior occasions emphasized that, while the notice-pleading regime established by the Federal Rules of Civil Procedure is generous, it is not without limit. The Court has been particularly sensitive to ensuring that the pleading requirements are met before discovery is allowed in complex civil actions where proceeding beyond the Rule 12(b)(6) stage can have enormous practical and financial consequences for litigants given the burdens typically imposed by the discovery process in such cases.

In *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005), for example, the Court unanimously held – in an opinion by Justice Breyer – that an allegation that the plaintiffs had "'paid artificially inflated price for [a stock] . . . and suffered "damage[s]" thereby'" failed adequately to plead the element of "loss causation" in a federal securities fraud action. *Id.* at 340 (quoting complaint; alteration in original). As the Court explained, while Rule 8(a) of the Federal Rules of Civil Procedure does not impose any "special . . . requirement in respect to the pleading" of such matters, "the 'short and plain statement' [that the Rule does require] must

provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id.* at 346 (quoting *Conley*, 355 U.S. at 47). Moreover, the Court stressed that overlooking that important requirement "would permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Id.* at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (alteration by the Court in *Dura*)). The Court further observed that relaxing that requirement would lead the very sort of "harm" that Congress has sought to avoid, namely "'abusive' practices" such as "'the routine filing of lawsuits . . . with only [a] faint hope that the discovery process might lead eventually to some plausible cause of action.'" *Id.* (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995) (alterations in original)).

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) – decided more than 25 years before *Iqbal* – is to the same effect. In that case, the Court, by an 8-1 vote, held that a complaint brought by a union against a contractors' association failed to sufficiently alleged a violation of the antitrust laws. The Court – in an opinion written by Justice Stevens – held that the district court erred in failing to require the union "to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss." *Id.* at 528 n.17. Furthermore, after recognizing *Conley*, the Court stressed that, "[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* See also *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) ("Although [Rule 8] encourages brevity, the complaint must say enough to give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'") (quoting *Dura*,

544 U.S. at 346) (private securities fraud action) (Opinion by Ginsburg, J.); *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 457-459 (2006) (holding that complaint failed adequately to allege proximate causation for RICO violation; refusing to accept as sufficient conclusory allegation that plaintiff had "suffered its own harms" as a result of the defendant's actions).

The Court has invoked the same requirements outside the commercial sphere in cases presenting civil rights claims. In *Papasan* v. *Allain*, 478 U.S. 265 (1986), for example, the Court – in an opinion by Justice White – held that a complaint brought by local school children and school officials against state officials challenging a State's distribution of public school land funds under the Equal Protection Clause failed to state a claim upon which relief could be granted. In so holding, the Court stressed that, "[a]lthough for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a *legal conclusion* couched as a factual allegation." *Id.* at 286 (emphasis added) (citing *Briscoe* v. *LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd on other grounds*, 460 U.S. 325 (1983); 2 A J. Moore & J. Lucas, *Moore's Federal Practice* ¶12.07, at 12-64 & n.6 (1985)). Thus, where the complaint did not make any specific underlying factual allegations (such as that school children "are not taught to read or write," or "receive no instruction on even the educational basics"), the Court held that "we are not bound to credit and may disregard the allegation that the [plaintiffs] have been denied a minimally adequate education." *Id.*

The Supreme Court has also recognized that a proper application of the pleading rules is critical in the context of personal damages claims against government officials who enjoy qualified immunity for actions taken while performing their public duties. The qualified immunity doctrine is designed to promote "the effective functioning of government," *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974) (citation omitted), by ensuring that litigation targeting those

who do the Nation's business does not "diver[t] . . . official energy from pressing public issues," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and deter officials' "willingness to execute [their] office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240. The policies underlying the qualified immunity doctrine are especially important when it comes to "matters of national security and foreign policy" and with respect to Cabinet-level and other high-ranking officials, such as the Supreme Court petitioners – former Attorney General Ashcroft and Director Mueller – in the *Iqbal* case, who are "easily identifiable [targets] for suits for civil damages." *Mitchell* v. *Forsyth*, 472 U.S. 511, 541-542 (1985) (Stevens, J., concurring in the judgment) (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982)).

Long before *Iqbal*, the Court recognized that use of overly permissive pleading standards to evaluate complaints against government officials would undermine the important purposes served by qualified immunity doctrine and called for a "firm application of the Federal Rules of Civil Procedure" to such claims. *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). The Court has also recognized that a "firm application" of the Federal Rules is especially important where, as in *Iqbal*, an unconstitutional motive is an element of the alleged illegality. Such cases present a "potentially serious problem" because "an official's state of mind is easy to allege and hard to disprove, [and] insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks omitted). As a result, the Court has instructed trial courts to "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish . . . cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

B. Prior Court of Appeals Precedent

Given this body of Supreme Court precedent, it is not surprising to find a legion of case law in the lower federal courts recognizing similar requirements in testing the sufficiency of pleadings under Rule 8. Indeed, there is ample case law within the federal circuits supporting the basic propositions on which *Twombly* and *Iqbal* were decided, including that conclusory pleadings and formulaic recitations of the elements of a claim are insufficient; that courts need not assume implausible or speculative inferences from pleaded facts; that discovery is not warranted to permit a plaintiff to attempt to develop adequate pleadings; and that *Conley*'s "no set of facts" language cannot be given its literal reach. To cite only a few examples:

First Circuit: *Aponte-Torres* v. *University of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) ("We ought not * * * credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'") (citation omitted); *Eastern Food Servs.* v. *Pontifical Catholic Univ.*, 357 F.3d 1, 3 (1st Cir. 2004) (dismissing antitrust claim for lack of plausibility); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003) (court is not bound to credit "'bald assertions'" or "'unsupportable conclusions'") (citation omitted); *DM Research* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (complaint must set forth "a *factual* predicate concrete enough to warrant further proceedings"; sufficient factual predicate is "the price of entry, even to discovery"); *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) (despite *Conley*, "courts 'do not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened'" (quoting Wright & Miller, *Federal Practice and Procedure: Civil* § 1357)).

Second Circuit: *Cantor Fitzgerald, Inc.* v. *Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) ("'[W]e give no credence to plaintiff's conclusory allegations.'") (citation omitted); *Virtual*

Countries, Inc. v. *Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) ("bald assertions" of harm are not sufficient); *George Haug Co.* v. *Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (*Conley* qualified by *Associated Gen. Contractors*); *Heart Disease Research Found.* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("[A] bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.").

Third Circuit: *City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998) ("We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner"; courts need not accept "'unsupported conclusions and unwarranted inferences.'") (citation omitted); *Morse* v. *Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss.").

Fourth Circuit: *Jordan* v. *Alternative Res. Corp.*, 458 F.3d 332, 345 (4th Cir. 2006) (stating that "we have rejected reliance on . . . conclusory allegations" at the pleading stage), *cert. denied*, 549 U.S. 1362 (2007); *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002) ("'[A]llegations must be stated in terms that are neither vague nor conclusory.'") (citation omitted); *Estate Constr. Co.* v. *Miller & Smith Holding Co.*, 14 F.3d 213, 220-221 (4th Cir. 1994) (same).

Fifth Circuit: *United States ex rel. Bain* v. *Georgia Gulf Corp.*, 386 F.3d 648, 654 (5th Cir. 2004) ("legal conclusions" are not sufficient); *Blackburn* v. *City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (despite *Conley*, "'conclusory allegations or legal conclusions masquerading as factual assertions will not suffice to prevent a motion to dismiss'") (citation omitted); *Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("Conclusory allegations and unwarranted deductions of fact are not admitted as true ….").

Sixth Circuit: *Mezibov* v. *Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (legal conclusions not sufficient), *cert. denied*, 547 U.S. 1111 (2006); *Columbia Natural Resources, Inc.* v. *Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) ("liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences"; "[i]n practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory") (internal quotation marks, citations, emphasis and alterations omitted); *Blackburn* v. *Fisk Univ*., 443 F.2d 121, 123 (6th Cir. 1971) ("[W]e are not bound by allegations that are clearly unsupported and unsupportable.").

Seventh Circuit: *Fries* v. *Helsper*, 146 F.3d 452, 457 (7th Cir.) ("[M]ere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss."), *cert. denied*, 525 U.S. 930 (1998); *Kyle* v. *Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (*Conley*'s "no set of facts" language "'has never been taken literally'") (citation omitted); *Sneed* v. *Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998) (despite *Conley*, courts are "not obliged to accept as true conclusory statements of law or unsupported conclusions of fact").

Eighth Circuit: *Farm Credit Servs. of Am.* v. *American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) ("[W]e are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.'") (quoting *Wiles* v. *Capitol Indem. Corp*., 280 F.3d 868, 870 (8th Cir. 2002)).

Ninth Circuit: *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) ("no set of facts" language limited by *Associated Gen. Contractors*, qualified immunity doctrine, and standing requirements; "'conclusory allegations without more are insufficient to defeat a motion to dismiss'") (citation omitted); *Woodrum* v. *Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989) (stating that "conclusory allegations that [defendants] conspired do not

support a claim"); *Jackson* v. *Nelson*, 405 F.2d 872, 873 (9th Cir. 1968) (per curiam) ("a series of broad conclusory statements unsupported, for the most part, by specific allegations of fact" are insufficient to withstand a motion to dismiss under Rule 12(b)(6)).

Tenth Circuit: *Tal* v. *Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("Bare bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim."), *cert. denied*, 549 U.S. 1209 (2007); *Cayman Exploration Corp.* v. *United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 & n.2 (10th Cir. 1989) (despite *Conley*, "courts may require some minimal and reasonable particularity in pleading before they allow an antitrust action to proceed") (citing *Associated Gen. Contractors*); *Ryan* v. *Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957) (refusing to credit "unwarranted inferences drawn from the facts or footless conclusion of law predicated upon them").

Eleventh Circuit: *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir.) ("[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."), *cert. denied*, 540 U.S. 1016 (2003); *Oxford Asset Management, Ltd.* v. *Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (same), *cert. denied*, 540 U.S. 872 (2003).

District of Columbia Circuit: *Trudeau* v. *FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) ("although '[i]n considering the claims dismissed pursuant to Rule 12(b)(6), we must treat the complaint's factual allegations as true [and] must grant plaintiff the benefit of all reasonable inferences from the facts alleged,' 'we are not bound to accept as true a legal conclusion couched as a factual allegation,' or to 'accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint.'") (brackets in original; citations omitted); *Browning* v. *Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("[W]e accept neither 'inferences

drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations.'") (citation omitted); *Kowal* v. *MCI Commc'ns Corp.*, 15 F.3d 1271, 1276 (D.C. Cir. 1994) (despite *Conley*, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." (citing *Papasan*, 478 U.S. at 286)).

Federal Circuit: *Samish Indian Nation* v. *United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (the court accepts as true only "non-conclusory allegations of fact"); *Bradley* v. *Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice . . . .").

C. Commentary

Finally, it is worth noting that well-known commentators had also recognized prior to *Twombly* and *Iqbal* that, while generous, the gateway pleading requirements established by Federal Rules of Civil Procedure are not toothless. For example, Professors Wright and Miller had observed that "the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, at 236 (3d ed. 2004). See also *id.* § 1216, at 220-227 (complaint "must contain allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial"); *id.* § 1216, at 233-234 (when the allegations do not state a claim for relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court") (quoting *Daves* v. *Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953).

* * * * *

The *Twombly* and *Iqbal* decisions fit comfortably within that deeply-rooted body of precedent and represent a natural application of existing law. To be sure, the cases clarified the applicable pleading standards under the Federal Rules of Civil Procedure and provide important guidance to the lower courts in evaluating the sufficiency of pleadings. But they represent a natural outgrowth of decades' worth of settled pleading law.

III. IT IS TOO SOON TO DECIDE THE IMPACT OF *TWOMBLY* AND *IQBAL*

Given the staggering number of suits filed in federal court each year – 250,000, by one authoritative estimate, see U.S. Courts, U.S. District Courts–Civil Cases Commenced, Terminated, and Pending During the 12-month Periods Ending June 30, 2007 and 2008, Table C, *available at* http://www.uscourts.gov/stat/june08/C001Jun08.pdf – and the number of motions to dismiss filed each year, it is not surprising that the *Twombly* and *Iqbal* cases have been cited with enormous frequency by the lower courts. As of November 30, 2009, the *Iqbal* decision alone has been cited nearly 3500 times. But that figure itself says little about the substantive impact that *Twombly* and *Iqbal* have had in the lower courts. Rather, the figure simply represents the number of times that a lower court has referenced *Iqbal*, and reflects that *Twombly* and *Iqbal* concern a gateway determination made frequently by the lower courts given the huge numbers of civil actions pending nationwide. To evaluate the impact of *Twombly* and *Iqbal*, it is necessary to consider how the lower courts are actually using the guidance provided by those decisions – for example, to assess whether or to what extent lower courts are relying on *Twombly* and *Iqbal* to dismiss complaints that would otherwise have survived a Rule 12(b)(6) motion to dismiss.

The most comprehensive study of which I am aware on the impact of *Twombly* and *Iqbal* is being performed by Advisory Committee on Civil Rules (Advisory Committee) within the

Judicial Conference of the United States, which is chaired by United States District Judge Mark R. Kravitz. The Advisory Committee oversees the Federal Rules of Civil Procedure in carrying out the judicial supervision and rulemaking process authorized by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2072-2074. One of the Advisory Committee's statutory directives as part of the Judicial Conference of the United States is to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. And in carrying out that statutory obligation, the Advisory Committee is currently "examining the effect of [the *Twombly* and *Iqbal* decisions] on the way in which courts consider motions to dismiss, and analyzing whether courts are interpreting these recent pronouncements by the Supreme Court as a significant change in the pleading requirements." November 25, 2009 Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee Concerning the "Application of Pleading Standards Post-*Ashcroft* v. *Iqbal* " at 1 (Kuperman Mem.), *available at* http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20Nov30.pdf. (Ms. Kuperman is the Rules Law Clerk for the Honorable Lee H. Rosenthal, Chair of the Standing Committee on the Federal Rules of Practice and Procedure. An earlier version of this memorandum was publicly distributed at the October 9-10, 2009, meeting of the Advisory Committee in Washington, D.C.) The Advisory Committee's research is embodied in a 150-page memorandum from Ms. Kuperman to the Standing Rules Committee and Civil Rules Committee discussing *Twombly* and *Iqbal* and summarizing each appellate decision that has been issued since *Iqbal* that has "examined" or "discussed" *Iqbal*.

This memorandum explains that, "[a]t this early stage in the development of the case law discussing and applying the *Iqbal* pleading standards, it is difficult to draw many generalized conclusions as to how the courts are interpreting and applying that decision." Kuperman Mem.

at 2. "Overall," the memorandum concludes, "the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints." *Id.* The memorandum explains that "[m]any courts have emphasized that notice pleading remains intact and continue to rely on pre-*Twombly* case law to support some of the propositions at the heart of *Twombly* and *Iqbal* – that legal conclusions need not be accepted as true and that at least some factual averments are necessary to survive the pleadings stage." *Id.* at 2-3. At the same time, the memorandum further explains that, "[w]hile it seems likely that *Twombly* and *Iqbal* have resulted in screening out some claims that might have survived before those cases, it is much more difficult to determine whether *meritorious* claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those cases that have no plausible basis for proceeding." *Id.* at 3-4 (emphasis added). These conclusions square with the observations of Judge Kravitz, the chair of the Advisory Committee, who recently commented that judges are "'taking a fairly nuanced view of *Iqbal*,'" and that *Iqbal* has not thus far proven to be a "'blockbuster that gets rid of any case that is filed.'" Tony Mauro, *Plaintiffs' Groups Mount Effort to Undo* Iqbal, *National Law Journal*, Sept. 21, 2009 (quoting Judge Kravitz).

However one characterizes the *Twombly* and *Iqbal* decisions, it is clear that they have not led to the wholesale dismissal of complaints. Indeed, despite the dire predictions of some of the decision's critics, the fact remains that courts have denied motions to dismiss for failure to state a claim after *Twombly* and *Iqbal* in cases involving claims against government officials for actions undertaken in defending the country against terrorist attack, see, *e.g.*, *Al-Kidd* v. *Ashcroft*, 580 F.3d 949 (9th Cir. 2009); *Padilla* v. *Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), as well as in cases involving commercial claims and motive-based constitutional claims, see, *e.g.*, *Hollis* v. *Mason*, No. Civ. 5-08-1094, 2009 WL 2365691 (E.D. Cal. July 31, 2009) (constitutional claim

for retaliation); *Executive Risk Indemnity, Inc.* v. *Charleston Area Medical Center*, No. 2:08-cv-00810, 2009 WL 2357114 (S.D. W.Va. July 30, 2009) (breach of contract); *Consumer Protection Corp.* v. *Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694 (D. Ariz. July 16, 2009) (claim under Telephone Consumer Protection Act); *Intellectual Capital Partner* v. *Institutional Credit Partners LLC*, No. 08 Civ. 10580 (DC), 2009 WL 1974392 (S.D.N.Y. July 8, 2009) (breach of contract); *Lange* v. *Miller*, No. 09-cv-00435-LTB, 2009 WL 1841591 (D. Colo. June 25, 2009) (conspiracy to violate Fourth Amendment); *Oshop* v. *Tennessee Dep't of Children's Servs.*, No. 3:09-CV-0063, 2009 WL 1651479 (M.D. Tenn. June 10, 2009) (bad-faith denial of substantive due process); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 587 F. Supp. 2d 27 (D.D.C. 2008) (antitrust conspiracy); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 580 F. Supp. 2d 896 (N.D. Cal. 2008) (same).

Likewise, numerous complaints alleging civil rights claims have survived dismissal in the wake of *Twombly* and *Iqbal* as well. See, *e.g.*, *Fowler* v. *UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009) (disability discrimination); *McGrath* v. *Dominican College of Blauvelt*, No. 07 Civ. 11279, 2009 U.S. Dist. LEXIS 110122 (S.D.N.Y. Nov. 25, 2009) (sexual discrimination); *Jacobeit* v. *Rich Twp. High School District 227*, No. 09 C 1924, 2009 U.S. Dist. LEXIS 110302 (N.D. Ill. Nov. 25, 2009) (racial, age, and disability discrimination); *Kelley* v. *7-Eleven Inc.*, No. 09-CV-1376, 2009 WL 3388379 (S.D. Cal. Oct. 20, 2009) (disability discrimination); *Montano-Perez* v. *Durrett Cheese Sales, Inc.*, No. 3:08-1015, 2009 WL 3295021 (M.D. Tenn. Oct. 13, 2009) (racial discrimination); *Glover* v. *Catholic Charities, Inc.*, No. L-09-1390, 2009 WL 3297251 (D. Md. Oct. 8, 2009) (sex discrimination); *Garth* v. *City of Chicago*, No. 08 C 5870, 2009 WL 3229627 (N.D. Ill. Oct. 2, 2009) (racial discrimination); *Weston* v. *Optima Commc'ns Sys., Inc.*, No. 09 Civ. 3732 (DC), 2009 WL 3200653 (S.D.N.Y. Oct. 7, 2009) (employment

retaliation); *Gillman* v. *Inner City Broad. Corp.*, No. 08 Civ. 8909(LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009) (sexual hostile work environment discrimination); *Bell* v. *Turner Recreation Comm'n*, No. 09-2097-JWL, 2009 WL 2914057 (D. Kan. Sept. 8, 2009) (racial discrimination and retaliation); *Peterec-Tolino* v. *Commercial Elec. Contractors, Inc.*, No. 08 Civ. 0891 (RMB)(KNF), 2009 WL 2591527 (S.D.N.Y. Aug. 19, 2009) (disability and age discrimination); *Chao* v. *Ballista*, 630 F. Supp. 2d 170 (D. Mass. 2009) (§ 1983 claim).

To be sure, litigants are now engaged in an active and, no doubt in many instances, intense debate over the impact of *Twombly* and *Iqbal* in particular cases. And the impact of those decisions – and the precedents on which they are grounded – may well vary from one case to the next. See *Iqbal*, 129 S. Ct. at 1950 ("[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task"). For example, consistent with the Supreme Court's prior precedents in cases like *Dura Pharmaceuticals* and *Associated General Contractors*, courts are particularly careful in evaluating the pleadings in complex civil cases where simply sanctioning discovery and the like can have an "in terrorem" effect. *Dura Pharm.*, 544 U.S. at 347. But at this point, less than six months after *Iqbal* was decided by the Supreme Court, it is simply too early to say what impact *Twombly* and *Iqbal* have had on civil litigation in general in the United States.

IV. ALLOWING CONCLUSORY AND IMPLAUSIBLE CLAIMS TO GO FORWARD WOULD EXACT ENORMOUS COSTS

In evaluating *Twombly* and *Iqbal*, it is also constructive to consider the alternative – *i.e.*, a system in which courts permitted conclusory and implausible claims to go forward, at least for the purpose of allowing plaintiffs an opportunity to attempt to develop claims through discovery "fishing expeditions." The potential adverse consequences of such a regime are enormous.

A. The Potentially Devastating Costs For Government Officials

The consequences of relaxing the pleading standards recognized in *Twombly* and *Iqbal* would be particularly harmful for government officials who face suit for actions allegedly carried out in the course of their duties. Indeed, in the *Iqbal* case, a bipartisan group of former Attorneys General and a former Director of the FBI who served in five different Administrations – William P. Barr, Griffin Bell, Benjamin Civiletti, Edwin Meese, William Sessions, and Richard Thornburgh – filed a brief urging the Court to hold that the complaint failed to state a claim against the former Attorney General and FBI Director, and explaining the "disruptive effects" that allowing conclusory allegations to proceed would "have on the ability of high-level officials to carry out their missions effectively." Amicus Br. for William P. Barr *et al.* at 6.

As explained above, the qualified immunity doctrine is designed to protect government officials who are sued in their individual capacity from the burdens of civil litigation, including not only the prospect of crippling personal damages liability but also the "burdens of broad-ranging discovery." *Mitchell*, 472 U.S. at 526; see *id.* ("[E]ven such pretrial matters as discovery are to be avoided if possible, as '[inquiries] of this kind can be peculiarly disruptive of effective government.'") (citation omitted); see also *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) ("[A]voidance of disruptive discovery is one of the very purposes of the official immunity doctrine . . . ."). These concerns are particularly acute with respect to high-ranking government officials like the Attorney General of the United States, who are prime targets for litigation given the number of individuals affected by their policies and the fact that many of the individuals affected by their policies often have axes to grind with the government (making them more likely to invoke the judicial process for abusive or vexatious litigation). In order for our government to function, such officials must be able "to perform their sensitive duties with

decisiveness and without potentially ruinous hesitation." *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment). And, as discussed, one of the important ways that the Supreme Court has sought to ensure that the critical policies underlying the qualified immunity doctrine are given effect is by insisting on a "firm application of the Federal Rules of Civil Procedure" in evaluating the sufficiency of claims raised against government officials. *Butz*, 438 U.S. at 507.

These concerns were starkly presented in *Iqbal*. As Second Circuit Judge Jose A. Cabranes recognized, Iqbal was seeking to force the former Attorney General and Director of the FBI "to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the [FBI] and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the Amercian Republic." *Iqbal*, 490 F.3d 143, 179 (concurring). Moreover, as Judge Cabranes further observed, if Iqbal were successful in obtaining discovery from the former Attorney General and FBI Director based on his bare-bones complaint, then "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* Fortunately, however, that "blueprint" will not work today thanks to the Supreme Court's decision in *Iqbal*. In refusing to endorse that "blueprint," the Supreme Court specifically recognized these grave concerns relating to the effective functioning of our government. See 129 S. Ct. at 1953 ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified

when Government officials are charged with responding to, as Judge Cabranes aptly put it, 'a national and international security emergency unprecedented in the history of the American Republic.'") (quoting *Iqbal*, 490 F.3d at 179).

The threat posed by baseless litigation targeting high-ranking public officials is not new, and it is not confined to the prior Administration. For example, former Attorney General Reno, Deputy Attorney General Holder, and other high-ranking officials were subjected to personal damages claims based on conclusory allegations of their alleged personal involvement with respect to actions purportedly carried by lower-level law-enforcement officers during the 2000 raid in which agents of the former Immigration and Naturalization Service (INS) seized Elian Gonzalez from his Miami relatives in order to remove him to Cuba. The courts, however, held that plaintiffs had failed adequately to plead "'specific, non-conclusory allegations of fact'" establishing that those high-ranking officials were personally involved in the alleged violation of clearly established constitutional rights and thus dismissed th claims. See *Gonzalez* v. *Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003); see *Dalrymple* v. *Reno*, 334 F.3d 991, 996 (11th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004).

Similarly, Attorney General Edward Levi – who held that office for 24 months during the Ford Administration – was faced upon leaving office with over 30 suits filed against him personally for actions undertaken as Attorney General. Not a single one of them had merit, and no judgment against him was ever entered. Yet, all of these cases "needed attention," and "[i]t took about eight more years before the last of them was cleaned up." Bennett Boskey, ed., *Some Joys of Lawyering* 114 (2007) (describing "this long aggravation so undeserved"). To say the least, the threat of baseless litigation against high-ranking officials has not lessened in the 30 years since Attorney General Levi held his position in the Department of Justice.

If allegations like those at issue in Iqbal were allowed to proceed to discovery against the Attorney General and other high-ranking officials, then there would be virtually no limit on the type of conclusory and bare-bone allegations that could subject such officials to the burdens of civil litigation. To take just one example, in the wake of the court of appeals' decision in *Iqbal* allowing the claims to proceed against the former Attorney General and FBI Director, one district court – pointing to the Second Circuit's decision in *Iqbal* – refused to dismiss a prisoner's "conclusory allegation" that Attorney General Ashcroft and other federal officials were personally involved in a decision to transfer him from a federal prison in Illinois to a state prison in Connecticut purportedly as part of a conspiracy to retaliate against the prisoner for filing various lawsuits and grievances. *Twitty* v. *Ashcroft*, No. 3:04-CV-410 (RNC), 2008 WL 346124, at *1 (D. Conn. Feb. 4, 2008). The result was to allow "some discovery on the issue of personal involvement" against the federal defendants. *Id.* If that kind of claim is sufficient, then virtually any prisoner or individual who claims he was subjected to government action by the Department of Justice would be entitled to get "some discovery" – a deposition, interrogatories, and document production, or combination thereof – against the Attorney General of the United States and other high-ranking officials simply by making a "conclusory allegation" that such officials were personally involved in the matter. Even if the discovery were limited or tailored in every individual case, such a regime would impose a crippling burden on the already daunting demands and duties of the Attorney General and other high-ranking officials.

In the wake of the September 11 attacks, the Attorney General and other high-ranking government officers – in the current Administration as well as the prior one – have had to make innumerable difficult decisions in seeking to protect the Nation from further terrorist attack. In return, they have been hit – and in all likelihood will continue to be hit – with litigation

challenging their decisions and the decisions or actions of lower-level officials carrying out law-enforcement policies and programs. In *Iqbal*, the Supreme Court correctly rejected the notion that any individual allegedly affected by such a decision could subject the Attorney General or other high-ranking official to the demands of civil discovery, if not a full-blown trial, simply by making a conclusory allegation that the Attorney General or other official was personally involved in, or knew of and condoned, the specific action at issue, and that the action was undertaken with an unconstitutional motive. A contrary regime would gravely undermine "the national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment).

As the country continues to prosecute two wars abroad and seeks to prevent further terrorist attacks at home, it has never been more important to ensure that our officials are making the difficult decisions necessary to protect Americans from attack free from concerns about the costs and burdens of litigation targeting such officials for carrying out their vital duties. In *Iqbal*, the Supreme Court appropriately recognized those concerns in reiterating that bare-bones allegations of the supervisory involvement of high-ranking officials in the alleged actions carried out by others do not open the door to discovery against such officials. See 129 S. Ct. at 1953.

B. The Enormous Costs For Civil Defendants And Society At Large

Allowing conclusory and implausible claims to proceed to discovery would also impose added costs on civil defendants and society at large. As the Supreme Court recognized in *Twombly*, it has been reported that "discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed." 550 U.S. at 559 (citing Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair,

Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)). In our system, a litigant is required to cross the minimum pleading threshold set forth in Rule 8(a) before he may level discovery demands; litigants are not entitled to discovery to fish around for an adequate claim in the first place. *DM Research, Inc.* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome.") (Boudin, J.). To be sure, "[o]ccasionally, an implausible conclusory assertion may turn out to be true." *Id.* at 56. But it is well-settled that "the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." *Id.*

As courts have recognized, the costs and burdens of civil discovery are often significant, especially in complex civil cases. See, *e.g.*, *Twombly*, 550 U.S. at 558; *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (observing that "discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes") (citing The Brookings Institution, *Justice For All: Reducing Costs and Delay in Civil Litigation*, Report of a Task Force, at 6-7 (1989)); *Car Carriers Inc.* v. *Ford Motor Company*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery where there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); *Asahi Glass Co.* v. *Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the

outset before a patent or antitrust case should be permitted to go into its inevitably costly and protracted discovery phase."); see also *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* at 8 (March 11, 2009) ("discovery is very expensive and time consuming and easily permits substantial abuse"). Indeed, Congress has amended the securities laws "to protect defendants from the costs of discovery and trial in unmeritorious cases." *Tellabs, Inc.*, 551 U.S. at 335-336 (Stevens, J., dissenting) (referring to PLSRA's pleading requirements).

Several factors magnify the potential costs of discovery. First, generally speaking, the discovery authorized by the Federal Rules of Civil Procedure is quite broad: a party may take discovery, through depositions or document requests, of *any* nonprivileged information that is "relevant to any party's claim or defense" and is either admissible at trial or "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Second, in complex civil actions, defendants are often large entities with vast amounts of potentially discoverable information. As a result, responding to even a relatively simple discovery request can be extremely time-consuming and expensive. Third, the universe of potentially discoverable material has grown exponentially because of electronic data storage. At present, more than 90 percent of discoverable information is generated and stored electronically. See Association of Trial Lawyers of America, *Ethics in the Era of Electronic Evidence* (Oct. 1, 2005). Such storage has vastly increased the volume of information that is either itself discoverable, or that must be searched in order to find discoverable information. Large organizations receive, on average, some 250 to 300 million e-mail messages monthly, and they typically store information in terabytes, each of which represents the equivalent of 500 million typed pages. See Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure (Sept.

2005). Searching such systems for discoverable information is enormously expensive, as is producing such information and reviewing it document-by-document for privilege. One recent study found an average of $3.5 million of e-discovery litigation costs for a typical lawsuit. See Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* 25 (2008). The cost is surely much greater in larger complex litigation. See *Regan-Touhy* v. *Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) ("the burdens and costs associated with electronic discovery, such as those seeking 'all email,' are by now well known").

To be sure, not all federal cases entail huge discovery costs. But in those cases that do generate significant discovery – typically complex civil cases against larger defendants – the expense and burden of discovery is invariably great. And, regardless of the scope of discovery in any given case, there is no basis to subject defendants to discovery based on nothing more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," or allegations so implausible that they cannot even support a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. See, *e.g.*, *TV Communications Network, Inc.* v. *ESPN, Inc.*, 767 F. Supp. 1062, 1070 (D. Colo. 1991) ("The heavy cost of modern antitrust litigation militates against launching litigants into massive and expensive discovery when there is no reasonable prospect that the plaintiff could formulate a viable cause of action from the facts narrated in the complaint."), *aff'd sub nom. TV Communications Network, Inc.* v. *Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992). Doing so would burden defendants with litigation costs for no good reason, would flood the system with meritless or (at best) highly dubious litigation, and would compel "cost-conscious defendants to settle even anemic cases" (*Twombly*, 550 U.S. at 559), to avoid the considerable time and expense of protracted discovery in complex cases. See *Dura*, 544 U.S. at 347. And

interpreting the Federal Rules to allow for such "fishing expeditions" would directly contravene the first rule of the Federal Rules of Civil Procedure – that all of the civil rules (including Rule 8) "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. Proc. 1. Moreover, if conclusory and implausible allegations were sufficient to entitle a plaintiff to discovery, then it is likely that more non-meritorious suits will be filed in federal court by plaintiffs either seeking to use the machinery of discovery as a means of attempting to *find* a claim or, even worse, seeking to use discovery demands to harass a defendant or extract an *in terrorem* settlement.

Ultimately, like anything else, the costs of discovery are passed on by defendants and borne by society as a whole. Permitting conclusory and implausible claims to proceed to discovery would increase the already significant costs of civil litigation borne by many and exact a toll on Americans and American businesses in a time of widespread economic unrest.

V. THE PROPOSED LEGISLATIVE RESPONSE IS UNNECESSARY AND UNSOUND

In the Senate, a bill (S. 1504) has been introduced that would provide: "Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley* v. *Gibson*, 355 U.S. 41 (1957)." S. 1504, 111th Cong. § 2 (2009). Respectfully, this proposed bill – which seems intended to override the Court's decisions in *Twombly* and *Iqbal* – should not be enacted.

First, as explained above, the *Twombly* and *Iqbal* cases were correctly decided and are in accord with a longstanding body of precedent in the Supreme Court and courts of appeals. Any effort to override that precedent would be unwarranted and unsound. In particular, as discussed,

doing so would have potentially devastating consequences for the proper functioning of our government by exposing government officials to the burdens of defending against baseless civil litigation while attempting to protect the country from terrorist attacks and other threats. Moreover, less than six months have passed since *Iqbal* was decided. The most comprehensive study to date – conducted under the auspices of the Advisory Committee on Civil Rules – concludes that there is no evidence of a "drastic change" in pleading practice across the country in the wake of *Twombly* and *Iqbal*. Kuperman Mem. at 2. Accordingly, it is far too soon to say whether any legislative response is necessary, much less what response is warranted.

Second, the proposed bill would create significant uncertainty – and therefore more litigation – with respect to the gateway standards for evaluating the sufficiency of pleadings. For example, it is not clear what it means to be governed by "the standards set forth . . . in *Conley*." There are at least three possible interpretations:

(a) The bill could mean *Conley*, as clarified by the Supreme Court's decisions in *Twombly* and *Iqbal* clarified the Court's decision in *Conley*. But does not seem to be the intent of the legislation, since it apparently seeks to override the *Twombly* and *Iqbal* decisions.

(b) The bill could require a court to apply *Conley*'s "no set of facts" language literally. But courts and commentators have recognized for decades that a literal application of *Conley*'s "no set of facts" language makes no sense. See, *e.g.*, *Kyle* v. *Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (the *Conley* "no set of facts" standard "'has never been taken literally'") (citation omitted); *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (explaining that *Conley* "unfortunately provided conflicting guideposts"); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.) (the "no set of facts" language in *Conley* "has never been taken literally"); *Gen-Probe, Inc.* v. *Amoco Corp.*, 926 F. Supp. 948, 961

(S.D. Cal. 1996) (noting that *Conley*'s "no set of facts" language is not to be "taken literally") (citation omitted); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. Rev. 1023, 1028 n.44 (1989) (noting that *Conley*'s "no set of facts" "statement, if taken literally, would foolishly protect from challenge complaints alleging that only that defendant wronged plaintiff or owes plaintiff a certain sum"); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998) ("Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1769 (1998) ("if courts hewed rigidly to the line laid down in *Conley* v. *Gibson*, pleading practice would probably have vanished."). As a broad coalition of seven Justices – led by Justice Souter – concluded in *Twombly*, *Conley*'s "no set of facts" language had "puzzle[ed]" the profession long enough. 550 U.S. at 563; see *id.* at 563 n.8 (explaining that the Court's reading of *Conley*'s squared with the Court's prior cases).

And (c) the bill could require some other, non-literal interpretation of *Conley*. But it is not clear what that interpretation would be. One of the reasons that the Supreme Court had to revisit this area of law in *Twombly* and *Iqbal* is the confusion and uncertainty that *Conley*'s "no set of facts" language had created over time. See 550 U.S. at 562-563 (explaining that *Conley*'s "no set of facts" language "has been questioned, criticized, and explained away long enough," and that "after puzzling the profession for 50 years, this famous observation has earned its retirement"); see *id.* at 562 (citing cases); see also, *e.g.*, *McGregor* v. *Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (6th Cir. 1988); *O'Brien* v. *DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976). The proposed bill would invite further conflict and confusion over what interpretation to

give *Conley*'s "no set of facts" language. Moreover, regardless of what interpretation of *Conley* governs (or is determined by the courts to govern), courts will have to sort out the impact of the legislation on the enormous body of case law discussed above holding – long before *Iqbal* – that conclusory and implausible allegations are insufficient to state a claim for relief.

A bill proposed in the House of Representatives (H.R. 4115) explicitly invokes *Conley*'s "no set of facts" language and provides that "[a] court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." H.R. 4115, 111th Cong. § 2 (2009). The legislation further provides that a complaint need not be "plausible" on its face, or sufficient even to support a "reasonable inference that the defendant is liable for the alleged misconduct," to pass the federal pleading threshold. *Id*. That legislation would apparently call for a literal interpretation of *Conley*'s "no set of facts" language, even though, as noted, the consensus among courts and commentators before *Twombly* and *Iqbal* was that *Conley* could not be taken literally. In addition, it would mandate that complaints stating *implausible* claims be allowed to proceed to discovery. If enacted, that legislation would dramatically lower the federal pleading standards and suffer from the other flaws discussed herein with respect to the proposed Senate bill.

Third, and more generally, to the extent that the proposed bill is premised on the notion that it is possible simply to "reset" the law to where it was before *Twombly* and *Iqbal* by invoking *Conle*y, that is incorrect. On the day before *Twombly* was decided, the law governing pleading was in a much more nuanced state. *Conley*'s "no set of facts" language was not taken literally. If it had been, then far fewer cases would have been dismissed at the pleading stage. Moreover, as discussed above, far from reading *Conley* literally, the lower courts had repeatedly

held that conclusory and implausible allegations were insufficient to state a claim. As a result, if the new law actually required a literal application of *Conley*, enacting the proposed legislation would do far more than simply "reset" the law to where it was pre-*Twombly*, it would dramatically *change* the law by significantly liberalizing the pleading requirements that existed for decades before *Twombly* and *Iqbal*. Some groups – plaintiffs' lawyers come to mind – may well desire such a result. But such legislation would impose great costs on defendants and society at large by permitting baseless and implausible claims to proceed to discovery.

Fourth, the proposed bill would appear to override or, at a minimum, cast doubt on statutory pleading and dismissal requirements such as those adopted by the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b)(1) and (2), and Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(c)(2), enacted by Congress in an effort to eliminate abusive and vexatious litigation, see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit,* 547 U.S. 71, 81-83 (2006) (discussing litigation abuses that led to enactment of the PSLRA), because the bill's opening "Except as provided" clause appears to wipe out all prior legislative enactments concerning pleading requirements. Likewise, the bill appears to override or, at a minimum, cast doubt on other pleading requirements set forth in the Federal Rules of Civil Procedure, including the heightened pleading requirement in Rule 9(b) for "fraud or mistake." Fed. R. Civ. P. 9(b).

And finally, because of the uncertainties discussed above, the proposed bill is likely to generate significant litigation over a threshold determination – whether a complaint satisfies the gateway standards for pleading an adequate claim for relief – that must be made in every federal case and should be governed by a clear set of rules. The *Twombly* and *Iqbal* decisions have brought greater clarity to this important area of law. If enacted, the proposed legislation would unsettle the rules in this area and create enormous uncertainty and unpredictability.

VI. ANY NECESSARY RESPONSE SHOULD BE ADDRESSED THROUGH THE STATUTORILY-AUTHORIZED JUDICIAL RULEMAKING PROCESS

To the extent Congress is concerned about the Supreme Court's decisions in *Twombly* and *Iqbal*, there is a superior process for addressing the matter: the judicial rulemaking process established by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2072-2074. The Rules Enabling Act establishes a procedure for amending the Federal Rules of Civil Procedure that ensures that any changes to the Federal Rules take place in an orderly and measured fashion by those who have expert knowledge of the Federal Rules. Proposed amendments to the Rules undergo a rigorous process that minimizes the risk of unintended consequences, including consideration by advisory committees comprised of judges and lawyers who are experts in the area, notice and public comment, consideration by the Standing Committee and the Judicial Conference, consideration by the Supreme Court, and transmission to Congress for consideration. See U.S. Courts, *Federal Rulemaking*: *A Summary for the Bench and Bar*, *available at* http://www.uscourts.gov/rules/newrules3.html.

"The ideal of nationally uniform procedural rules promulgated by the Supreme Court after consideration by expert committees – commonly known as 'court rulemaking' – has been the cornerstone of civil rulemaking in the federal courts since adoption of the Rules Enabling Act in 1934." Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 Geo. L.J. 887, 888 (1999). There are enormous institutional advantages to the judicial rulemaking process. As Judge Jack B. Weinstein has explained, under the procedure established by the Rules Enabling Act, "[r]ulemaking is delegated so that Congress may profit from the expertise of courts and specialists in areas of litigation procedure with which they are far more conversant than Congress." *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905, 929 (1976), quoted in *Rules Enabling*

Act of 1985: Hearing before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 99th Cong. 307-08 (1985); see also *id.* at 930 ("The effectiveness of the rulemaking mechanism under a delegation system depends heavily on the wisdom of Congress in exercising a considered restraint; absent this, the expertise of the various advisory committees will be almost valueless."); see also *Oversight and H.R. 4144, Rules Enabling Act: Hearings before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 4 (1983-1984) (statement of Judge Edward T. Gignoux) (noting that the membership of the committees tasked with reviewing and revising the Rules consists of "experienced judges, lawyers and law professors" who have "expertise in procedural matters," and explaining that "[t]he advisory committees and their reporters are the heart of the rulemaking process" provided for under the Rules Enabling Act). By contrast, "legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems." A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem In Constitutional Revision*, 107 U. Pa. L. Rev. 1, 10 (1958), quoted in *Oversight and H.R. 4144 Rules Enabling Act: Hearings before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 300 (1983-1984).

As Congress has recognized, "[f]ederal national or supervisory rulemaking since 1934 has generally been a story of successful implementation of the Congressional plan for creating a uniform and consistent set of rules of practice and procedure. This rulemaking process has worked, in part, because Congress has granted the judicial branch a high degree of deference due to that branch's intimate working knowledge of problems of practice and procedure." H.R. Rep.

No. 99-422, at 7 (1985). And that process is ideally suited for monitoring the situation in the lower courts in the wake of *Twombly* and *Iqbal* and responding if need be. Indeed, as discussed, the Advisory Committee on Civil Rules has already begun actively monitoring the case law applying and discussing the *Twombly* and *Iqbal* decisions. The Advisory Committee – which is comprised of judges and practitioners who are intimately familiar with the Federal Rules of Civil Procedure and decisions in this area – occupies a better vantage point than this Committee to evaluate the situation and determine whether any amendment to the Federal Rules of Civil Procedure is necessary. The Advisory Committee is currently examining the impact of *Twombly* and *Iqbal* on motions to dismiss for failure to state a claim, the number of new complaints filed each year, and the grant of leave to amend pursuant to Federal Rule of Civil Procedure 15 where claims have been dismissed. If the Advisory Committee determines that *Twombly* and *Iqbal* have had an adverse impact on civil litigation, it may craft an appropriate amendment to the Federal Rules of Civil Procedure through the judicial rulemaking process.

There is no reason for Congress to override the time-honored judicial rulemaking process when it comes to evaluating or addressing the *Twombly* and *Iqbal* decisions. Indeed, the threshold nature of pleading standards and the interaction between Rule 8 of the Federal Rules of Civil Procedure and other rules (*e.g.*, Rule 12(b)(6) and Rule 15) make this an issue that is particularly well-suited for the expertise and deliberative attention of the Judicial Conference of the United States in carrying out its statutory duty to engage in "a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331.

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Thank you, Mr. Chairman for the opportunity to testify on these important matters. I look forward to answering the Committee's questions.