NOTICE PLEADING'S QUIET RETURN

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ABSTRACT

Fifteen years ago, the Supreme Court announced two significant civil procedure decisions – Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and* Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Together,* Iqbal *and* Twombly *marked a new approach to pleading in federal courts. No longer would courts apply the forgiving notice pleading standard, in force since the 1938 adoption of the Federal Rules of Civil Procedure. In its place, the Court introduced plausibility pleading, inviting district courts to apply their "judicial experience and common sense" to decide whether a claim was "plausible."*

Commentators expressed alarm, predicting that the new standard would lead to premature termination of claims in federal court, with plaintiffs unable to obtain the discovery necessary to show the viability of their claims at the threshold pleading stage. And to some degree empirical data suggest that those concerns had merit. But as this Article demonstrates, matters have been different in the Supreme Court, where the Justices have shown little appetite for their own new pleading standard. Indeed, as demonstrated by a close review of the opinions, briefing, and oral argument in cases implicating pleading since the Court decided Iqbal*, notice pleading principles still govern the Court's resolution of pleading disputes. As elaborated in further detail in this Article, lower courts, the advocates who appear before them, and the rulemakers who must consider future changes to transsubstantive doctrine should take note, rather than reflexively apply a heightened pleading standard thought to have been created by the Court in* Iqbal *and* Twombly.

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INTRODUCTION

When the Supreme Court announced its highly anticipated decision in *National Rifle Association v. Vullo*[1] on May 30, 2024, court watchers focused their attention on the decision's First Amendment implications, the unanimous victory for the National Rifle Association, or both.[2] Left unnoticed was the decision's emphasis on pleading doctrine.

But pleading was central to the case. Indeed, after dispensing with a jurisdictional objection in a footnote,[3] the Court centered its discussion almost entirely on pleading doctrine and whether the NRA had "plausibly" alleged a First Amendment violation.[4] In that analysis, the Court took care

1. 602 U.S. 175 (2024).

2. *See, e.g.*, Abbie VanSickle, *Supreme Court Clears Way for N.R.A. to Pursue First Amendment Challenge*, N.Y. TIMES (May 30, 2024), https://www.nytimes.com/2024/05/30/us/supreme-court-nra-first-amendment.html [https://perma.cc/RP4G-JWF9]; Ian Millhiser, *The NRA Just Won a Big Supreme Court Victory. Good.*, VOX (May 30, 2024, 11:45 AM), https://www.vox.com/scotus/352598/supreme-court-nra-vullo-guns-first-amendment [https://perma.cc/LJ48-BHW9]; Justin Jouvenal, *Supreme Court Rules Official Likely Violated NRA's Free Speech Rights*, WASH. POST (May 30, 2024), https://www.washingtonpost.com/politics/2024/05/30/nra-first-amendment-rights-supreme-court-vullo/ [https:// perma.cc/CR6D-VALM]**;** John Fritze & Devan Cole, *Supreme Court Sides with NRA in Free Speech Ruling that Curbs Government Pressure Campaigns*, CNN (May 30, 2024, 12:20 PM), https://www.cnn.com/2024/05/30/politics/supreme-court-first-amendment [https://perma.cc/LD3V-FM8M].

3. *See Vullo*, 602 U.S. at 186 n.3 (rejecting argument that Court should dismiss case as improvidently granted because the Court declined to grant certiorari on qualified immunity, an issue on which the N.R.A. had lost in the Second Circuit). In the interest of full disclosure, I joined an amicus brief arguing that the Court lacked jurisdiction in *Vullo*. *See* Brief for Federal Courts and Civil Procedure Scholars as Amici Curiae in Support of Respondent (Regarding Jurisdiction), *Vullo*, 602 U.S. 175 (No. 22-842), 2024 WL 891253.

4. *Vullo*, 602 U.S. at 191–98; *id.* at 199 (Gorsuch, J., concurring).

to accept the NRA's "well-pleaded factual allegations in the complaint as true,"[5] consider the "reasonabl[e]" inferences that one could take from those allegations in a light favorable to the plaintiff,[6] look to the "context" that might amplify the plausibility of the plaintiff's claims,[7] and consider "the complaint, assessed as a whole," rather than piecemeal.[8]

Moreover, in rejecting the Second Circuit's attempt to construct an "obvious alternative explanation" for the defendant's conduct, the Court made clear that lower courts should not "tak[e] the allegations in isolation" or "fail[] to draw reasonable inferences" in the plaintiff's favor.[9] The Court emphasized that lower courts have "an obligation to draw reasonable inferences in the [plaintiff's] favor and consider the allegations as a whole" and that they commit reversible error when they fail to follow this instruction.[10]

Finally, the Court rejected the defendant's attempt to use unsworn statements to rebut the plaintiff's allegations about why the defendant pursued her actions. Given the obligation to assume the truth of well-pleaded factual allegations, the Court reemphasized that any such contentions must be elaborated and evaluated through discovery, not at the pleading stage.[11]

The Court closed by reassuring readers that it "does not break new ground in deciding this case."[12] Whether this is true as to First Amendment doctrine,[13] the *Vullo* Court's approach to pleading might have raised the eyebrows of some careful observers. After all, in 2007 and 2009, the Court sent shock waves through the procedural and litigation communities by deciding *Bell Atlantic Corp. v. Twombly*[14] and *Ashcroft v. Iqbal*,[15] holding in both cases that the plaintiffs had failed to plausibly allege violations of federal law in large part by resting on "obvious alternative explanation[s]"

5. *Id.* at 191 (majority opinion).
6. *Id.* at 192–93.
7. *Id.* at 193–94.
8. *Id.* at 194; *id.* at 199 (Gorsuch, J., concurring) (criticizing Second Circuit's "decision to break up its analysis into discrete parts").
9. *Id.* at 194 (majority opinion); *id.* at 199 (Gorsuch, J., concurring).
10. *Id.* at 195 (majority opinion).
11. *Id.* ("Of course, discovery in this case might show that the allegations of coercion are false, or that certain actions should be understood differently in light of newly disclosed evidence. At this stage, though, the Court must assume the well-pleaded factual allegations in the complaint are true.").
12. *Id.* at 197.
13. *See, e.g.*, Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 147 (2024) ("The Court's non-formalistic approach in *Vullo* . . . closely mirrored that in *Bantam Books* . . . .").
14. 550 U.S. 544 (2007).
15. 556 U.S. 662 (2009). Again, in the interest of full disclosure, I litigated and argued the *Iqbal* case on behalf of the plaintiffs, from the inception of the case in the district court, to the Supreme Court, and back on remand.

found nowhere in the plaintiffs' complaints.[16] To many eyes, those decisions hailed a new approach to pleading in federal civil litigation.[17] In those decisions, the Court adopted a pleading regime focused on the "plausibility" of the plaintiff's allegations, leaving behind, so it would seem, the "notice pleading" regime established by Rule 8 and enunciated in *Conley v. Gibson* in 1957.[18] Although *Vullo* contains ample citations to *Iqbal* and *Twombly*,[19] its application of the plausibility pleading regime raises questions about how committed the Court is to the enterprise.

As I demonstrate in this paper, *Vullo* is not the first case to surface this tension—in nearly every significant opinion that has addressed pleading since 2009, the Court has stepped back from the most extreme readings of *Iqbal* and *Twombly*. Fifteen years removed from *Iqbal*, the Court has declined multiple opportunities to continue the anti-litigation revolution in the procedural world, in many cases embracing the notice pleading principles that informed federal civil procedure for decades prior to *Iqbal* and *Twombly*.[20] Whether in cases directly raising pleading doctrine, cases in which litigants sought to bring pleading into the fore, or in opportunities to correct lower courts which thumb their nose at the Court's plausibility pleading doctrine, the Court has almost always refused invitations to apply *Twombly* and *Iqbal* in ways many commentators (including this author) feared. Indeed, in some circumstances the Court seems to have turned back, ever so slightly, to the liberal pleading regime that characterized the *Conley* era.[21]

I explore this phenomenon in three distinct areas. First, I closely review Supreme Court opinions over the past fifteen years that directly implicate pleading doctrine. To complement this review, I also examine the briefs and oral arguments associated with these cases. Second, I review material from

16. *See Twombly*, 550 U.S. at 567–69; *Iqbal*, 556 U.S. at 682.

17. *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2129 & n.59 (2015) (reviewing literature). *Iqbal* and *Twombly* have also prompted consideration in state courts as to whether to adhere to notice pleading standards or to adopt a stricter "plausibility" regime. *See* Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409, 422–23 (2022) (summarizing response of state courts to Supreme Court's plausibility pleading doctrine).

18. 355 U.S. 41 (1957).

19. Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 181, 195 (2024).

20. The Federal Rules of Civil Procedure, promulgated in 1938, ushered in the notice pleading regime, and the Supreme Court explicated the "liberal" pleading requirements under the Federal Rules in 1954. *See Conley*, 355 U.S. at 45–47. *Conley* would serve as the seminal pleading decision for the next fifty years. *See* Reinert, *supra* note 17, at 2125–26.

21. I am not the first to make this observation—Adam Steinman surveyed Supreme Court case law seven years after *Iqbal* to conclude that notice pleading principles remained alive and well in the Supreme Court's post-*Iqbal* jurisprudence. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016) [hereinafter Steinman, *Plausibility Pleading*]; *see also* Adam N. Steinman, *Notice Pleading in Exile*, 41 CARDOZO L. REV. 1057 (2020).

cases in which the parties raised arguments about the impact of *Twombly* and *Iqbal*, but in which the Court declined to address them. And finally, I explore those cases in which the Court declined opportunities to use its certiorari jurisdiction to discipline lower courts which expressed resistance to the plausibility pleading regime.

The picture that emerges from this survey is of a Court that is at most half-hearted about embracing plausibility pleading, and at times more supportive of a notice pleading regime than commentators predicted. Whether in cases involving securities litigation,[22] constitutional rights,[23] or interstate commerce,[24] the post-*Iqbal* Court has taken a distinctly *Conley*-era approach to factual allegations by reading the allegations and inferences therefrom in the light most favorable to the pleader. In only two cases did the Court find a complaint's allegations to be *factually* insufficient,[25] and in one of these cases the plaintiffs arguably pleaded themselves out of court by attaching a critical document to their complaint that undercut their factual allegations.[26] Along similar lines, the Court has addressed the legal sufficiency of complaints in a broad spectrum of cases, again a function consistent with *Conley*'s notice pleading regime.[27] In these and other cases that also covered a broad range of substantive claims, the Court resolved governing law but declined invitations to address pleadings, leaving it to lower courts to address on remand.[28] If the Court meant for *Iqbal* and *Twombly* to usher in a new era for pleading doctrine, its approach over the last fifteen years reflects at best a lukewarm embrace of those cases.

At the same time, the Court has been ever-more aggressive about discarding precedent in other areas. No longer satisfied with the incremental change characterized by the early Roberts Court,[29] this new Court sees no

22. Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011).

23. *Vullo*, 602 U.S. 175; Ziglar v. Abbasi, 582 U.S. 120 (2017).

24. Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023); *cf.* Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81 (2014) (applying plausibility standard to petition for removal).

25. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020); Wood v. Moss, 572 U.S. 744 (2014).

26. In *Wood*, The Court found that the complaint did not sufficiently allege viewpoint discrimination based on a map that the plaintiffs attached to their complaint which "corroborates that, because of their location, the protesters posed a potential security risk to the President." *Wood*, 572 U.S. at 762.

27. *See infra* Section II.B.

28. *See infra* Section II.B.

29. *Compare* Richard L. Hasen, Essay, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1597 (2016) ("The Roberts Court has been fundamentally conservative, but for jurisprudential, temperamental, or strategic reasons, Justices who have held the balance of power appear to prefer incrementalism to radical change."), Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 85 (2022), *and* Douglas W. Kmiec, *Overview of the Term: The Rule of Law and Roberts's Revolution*

downside to making transformative change in one fell swoop.[30] Yet I argue here that in the realm of pleading, the Court has stepped back from an extreme anti-litigation agenda and, in certain respects, reverted to the notice pleading regime that characterized the first seventy years of federal civil litigation. It is, in short, neither the incrementalist change supposedly favored by Chief Justice Roberts nor the savage disruption practiced by the more conservative wing of the Court.

There are significant implications that follow. First, the Court's hesitation to double down on plausibility pleading may have consequences for the future of transsubstantive pleading doctrine. Second, for lower courts, advocates, and academics, the Court's approach to pleading offers important lessons about the role of legal change in areas as malleable as pleading standards. Third, rulemakers should take note of the Court's hesitation to embrace plausibility pleading as they consider any future amendments to the Federal Rules of Civil Procedure.

I paint this landscape in three parts. In Part I, I review the emergence of plausibility pleading and the consequences many predicted would follow. In Part II, I show how the post-*Iqbal* Court has hesitated to embrace extreme applications of the teachings of *Twombly* and *Iqbal*. Instead, the Court has hewed more closely to the regime encapsulated by *Conley* and notice-pleading principles.

In Part III, I explore ramifications of and explanations for the Court's hesitation in the field of pleading. For understandable reasons, legal realists rushed to criticize both *Iqbal* and *Twombly* as in line with the Roberts

of Restraint, 34 PEPP. L. REV. 495, 515–17 (2007), *with* Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 796–97 (2009) (characterizing Roberts Court as minimalist in some ways and "not particularly modest" in others), *and* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 136–38 (2021) (characterizing the Roberts Court as mostly incrementalist but observing that "[w]e may in fact be on the cusp of a new Supreme Court Term that tips decisively in this more radical direction — away from gradual erosion and pragmatic compromise and toward decisive announcement of a new order").

30. Most prominently, in the past few years the Court has overruled significant precedent in the area of reproductive freedom and affirmative action. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262 (2022). These decisions suggest a far less incremental approach to legal change than commentators associated with the early Roberts Court. *See generally* Justin Driver, *The Cure As Disease: The Conservative Case Against* SFFA v. Harvard, 2023 SUP. CT. REV. 1, 55 ("*SFFA* unmistakably reveals, however, that the dominant portrait of Chief Justice Roberts as an incremental institutionalist is overdrawn, at least when it comes to race."); Melissa Murray, Essay, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1501 (2024) (arguing that the Roberts Court's approach to stare decisis reflects a "desire to rectify an earlier error or injustice" created by prior decisions which the Court perceives has injured White people as a class); Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024); Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 YALE L.J. F. 161, 190 (2023) (arguing that Court's use of history and tradition in *Dobbs* may be an attempt to "legitimize deeply unpopular or revolutionary results").

Court's conservative leanings.[31] But the Court's approach to pleading since *Iqbal* does not map so neatly onto this account. Nonetheless, as I explain in Part III, there is space for a slightly different legal realist account of the Court's pleading jurisprudence, one that recognizes the key relationship between transsubstantive procedure and the conservative legal movement. This has significant implications for lower courts, advocates, and commentators. Perhaps most importantly, federal rulemakers should take note of the Court's half-hearted embrace of plausibility pleading as they consider future amendments to the Federal Rules.

I. THE EMERGENCE OF PLAUSIBILITY PLEADING

The Federal Rules of Civil Procedure, adopted in 1938, were transformative on multiple levels. Mutual discovery obligations, the joinder of law and equity, and the adoption of liberal pleading rules were all consistent with the rulemakers' vision to increase access to courts with the elimination of technical barriers that had dominated legal practice for decades.[32] Focusing on pleading, Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief,"[33] a sharp departure from common law rules.[34] "Fact" pleading was abandoned, for fear that it "led to wasteful disputes about distinctions that . . . were arbitrary or metaphysical, too often cutting off adjudication on the merits."[35]

The Rules still contemplated some judicial screening before mutual discovery obligations kicked in. Rule 8 was not toothless, as the Supreme Court clarified in its seminal decision in *Conley v. Gibson*.[36] In *Conley*, the Court held that Rule 8 imposes a minimal burden for pleading facts, sufficient to give notice to the defendant of the nature of the plaintiff's lawsuit, but not so rigorous that potentially meritorious lawsuits could be prematurely dismissed because of a lack of specifics at the beginning of the

31. Brian T. Fitzpatrick, Essay, Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1634–37 (2012) (summarizing, but criticizing, academic literature characterizing *Iqbal* and *Twombly* as "conservative judicial activism").

32. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438–40 (1986). For an overall history of the Federal Rules, see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–74 (1987).

33. Fed. R. Civ. P. 8(a)(2).

34. The goal of the Federal Rules was to create both simplicity and uniformity in pleading and to prevent premature dismissals. *See* Marcus, *supra* note 32, at 439 ("Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'").

35. Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009) (Stephen Burbank in rebuttal).

36. 355 U.S. 41, 47–48 (1957).

case.[37] A complaint satisfied Rule 8 without "set[ting] out in detail the facts upon which [the claimant] base[d] his claim."[38] If additional factual detail was necessary to prepare an answer, Rule 12(e) could be deployed at the outset of litigation, but more importantly, discovery was the best vehicle for testing the factual support for the plaintiff's claims.[39] Under *Conley*'s framework, complaints could not be dismissed for failure to state a claim "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[40] Thus, Rule 12(b)(6) was to be used in those rare cases in which no viable legal theory supported a plaintiff's claim.[41]

Along with the principle that pleading was about providing sufficient notice came other rules of construction. First, the factual allegations contained in a plaintiff's complaint were deemed true, for the purpose of resolving motions to dismiss.[42] Pre-discovery motions were not a place to resolve knotty factual disputes, nor for defendants to tell their side of the factual story. Second, ambiguity or nuance would be resolved in favor of the pleader—it was not just that courts were to take the facts alleged to be true for the purposes of the pre-discovery motions, but all inferences that could reasonably be drawn from those facts would be read in favor of the claimant.[43] Only after examining the complaint as a whole, drawing all of those inferences in favor of the pleader, could a court take the drastic step of dismissing a complaint before there was an opportunity for discovery.

For decades, *Conley*'s notice pleading standard dominated the landscape of pre-discovery motions to dismiss, at least rhetorically.[44] In the lower courts, bare-bones complaints would suffice, with discovery available to

37. *Id.*
38. *Id.* at 47.
39. *Id.* at 48 n.9.
40. *Id.* at 45–46.
41. Bank of Abbeville & Tr. Co. v. Commonwealth Land Title Ins. Co., 201 F. App'x 988, 990 (5th Cir. 2006) (per curiam); Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041 (7th Cir. 1999); *see also* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 407 (2011); Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1191–92 (2010).
42. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 732 (1961).
43. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("[I]t is well established that, in passing on a motion to dismiss, . . . the allegations of the complaint should be construed favorably to the pleader.").
44. For example, Christopher Fairman documented examples of lower courts applying a variety of heightened pleading standards in some specific substantive areas. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998–1011 (2003); *see also* Fitzpatrick, *supra* note 31, at 1631–32.

flesh out the details.[45] Even as it shifted composition from 1957 until 2007, the Supreme Court maintained a consistent commitment to *Conley*'s notice pleading rule, twice unanimously rejecting heightened pleading standards that lower courts had introduced in civil rights and employment discrimination cases,[46] even while acknowledging that heightened fact pleading might have "practical merit[]."[47]

The Supreme Court's decisions in *Twombly* and *Iqbal* introduced new concepts, principally the standard of "plausibility." The lower courts in those cases had faithfully applied the *Conley* standard and had abided by the Court's prior direction that heightened pleading standards may be obtained only "by the process of amending the Federal Rules," not by judicial fiat.[48] *Twombly* started by introducing three notable changes to pleading jurisprudence. First, the Court "retire[d]" *Conley*'s language that Rule 12(b)(6) options were to be evaluated by whether "the plaintiff can prove no set of facts" consistent with the defendant's liability.[49] Second, *Twombly* replaced *Conley*'s standard with a "plausibility" inquiry,[50] a term foreign to Rule 12 adjudications.[51] Finally, the *Twombly* Court incorporated into its Rule 12 standard concerns that threats of burdensome discovery extracted settlements from defendants, even for claims of dubious merit.[52] In the Court's view, district courts had failed in reducing these risks through "careful case management."[53]

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45. *See, e.g.*, Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005) (Plaintiffs "need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of."); United States v. Baxter Int'l, Inc., 345 F.3d 866, 882 (11th Cir. 2003) ("plead[ing] evidence" is not necessary); United Steelworkers of Am. v. Oregon Steel Mills, Inc., 322 F.3d 1222, 1229 (10th Cir. 2003) ("Although USWA's pleading was general, it was sufficient to meet the minimal requirements of the Federal Rules."); Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) (bare-bones averments of fraudulent schemes sufficient for a § 10–b action).

46. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002) (explaining that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits); Leatherman v. Tarrant Cnty. Narcotics Intell. & Coordination Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard for § 1983 claims against municipalities); *see also* Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

47. *Swierkiewicz*, 534 U.S. at 514–15.

48. *Id*. at 515 (quoting *Leatherman*, 507 U.S. at 168); Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007); Twombly v. Bell Atl. Corp., 425 F.3d 99, 106–08 (2d Cir. 2005).

49. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007) (reviewing criticisms of *Conley* and concluding that expansive language of the case "has been questioned, criticized, and explained away long enough").

50. *Id.* at 556–57.

51. *See* Edward Brunet, *The Substantive Origins of "Plausible Pleadings": An Introduction to the Symposium on* Ashcroft v. Iqbal, 14 LEWIS & CLARK L. REV. 1, 3–8 (2010) (reviewing use of word "plausible" in summary judgment context).

52. *Twombly*, 550 U.S. at 558–59.

53. *Id.* at 559 (citation and internal quotation marks omitted).

Initially, *Twombly* was subject to conflicting interpretations. Some observers and lower courts treated it as limited to cases in which the costs of discovery were likely to be high and settlement-forcing.[54] For others, *Twombly* was interpreted to apply broadly to all civil actions.[55] *Iqbal* resolved this short-lived dispute by making it clear that plausibility pleading applied in all civil cases, not just antitrust claims.[56]

Iqbal also articulated a two-step process for evaluating the sufficiency of a complaint.[57] First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion.[58] Second, and consistent with *Twombly*, courts must conduct a plausibility analysis that assesses the fit between the non-conclusory facts alleged and the relief claimed.[59] The judge may assess plausibility by calling on her "judicial experience and common sense,"[60] a surprising turn from the judicial role contemplated in *Conley*.[61]

Both decisions have received ample attention from academics, jurists, and practitioners since their announcement. *Iqbal* alone has, as of this writing, been cited by more than 360,000 courts, more than 2,900 law review articles, and innumerable briefs and motions.[62] Many have criticized the decisions for potentially altering the meaning of the Federal Rules outside of the traditional procedures contemplated by the Rules Enabling Act.[63] Others have lamented that the plausibility standard is vague and

54. *See, e.g.*, Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 488–89 (6th Cir. 2009) (quoting Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009) in suggesting that *Twombly* was "limited to expensive, complicated litigation").

55. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 172 n.6 (2d Cir. 2009); Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008).

56. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

57. *Id.* at 678–80.

58. *Id.* In announcing this new gloss on pleading, the Court also held that allegations of state of mind, despite the explicit language of Rule 9(b), must be alleged with some factual detail. *Id.* at 686–87 (interpreting Fed. R. Civ. P. 9(b) to require more than "general" allegations for state of mind even where neither fraud nor mistake is alleged). The *Iqbal* Court's interpretation of Rule 9(b) "is arguably at odds with both the Rule's text and the Advisory Committee notes to Rule 9." Alexander A. Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 7 n.43 (2012).

59. *Iqbal*, 556 U.S. at 678–80.

60. *Id.* at 679.

61. *See* Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

62. These figures were generated using the "Citing References" function on the Westlaw database, on July 13, 2025.

63. *See, e.g.*, Burbank, *supra* note 41, at 1190; Fitzpatrick, *supra* note 31, at 1637; Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-Authors*, 78 GEO. WASH. L. REV. 9, 28–29 (2009); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84–89 (2010); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 334 (2012); *cf.* James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 538–39 (2011) (suggesting that the Court's decisions in *Iqbal* and *Twombly* might reflect its own frustration with the rulemaking process).

difficult to apply.[64] And some commentators have expressed concern that if *Twombly* and *Iqbal* are interpreted to require district courts to evaluate plaintiffs' factual allegations, they may raise constitutional concerns by arrogating to judges decisions that the Seventh Amendment commits to a jury.[65] Almost all commentators agree that *Iqbal* and *Twombly* marked a break from the liberal pleading doctrine enunciated in 1957 by *Conley v. Gibson*.[66] Perhaps the most cogent argument to the contrary was mounted by Adam Steinman, who suggested shortly after *Iqbal* that one could reconcile *Iqbal* and *Twombly* with notice pleading without a significant disruption to pleading doctrine.[67]

Moreover, the vast majority of commentators viewed plausibility pleading as transforming pleading to the detriment of plaintiffs. As Stephen Burbank noted, *Iqbal* and *Twombly*'s "plausibility" pleading took the relatively distinct roles accorded to Rules 8, 12(b)(6), and 12(e), and conflated them to introduce a pleading regime in tension with the original purposes of the Federal Rules.[68] In so doing, he argued, the Court may have made "factual screening" a function of Rule 12(b)(6) and made Rule 12(e) "essentially irrelevant."[69] Under notice pleading, a complaint was sufficient if the allegations, taken as true, created the possibility that the pleader would be entitled to some kind of relief. Under *Iqbal* and *Twombly*, many argued, what might have passed muster under *Conley* would no longer be sufficient.[70]

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64. *See, e.g.*, Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 467 (2014) ("The overly subjective and vague nature of the test fails to properly guide judges . . . ."); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1059 ("The Supreme Court's plausibility paradigm abrogated fifty years of pleading jurisprudence and left in its place a vague and undefined standard."). *But see* Fitzpatrick, *supra* note 31, at 1630–34 (arguing that critics overstate the impact of plausibility pleading).

65. *See, e.g.*, Kenneth S. Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 480–81 (2010); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

66. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 121–25 & nn.11–24 (2011) (reviewing literature); *see generally* A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013). *But see, e.g.*, William H.J. Hubbard, *A Theory of Pleading, Litigation, and Settlement* 24 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 663, 2013) (concluding, after surveying empirical data and pleading jurisprudence that "the effects of *Twombly* and *Iqbal* on pleadings practice in the federal courts has been modest").

67. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1324–41 (2010); *see also* Steinman, *Plausibility Pleading*, *supra* note 21, at 353–55.

68. Burbank, *supra* note 41, at 1191–92.

69. *Id.* at 1192.

70. *See, e.g.*, Brooke D. Coleman, *What if?: A Study of Seminal Cases as if Decided Under a* Twombly/Iqbal *Regime*, 90 OR. L. REV. 1147 (2012); McCauley v. City of Chicago, 671 F.3d 611, 626–27 (7th Cir. 2011) (Hamilton, J., dissenting in part).

One can understand why so many commentators drew this conclusion, given the difference between the standards applied in the cases. *Conley* instructed courts to find pleadings sufficient where they provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests," and to dismiss complaints only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[71] *Twombly* explicitly rejected the latter formulation and *Iqbal* clarified that a "plausibility" analysis applies to all Rule 12(b)(6) motions for failure to state a claim.[72] Under plausibility pleading, a claim will be dismissed if, after taking as true all non-conclusory allegations, no plausible entitlement to relief can be shown on the face of the complaint.[73] Moreover, the empirical evidence suggested that, in certain categories of cases, plausibility pleading was associated with higher dismissal rates at the Rule 12(b)(6) stage.[74]

The tension between plausibility pleading and notice pleading was noted by lower court judges as well, who sometimes using pointed language to express their consternation and confusion.[75] Courts "struggl[ed]" to

71. Conley v. Gibson, 355 U.S. 41, 45–47 (1957).

72. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007).

73. *Iqbal*, 556 U.S. at 678.

74. *See* Reinert, *supra* note 17, at 2142–56 (concluding that plausibility pleading doctrine resulted in increased dismissal rates overall, with particularly strong effect in civil rights cases). *But see* William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 57–58 (2013) (concluding that *Twombly* did not increase dismissal rates overall or the rates at which motions to dismiss were granted).

75. *See, e.g.*, McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin., 780 F.3d 582, 590 (4th Cir. 2015) (Wynn, J., dissenting) ("The apparent tension between the Court's decisions in *Iqbal* and *Swierkiewicz* is well-documented."), *cert. denied*, 136 S. Ct. 1162 (2016); McCone v. Pitney Bowes, Inc., 582 F. App'x 798, 801 n.4 (11th Cir. 2014) (stating that "*Twombly* effectively overruled *Swierkiewicz* when it rejected the old standard for dismissal set out in [*Conley*] . . . . [b]ut this had no impact on *Swierkiewicz*'s statement that a plaintiff is not required to plead a prima facie case of discrimination in order to survive dismissal"); Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 51 (1st Cir. 2013) (relationship between "the prima facie case and the plausibility standard . . . has created some confusion"); Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 43–44 (1st Cir. 2013) (application of plausibility pleading in antitrust context "has elicited considerable confusion"); Horras v. Am. Cap. Strategies, Ltd., 729 F.3d 798, 807 (8th Cir. 2013) (Colloton, J., dissenting in part and concurring in the judgment in part) ("*Iqbal* says that *Twombly* applies to all civil actions, . . . but *Swierkiewicz*, . . . reaffirmed by *Twombly*, . . . provides that the simplified notice pleading standard of Rule 8(a) likewise applies to all civil actions . . . ."); Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 319–20 n.17 (3d Cir. 2010) (noting disagreement within Third Circuit regarding how to interpret *Swierkiewicz* in light of *Iqbal*); Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010) (noting that *Iqbal* had created tension with prior circuit cases involving pleading of equal protection claims); Swanson v. Citibank, N.A., 614 F.3d 400, 403 (7th Cir. 2010) (courts are "still struggling" with how to apply plausibility pleading); Robbins v. Oklahoma *ex rel.* Dep't of Human Servs., 519 F.3d 1242, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid."); *see also* Miller, *supra* note 63, at 31 ("[I]nconsistencies and uncertainties of application have arisen, causing confusion and disarray among judges and lawyers.").

determine how high the Supreme Court "meant to set the bar" when it held that claims must be plausible—and how to resolve the plausibility standard with the Court's previous pleading decisions, which it did not purport to overrule.[76] As the Ninth Circuit noted, the contrast between plausibility pleading and pre-2007 case law is "perplexing" and leaves courts unsure whether to apply "the more lenient or the more demanding standard."[77]

Iqbal and *Twombly* provoked this reaction even as the Court itself disclaimed any intent to adopt a heightened fact pleading standard.[78] As the next Part aims to demonstrate, the Court appears to have held fast to that promise and, in some respects, stepped back from the precipice many predicted would follow from *Iqbal* and *Twombly*.

II. PLEADING IN THE COURT POST-*IQBAL*

Notwithstanding the concern that *Iqbal* and *Twombly* has raised for many commentators and lower courts, the Supreme Court's application of plausibility pleading has proven more nuanced. In this Part, I review several categories of cases in which pleading was implicated, but in which the Court took pains to tread lightly. Indeed, as I will show here, there are indications from some cases that the Court has stepped back from extreme readings of *Iqbal* and *Twombly*, returning pleading doctrine to the more familiar terrain landscaped by *Conley*.

I do not write on a blank slate. In 2016, Adam Steinman surveyed the Supreme Court pleading decisions since *Iqbal*, including some of the cases I discuss in this Article, and concluded that they "confirm the view that *Twombly* and *Iqbal* should be applied in a way that preserves notice pleading and pre-*Twombly* Supreme Court case law."[79] In this Part, I aim both to build on Steinman's prior work and look to other sources, but my conclusions are similar to his.

Like Steinman, I examine closely the opinions the Court has issued in cases raising pleading issues. Unlike Steinman, I also look to sources beyond the opinions, by consulting the briefing and oral argument. This approach allows for examination of many cases in which pleading issues were raised by the parties, but in which the Court declined opportunities to address them. And closely examining the oral argument transcripts offers insight into how the Justices described their own understanding of the

76. *Swanson*, 614 F.3d at 403; *see also* Khalik v. United Air Lines, 671 F.3d 1188, 1191 & n.2 (10th Cir. 2012) (noting "disagreement" and "confusion" as to whether plausibility standard "requires minimal change or whether it in fact requires a significantly heightened fact-pleading standard").

77. Starr v. Baca, 652 F.3d 1202, 1215–16 (9th Cir. 2011).

78. *See Iqbal*, 556 U.S. at 681; *Twombly*, 550 U.S. at 570.

79. Steinman, *Plausibility Pleading*, *supra* note 21, at 381.

relevant pleading doctrine. As I will show, although the record is mixed, for the most part this material reflects a Court that conceives of the new pleading doctrine as quite consistent with pre-plausibility case law.

The first set of cases I examine involves opinions in which the Court directly addresses the factual sufficiency of specific complaints. Many commentators raised alarm that, notwithstanding the majority's disclaimers, the Court's decisions in *Twombly* and *Iqbal* adopted a heightened fact pleading regime, calling for more searching scrutiny of factual allegations than would be appropriate under notice pleading.[80] Many critics of plausibility pleading worried specifically about how the standard would be applied to allegations concerning a defendant's state of mind, where informational asymmetry is highest and where discovery often is essential.[81] Yet the cases that address factual sufficiency, including those concerning the defendant's state of mind, have in the main been more consistent with notice pleading than the most extreme versions of plausibility pleading.

In a second set of cases I examine, the Court has declined invitations to address factual sufficiency, instead resolving cases by looking to the legal theory behind a plaintiff's claims. Again, this is an approach that is fully consistent with pre-*Twombly* principles. The Court adopted this method in several cases in which some of the arguments made by the parties would seem to be consistent with the plausibility pleading principles from *Iqbal* and *Twombly*. Instead of addressing factual sufficiency in these cases, the Court left those questions to be addressed by lower courts on remand.

In a third set of opinions, the Court declined invitations to address pleading at all, resolving the cases on other grounds. Like the prior set of cases addressing legal sufficiency, the Court forwent multiple opportunities to emphasize plausibility pleading principles. Indeed, where the Court addressed pleading at all in these cases, their stance was far more suggestive of notice pleading principles.

Finally, I look to the many significant Court of Appeals decisions in which lower court judges pointed to the tension between *Iqbal* and *Twombly*

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80. *See, e.g.*, Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 560–62; Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1348 (2010); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 624–25 (2010); Miller, *supra* note 63.

81. *See* Burbank, *supra* note 80, at 561 ("Perhaps the most troublesome possible consequence of *Twombly* is that it will deny access to court to those who, although they have meritorious claims, cannot satisfy its requirements . . . because of informational asymmetries."); Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1446 (2010) (identifying discrimination claims as "particularly vulnerable" to dismissal because of "stark informational asymmetries between the parties"); Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 623–31 (2011).

and other extant pleading doctrine, sometimes calling for additional guidance. In many of these cases, the lower court decision minimized the impact of *Iqbal* and *Twombly* by hewing more closely to notice pleading principles. And yet the Court declined to grant petitions for certiorari that drew attention to these inconsistencies.

The picture that emerges is a Court seemingly hesitant to widen the rift between *Iqbal*, *Twombly*, and the *Conley* era even as it rushes to discard precedent in many other significant areas of law.[82] The equivocation is as old as plausibility pleading itself. On one hand, the Court described the plausibility pleading standard as "new" in 2009, when it remanded to the lower court for a consideration of whether a plaintiff should be permitted leave to amend in light of *Twombly*.[83] Yet the Court also, shortly after announcing *Twombly*, indicated that Rule 8(a)(2) still set forth a "liberal pleading standard" which focuses on providing notice, not "[s]pecific facts."[84] I argue here that, fifteen years into the plausibility pleading project, notice pleading principles are still alive and well.

A. The Court's Approach to Factual Allegations: Echoes of Notice Pleading

Since 2009, the Court has granted certiorari in more than fifteen cases in which pleading issues were raised by the parties, yet in only a handful has the Court directly addressed factual allegations. For these purposes, cases in which the Court made one-off references to pleading are not particularly instructive. But even in those cases, the Court has indicated that it may not consider *Iqbal* and *Twombly* to mark such a sharp break from prior cases For instance, in *Skinner v. Switzer*,[85] the Court cited to *Swierkiewicz* rather than *Iqbal* or *Twombly* when it described the federal pleading standard.[86] But *Skinner* did not principally concern application of the federal pleading standard; rather, it raised the question of whether a convicted prisoner

82. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (overruling *Chevron*); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (overruling affirmative action precedent); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling abortion precedent).

83. Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438, 456 (2009) ("It is for the District Court on remand to consider whether the amended complaint states a claim upon which relief may be granted in light of the new pleading standard we articulated in *Twombly* . . . .").

84. Erickson v. Pardus, 551 U.S. 89, 93–95 (2007). It bears emphasis that *Erickson* was a case involving a *pro se* litigant, which called for a liberal construction of the pleadings. *Id.*

85. 562 U.S. 521 (2011).

86. *Id.* at 529–30 ("Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was 'not whether [Skinner] will ultimately prevail' on his procedural due process claim, see *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), but whether his complaint was sufficient to cross the federal court's threshold, see [*Swierkiewicz*].").

seeking access to biological evidence for DNA testing could assert that claim via 42 U.S.C. § 1983, or was required to file a petition for writ of habeas corpus.[87] It therefore did not provide a full opportunity for the Court to clarify pleading standards.

But in the handful of cases in which the Court specifically grappled with the factual allegations of the plaintiff's complaint, it applied an analysis that is quite consistent with notice pleading. First, in *Matrixx Initiatives, Inc. v. Siracusano*, [88] a group of investors brought a class action against a pharmaceutical company for allegedly failing to disclose material information about one of the company's products.[89] The Ninth Circuit had held that the plaintiffs had sufficiently pleaded materiality and scienter.[90] The Supreme Court granted the defendants' petition for certiorari on the question of whether the pleadings adequately stated a claim under Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U.S.C. § 78j(b), and Securities and Exchange Commission (SEC) Rule 10b–5, 17 CFR § 240.10b–5 (2010).[91]

The parties focused much of their briefing on the sufficiency of the pleadings. Matrixx and its executives argued that the class action complaint failed to sufficiently allege materiality and scienter.[92] According to the defendants, the facts alleged in the complaint were not sufficiently specific to establish scienter, nor did they give rise to a strong inference that the defendants intended to deceive investors.[93] The central factual question was whether the defendants violated federal securities laws by failing to disclose anosmia adverse event reports (AERs) associated with Zicam, one of Matrixx's products. The plaintiffs alleged that by failing to disclose the AERs, the defendant failed to provide information which investors would have taken into account when making investment decisions.[94] Matrixx proposed that to allege that the AERs were material, plaintiffs had to allege facts demonstrating that the reported incidence rate among those who used Zicam exceeded the rate of anosmia among individuals with a common cold.[95] In other words, according to the defendants, the complaint had to allege that the incidence rate differed from the background rate to a statistically significant degree.[96] Defendants argued further that the failure

87. *Id.* at 531.
88. 563 U.S. 27 (2011).
89. *Id.* at 31.
90. Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167, 1183 (9th Cir. 2009).
91. Petition for a Writ of Certiorari, *Matrixx*, 563 U.S. 27 (No. 09-1156), 2010 WL 1063936.
92. Brief for Petitioners at 15, *Matrixx*, 563 U.S. 27 (No. 09-1156), 2010 WL 3334501.
93. *Id.* at 3–4.
94. *Matrixx*, 563 U.S. at 30.
95. Brief for Petitioners at 48, *Matrixx*, 563 U.S. 27 (No. 09-1156), 2010 WL 3334501.
96. *Id.* at 45–49.

to disclose anecdotal AERs does not give rise to an inference that petitioners intended to deceive investors, particularly given the heightened requirements for pleading scienter imposed by the Private Securities Litigation Reform Act (PSLRA).[97]

The plaintiffs responded by arguing that under *Iqbal* and *Twombly,* they were only required to establish a plausible inference of materiality.[98] They asserted that this inference was established by pleading that physicians concluded there was a link between the product and anosmia, this link threatened the company's revenue, and stock prices changed once this information became public.[99] The plaintiffs also took issue with defendants' argument that the complaint was insufficient because it failed to deny the causal link between anosmia and infections caused by the common cold. According to the plaintiffs, *Iqbal* did not require them to "anticipate and negate detailed factual counterarguments in a complaint."[100]

These arguments were vetted at oral argument as well. Both Justice Ginsburg and Justice Breyer were skeptical of Matrixx's position that the complaint had to allege a statistically significant difference between the rate of reported events and the background rate.[101] Justice Ginsburg suggested that discovery, not pleading, was the appropriate stage at which to raise those questions,[102] while Justice Breyer questioned whether courts were competent to determine at the pleading stage whether a certain number of AERs may be within the normal course of business for drug companies and what may rise to the level at which investors should be notified.[103] Given that Justices Breyer and Ginsburg had dissented in *Iqbal*, one would not necessarily expect the entire Court to share their concerns about the limits of plausibility pleading.

It was thus somewhat surprising when the Court unanimously held that the allegations as to materiality satisfied the plausibility standard, and that the allegations as to scienter satisfied the PSLRA's heightened pleading standard.[104] In the Court's view, the complaint alleged with sufficient detail that the company received information that "plausibly indicated a reliable causal link" between the product and anosmia.[105] The Court held that defendants' argument that "statistical significance is the only reliable

97. *Id.* at 49–50.
98. Brief for Respondents at 21, *Matrixx*, 563 U.S. 27 (No. 09-1156), 2010 WL 4477792.
99. *Id.*
100. *Id.* at 33–34 ("The issue of possible alternative causes for the reported incidences of Zicam-induced anosmia is an evidentiary dispute that should be resolved on summary judgment or at trial . . . .").
101. Transcript of Oral Argument at 22, *Matrixx*, 563 U.S. 27 (No. 09-1156), 2011 WL 65028.
102. *Id.* at 4.
103. *Id.* at 21.
104. *Matrixx*, 563 U.S. at 45–46, 48–50.
105. *Id.* at 45.

indication of causation" was "flawed," in large part because medical experts and the FDA "rely on other evidence to establish an inference of causation."[106] And because "medical professionals and regulators act on the basis of evidence of causation that is not statistically significant, it stands to reason that in certain cases reasonable investors would as well."[107] In other words, drawing reasonable inferences in favor of the pleader, the Court held that the plaintiffs had plausibly alleged materiality.[108] The Court reasoned that the allegations "raise a reasonable expectation that discovery will reveal evidence" that will meet the materiality requirement and "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[109]

As for the heightened pleading requirement for scienter, the Court found that standard satisfied as well. Matrixx had argued that the inference of scienter had not been sufficiently alleged because, parroting the "obvious alternative explanation" theories of *Iqbal* and *Twombly*, "the most obvious inference is that petitioners did not disclose the AERs simply because petitioners believed they were far too few . . . to indicate anything meaningful about adverse reactions to use of Zicam."[110] The Court rejected this argument and concluded that, taking the allegations "collectively," they gave rise to a "cogent and compelling" inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market.[111] This inference was "at least as compelling as any opposing inference one could draw from the facts alleged," sufficient to satisfy the PSLRA's heightened scienter standard.[112] *Matrixx*, then, reflects an approach to pleading that emphasizes the reasonable inferences one can draw from the allegations in the plaintiff's complaint and a willingness to look to discovery to resolve the ultimate merits of a plaintiff's claims, hallmarks of the *Conley* era.

Along the same lines as *Matrixx*, but in a very different legal context, the Court also addressed factual sufficiency in *Ziglar v. Abbasi*,[113] a *Bivens* case

106. *Id.* at 40–41.

107. *Id.* at 43.

108. *Id.* at 45–46.

109. *Id.* at 46 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) and then Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (alteration in original)).

110. Brief for Petitioners at 49, *Matrixx*, 563 U.S. 27 (No. 09-1156), 2010 WL 3334501.

111. 563 U.S. at 50 (citation omitted).

112. *Id.* (citation omitted). This aspect of the *Matrixx* decision was informed by the PSLRA's heightened pleading standard, which even during *Conley*'s ascendance contemplated weighing competing inferences at the pleading stage. *See* Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 319–21, 323 (2007).

113. 582 U.S. 120 (2017).

that raised some of the same essential facts as *Iqbal*. After the Second Circuit affirmed in large part the denial of the defendants' motion to dismiss for failure to state a claim,[114] the Supreme Court granted certiorari. Most of the briefing and argument in *Ziglar* was devoted to the question of whether a *Bivens*-type cause of action existed for the constitutional violations alleged by the plaintiffs.[115] The Supreme Court's opinion followed suit, holding that the plaintiffs had no right to sue for damages for the vast majority of claims they brought in the litigation.[116]

As to the plaintiffs' claims against former prison warden Dennis Hasty, however, the Court addressed only the plausibility of the plaintiffs' claims that Hasty was deliberately indifferent to abusive conduct by his subordinates, leaving for lower courts to decide on remand whether plaintiffs could bring a *Bivens* claim for Hasty's alleged conduct.[117] Hasty had argued in his briefing that the complaint failed to meet *Iqbal*'s plausibility requirements because it failed to identify how he was responsible for the allegedly abusive conduct of his subordinates.[118] The plaintiffs had alleged that the Warden was deliberately indifferent because he deliberately avoided being made aware of any misconduct by neglecting his duties to make rounds on the units where the plaintiffs were confined—but Hasty argued that there was an "obvious alternative explanation" for his failure to make rounds—namely his delegation of authority to a subordinate in the Metropolitan Detention Center.[119] Moreover, Hasty argued, plaintiffs' assertion that he was "made aware" of abuses, without additional detail, was "fatally conclusory."[120] Hasty maintained that the plaintiffs had to allege facts demonstrating that he was aware of the abuse and knew that it would not be addressed by proper reporting channels if he did not intervene.[121] At oral argument, counsel for

114. Turkmen v. Hasty, 789 F.3d 218 (2d Cir. 2015); Petition for a Writ of Certiorari, *Ziglar*, 582 U.S. 120 (No. 15-1358), 2016 WL 2642061.

115. *See* Brief for Respondents at 20–47, *Ziglar*, 582 U.S. 120 (Nos. 15-1358, 15-1359, 15-1363), 2016 WL 7368657; Brief for the Petitioners at 17–30, *Ziglar*, 582 U.S. 120 (No. 15-1359), 2016 WL 6873020.

116. *Ziglar*, 582 U.S. at 130–46.

117. *Id.* at 149. On remand, the district court held that *Bivens* claim could not be brought against Hasty. Turkmen v. Ashcroft, No. 02-cv-02307, 2021 WL 4099495 (E.D.N.Y. Sept. 9, 2021). The case was settled after plaintiffs appealed that decision. *See* Arun Venugopal, *6 Men Detained After 9/11 Share $98,000 Settlement, Receive Letters Noting 'Unduly Harsh' Confinement*, GOTHAMIST (July 5, 2022), https://gothamist.com/news/6-men-detained-after-911-share-98000-settlement-receive-letters-noting-unduly-harsh-confinement [https://perma.cc/H8DG-BFXW].

118. Brief for Petitioners Dennis Hasty and James Sherman at 54–57, *Ziglar*, 582 U.S. 120 (No. 15-1363), 2016 WL 6873021.

119. *Id.* at 55–56.

120. Reply Brief for Petitioners Dennis Hasty and James Sherman at 21–22, *Ziglar*, 582 U.S. 120 (No. 15-1363), 2017 WL 167314.

121. *Id.* at 20.

Hasty also argued that plaintiffs failed to specify what injuries they suffered as a result of the defendant's alleged deliberate indifference.[122] But Justices Ginsburg, Kennedy, and Breyer all pushed back on Hasty's argument that such specificity was necessary.[123]

Justice Kennedy, who wrote the Court's opinion in *Iqbal*, also authored the Court's opinion for the majority in *Abbasi*, rejecting a *Bivens*-type claim for the vast majority of claims, but remanding as to the deliberate indifference claims against Hasty.[124] The Court rejected Hasty's argument that plaintiffs' complaint was insufficiently specific and that obvious alternative explanations existed for his failure to supervise the units on which the plaintiffs were held.[125] In so doing, the Court took pains to detail the factual allegations it "assumed to be true, subject to proof at a later stage," including that Hasty "encouraged the abuse by referring to [the plaintiffs] as 'terrorists,'" that he "stayed away from the Unit to avoid seeing the abuse," and that he "was made aware of the abuse" nonetheless.[126] It is significant that these allegations, taken as true by the Court, each related to Hasty's alleged state of mind with respect to the constitutional violations. Many commentators, including this author, have suggested that one of the significant differences between plausibility pleading and notice pleading is the extent to which the former poses challenges in cases that turn on a defendant's state of mind.[127] The Court's decision in *Abbasi* to treat each of these allegations as factual, assumed to be true at the Rule 12(b)(6) stage, is another indication that the Court does not read *Iqbal* and *Twombly* to mark so sharp a break with notice pleading standards.

It is noteworthy that the principal dissent in *Iqbal* predicted that the case spelled an end to so-called supervisory liability *Bivens* claims,[128] yet in *Ziglar* the Court had no trouble finding factual allegations sufficient to support just such a supervisory liability theory. Moreover, although *Iqbal* highlighted the supposedly "conclusory" character of the allegations that the defendants there had intentionally discriminated on the basis of race, religion, and national origin, the plaintiffs had made arguably similarly sparse allegations to support their deliberate indifference claim against Warden Hasty, yet the Court did not characterize any of them as

122. Transcript of Oral Argument at 21–23, *Ziglar*, 582 U.S. 120 (Nos. 15-1358, 15-1359, 15-1363), 2017 WL 201454.

123. *Id.*

124. *Ziglar*, 582 U.S. at 155–56.

125. *Id.* at 146–47.

126. *Id.*

127. *See supra* note 81; *see also* Reinert, *supra* note 58, at 12–14.

128. Ashcroft v. Iqbal, 556 U.S. 662, 691–94 (Souter, J., dissenting).

"conclusory." Indeed, none of the opinions filed in *Abbasi* used the word "conclusory."[129]

The final, and perhaps most significant case, addressing the factual sufficiency of pleadings came just last Term, in *National Rifle Association v. Vullo*.[130] *Vullo* concerned a claim by the NRA against the New York Department of Financial Services (DFS), alleging infringement on their freedom of speech on account of the regulator encouraging banks to stop doing business with the organization. The Second Circuit held that plaintiff failed to plausibly allege unconstitutional threats or coercion, and also granted qualified immunity.[131] The Supreme Court granted certiorari only on the question of whether the NRA had plausibly alleged a First Amendment claim, not on the qualified immunity defense.[132]

In its merits briefing, the NRA argued that the Second Circuit erroneously held that the allegations failed to plausibly state a First Amendment violation.[133] The NRA's claims against Vullo were based on statements she made that the NRA alleged encouraged financial institutions to sever their relationships with the NRA.[134] The NRA criticized the Second Circuit decision for not drawing inferences in the plaintiff's favor and for failing to consider the complaint as a cumulative whole.[135]

The defendant maintained, by contrast, that there was an obvious alternative explanation for why businesses cut ties with the NRA: because mass shootings produced public pressure against the organization.[136] The defendant also maintained that Vullo's alleged statements and actions were not coercive, and to allow the complaint to go forward would contravene *Iqbal*'s teachings about the burdens of suits against public officials.[137] Attacking the level of detail alleged in the complaint, Vullo suggested that plaintiffs failed to allege "anything specific that Vullo said" in a meeting in which the NRA claimed that Vullo offered benefits in exchange for an insurance underwriter to assist in her campaign against the NRA.[138] The NRA, in reply, disputed the characterization of the allegations as

129. *See generally Ziglar*, 582 U.S. 120.
130. 602 U.S. 175 (2024).
131. Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700 (2d Cir. 2022).
132. *Vullo*, 602 U.S. 175.
133. Brief for Petitioner National Rifle Association of America at 19, *Vullo*, 602 U.S. 175 (No. 22-842), 2024 WL 144433.
134. *Id.*
135. *Id.* at 39–42.
136. Brief for Respondent at 4, *Vullo*, 602 U.S. 175 (No. 22-842), 2024 WL 791438.
137. *Id.* at 3, 34–35 (arguing that permitting complaint to survive would implicate *Iqbal*'s concern about discovery and "deterring officials from enforcing the law for fear of damage suits").
138. *Id.* at 40.

conclusory[139] and argued that *Iqbal* does not require specific quotes to support an allegation.[140] The NRA took the position that it is sufficient that plaintiffs identified a meeting and conveyed the substance of what was said.[141]

At oral argument, the NRA's attorney argued that at the pleading stage, the allegations must be taken as a whole.[142] Counsel for Vullo argued that *Iqbal* requires courts to consider whether between alleged coercion or an obvious explanation, coercion is plausible,[143] and warned against the burden of discovery on public servants.[144] Defense counsel also warned that permitting a complaint as thin as the NRA's to survive a Rule 12(b)(6) would open the doors to a flood of retaliation claims.[145] In response to the defendant's argument that *Iqbal* and *Twombly* require a focus on obvious alternative explanations, Justice Gorsuch stated that *Iqbal* requires courts to look at the whole of the allegations taken together to determine plausibility, seeming to reference the argument from the briefs that the Second Circuit opinion did not consider all of the allegations together.[146]

In its unanimous opinion, after resolving a jurisdictional objection in a footnote,[147] the Court focused almost entirely on pleading doctrine and whether the NRA had "plausibly" alleged a First Amendment violation.[148] The Court concluded that the NRA's complaint was sufficient to allege a First Amendment claim, taking care to accept the NRA's "well-pleaded factual allegations in the complaint as true,"[149] consider the "reasonabl[e]" inferences that one could take from those allegations in a light favorable to the plaintiff,[150] look to the "context" that might amplify the plausibility of the plaintiff's claims,[151] and consider "the complaint, assessed as a whole,"

139. Reply Brief for Petitioner National Rifle Association of America at 11, *Vullo*, 602 U.S. 175 (No. 22-842), 2024 WL 1096969.

140. *Id.*

141. In the aftermath of *Vullo*, serious questions have been raised about whether the meeting alleged by the NRA to have taken place in fact occurred. *See* Danny Hakim, *After N.R.A.'s Supreme Court Win, a Dispute over Key Facts*, N.Y. TIMES (Dec. 9, 2024), https://www.nytimes.com/2024/12/09/us/nra-supreme-court.html [https://perma.cc/RY4H-CNTN] (reporting that every participant in alleged meeting denied that meeting took place).

142. Transcript of Oral Argument at 6, *Vullo*, 602 U.S. 175 (No. 22-842), 2024 WL 1175828.

143. *Id.* at 55.

144. *Id.* at 56.

145. *Id.* at 70.

146. *Id.* at 73–74.

147. *See Vullo*, 602 U.S. at 186 n.3 (rejecting argument that Court should dismiss case as improvidently granted because the Court declined to grant certiorari on qualified immunity, an issue on which the N.R.A. had lost in the Second Circuit).

148. *Id.* at 191–98; *id.* at 199 (Gorsuch, J., concurring).

149. *Id.* at 191 (majority opinion).

150. *Id.* at 192–93.

151. *Id.* at 193–94.

rather than piecemeal.[152] Moreover, in rejecting the Second Circuit's attempt to construct an "obvious alternative explanation" for the defendant's conduct, the Court made clear that lower courts should not "tak[e] the allegations in isolation" or "fail[] to draw reasonable inferences" in the plaintiff's favor.[153] The Court emphasized that lower courts have "an obligation to draw reasonable inferences in the [plaintiff's] favor and consider the allegations as a whole" and that they commit reversible error when they fail to follow this instruction.[154] Finally, the Court rejected the defendant's attempt to sow doubt as to the adequacy of the plaintiffs' allegations by injecting her own unsworn allegations about why she pursued her actions—given the obligation to assume the truth of well-pleaded factual allegations, any such contentions must be elaborated and evaluated through discovery, not at the pleading stage.[155]

Notably, *Vullo*, like *Matrixx* and *Abbasi*, also involved allegations about the defendant's state of mind. The NRA alleged that the defendants "intentionally ignored" evidence that other non-NRA insurance policies had some of the same features DFS raised regarding the NRA policies because "enforcing the Insurance Law was never their goal"; targeting gun advocacy groups was.[156] The complaint is replete with additional allegations along the same lines, including that defendants "selectively targeted" the NRA "because of" the organization's constitutionally-protected advocacy,[157] that defendants issued guidance letters in 2018 because they "intended . . . to intimidate institutions into acceding to a political blacklisting campaign,"[158] and that "Vullo and DFS discriminated against the NRA and its business partners because of Vullo's personal animus toward the NRA and its Second Amendment advocacy."[159] Although the Court treated similar allegations in *Iqbal* as conclusory,[160] it did not treat any of the NRA's allegations the same, crediting the allegations as to intent and purpose as factual.

Matrixx, *Ziglar*, and *Vullo*, taken together, suggest that the Court's approach to factual sufficiency in the plausibility pleading era is consistent

152. *Id.* at 194; *id.* at 199 (Gorsuch, J., concurring) (criticizing Second Circuit's "decision to break up its analysis into discrete parts").

153. *Id.* at 194–95 (majority opinion); *id.* at 199 (Gorsuch, J., concurring).

154. *Id.* at 195 (majority opinion).

155. *Id.* at 195.

156. National Rifle Association of America's Second Amended Complaint and Jury Demand ¶ 22, Nat'l Rifle Assoc. of Am. v. Vullo, No. 18-cv-00566 (N.D.N.Y. 2020), 2020 WL 4341928.

157. *Id.* ¶ 37; *see also id.* ¶ 103 (alleging that defendants "exercised this discretion to harm the NRA because of the NRA's speech regarding the Second Amendment"); *id.* ¶ 117 (alleging "disparate treatment of the NRA-related programs and the comparators was caused by Vullo's intent to punish and/or inhibit the NRA because of the NRA's constitutionally protected speech").

158. *Id.* ¶ 49.

159. *Id.* ¶ 114.

160. *See* Ashcroft v. Iqbal, 556 U.S. 662, 680–81 (2009) (addressing Paragraph 96 of complaint).

with much of notice pleading. Of course, factual allegations are to be taken as true. But, more importantly, the Court has not required specific and detailed factual allegations, even in cases where a defendant's state of mind is critical to the plaintiff's claims. Moreover, the Court has focused on the complaint as a whole, emphasizing the importance of drawing inferences in the plaintiff's favor, and resisting defendant's attempts to suggest alternative explanations for their alleged misconduct.

One can see this approach operating when the Court parsed pleadings for other purposes as well. For example, in *Dart Cherokee Basin Operating Company, LLC v. Owens*,[161] a case involving the sufficiency of a notice of removal, petitioners had relied on *Iqbal* to assert that their notice of removal contained the required "short and plain statement of the grounds for removal" even though it did not contain evidence showing that the case satisfied the Class Action Fairness Act's $5 million amount in controversy requirement.[162] Respondent rested on the lower court's holding that the allegation as to jurisdictional amount was "conclusory" under *Twombly*.[163] At oral argument, Justices Kagan and Ginsburg emphasized that the language regarding the notice of removal tracked Rule 8 and that under Rule 8 it is unnecessary to plead evidence.[164] Justice Breyer expressed his consternation about what conclusory even meant.[165] In a 5-4 opinion, the Court, applying the plausibility standard, sided with petitioners and stated that pleading evidence is not necessary for a removing defendant to establish the sufficiency of the notice of removal.[166]

And in *National Pork Producers Council v. Ross*,[167] five Justices, in separate opinions, found that the challengers to a California state law adequately alleged that the state law burdened interstate commerce, although they disagreed on what should follow from those allegations. *Ross* was a challenge to California's Proposition 12 for allegedly burdening interstate commerce by forcing pork producers to comply with California requirements regardless of their location. The Ninth Circuit affirmed the district court's dismissal of the complaint, reasoning that there was no

161. 574 U.S. 81 (2014).

162. Brief for Petitioners at 3, *Dart Cherokee*, 574 U.S. 81 (No. 13-719), 2014 WL 3828440.

163. Brief for Respondent at 35, *Dart Cherokee*, 574 U.S. 81 (No. 13-719), 2014 WL 3704562.

164. Transcript of Oral Argument at 37, *Dart Cherokee*, 574 U.S. 81 (No. 13-719), 2014 WL 9866150 (Justice Ginsburg noting that requiring evidence "is quite an extreme interpretation and counter to the whole thrust of the Federal rules"); *id.* at 39 (Justice Kagan referring to "notice pleading" standards).

165. *Id.* at 45–46.

166. *Dart Cherokee*, 574 U.S. at 89. The dissenters did not disagree about the applicable pleading standard but would have dismissed the case as improvidently granted. *Id.* at 102 (Scalia, J., dissenting).

167. 598 U.S. 356 (2023).

exterritorial effect under the dormant Commerce Clause and the alleged cost to market participants was not a substantial burden.[168]

The plaintiffs argued that the complaint plausibly alleged that Proposition 12 violates the Commerce Clause under the Court's extraterritoriality and *Pike* doctrines.[169] If this was so, plaintiffs argued, their legal claim should have survived as plausible because the complaint alleged that the burdens on interstate commerce substantially outweighs local concerns.[170] The defendants maintained that the allegations failed to state a claim under *Pike*.[171] They elaborated that *Pike* balancing is only appropriate where the plaintiff has plausibly alleged a burden on interstate commerce, and there was no clearly excessive burden from the California law because pork producers already segregate supply chains, a "reality" that *Iqbal* permits courts to take into account in construing the complaint.[172]

At oral argument, counsel on behalf of the plaintiffs argued that they had sufficiently pleaded both the extraterritorial regulation and the burden on interstate commerce.[173] Justice Gorsuch pushed plaintiff's counsel to elaborate on the plausibly alleged harm to interstate commerce or consumers.[174] Counsel on behalf of the Humane Society (defendants in the case along with California) contended that the complaint was properly dismissed because it did not rebut the existence of a health and safety interest for California's regulation.[175] Justice Jackson proposed that instead, the complaint must show that it is "plausible that the burden outweighs any possible health interest."[176] The Humane Society's attorney then shifted tack and specifically invoked *Twombly* as requiring that the complaint make economic sense for it to be plausible.[177]

The Court's plurality opinion ruled in favor of the defendants. The Court stated that *Pike* requires plaintiffs to plead facts that plausibly show that a law imposes "'substantial burdens' on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other."[178] The plurality opinion specifies that plaintiffs must plead facts that plausibly show a substantial harm to interstate commerce, facts demonstrating a speculative possibility are insufficient, and plaintiffs'

168. Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021).
169. Brief for Petitioners at 19, *Ross*, 598 U.S. 356 (No. 21-468), 2022 WL 2165184.
170. *Id.* at 44–45.
171. Brief for the State Respondents at 10, *Ross*, 598 U.S. 356 (No. 21-468), 2022 WL 3284512.
172. *Id.* at 10, 42–44.
173. Transcript of Oral Argument at 24, *Ross*, 598 U.S. 356 (No. 21-468), 2022 WL 22297225.
174. *Id.* at 37.
175. *Id.* at 134.
176. *Id.* at 140–41.
177. *Id.* at 138–41.
178. *Ross*, 598 U.S. at 383.

complaint failed to meet these requirements.[179] The plurality's assessment of whether the plaintiffs had plausibly alleged a violation of substantial burden on interstate commerce was guided by a 1978 case, *Exxon Corp. v. Governor of Maryland*.[180] Because the facts alleged in *Ross* suggested no more of a burden on interstate commerce than the facts in *Exxon Corp.*, the plurality concluded that the plaintiffs had not sufficiently alleged a substantial burden.[181] And when the plurality looked to the standards set forth in *Iqbal* and *Twombly*, it found that the allegations as to a substantial burden on interstate commerce were "nothing more than a speculative possibility."[182] Notably, the plurality did not find that the allegations in the complaint were conclusory—only that they did not plausibly establish a substantial burden on interstate commerce. At the same time, five Justices found that the complaint adequately alleged a substantial burden on interstate commerce, although they disagreed about the legal effect of those allegations.[183]

In *Tyler v. Hennepin County*,[184] the Court also rejected the defendants' attempt to rely on *Iqbal* and *Twombly* in the context of standing. In *Tyler*, an individual plaintiff brought a suit against Hennepin County, alleging that it unlawfully retained excess proceeds from the sale of her home in violation of the Takings Clause of the Fifth Amendment. The Eighth Circuit held that the county did not violate the Takings Clause[185] and the Court granted certiorari.[186]

Defendants argued in their merits brief that plaintiff's allegations as to injury-in-fact were not sufficient under *Twombly* and *Iqbal*.[187] The gravamen of defendants' argument rested on the premise that to plausibly allege injury-in-fact the plaintiff had to exclude an obvious alternative explanation: that the sale of her home did not cause her injury because she would not have received the $25,000 difference between the outstanding taxes and fees she owed and the price at which the property was sold.[188]

179. *Id.* at 385.
180. 437 U.S. 117 (1978).
181. 598 U.S. at 383–85 (plurality opinion).
182. *Id.* at 386–87.
183. *See id.* at 394 (Barrett, J., concurring in part); *id.* at 397 (Roberts, C.J., concurring in part and dissenting in part on behalf of four Justices). As one reads the separate opinions, however, it is evident that the disagreement between the approaches was not so much about the nature of the allegations as it was about whether certain consequences of California's rule could be characterized as "compliance costs" or harms to the interstate market. *Id.* at 399–403 (Roberts, C.J., concurring in part and dissenting in part).
184. 598 U.S. 631 (2023).
185. Tyler v. Hennepin Cnty., 26 F.4th 789 (8th Cir. 2022).
186. 143 S. Ct. 644 (2023).
187. Brief for Respondents at 12, *Tyler*, 598 U.S. 631 (No. 22-166), 2023 WL 2759804.
188. *Id.* 12–13.

Defendants claimed that the complaint failed to exclude this "obvious alternative explanation" because the plaintiff had never alleged that she had equity in her home and had never disclaimed the existence of other debts or encumbrances exceeding $25,000.[189] They also made reference to public records showing encumbrances to support their argument that the complaint had not plausibly established injury-in-fact.[190]

At oral argument, Chief Justice Roberts pushed back on defendants' premise that a property is valueless just because the owner owes money on it.[191] Hennepin County's attorney maintained that *Iqbal* requires ruling out reasonable alternatives, and as a consequence the complaint had to allege that the property was worth more than the debt owed by the plaintiff.[192] Justice Barrett disagreed, saying that the plaintiff does not have to "negate every possible claim."[193]

The Court did not take up the invitation to insist that a complaint refute "obvious alternative explanations." Although the Court's majority opinion did not refer to *Iqbal*, tucked into the standing analysis, the majority stated that "Tyler need not definitively prove her injury or disprove the County's defenses" and that she had plausibly alleged that she has suffered financial injury.[194] *Tyler* is thus consistent with the arc of cases in which the Court has resisted applying plausibility pleading broadly.[195]

This trend is not uniform. On two occasions over the past fifteen years, the Court has read allegations in plaintiffs' complaint in a way that is arguably in tension with notice pleading principles. *Department of Homeland Security v. Regents of the University of California*[196] involved a challenge to the Trump Administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain undocumented people who had entered the United States as children. The case involved complex questions of administrative law, but one principal issue addressed by the Court was whether the plaintiffs stated a plausible equal protection claim against the defendants.[197]

189. *Id.* 12–13.
190. *Id.* 13–14.
191. Transcript of Oral Argument at 70–71, *Tyler*, 598 U.S. 631 (No. 22-166), 2023 WL 9375480.
192. *Id.* at 71.
193. *Id.*
194. *Tyler*, 598 U.S. at 637.
195. It is possible that the Court did not discuss the defendants' argument regarding "obvious alternative explanations" because it did not believe they were obvious, but its failure to even engage with the argument suggests an approach more consistent with notice pleading.
196. 591 U.S. 1 (2020).
197. *Id.* at 16.

In a portion of the opinion that only commanded a plurality (himself and Justices Ginsburg, Breyer, and Kagan), Chief Justice Roberts determined that the plaintiffs had not plausibly alleged an equal protection claim. The plaintiffs, relying on the factors set forth in *Arlington Heights*, argued that they had shown that an invidious discriminatory purpose was a motivating factor in the decision to rescind DACA by pointing to three factors: "(1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump."[198] The plurality found the first insufficient because Latinos are a large portion of undocumented people in the United States, so "one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program."[199] As to the second, the plurality was unconvinced that the history of the DACA rescission was unusual, reasoning that the rescission occurred in response to new information, namely the Attorney General's concern about the legality of the program.[200] And even if Trump's statements about Latinos "evince[d] discriminatory intent," there were no allegations showing that they were "contemporary statements probative of the decision at issue" because there were other relevant actors more directly involved in the rescission decision.[201] In these respects, the plurality accepted whole cloth the arguments made by the United States in its briefing.[202]

Justice Sotomayor, writing separately, disagreed with the plurality's assessment of the allegations. President Trump's statements were relevant because they "bear on unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA."[203] Justice Sotomayor also criticized the plurality for looking at the disparate impact on Latinos in isolation: "At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier."[204] And Justice Sotomayor criticized the plurality's treatment of the history of the DACA rescission as

198. *Id.* at 34 (plurality opinion).

199. *Id.* ("Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.").

200. *Id.* at 34–45.

201. *Id.* at 35 (citation and internal quotations omitted).

202. Brief for the Petitioners at 54–57, *Dep't of Homeland Security*, 591 U.S. 1 (Nos. 18-587, 18-588, 18-589), 2019 WL 3942900.

203. *Dep't of Homeland Security*, 591 U.S. at 37–38 (Sotomayor, J., concurring in part, concurring in judgment in part, and dissenting in part).

204. *Id.* at 38.

lacking in context.[205] In all of these respects, Justice Sotomayor's opinion bears striking similarity to her opinion for the majority in *Vullo*, in which she also emphasized the importance of drawing inferences in the plaintiff's favor at the pleading stage, taking pains to read the allegations in a broad context, not in isolation.

Wood v. Moss[206] is also in arguable tension with the broad notice pleading arc of the past fifteen years. There the Court assessed whether a complaint had plausibly alleged that the only reason Secret Service agents had displaced them from a protest against the president was because of the viewpoint they were expressing in their protest. The Court found that the complaint did not sufficiently allege viewpoint discrimination in large part because a map that the protesters attached to their complaint "corroborates that, because of their location, the protesters posed a potential security risk to the President."[207] And because the case revolved around qualified immunity, so long as the agents had a valid security reason to relocate the protesters, they were immune from a damages suit.[208] The Government defendants who had argued in their briefing, in reliance on *Iqbal*, that even if the allegations were "consistent with unlawful conduct," they did not refute the "obvious alternative explanation" that the Secret Service agents were motivated by security concerns for the President, not by their intent to discriminate against the protesters' political message.[209] The plaintiffs, by contrast, sought to establish how their factual allegations met the plausibility pleading standard by pointing to alleged differential treatment of pro-Bush and anti-Bush protesters, as well as an alleged history of Secret Service agents engaging in viewpoint discrimination in other contexts.[210] The Court, in resolving the case on qualified immunity grounds, did not directly endorse the defendants' invitation to find an "obvious alternative explanation" for the conduct alleged in the complaint.[211]

In sum, in a broad range of cases in which the factual sufficiency of a complaint was addressed directly or indirectly, the Court's opinions since *Iqbal* reflect a pleading standard notably consistent with notice pleading. The Court has rejected arguments that a complaint must contain allegations that rule out lawful alternative explanations for the defendant's conduct. It

205. *Id.* at 38–39.
206. 572 U.S. 744 (2014).
207. *Id.* at 762.
208. *Id.* at 763.
209. Reply Brief for Petitioners at 2–3, *Wood*, 572 U.S. 744 (No. 13-115), 2014 WL 984991 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009)).
210. Brief for Respondents at 16–31, *Wood*, 572 U.S. 744 (No. 13-115), 2014 WL 546897.
211. Petitioners had invited the Court to rely on *Iqbal* and *Twombly*'s logic of finding an "obvious alternative explanation" to rebut the plausibility of the plaintiffs' claims. *See* Reply Brief for Petitioners at 2–3, *Wood*, 572 U.S. 744 (No. 13-115), 2014 WL 984991 (quoting *Iqbal*, 556 U.S. at 682).

has insisted that complaints be read charitably and as a whole, with reasonable inferences drawn in the plaintiff's favor. Even in cases in which the defendant's state of mind was at issue, the Court has credited sparse allegations. And at oral argument, Justices from across the ideological spectrum have expressed support for pleading principles consistent with the *Conley* era. If *Iqbal* and *Twombly* were meant to transform pleading, the Court has not followed through on that promise in these cases.

B. The Role of Legal Sufficiency at the 12(b)(6) Stage

In the previous Section, I reviewed post-*Iqbal* pleading decisions concerning factual sufficiency and demonstrated that the Court's approach to those cases has been fundamentally consistent with notice pleading principles. In this Section, I turn my focus to cases addressing the legal sufficiency of plaintiff's claims to show that in this area too the Court has been broadly consistent with the *Conley* era, in which courts closely examined the plaintiff's legal theory at the Rule 12(b)(6) stage. More importantly, the Court has resolved many cases on legal sufficiency grounds even as parties sought to deploy *Iqbal* and *Twombly* broadly to undermine the factual sufficiency of particular pleadings.

1. Legal Sufficiency as a Function of Prohibited Conduct

The first set of cases I consider in this Section are those in which the Court's decision turned on statutory interpretation—namely cases in which the Court addressed whether the conduct alleged by the defendant was actionable under the relevant statute. In *Twitter, Inc. v. Taamneh*,[212] for example, the Court unanimously held that complaints brought by terrorist attack victims against social media platform operators were insufficient to support claims under 18 U.S.C. § 2333(d)(2) that the operators provided material support to terrorist groups, aiding and abetting the attacks.[213] The parties devoted significant attention to the question of whether the plaintiffs had sufficiently alleged as a matter of fact that the Twitter knew that its platform were being used by ISIS to assist in its terrorist attacks.[214] The plaintiffs emphasized that the court's role is limited to deciding whether the factual allegation at issue (knowledge) is adequately supported by facts such

212. 598 U.S. 471 (2023).
213. *Id.*
214. *Compare* Brief for Respondents at 14, 72–73, *Taamneh*, 598 U.S. 471 (No. 21-1496), 2023 WL 199372, *with* Reply Brief for Respondents Facebook, Inc. and Google LLC Supporting Petitioner at 3, *Taamneh*, 598 U.S. 471 (No. 21-1496), 2023 WL 2020072.

that it is plausible.[215] And although *Iqbal* and *Twombly* were not mentioned at oral argument, the parties sparred over the level of specificity required for a complaint's allegations, with plaintiffs' counsel citing *Leatherman* and *Swierkiewicz* for the proposition that pleadings are not required to include specific allegations.[216]

The Court, however, declined the parties' invitation to wade into the sufficiency of the complaint's factual allegations. The Court's opinion was based instead on its interpretation of the requirements necessary to establish aiding and abetting liability under Section 2333(d)(2).[217] The Court held that it was not sufficient for the plaintiffs simply to allege that the defendants knew they were "playing some sort of role in ISIS' enterprise," allegations that the Court found were adequately supported by the complaint.[218] Instead, the plaintiffs had to show more, namely that the defendants "culpably associated themselves" with ISIS' attacks by consciously trying to help.[219] Thus, the failing in the plaintiffs' complaint was not about whether it was factually sufficient, but about whether the plaintiffs were correct as a matter of law that knowing and failing to act was sufficient to establish aiding and abetting liability.

The Court also declined opportunities to address factual sufficiency in a pair of cases involving securities fraud claims. *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[220] involved a securities class action in which investors alleged that the defendants fraudulently omitted material information in the corporation's SEC filing.[221] The Sixth Circuit held that investors adequately pleaded fraud as to some of their claims but not as to others.[222] The Supreme Court granted certiorari to address the question of how Section 11 of the Securities Act of 1933 applied to statements of opinion.

Although neither party addressed *Iqbal* or *Twombly* in its briefing,[223] the plausibility pleading standard was raised multiple times during oral

215. Brief for Respondents at 72, *Taamneh*, 598 U.S. 471 (No. 21-1496), 2023 WL 199372.

216. *See* Transcript of Oral Argument at 41, 49, 59, 128, 143, *Taamneh*, 598 U.S. 471 (No. 21-1496), 2023 WL 9375469.

217. *Taamneh*, 598 U.S. at 498–500.

218. *Id.* at 497.

219. *Id.* at 498–500 (citation and internal quotations omitted). In a very recent opinion, the Supreme Court relied on *Taamneh* to unanimously hold that the Mexican Government had not sufficiently alleged that certain gun manufacturers had aided and abetted illegal trafficking of guns into Mexico. Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos, 605 U.S. 280, 294–98 (2025).

220. 575 U.S. 175 (2015).

221. *Id.* at 179–80.

222. Ind. State Dist. Council v. Omnicare, Inc., 719 F.3d 498 (6th Cir. 2013).

223. Brief for the Petitioners at 16, *Omnicare*, 575 U.S. 175 (No. 13-435), 2014 WL 2568217; Brief for the Respondents at 33, *Omnicare*, 575 U.S. 175 (No. 13-435), 2014 WL 4253028; Reply Brief for the Petitioners at 16, *Omnicare*, 575 U.S. 175 (No. 13-435), 2014 WL 4748549.

argument in colloquies with the Solicitor General, who had filed an amicus curiae brief supporting vacatur and remand. These colloquies reveal the United States walking a fine line by attempting to support the plaintiffs' theory of the case in *Omnicare* but also by deploying *Iqbal* and *Twombly* in the face of questioning from the Justices as to how easy it might be for securities class action plaintiffs to bring a claim for statements of opinion which turn out to be wrong. For example, when Justice Alito raised a concern about whether it would be too easy for plaintiffs to allege a Section 11 violation every time a statement of opinion turned out to be wrong, the United States noted that *Iqbal* and *Twombly*'s "stringent" standard would not permit "conclusory" allegations.[224] Justice Alito then asked if *Twombly* requires plaintiffs to allege in their complaint the kind of investigation that was conducted by the defendant.[225] The United States ducked the question, reiterating that it would depend on the facts of the case but that under *Twombly* and *Iqbal* a plaintiff could not just give conclusory allegations.[226] And when Justice Breyer and Chief Justice Roberts came at the issue from the other side, by suggesting that the question of whether corporate officers reasonably believed certain statements of opinion to be true was one for the jury after discovery, the United States resisted the suggestion by once again pointing to *Twombly* and *Iqbal*'s teachings.[227]

The Court's majority opinion did not adopt any of the United States' positions regarding how *Iqbal* and *Twombly* should be applied, but vacated and remanded for the lower court to consider the pleadings anew based on its guidance.[228] The Court directed that the complaint be reviewed to determine whether it sufficiently alleged that Omnicare had omitted specific facts, and if so, whether it would have been material to a reasonable investor.[229] The Court provided some guidance to the lower court tasked with reviewing the pleadings—for instance by highlighting certain allegations as conclusory because they merely recited the elements of the cause of action.[230] But in so doing, the Court rejected the defendant's invitation to construct pleading rules according to desired policy—namely Omnicare's concern that by permitting liability based on statements of

224. Transcript of Oral Argument at 47, *Omnicare*, 575 U.S. 175 (No. 13-435), 2014 WL 5593456 ("First of all, it's not just that they could allege a conclusion under this Court's decision in *Twombly* and *Iqbal*. It's that you have to have facts to support it.").

225. *Id.* at 50.

226. *Id.* at 50.

227. *Id.* at 50–53.

228. *Omnicare*, 575 U.S. at 195.

229. *Id.* at 196.

230. *Id.* (finding conclusory allegations that Omnicare "omitted to state facts necessary to make the statements made not misleading" and that Omnicare "lacked 'reasonable grounds for the belief' it stated respecting legal compliance." (citation omitted)).

opinion that amount to omissions, the Court would be "threatening 'unpredictable' and possibly 'massive' liability."[231] This concern, the Court noted, was for Congress, "not the courts"[232]—and courts could manage any complexity by subjecting the pleadings to ordinary rules.

In *Janus Capital Group, Inc. v. First Derivative Traders*,[233] the Court addressed legal sufficiency in another case involving SEC violations.[234] The Fourth Circuit had held that the investors had adequately pleaded allegations sufficient to survive a motion to dismiss.[235] Defendants petitioned for certiorari.[236] As with *Omnicare*, the case provided opportunities for the Court to address the factual sufficiency of the pleadings.

In their brief, defendants cited *Iqbal* to argue that the complaint did not make factual allegations sufficient to conclude that Janus Capital Management (JCM) made the statements at issue, because the statements were made by Janus Funds, not JCM.[237] Defendants argued that this failure meant that the complaint could not satisfy Rule 8, much less Rule 9(b).[238] Plaintiffs responded that the nature of the relationship between a mutual fund and the investment advisor reinforces the plausibility of the allegations that JCM made the statements in the prospectuses.[239] Plaintiffs reasoned that courts applying Rule 9(b) follow the general rule that a court may draw reasonable inferences from the alleged facts to determine whether the complaint states a plausible claim for relief.[240]

At oral argument, plaintiffs' counsel argued that the complaint was adequately pleaded, but the Court was focused on the question of what the word "make" means in Section 10(b)(5).[241] The majority opinion held that JCM did not make the statements in the Janus Investment Fund prospectuses within the meaning of Section 10(b)(5); rather Janus Investment Fund made them.[242] Therefore, First Derivative failed to state a claim against JCM under SEC Rule 10(b)(5), which only applies to parties who "make" an actionable statement.[243] Thus, although it had opportunities to address additional questions concerning the factual sufficiency of the pleadings in

231. *Id.* at 193 (citation omitted).
232. *Id.*
233. 564 U.S. 135 (2011).
234. *Id.* at 140.
235. In re Mutual Funds Inv. Litig., 566 F.3d 111, 131 (4th Cir. 2009).
236. Petition for a Writ of Certiorari, *Janus*, 564 U.S. 135 (No. 09-525), 2009 WL 3614467.
237. Brief for Petitioners at 9–10, *Janus*, 564 U.S. 135 (No. 09-525), 2010 WL 3501188.
238. *Id.* at 31.
239. Brief for Respondent at 21–22, *Janus*, 564 U.S. 135 (No. 09-525), 2010 WL 4253501.
240. *Id.* at 53.
241. Transcript of Oral Argument at 44–45, *Janus*, 564 U.S. 135 (No. 09-525), 2010 WL 4956290.
242. *Janus*, 564 U.S. at 146–47.
243. *Id.* at 148.

the case, the majority rested its decision on its interpretation of the word "make" in the securities laws. The dissenters disagreed as to the interpretation of the word "make," and then proceeded to argue that the complaint's allegations were sufficient to satisfy the elements of Section 10(b)(5).[244] Neither opinion addressed *Twombly* or *Iqbal*.

A final case in which the Court addressed whether the plaintiff's legal theory was viable is *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita, Inc*.[245] The plaintiffs had alleged that a healthcare plan violated the Medicare Secondary Payer Act (MSPA) by treating individuals with kidney failure differently than other patients for purposes of benefit eligibility.[246] The Sixth Circuit held that DaVita had plausibly alleged unlawful discrimination.[247]

In their briefing, plaintiffs argued that their allegations met the *Iqbal* leading standard.[248] They asserted that they had plausibly alleged a violation of the MSPA's anti-differentiation provision and that the plan had a prohibited disparate impact.[249] Pleading was not discussed at oral argument. And the Court reversed the Sixth Circuit's ruling without addressing pleading, holding that the plan did not violate MSPA because the plan provided the same dialysis benefits to all plan participants.[250] In other words, the Court reversed because of its interpretation of what kind of discrimination is actionable under MPSA, not the adequacy of the pleadings.

In each of the cases discussed above, the Court addressed the viability of the plaintiff's legal theory, while either crediting or not addressing the plaintiff's factual allegations. In each of these cases, the parties made arguments that invited the Court to broaden the impact of plausibility pleading. And in each case, the court declined the invitation. The Court's silence is not determinative, but it suggests at least some hesitation to amplify *Twombly* and *Iqbal*'s logic.

2. Legal Sufficiency in Other Contexts

In several cases, legal sufficiency arose regarding other issues in a case, such as defenses, causation, or technical pleading requirements. Again,

244. *Id.* at 158–61 (Breyer, J., dissenting).
245. 596 U.S. 880 (2022).
246. *See id.* at 883.
247. DaVita, Inc. v. Marietta Mem'l Hosp. Emp. Health Benefit Plan, 978 F.3d 326 (6th Cir. 2020).
248. Brief for Respondents at 43, *Marietta*, 596 U.S. 880 (No. 20-1641), 2022 WL 216163.
249. *Id.* at 31, 47.
250. *Marietta*, 596 U.S. at 885.

these were cases in which the parties' arguments provided the Court with opportunities to address the impact of plausibility pleading more broadly. And in each case the Court declined those opportunities.

One case addressed the role of a common law defense in an ERISA case. In *Fifth Third Bancorp v. Dudenhoeffer*,[251] the Supreme Court granted certiorari on the question of whether, to state a claim that a fiduciary of an employee stock ownership plan violated the duty of prudence by continuing to invest plan assets in the employer's stock, a plaintiff must overcome a "defense-friendly standard that the lower courts [had] called a 'presumption of prudence.'" [252] In *Dudenhoeffer*, plaintiffs were participants in an employee stock ownership plan (ESOP) who brought a class action against their employer under the Employee Retirement Income Security Act (ERISA).[253] The Sixth Circuit held that the complaint plausibly alleged a class claim under ERISA, and although it recognized the so-called "presumption of prudence" defense for fiduciary defendants, it held that this was not applicable at the pleading stage because it imposed evidentiary, not pleading, burdens.[254]

Defendants' petition for certiorari argued that the Court's review was necessary because several courts of appeals had followed *Iqbal* and *Twombly* to apply the presumption of prudence at the pleading stage.[255] In their merits brief, the defendants leaned heavily on plausibility pleading doctrine, insisting that plaintiffs must plead facts pointing to "extraordinary circumstances" that would make continuing to invest in employer securities unwise.[256] By failing to do so, petitioners contended that plaintiffs had not plausibly alleged facts showing an entitlement to relief. Defendants also analogized the requirement that the plaintiffs show a "violation of the duty of prudence as it applies to an ESOP fiduciary" to the requirement that the plaintiff in *Iqbal* overcome qualified immunity.[257] They argued that just as qualified immunity is a rebuttable presumption, so is the "business judgment rule's 'presumption that directors act . . . in the best interests of the company.'"[258] According to defendants, plaintiffs had not stated a claim for breach of the duty of prudence because their complaint revolves around the stock price declining and defendants' alleged knowledge that the losses

251. 573 U.S. 409 (2014).
252. *Id.* at 412.
253. *Id.* at 412–13.
254. Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 420 (6th Cir. 2012).
255. Petition for a Writ of Certiorari at 12–16, *Dudenhoeffer*, 573 U.S. 409 (No. 12-751), 2012 WL 6636191.
256. Petitioners' Brief on the Merits at 45, *Dudenhoeffer*, 573 U.S. 409 (No. 12-751), 2014 WL 333879.
257. *Id.* at 45–46.
258. *Id.* at 47 (citation omitted).

were approaching.[259] These allegations, defendants maintained, did not sufficiently state a claim of the breach of the duty of prudence.[260]

Plaintiffs responded that the complaint plausibly described disloyal and imprudent conduct in violation of ERISA.[261] For the duty of loyalty claim, plaintiffs characterized the complaint as demonstrating "facts that document a conflict of interest between petitioners and their duty to respondents," and showing that defendants "acted on that conflict in ways that harmed respondents."[262] Plaintiffs also argued that they pleaded adequately specific allegations as to prudence, citing *Iqbal* to stress that the complaint sufficiently moves "across the line from conceivable to plausible."[263]

The Court's majority opinion vacated the Court of Appeals decision.[264] The Court first held that no presumption of prudence applied as a substantive matter.[265] In so doing, it rejected defendants' policy-based argument that without a presumption of prudence, companies which offer ESOPs will be subjected to "meritless, economically burdensome lawsuits."[266] Although the Court recognized the validity of that concern, it held that the presumption is not "an appropriate way to weed out meritless lawsuits," identifying "careful, context-sensitive scrutiny of a complaint's allegations" instead.[267] Notwithstanding the parties' invitation, the Court did not determine whether, having resolved the presumption of prudence issue, the complaint adequately alleged an ERISA violation. Instead, it directed the Court of Appeals on remand to apply the plausibility pleading standard without application of any presumption.[268]

In so doing, however, it provided guidance which would seem to work in a defendant's favor in such cases. First, it held that allegations that a fiduciary should have known from publicly available information that the market was over- or undervaluing stock are generally implausible.[269] Instead, a plaintiff should point to "any special circumstance rendering [defendant's] reliance on the market price imprudent."[270] Second, to the extent that the plaintiff bases its theory on the defendant's failure to act on nonpublic information, "a plaintiff must plausibly allege an alternative

259. *Id.* at 50–51.
260. *Id.* at 51.
261. Brief for Respondents at 21, *Dudenhoeffer*, 573 U.S. 409 (No. 12-751), 2014 WL 827972.
262. *Id.* at 22.
263. *Id.* at 24 (citation omitted).
264. *Dudenhoeffer*, 573 U.S. at 426.
265. *Id.* at 420–25.
266. *Id.* at 424.
267. *Id.* at 425.
268. *Id.*
269. *Id.*
270. *Id.* at 427.

action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[271] On remand, the parties jointly moved to remand to the district court,[272] where they ultimately agreed to a class action settlement.[273]

Two cases addressed legal sufficiency in the context of causation. In *Comcast Corp. v. National Association of African American-Owned Media*,[274] a Black-owned media network brought a claim against Comcast, alleging that the company disfavored Black-owned networks in violation of § 1981.[275] The Ninth Circuit held that the plaintiffs had pleaded a viable claim.[276] Although the defendants sought certiorari on whether the plaintiffs had stated a plausible claim for relief, the Court limited its grant of certiorari only to the standard for causation for § 1981 claims.[277]

Despite the limited grant of certiorari, the parties made numerous pleadings-based arguments in their briefing.[278] These arguments also surfaced during oral argument, where defendants insisted that the complaint did not meet the *Iqbal* standard and that plaintiffs must plausibly plead but-for causation.[279] But several Justices pressed Comcast on how a plaintiff could satisfy its burden. Justice Gorsuch suggested that a plaintiff could allege a required mental state based on information and belief, leaving the relevant facts to be developed in discovery.[280] Justice Kagan proposed that *Swierkiewicz* applied and is still good law, elaborating that it held that plaintiffs were not required to show prima facie cases in their pleadings.[281] The Justices responded similarly to arguments made by the United States,

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271. *Id.* at 428.

272. *See* Dudenhoefer v. Fifth Third Bancorp, No. 08-cv-00538 (S.D. Ohio Feb. 12, 2016), ECF No. 130.

273. *See* Dudenhoeffer v. Fifth Third Bancorp, No. 08-cv-00538, 2016 WL 9343954, at *1 (S.D. Ohio Mar. 29, 2016) (granting preliminary approval to proposed class action settlement).

274. 589 U.S. 327 (2020).

275. *Id.* at 330.

276. *Id.* at 331.

277. 139 S. Ct. 2693 (2019).

278. Brief for Petitioner at 18, *Comcast*, 589 U.S. 327 (No. 18-1771), 2019 WL 3824689 (arguing that complaint did not negate legitimate, race-neutral reasons for Comcast's decision not to carry Entertainment Studios Network); *id.* at 45–46 (arguing that complaint had not nudged the claim "across the line from conceivable to plausible"); Brief for Respondents at 27, *Comcast*, 589 U.S. 327 (No. 18-1171), 2019 WL 4689149 (arguing that discovery was necessary to root out whether defendant had acted with animus); *id.* at 18, 53 (maintaining that complaint included well-pleaded allegations supporting inference of racial discrimination).

279. Transcript of Oral Argument at 4, 10–11, *Comcast*, 589 U.S. 327 (No. 18-1171), 2019 WL 9096157.

280. *See id.* at 11–12 ("JUSTICE GORSUCH: Isn't it perfectly common . . . when you're alleging a mental state of an opposing party and you have yet to have discovery to . . . allege on information and belief mental states, and isn't that the simple solution here?").

281. *Id.* at 13.

which appeared as *amicus curiae* in support of the defendants, without taking a position on whether the particular pleading in *Comcast* plausibly established a § 1981 claim.[282] Justices Breyer, Kavanaugh, and Alito all expressed the view in colloquies with the government that it was a rare case in which the difference between requiring that a plaintiff plead that race was a motivating factor and requiring that a plaintiff prove that race was a but-for cause would make a difference at the pleading stage. All the Justices involved in the colloquies seemed to accept the proposition that if a plaintiff could allege that race was a motivating factor, in most cases the inference could be drawn at the pleading stage that race was a but-for cause.[283]

Comcast thus provided the Court with an opportunity to opine quite broadly on what allegations were sufficient to allege discrimination, including by addressing whether *Swierkiewicz* survives *Iqbal* and *Twombly*. But the Court's majority opinion simply held, as to legal sufficiency, that the plaintiff must plead but-for causation and remanded to the Ninth Circuit to determine the sufficiency of the plaintiff's pleadings.[284] Other than citing to *Iqbal*, the Court provided no additional guidance to the lower courts.[285] The Ninth Circuit then remanded to the district court to address the sufficiency of the complaint's allegations,[286] and the parties stipulated to a joint dismissal on June 10, 2020.[287]

In *Bank of America Corp. v. City of Miami*,[288] the Court again addressed a question of legal sufficiency in the context of causation without taking on the sufficiency of the plaintiff's allegations. The case concerned a suit by the City of Miami against Bank of America and Wells Fargo alleging that their discriminatory and predatory lending practices caused financial harm to the city.[289] The Eleventh Circuit had held that the city adequately pleaded that the banks' misconduct caused its financial injuries.[290]

In their briefing, the parties sparred regarding the factual adequacy of the city's complaint, including the ongoing relevance of *Swierkiewicz* and *Leatherman*.[291] The Court's majority opinion, however, declined to address

282. *Id.* at 32.
283. *Id.* at 25–26 (Justice Breyer); *id.* at 30 (Justice Alito); *id.* at 31 (Justice Kavanaugh).
284. *Comcast*, 589 U.S. at 341.
285. *Id.*
286. Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., 804 F. App'x 709 (9th Cir. 2020).
287. *See* Joint Stipulation to Dismiss Case pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., No. 15-cv-01239 (C.D. Cal. June 10, 2020).
288. 581 U.S. 189 (2017).
289. *Id.* at 195.
290. City of Miami v. Bank of Am. Corp., 800 F.3d 1262 (11th Cir. 2015).
291. Brief for Petitioners, *Bank of Am.*, 581 U.S. 189 (No. 15-1112), 2016 WL 4446486; Brief of Respondent City of Miami at 32, 47 n.13, *Bank of Am.*, 581 U.S. 189 (No. 15-1112), 2016 WL 5800272.

the factual allegations and focused only on the appropriate causation standard for Federal Housing Act (FHA) claims.[292] Because the lower court had applied the wrong legal standard, the Court vacated and remanded for further proceedings.[293] The Court's holding was premised on the causation requirements of the FHA, not on the sufficiency (or not) of the plaintiff's factual allegations.[294] Indeed, the Court specifically declined the parties' invitation to "draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall."[295] Justice Thomas, joined by Justices Kennedy and Alito, would have gone further and held that the complaint's allegations did not satisfy the proximate cause standard elaborated by the Court.[296]

The Court also addressed legal sufficiency in technical terms in *Johnson v. City of Shelby*,[297] ultimately reaffirming pre-*Twombly* case law about the sufficiency of Section 1983 pleadings. In *Johnson*, former police officers sued the City of Shelby, Mississippi, alleging unlawful termination.[298] The Fifth Circuit dismissed the case on the basis that the officers did not assert their due process claims as § 1983 claims.[299]

Plaintiffs petitioned for certiorari, arguing that the Fifth Circuit contravened the Court's unanimous 1993 decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[300] and that the Court should accept the case to determine whether *Leatherman* was overruled by *Iqbal* and *Twombly*.[301] *Leatherman* had established that federal courts may not impose heightened pleading standards by fiat.[302] Plaintiffs also argued that the Fifth Circuit's requirement contravened *Conley*'s holding that "one misstep by counsel" should not be "decisive to the outcome."[303]

The Court summarily reversed and remanded in a *per curiam* opinion holding that the complaint did not need to expressly invoke § 1983. The Court stated that federal pleading rules do not require dismissal for an "imperfect statement of the legal theory supporting the claim asserted."[304]

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292. *Bank of Am.*, 581 U.S. at 194.
293. *Id.*
294. *Id.* at 202–03.
295. *Id.* at 203.
296. *See id.* at 211–13 (Thomas, J., concurring in part and dissenting in part). On remand, the Eleventh Circuit held that some of plaintiff's claims satisfied the proximate causation standard, but that decision was vacated as moot after the City of Miami voluntarily dismissed its complaint.
297. 574 U.S. 10 (2014).
298. *Id.*
299. Johnson v. City of Shelby, 743 F.3d 59 (5th Cir. 2013).
300. 507 U.S. 163 (1993).
301. Petition for Writ of Certiorari at 6, *Johnson*, 574 U.S. 10 (No. 13-1318), 2014 WL 1712087.
302. *Leatherman*, 507 U.S. at 168–69.
303. Petition for Writ of Certiorari at 10, *Johnson*, 574 U.S. 10 (No. 13-1318), 2014 WL 1712087.
304. *Johnson*, 574 U.S. at 11.

The opinion cited *Leatherman* and *Swierkiewicz* for the proposition that there are no heightened pleading rules for plaintiffs claiming violations of their constitutional rights.[305] The opinion distinguished *Twombly* and *Iqbal* because they were concerned with factual allegations sufficient to survive a motion to dismiss, but in *Johnson* the petitioner's complaint was not deficient in its factual allegations.[306] Perhaps most significantly, the *Johnson* Court stated that the complaint reviewed there survived under plausibility pleading because it "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city," thereby accomplishing the purpose of "inform[ing] the city of the factual basis for their complaint."[307] Notably, the complaint filed in *Johnson* reveals very little detail in terms of the allegations made against the City,[308] suggesting that the Court's understanding of the change wrought by plausibility pleading may be limited indeed.

Plausibility pleading was only elliptically referred to in *Nestle USA, Inc. v. Doe*,[309] a case in which formerly enslaved children forced to work on cocoa farms filed a class action against Nestle USA and similar corporations, alleging liability under the Alien Tort Statute (ATS). The Ninth Circuit held that plaintiffs had adequately pleaded domestic application of ATS because the corporations' operational decisions occurred in the United States.[310] The parties did not specifically address plausibility pleading in their briefs or at oral argument, but plaintiffs' counsel had a pointed colloquy with Justice Alito regarding allegations about what defendants knew about the use of enslaved child labor.[311] Plaintiffs' counsel pointed out that they alleged that defendants were closely involved in the cocoa-growing region and that they had knowledge based on reports generated by investigations made by the defendants' own employees.[312] Justice Alito noted that even under notice pleading it was not "too much to ask" for allegations that the defendants "specifically knew that forced child labor was being used on the farms or farm cooperatives with which they did business."[313]

The Court's opinion, however, never addressed the sufficiency of the allegations as to knowledge. Instead, the majority opinion, joined by eight

305. *Id.*
306. *Id.* at 12.
307. *Id.*
308. *See* Complaint, Johnson v. City of Shelby, No. 10-cv-00036 (N.D. Miss. Mar. 10, 2010).
309. 593 U.S. 628 (2021).
310. Doe v. Nestle, S.A., 929 F.3d 623, 638 (9th Cir. 2019).
311. Transcript of Oral Argument at 63–64, *Nestle*, 593 U.S. 628 (Nos. 19-416, 19-453), 2020 WL 10180656.
312. *Id.*
313. *Id.* at 64.

Justices, held that in order to plead facts sufficient to support a domestic application of ATS, "plaintiffs must allege more domestic conduct than general corporate activity."[314] On remand, the Ninth Circuit affirmed the district court's order dismissing the complaint.[315]

In each of the cases summarized above, the Court closely examined the legal sufficiency of the plaintiff's claims, without addressing the sufficiency of the plaintiff's factual allegations. Indeed, in some of the cases, the Court credited plaintiff's allegations in ways consistent with notice pleading standards. But most germane to my argument here, each of these cases presented the Court with opportunities to wade into factual sufficiency, and in each case the Court declined the opening.

C. Pleading Ignored

The Court also has heard several cases in which it ignored arguments regarding pleading, ultimately resolving the cases on other grounds. In *Arizona Christian School Tuition Organization v. Winn*,[316] taxpayers challenged Arizona's tuition tax credit, alleging that it impermissibly funded private religious schools.[317] The Ninth Circuit held that the taxpayers had sufficiently alleged an as-applied Establishment Clause claim.[318]

Defendants petitioned for certiorari on the question of standing and the adequacy of the pleadings.[319] On the merits, the defendants argued, inter alia, that the Ninth Circuit erred in finding that the complaint sufficiently pleaded an establishment clause violation.[320] They argued that the Ninth Circuit essentially applied the "no set of facts" standard from *Conley*, abrogated by *Twombly*.[321] The Court never addressed pleading, however, finding instead that the taxpayers lacked standing, with Justice Kagan authoring a dissent arguing that standing was appropriate.[322]

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314. *Nestle*, 593 U.S. at 634. Justice Alito dissented on the ground that the Court, by addressing whether the complaint adequately alleged extraterritoriality, went beyond the question presented. *Id.* at 657–58 (Alito, J., dissenting).

315. Doe v. Nestle SA, 4 F.4th 706 (9th Cir. 2021).

316. 563 U.S. 125 (2011).

317. *Id.*

318. Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1013 (9th Cir. 2009).

319. Petition for Writ of Certiorari, *Winn*, 563 U.S. 125 (No. 09-987), 2010 WL 619543.

320. Brief for Petitioner Arizona Christian School Tuition Organization at 46, *Winn*, 563 U.S. 125 (Nos. 09-987, 09-991), 2010 WL 3017756.

321. *Id.* at n.17; *see also* Brief of Respondents in Support of Petitioners at 11, *Winn*, 563 U.S. 125 (Nos. 09-987, 09-991), 2010 WL 3017758 (arguing that plaintiffs failed to state facts sufficient to support a claim that the program "lacks a valid secular purpose" or that the Arizona legislature acted to endorse religion).

322. *Winn*, 563 U.S. at 146; *id.* at 150 (Kagan, J., dissenting).

In *Rotkiske v. Klemm*,[323] plaintiff filed suit against Klemm & Associates alleging violations of the Fair Debt Collection Practices Act (FDCPA).[324] The Third Circuit affirmed the district court's motion to dismiss for failure to state a claim on statute of limitations grounds, reasoning that FDCPA's one-year limitations period begins when the defendant violates FDCPA, not when the plaintiff discovers the violation.[325] On the merits, defendants argued that the complaint was conclusory and failed to state a claim that was plausible on its face.[326] The Court ruled for the defendants, reasoning that the limitations period began on the date of the alleged violation, not when the violation is discovered.[327] Notably, however, Justice Thomas's opinion for the Court cited to *Swierkiewicz* in elaborating the standard for deciding a motion to dismiss.[328]

In *Mckesson v. Doe*,[329] a police officer was injured at a protest and sued the protest's organizer.[330] The Fifth Circuit held that the officer sufficiently stated a plausible negligence claim against the organizer.[331] In his merits briefing, the defendant argued that the plaintiff failed to allege sufficient facts to state a claim.[332] Specifically, the defendant insisted that the allegations that he knew of the attack and ratified it were implausible.[333] Citing to *Twombly*, the defendant argued that the plaintiff's mere assertions that defendant incited a riot were insufficient.[334] Further, defendant maintained that there were no allegations that he said anything to encourage the violence.[335]

In a *per curiam* opinion, the Court summarily vacated and remanded the Fifth Circuit's ruling.[336] The Court did not address pleading, but held that the Fifth Circuit's interpretation of state law to permit recovery under the specific circumstances of the case is "too uncertain a premise on which to address the question presented."[337] The Court reasoned that the constitutional issue was only implicated if Louisiana law permits recovery

323. 589 U.S. 8 (2019).
324. *Id.*
325. Rotkiske v. Klemm, 890 F.3d 422, 424 (3d Cir. 2018).
326. Brief for Respondents at 43, *Rotkiske*, 589 U.S. 8 (No. 18-328), 2019 WL 3230947.
327. *Rotkiske*, 589 U.S. at 10.
328. *Id.* at 10 n.1.
329. 592 U.S. 1 (2020).
330. *Id.* at 2.
331. Doe v. Mckesson, 945 F.3d 818, 827 (5th Cir. 2019).
332. Reply Brief for Petitioner at 3, *Mckesson*, 592 U.S. 1 (No. 19-1108), 2020 WL 3512838.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Mckesson*, 592 U.S. at 6.
337. *Id.* at 4.

under these circumstances, and the question of state law should have been certified to the Louisiana Supreme Court.[338]

As with the cases discussed in Section II.B, the Court had opportunities in *Winn*, *Rotkiske*, and *McKesson* to make clear the significant change wrought by plausibility pleading, but in each instance the Court declined. Indeed, in *Rotkiske* the Court referred to pre-*Twombly* case law in discussing the standards for pleading.[339] Thus, these cases each serve as additional examples of a Court that has, at most, feebly embraced plausibility pleading.

D. Failure to Discipline

Several Courts of Appeals have announced opinions pointing out the tensions between *Iqbal* and *Twombly* on one hand and pre-2007 notice pleading doctrine on the other. And even when these decisions have sought to minimize the effect of *Iqbal* and *Twombly* by seeking to harmonize them with pre-2007 doctrine, the Court has denied certiorari. Because it is rare for any Justice to issue any statement respecting denial of certiorari, and because the current Court takes fewer and fewer cases on certiorari each year, one should be cautious about drawing any conclusions from the Court's refusal to act in these cases. But it is noteworthy that many of these lower court decisions, discussed in detail below, involved antitrust or civil rights claims, just like *Iqbal* and *Twombly*, which one might expect the Roberts Court to pay particularly close attention to in the context of pleading.

In *West Penn Allegheny Health System Inc. v. UPMC*, for example, a hospital system sued another hospital alleging antitrust violations.[340] The Third Circuit declined to apply *Twombly*'s "plausibility standard with extra bite in antitrust to other complex cases."[341] Defendants petitioned for certiorari, characterizing the Third Circuit's decision as creating an "end-run" around *Iqbal* and *Twombly*.[342] Respondents argued that the Third

338. *Id.* at 4–5. After remand to the Fifth Circuit, the Louisiana Supreme Court accepted certification and issued an opinion answering that a protest leader could be sued for negligence "under the facts alleged in the complaint." Doe v. Mckesson, 339 So. 3d 524, 526 (La. 2022). The Fifth Circuit subsequently issued a new decision permitting plaintiff's negligent protest claims against Defendant. *See* Doe v. Mckesson, 71 F.4th 278, 289 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 913 (2024). The district court recently granted defendant's motion for summary judgment. Ford v. Mckesson, 739 F. Supp. 3d 344, 347 (M.D. La. 2024).

339. Rotkiske v. Klemm, 589 U.S. 8, 10 n.1 (2019).

340. W. Penn Allegheny Health Sys. Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010).

341. *Id.* at 98.

342. Petition for a Writ of Certiorari at 11, 19, UPMC v. W. Penn Allegheny Health Sys., Inc., 565 U.S. 817 (2011) (No. 10-1341), 2011 WL 1633949.

Circuit appropriately concluded that West Penn adequately pleaded antitrust claims against UPMC and Highmark.[343] The Court denied certiorari.[344]

The Ninth Circuit's decision in *Starr v. Baca* raised the relevance of *Iqbal* and *Twombly* in the context of a § 1983 suit for damages resulting from an attack that the plaintiff suffered while detained in the Los Angeles County Jail.[345] The Ninth Circuit held that the plaintiff had adequately stated a claim for relief based on the county sheriff's deliberate indifference.[346] The court detailed the allegations in the complaint regarding what Sheriff Baca knew or should have known and held that those allegations were sufficient to satisfy Rule 8(a).[347] The Ninth Circuit directly acknowledged that the tension between the Court's *Iqbal* and *Swierkiewicz*.[348]

> The juxtaposition of *Swierkiewicz* and *Erickson,* on the one hand, and *Dura, Twombly,* and *Iqbal,* on the other, is perplexing. Even though the Court stated in all five cases that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard in *Dura, Twombly* and *Iqbal*.[349]

The court resolved this difference by using the less stringent standard it associated with *Swierkiewicz*.[350] Defendant petitioned for rehearing en banc, which was denied over the votes of eight dissenters, who argued that the panel majority disregarded *Twombly* and *Iqbal*.[351] Defendant then petitioned for certiorari, arguing that the Ninth Circuit failed to apply *Iqbal* properly.[352] Petitioners posited that the allegations were not specific enough, reasoning that problems in the jail did not necessarily give the sheriff notice that the plaintiff specifically was at risk of assault by corrections officers.[353] Petitioners compared the allegations to a Third Circuit decision in which similar facts failed *Iqbal*'s plausibility standard.[354]

In opposition, respondent argued that the Ninth Circuit correctly applied *Iqbal*, and that plaintiffs are not required to show a probability of success at

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343. Brief for Respondent in Opposition at 2, *UPMC*, 565 U.S. 817 (Nos. 10-1341, 10-1346), 2011 WL 2581847.

344. *UPMC*, 565 U.S. 817.

345. Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011).

346. *Id.* at 1204.

347. *Id.* at 1209–12.

348. *Id.* at 1215–16.

349. *Id.* at 1215.

350. *Id.* at 1216.

351. *See* Starr v. County of Los Angeles, 659 F.3d 850, 851 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

352. Petition for Writ of Certiorari at 31–32, Baca v. Starr, 566 U.S. 982 (2012) (No. 11-834), 2011 WL 6950472.

353. *Id.* at 36.

354. *Id.* at 39 (citing Argueta v. U.S. Immigr. & Customs Enf't, 643 F.3d 60 (3d Cir. 2011)).

the pleading stage.[355] Respondents asserted that their complaint's factual allegations go beyond reciting the elements of the claim and that the Ninth Circuit properly found that the allegations in the complaint plausibly suggest that defendant was deliberately indifferent to the threat of violence against plaintiff.[356] The Court denied certiorari.[357]

The Fourth Circuit's decision in *Woods v. City of Greensboro*[358] involved another civil rights action implicating *Iqbal* and *Twombly*. In *Woods*, a minority-owned business brought a lawsuit against the City of Greensboro, claiming race discrimination under § 1981 based on the city's denial of a loan.[359] The Fourth Circuit held that the business had sufficiently alleged a race discrimination claim against the city, balancing the tension between *Swierkiewicz* and *Iqbal*.[360] The court noted that "discrimination claims are particularly vulnerable to premature dismissal because civil rights plaintiffs often plead facts that are consistent with both legal and illegal behavior, and civil rights cases are more likely to suffer from information-asymmetry, pre-discovery."[361]

The city petitioned for certiorari, arguing that the Fourth Circuit's opinion was contrary to *Iqbal*.[362] The city argued that the Fourth Circuit's majority opinion makes the Court's pleading standard "a toothless saw when applied to claims of race discrimination" because a plaintiff could always argue that the motivation was implicit bias.[363] The petition for writ of certiorari was denied.[364]

Similarly in *Bausch v. Stryker Corp.*, plaintiff sued the manufacturer of a hip replacement device for negligence and strict liability for a defective product.[365] The Seventh Circuit held that plaintiff's allegations properly state a claim, satisfying *Iqbal*'s plausibility requirement.[366] The opinion cited *Swierkiewicz* for the proposition that Rule 8 is meant to "focus litigation on the merits of a claim," not on technicalities that may keep plaintiffs out of court.[367] The court stated that in applying *Iqbal* to medical

355. Brief in Opposition at 18–20, *Baca*, 566 U.S. 982 (No. 11-834), 2012 WL 1111992.
356. *Id.* at 22–23.
357. *Baca*, 566 U.S. 982.
358. 855 F.3d 639 (4th Cir. 2017).
359. *Id.* at 644.
360. *Id.* at 653.
361. *Id.* at 652 (citation omitted).
362. Petition for Writ of Certiorari at 13, City of Greensboro v. BNT Ad Agency, LLC, 583 U.S. 1044 (2017) (No. 17-492), 2017 WL 4404981.
363. *Id.* at 12–13.
364. *BNT Ad Agency*, 583 U.S. 1044.
365. *Bausch v. Stryker Corp.*, 630 F.3d 546 (7th Cir. 2010).
366. *Id.* at 559.
367. *Id.* (quoting Brooks v. Ross, 578 F.3d 574, 580 (7th Cir. 2009) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002))).

device violations, it would take account of the reality that a great deal of the product-specific information is confidential under federal law. In these cases, "[f]ormal discovery is necessary before a plaintiff can be fairly expected to provide a detailed statement" of the claim.[368]

Defendants petitioned for certiorari, arguing that the Seventh Circuit failed to correctly apply *Iqbal*.[369] Petitioners characterized the Seventh Circuit opinion as taking a "sliding-scale" approach to pleading.[370] They argued that this method directly contradicts *Iqbal*, in which the records at issue were also not available to plaintiffs without discovery.[371] Petitioners argued further that the plaintiff failed to tie the injury to a violation of a specific federal requirement, thus falling short of *Iqbal*'s pleading requirements.[372] In response, respondents asserted that *Iqbal* requires the court to draw on "judicial experience and common sense," and that the Seventh Circuit had done so by addressing informational asymmetry between the parties.[373] The Court denied certiorari.[374]

Other circuit court decisions, while not directly acknowledging the tension between plausibility pleading and pre-2007 decisions, nonetheless seemed to minimize the impact of *Iqbal* and *Twombly*. In *Deslandes v. McDonald's USA, LLC*,[375] for example, the Seventh Circuit held that an antitrust complaint should go forward to discovery because discovery and economic analysis were necessary to determine whether the complaint was valid.[376] In so doing, the court cited to *Gomez v. Toledo*, a 1980 decision, for the proposition that affirmative defenses need not be anticipated in a complaint, and *Swierkiewicz*, for the proposition that a complaint need not "plead law or match facts to elements of legal theories."[377] McDonald's Corporation's petition for certiorari was denied.[378] And when the Fourth Circuit reversed the dismissal of a complaint, purporting to apply both *Swierkiewicz* and the plausibility pleading standard,[379] the defendant petitioned for certiorari, arguing that the Fourth Circuit's decision conflicted

368. *Id.* at 558.

369. Petition for a Writ of Certiorari at 10–11, Stryker Corp. v. Bausch, 565 U.S. 976 (2011) (No. 11-2), 2011 WL 2559146.

370. *Id.* at 11.

371. *Id.* at 30–31.

372. *Id.* at 13; *id.* at 28 ("'Manufacturing defect' is a legal conclusion that, under *Iqbal*, need not be taken as true." (citation omitted)).

373. Brief in Opposition to Petition for Writ of Certiorari at 22–23, *Stryker Corp.*, 565 U.S. 976 (No. 11-2), 2011 WL 4427085.

374. *Stryker Corp.*, 565 U.S. 976.

375. 81 F.4th 699 (7th Cir. 2023).

376. *Id.* at 705.

377. *Id.*

378. 144 S. Ct. 1057 (2024).

379. Woods v. City of Greensboro, 855 F.3d 639, 647–48 (4th Cir. 2017).

with *Twombly* and *Iqbal* and created conflict with how other courts applied those decisions.[380] The Court denied certiorari.[381]

Of course, there are examples of the Court denying petitions for certiorari seeking review of circuit courts ignoring pre-2007 case law and reading *Iqbal* and *Twombly* more broadly. In *McCleary-Evans v. Maryland Department of Transportation, State Highway Administration*, [382] for example, the Fourth Circuit dismissed accusations by a dissenting judge that it was ignoring *Swierkiewicz* by stating that even though *Twombly* and *Iqbal* did not overrule *Swierkiewicz*, they did "alter the criteria for assessing the sufficiency of a complaint."[383] The plaintiff's petition for certiorari invited the Court to resolve conflict among the courts of appeals regarding the application of *Swierkiewicz* after *Twombly* and *Iqbal*,[384] but the Court denied certiorari.[385]

And after the Fifth Circuit noted some tension between *Leatherman* and plausibility pleading, but held that the plaintiff's complaint could not suffice under either standard,[386] the Court again denied certiorari.[387] Moreover, when the Eighth Circuit affirmed the dismissal of a breach of fiduciary duty and contract claim, Judge Colloton dissented in part from that holding, arguing that the majority's opinion "overstates the effect of [*Iqbal* and *Twombly*]."[388] Judge Colloton specifically raised the Court's decisions in *Swierkiewicz* and *Erickson* as reasons to question how broadly to read *Iqbal* and *Twombly*.[389] The plaintiff petitioned for certiorari, raising the interpretation of *Iqbal* and *Twombly* in the certiorari petition,[390] but the Court denied certiorari.[391] The Court also declined to review two Fourth Circuit cases in which the Court of Appeals specifically contrasted the pre-2007 pleading standard with plausibility pleading, holding that the plaintiff

380. Petition for Writ of Certiorari at 13, City of Greensboro v. BNT Ad Agency, LLC, 583 U.S. 1044 (2017) (No. 17-492), 2017 WL 4404981.

381. 538 U.S. 1044 (2017).

382. 780 F.3d 582 (4th Cir. 2015).

383. *Id.* at 586–87.

384. Petition for a Writ of Certiorari, McCleary-Evans v. Md. Dep't of Transp., 577 U.S. 1138 (2016) (No. 15-573), 2015 WL 6735822.

385. 577 U.S. 1138 (2016).

386. Ratliff v. Aransas County, 948 F.3d 281, 284–85 (5th Cir. 2020).

387. 141 S. Ct. 376 (2020).

388. Horras v. Am. Cap. Strategies, Ltd., 729 F.3d 798, 806–07 (8th Cir. 2013) (Colloton, J., concurring in judgment in part and dissenting in part), *cert. denied*, 571 U.S. 1203 (2014).

389. *Id.* at 806–07 (pointing to tension between *Iqbal*, *Twombly*, and *Swierkiewicz*).

390. Petition for Writ of Certiorari, Horras v. Am. Cap. Strategies, Ltd., 571 U.S. 1203 (2014) (No. 13-843), 2014 WL 173012.

391. 571 U.S. 1203 (2014).

could not meet the standard set forth in the more recent, controlling, cases.[392]

Courts of appeals have also recognized tension between plausibility pleading and the model Forms, which had been appended to the Rules before Rule 84 was abrogated in 2015.[393] The Federal Circuit, for example, reversing dismissal of a patent infringement claim, stated that "to the extent any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleadings requirements, the Forms control."[394] A concurring judge took issue with the majority, arguing that the Forms and *Iqbal*/*Twombly* must be reconciled.[395] DirecTV petitioned for certiorari, arguing that the Court should take up the issue of how to resolve conflicts between the Forms and *Iqbal* and *Twombly*,[396] but the Court denied certiorari.[397]

This material, in its totality, suggests a Court that is reluctant at best to embrace plausibility pleading. Whether considered through the lens of the cases that address factual sufficiency directly, those in which the Court declined invitations to take on factual sufficiency, or the Court's failure to grant certiorari to discipline lower courts expressing resistance to plausibility pleading, notice pleading principles appear to be alive and well more than fifteen years after the Court's plausibility pleading intervention.

III. WHITHER PLAUSIBILITY PLEADING?

If, as this Article argues, the Court has taken a step back from plausibility pleading and moved back toward notice pleading principles, it raises two

392. Cook v. Howard, 484 F. App'x 805, 810 (4th Cir. 2012) ("As we have previously recognized, these later decisions require more specificity from complaints in federal civil cases than was heretofore the case." (citation and internal quotation marks omitted)), *cert. denied*, 568 U.S. 1230 (2013); Walters v. McMahen, 684 F.3d 435, 442 (4th Cir. 2012) ("As the decisions in *Twombly* and *Iqbal* have made clear, the standard employed in *Mendoza* [*v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002),] is no longer is applicable."), *cert. denied*, 568 U.S. 1212 (2013).

393. Even the abrogation of Rule 84 provides evidence that the Court is reluctant to fully embrace the proposition that plausibility pleading marks a sharp break with notice pleading. When it was initially proposed, the Rules Committee included Advisory Committee notes suggesting that it was necessary to abrogate Rule 84 in part because the Forms were inconsistent with plausibility pleading standard, but that sentence was modified by the Court to clarify that the abrogation of Rule 84 was not meant to communicate anything about pleading standards. *See* Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1097 (2015); Catherine T. Struve, *Phantom Rules*, 117 COLUM. L. REV. ONLINE 70, 86–87 (2017).

394. K-Tech Telecomms., Inc. v. Time Warner Cable, Inc., 714 F.3d 1277, 1283–84 (Fed. Cir. 2013).

395. *Id.* at 1287–89 (Wallach, J., concurring) ("Because these standards are reconcilable, it is unnecessary for the majority to pronounce that 'the Forms control' over plausibility.").

396. Petition for a Writ of Certiorari, DirecTV v. K-Tech Telecomms., Inc., 571 U.S. 1185 (2014) (No. 13-618), 2013 WL 6115828.

397. 571 U.S. 1185 (2014).

important questions: What might explain the Court's movement and what might it mean for the future of pleading doctrine? In this part, I suggest several potential explanations for the Court's apparent movement and explore the ramifications of the Court's reluctance to fully embrace the more extreme implications of *Iqbal* and *Twombly*.

First, one should acknowledge at the outset that perhaps the best explanation for the Court's approach to pleading in the aftermath of *Iqbal* and *Twombly* is that plausibility pleading principles are not all that different, in practice, from notice pleading principles.[398] After all, in both *Iqbal* and *Twombly*, the Court disclaimed any radical reinvention of pleading, emphasizing that it was not requiring heightened pleading or detailed factual allegations.[399] Yet available data suggest that lower courts, particularly in civil rights and employment discrimination cases, have applied plausibility pleading in ways that make it harder for claims to survive motions to dismiss.[400] And it is striking that, in the years since *Iqbal* and *Twombly*, litigants (predominantly defendants) who have addressed pleading in the Court have treated those cases as marking a sharp break with the past.[401] But if the Court never imagined that there was significant space between plausibility pleading and notice pleading standards, then the pattern

398. Adam Steinman has articulated some of the reasons why plausibility pleading and notice pleading may in practice have significant overlap. *See* Steinman, *supra* note 67, at 1324–41.

399. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

400. Reinert, *supra* note 17, at 2142–56.

401. Brief for Petitioners at 49, Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011) (No. 09-1156), 2010 WL 3334501; Brief for Petitioners Dennis Hasty and James Sherman at 54–57, Ziglar v. Abbasi, 582 U.S. 120 (2017) (No. 15-1363), 2016 WL 6873021; Brief for Respondent at 3–4, 34–35, Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024) (No. 22-842), 2024 WL 791438; Brief For Respondent at 35, Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81 (2014) (No. 13-719), 2014 WL 3704562; Brief for the State Respondents at 10, 42–44, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468), 2022 WL 3284512; Brief for Respondents at 12, Tyler v. Hennepin Cnty., 598 U.S. 631 (2023) (No. 22-166), 2023 WL 2759804; Reply Brief for Petitioners at 2–3, Wood v. Moss, 572 U.S. 744 (2014) (No. 13-115), 2014 WL 984991; Brief for Petitioners at 9–10, Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011) (No. 09-525), 2010 WL 3501188; Petitioners' Brief on the Merits at 45, Fifth Third Bancorp. v. Dudenhoeffer, 573 U.S. 409 (2014) (No. 12-751), 2014 WL 333879; Brief for Petitioner at 18, 45–46, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327 (2020) (No. 18-1771), 2019 WL 3824689; Brief for Petitioner Arizona Christian School Tuition Organization at 46 n.17, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) (Nos. 09-987, 09-991), 2010 WL 3017756; Brief for Respondents at 43, Rotkiske v. Klemm, 589 U.S. 8 (2019) (No. 18-328), 2019 WL 3230947; Reply Brief for Petitioner at 3, McKesson v. Doe, 592 U.S. 1 (2020) (No. 19-1108), 2020 WL 3512838; Petition for a Writ of Certiorari at 11, 18–19, UPMC v. W. Penn Allegheny Health Sys., Inc., 565 U.S. 817 (2011) (No. 10-1341), 2011 WL 1633949; Petition for a Writ of Certiorari at 10, Stryker Corp. v. Bausch, 565 U.S. 976 (2011) (No. 11-2), 2011 WL 2559146; Petition for Writ of Certiorari at 31–36, Baca v. Starr, 566 U.S. 982 (2012) (No. 11-834), 2011 WL 6950472; Petition for Writ of Certiorari at 10–13, City of Greensboro v. BNT Ad Agency, LLC, 583 U.S. 1044 (2017) (No. 17-492), 2017 WL 4404981.

described here is not surprising. And one would expect little change in the future.

Second, legal realists might argue that the Court's pleading jurisprudence has little to do with doctrine and much more to do with the policy preferences of the coalition of Justices who tend to drive outcomes.[402] If you are an incarcerated person suing the Attorney General for constitutional violations connected to the War on Terror (*Iqbal*), you will lose. If you are the NRA suing a state official for a First Amendment violation (*Vullo*), you will win. On this account, the Court does not have any particular affinity for one pleading doctrine—rather pleading serves as a useful way to achieve substantive outcomes without disclosing underlying policy-driven decisions. But this explanation would have to account for the broad range of cases the Court has heard since *Iqbal*, in which it has found pleadings sufficient in cases concerning securities fraud,[403] constitutional claims against municipalities,[404] and claims arising from the same context as *Iqbal*.[405] Nor does it explain the Court's refusal to discipline lower courts questioning the Court's plausibility standard and finding allegations sufficient in a wide range of contexts, including civil rights,[406] antitrust,[407] and products liability.[408]

Third, and a variant of the legal realism point, perhaps the Court is satisfied with the current state of affairs precisely because plausibility pleading is flexible enough to enable lower courts to impose higher pleading standards, with the Court stepping in as necessary to manage at the margins. We could call this the "Mission Accomplished" theory,[409] in which the Court accepts the instability created by plausibility pleading doctrine.[410] Yet

402. Scholars might debate where the ideological center of the Court has been over the past fifteen years, but all would agree that it skews conservative. *See generally* Lee Epstein, *Partisanship "All the Way Down" on the U.S. Supreme Court*, 51 PEPP. L. REV. 489 (2024); A.E. Dick Howard, *Now We Are Six: The Emerging Roberts Court*, 98 VA. L. REV. IN BRIEF 1 (2012); Stephen Jesse, Neil Malhotra, & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PNAS, issue no. 24, June 2022, art. no. e2120284119, https://www.pnas.org/doi/full/10.1073/pnas.2120284119 [https://perma.cc/8BSY-257H]; David Schultz & Jacob Bourgault, Essay, *John Roberts' Supreme Court: The Triumph of Partisanship and Ideology over Precedent*, 109 MINN. L. REV. HEADNOTES 113, 129 (2025).

403. *See supra* notes 88–112 and accompanying text (discussing decision in *Matrixx*).

404. *See supra* notes 183–93 and accompanying test (discussing decision in *Tyler*); *see supra* notes 297–308 and accompanying text (discussing decision in *Johnson*).

405. *See supra* notes 113–29 and accompanying text (discussing decision in *Abbasi*).

406. *See supra* notes 345–64 and accompanying text (discussing denial of certiorari in *Baca* and *Woods*).

407. *See supra* notes 340–44 and accompanying text (discussing denial of certiorari in *West Penn*).

408. *See supra* notes 365–74 and accompanying text (discussing denial of certiorari in *Bausch*).

409. Hat tip to Jonah Gelbach for suggesting this descriptor in a conversation with this author.

410. *See generally* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

the Mission Accomplished theory seems inconsistent with the Court's treatment of pleading when it has addressed it—the Court's apparent turn back toward notice pleading standards, by accepting as true bare allegations of a defendant's state of mind while also looking closely at the legal sufficiency of a complaint, speaks to a different mindset.[411]

One final possibility to consider is that the Court actually regrets the turn it took toward plausibility pleading.[412] After all, it elicited significant criticism and was a serious subject for legislative override in the immediate aftermath of *Iqbal*.[413] And judged by both the outcomes since *Iqbal* and statements made by Justices at oral arguments, a majority of the Court seems committed to the hallmarks of notice pleading. Indeed, to some degree the Justices' own experience with applying plausibility pleading may have convinced them of its fundamental incoherence. Consider this exchange between Justice Breyer and counsel in *Dart Cherokee*:

> JUSTICE BREYER: Isn't 8.2 million a fact?
>
> MR. SHARP: It's a conclusory fact.
>
> JUSTICE BREYER: Well, it's a fact. They said in their view --
>
> MR. SHARP: It's a conclusion.
>
> JUSTICE BREYER: All right. I don't know what a conclusory fact is as opposed to a regular fact. That seems like a lot of money to me, but I --
>
> MR. SHARP: I would agree with Your Honor. And it sometimes is difficult, but I think we deal with those a lot now that Twombly has been adopted by this Court. Conclusory -- conclusions are not sufficient in terms of pleading for the plaintiff.[414]

Similarly, in *Comcast*, Justices from across the ideological spectrum expressed their consternation that the defendant was arguing that a plaintiff could not allege a defendant's discriminatory state of mind on information

411. *See supra* Section II.A.

412. Kevin Clermont considered and rejected a version of this explanation, which he described as the "myth" that "The *Twombly*-*Iqbal* Justices Didn't Really Mean It." Kevin M. Clermont, *supra* note 80, at 1363.

413. *See* Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), https://www.govtrack.us/congress/bills/111/s1504/text [https://perma.cc/36EN-WAZM]; Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009), https://www.govtrack.us/congress/bills/111/hr4115/text [https://perma.cc/86YH-DAU4].

414. Transcript of Oral Argument at 45–46, Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81 (2014) (No. 13-719), 2014 WL 9866150.

and belief.[415] Along the same lines, in *Omnicare*, both Chief Justice Roberts and Justice Breyer expressed agreement that whether corporate officers reasonably believed certain statements of opinion to be true was one for the jury after discovery, not a question that could be resolved at the pleading stage.[416] One is left with the impression that the Court itself is unsure just what it wrought with *Iqbal* and *Twombly*.

The difficulty with this explanation is accounting for everything else the Court has done in the intervening years in which incrementalism has been abandoned for unbridled revision. In areas including reproductive rights, religious freedom, and administrative law, the current Court has appeared to be indifferent to criticisms about both process and outcomes. Instead, it is a Court that seems bent to reshaping the contours of important rights. Why would a Court like this second-guess its move toward revising pleading doctrine to make courts less open to achieving social change through litigation?[417]

The best answer may be a combination of a different kind of legal realism, leavened by the principle of procedural transsubstantivity. If this is a Court that is committed to reshaping American society, it must have realized along the way that liberal pleading doctrine is essential to that movement. Liberal pleading doctrine has long been a key to expanding access to the courthouse.[418] To the extent pleading standards function as a screening tool, the conservative legal movement can be waylaid by it as much as those seeking to use federal courts to advance progressive legal reforms. And for these litigants, the instability of plausibility pleading presents greater downside than the more predictable and manageable notice

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415. Transcript of Oral Argument at 11–12, Comcast Corp, v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327 (2020) (No. 18-1171), 2019 WL 9096157 (Justice Gorsuch endorsing view that information and belief pleading was sufficient to allege a defendant's state of mind, with discovery to follow); *id.* at 25–26 (Justice Breyer expressing same view); *id.* at 30 (Justice Alito expressing view that it was a "rare case" in which the complaint "goes out of its way to refute itself"); *id.* at 31 (Justice Kavanaugh seeking concession from defense counsel that "it's unusual" to dismiss a case at the 12(b)(6) stage with allegations similar to the plaintiff's).

416. Transcript of Oral Argument at 50–53, Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175 (2015) (No. 13-435), 2014 WL 5593456.

417. *But see* Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 176 (2015) (arguing that some of the Roberts Court's decisions regarding procedure rules reflect inappropriate "interference with lower court discretion").

418. *See generally* Hon. Robert L. Carter, *Civil Procedure as a Vindicator of Civil Rights: The Relevance of* Conley v. Gibson *in the Era of "Plausibility Pleading"*, 52 HOW. L.J. 17, 28 (2008); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 101 (2008); *see also* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985); Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 586 (2011); Margaret Y.K. Woo, *Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation-State*, 15 NEV. L.J. 1261, 1270 (2015).

pleading standard.[419] In this respect then, the fundamental principle of transsubstantivity may be key to the survival of notice pleading commitments.[420]

If so, then the Court's experiment with plausibility pleading may be an echo of its earlier approach to a different transsubstantive gatekeeping doctrine: summary judgment. When the Court decided the so-called Summary Judgment Trilogy in 1986,[421] many commentators predicted that it would radically reshape lower courts' grant of summary judgment in favor of defendants.[422] Empirical studies, however, have found mixed results when assessing the impact of the trilogy on the resolution of summary judgment motions.[423]

Whatever the explanation for the Court's hesitance to embrace plausibility pleading in full, there are significant implications for lower courts, advocates, and rulemakers. Taking lower courts first, it seems uncontroversial to observe that some changes to legal doctrine can be implemented with little friction. Lower courts, after all, are adept at applying clear rules, even in ideologically disputed areas such as standing doctrine.[424] This Article suggests that the roll-out of the changes wrought by *Iqbal* and *Twombly* are anything but clear, leaving lower courts in particular in a tenuous position.

On one hand, this Article (and Steinman's before it) suggests that plausibility pleading is not as extreme as some had predicted. As such, lower courts who are resistant to the reasoning behind plausibility pleading, or simply uncomfortable with what it asks courts to do at such an early stage of litigation,[425] have space, within this doctrine, to rely on notice pleading

419. For work discussing the instability created by the plausibility pleading test, see Clermont & Yeazell, *supra* note 410, at 840–44; Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 UC IRVINE L. REV. 187, 196, 211–12 (2013); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 159 (2010).

420. Barry Friedman has made a similar observation about the durability of *Ex parte Young*, 209 U.S. 123 (1908). As Friedman argues, notwithstanding the powerful criticisms of the fiction underlying *Ex parte Young*, it has emerged relatively unscathed because it is a tool that advocates across the political spectrum can use to challenge government action. *See generally* Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247 (Vicki C. Jackson & Judith Resnik eds., 2010).

421. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

422. Theodore Eisenberg & Kevin M. Clermont, Essay, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 198 (2014) (summarizing literature).

423. *See generally* Jonathan Remy Nash and D. Daniel Sokol, *The Summary Judgment Revolution that Wasn't*, 65 WM. & MARY L. REV. 389 (2023).

424. *See, e.g.*, Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 617 (2004) (finding that lower court judges "will render law-abiding and predictable decisions in circumstances where clear precedent *and* effective judicial oversight exists.").

425. *See* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014).

principles. But more broadly, the insights from this Article raise questions about how lower courts should behave under conditions of doctrinal uncertainty. One might argue that uncertainty in the doctrinal space created by the Supreme Court is valuable inasmuch as it allows lower courts to "keep[] multiple interpretive visions in play rather than locking into a single set of supreme normative commitments."[426] Pleading doctrine, however, might benefit from greater stability as opposed to multiple interpretive visions.[427] Moreover, if the Supreme Court is normatively committed to the fundamental principles of notice pleading, then lower courts should be hesitant to strategically anticipate the Supreme Court by adopting extreme versions of the plausibility pleading doctrine introduced in *Iqbal* and *Twombly*.[428] The same holds true for state courts continuing to grapple with whether to follow the Supreme Court's lead in adopting plausibility pleading.[429]

For advocates, the lessons from this Article are clearer. Rather than accept at face value the proposition that plausibility pleading has transformed the landscape of civil litigation, this Article suggests that advocates have many tools to deploy to argue that the heart of *Conley* survives, nearly two decades removed from the disruption introduced by *Iqbal* and *Twombly*. Even if Supreme Court Justices feel free to deploy pleading doctrine as a tool to achieve substantive ends, lower courts are more constrained.[430] This is particularly true for district courts,[431] which

426. Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 507–08 (2012). Gewirtzman, of course, was writing about substantive constitutional doctrine, not transsubstantive pleading doctrine.

427. Clermont & Yeazell, *supra* note 410, at 823–24.

428. As a theoretical matter, it seems likely that if lower court judges prefer to avoid being overturned by the Supreme Court, they will write opinions less likely to elicit a grant of certiorari. *See* Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 408 (2000). However, empirical data on the extent to which appellate courts seek to anticipate the preferences of the Supreme Court is mixed. *See* Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL'Y 37, 53 (2009) (reviewing literature).

429. *See* Gadson*, supra* note 17.

430. *See* Elise Borochoff, *Lower Court Compliance with Supreme Court Remands*, 24 TOURO L. REV. 849, 901–03 (2008) (suggesting that lower courts are heavily constrained by Supreme Court doctrine when deciding cases, but that appellate judicial ideology plays a limited role); Harry T. Edwards, Essay, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–62 (1998) (arguing that law, not ideology, determines the vast majority of appellate decision-making).

431. *See* Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 276 (1995) (in study of 2,258 civil rights cases, finding no evidence that individual judge characteristics are associated with case outcomes); Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325, 334–35 (1987) (suggesting that district courts "may rely heavily on Supreme Court precedents as one way of avoiding reversal").

make some pleading decisions that are effectively unreviewable.[432] If it advances their client's interests, advocates should therefore focus lower courts on how the Supreme Court has applied its own pleading standard, rather than accept as a given that *Conley*'s principles are no longer operative.

Finally, federal rulemakers should take notice of the insights elaborated herein. After *Iqbal* and *Twombly* were announced, many scholars accused the Court of acting outside of the rulemaking proceed and encouraged the Advisory Committee on the Federal Rules of Civil Procedure to respond.[433] The Advisory Committee was conscious of the force of these entreaties, with Edward H. Cooper, then the Reporter for the Advisory Committee, noting the complexity involved in considering any changes and taking the view that it was wise to "proceed[] with self-conscious deliberation."[434] Only a year after Cooper wrote those words, however, the Advisory Committee proposed to abrogate Rule 84 and the illustrative Forms appended to the Rules, in no small part because of the perceived tension between plausibility pleading and the Forms.[435]

If anything, this Article suggests that the Advisory Committee acted far too hastily in abrogating the Forms. Instead, rulemakers should return to considering whether to take action to ensure that pleading rules reflect the Court's own approach to pleading doctrine. If they do so, they can focus more clearly on the instability wrought by plausibility pleading, instability that imposes significant costs without any benefits consistent with the purposes of the Federal Rules.[436] Rulemakers might be squeamish about confronting the Court, but whatever the metes and bounds of plausibility pleading, this Article suggests that the Court has little appetite for it.

CONCLUSION

Fifteen years ago, the Supreme Court announced what appeared at the time to be a momentous change in pleading doctrine. But as I have argued in this Article, the notice pleading principles which originated in 1938 still

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432. In the federal system, denial of a motion to dismiss is not appealable, unless it falls within the narrow category of collateral orders subject to interlocutory appeal. *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299, 307 (1996) (denial of motion to dismiss on qualified immunity grounds is a "final" judgment subject to immediate appeal).

433. *See, e.g.*, Miller, *supra* note 63.

434. Edward H. Cooper, *King Arthur Confronts* TwIqy *Pleading*, 90 OR. L. REV. 955, 959 (2012).

435. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 939–40 (2020); A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms As Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113, 1136 (2015).

436. *See, e.g.*, Reinert, *supra* note 17, at 2162–66 (suggesting that plausibility pleading has not filtered for "merit" of claims); *see also supra* note 419.

dominate the Court's jurisprudence. Even as the current Court appears determined to transform the legal landscape in other ways, pleading doctrine appears stubbornly resistant to change. Lower courts, the advocates who appear before them, and the rulemakers who must consider future changes to transsubstantive doctrine should take note, rather than reflexively apply a heightened pleading standard thought to have been created by the Court in *Iqbal* and *Twombly*.