

FRONT LOADING AND HEAVY LIFTING: HOW PRE-DISMISSAL
DISCOVERY CAN ADDRESS THE DETRIMENTAL EFFECT OF
IQBAL ON CIVIL RIGHTS CASES

by
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Although the Federal Rules of Civil Procedure are trans-substantive, they have a greater detrimental effect on certain substantive claims. In particular, the Supreme Court's recent interpretation of Rule 8(a)(2)'s pleading requirement and Rule 12(b)(6)'s dismissal criteria—in Bell Atlantic v. Twombly and Ashcroft v. Iqbal—sets forth a plausibility pleading standard which makes it more difficult for potentially meritorious civil rights claims alleging intentional discrimination to survive dismissal. Such claims are more vulnerable to dismissal because: plaintiffs alleging intentional discrimination often plead facts consistent with both legal and illegal conduct; discriminatory intent is often difficult, if not impossible, to unearth pre-discovery because of informational inequities between the parties; and the plausibility standard's subjective nature fails to provide sufficient guidance to courts ruling on dismissal motions. This increased risk of dismissal threatens to undermine civil rights enforcement, compromise court access, and incentivize unethical conduct.

In response to this risk, courts are empowered and encouraged to utilize narrow, targeted, pre-dismissal discovery to determine plausibility at the pleading stage (“plausibility discovery”) so that the trans-substantive application of the Rules does not work an injustice against civil rights and other cases involving informational inequities. Courts

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should consider permitting some limited discovery towards the front of the litigation (front loading) for the purpose of determining a case's viability (heavy lifting). Courts already use early, targeted, pre-merits discovery to resolve threshold issues such as class certification, qualified immunity and jurisdiction. These models, while imperfect, illustrate how courts are willing and able to order clearly defined, narrow discovery to successfully resolve various preliminary litigation matters. Similarly, plausibility discovery is authorized and justified on policy grounds. This Article concludes with the types of arguments parties are likely to make post-Iqbal and a roadmap for how courts can order plausibility discovery while equitably balancing the parties' competing interests.

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I. INTRODUCTION

While the Federal Rules of Civil Procedure are trans-substantive,¹ their impact is not. The impact of the Rules on the outcome of civil litigation depends on the substantive claim at issue. Specifically, the confluence of Rule 8(a)(2)'s pleading requirements and Rule 12(b)(6)'s dismissal criteria—as recently interpreted by the Supreme Court in *Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*³—has a distinct detrimental impact on civil rights⁴ cases alleging intentional discrimination. Application of these Rules, under the Court's new plausibility pleading standard, is more outcome determinative for civil rights cases because of

¹ See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. (forthcoming 2010) (manuscript at 7), available at <http://ssrn.com/abstract=1428992> (“A procedural rule is trans-substantive if it applies equally to all cases regardless of substance. A substance-specific procedural rule, in contrast, requires specific processes for a particular substantive category of case.”).

² 127 S. Ct. 1955 (2007).

³ 129 S. Ct. 1937 (2009).

⁴ “Civil rights” is broadly defined. It includes various federal statutes (such as Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Fair Housing Act) as well as constitutional torts (such as claims brought under 42 U.S.C. §§ 1981, 1983).

the informational inequity that exists between the parties and the evidentiary hurdles that exist for such claims.⁵

Civil rights cases alleging intentional discrimination face a number of evidentiary hurdles specific to the underlying cause of action. First, factual allegations lend themselves to theories consistent with both legal and illegal conduct. At the pleading stage—where alternative theories of liability and mixed motives are often pled—a court may dismiss the case as implausible, a premature conclusion prior to the discovery process in many cases. Second, plaintiffs alleging intentional discrimination are at a distinct evidentiary disadvantage pre-discovery because of the difficulty in uncovering facts sufficient to demonstrate illegal motive. Unearthing discrimination has become more difficult over time because of the more subtle and institutional forms it takes. Moreover, such evidence is often in the exclusive possession of the defendant, thereby creating an informational inequity between the parties. Third, the plausibility standard's highly subjective nature fails to provide courts sufficient guidance when ruling on Rule 12(b)(6) motions, thereby increasing the risk of courts' relying on extrajudicial factors when determining plausibility. For example, skepticism over whether intentional discrimination continues to exist—a particularly acute controversy in an alleged “post-racial” Obama society—may impermissibly come into play at this early stage of the litigation. All of these factors make potentially meritorious civil rights claims more vulnerable to premature dismissal under the recent pleading paradigm.

By making the pleading standard more rigorous, the Supreme Court sought to spare litigants from costly and complex discovery in *Twombly*'s antitrust class action, and to spare national security government officials from distracting and time consuming discovery in *Iqbal*. In the face of expensive and time consuming merits discovery, the Supreme Court should be commended for its efforts to explore ways in which cases can be evaluated more efficiently, without a gross expenditure of resources and time.

But the question now is not whether discovery will be diminished or even eliminated under certain circumstances, following *Twombly* and *Iqbal*, but what will be discovered and when. The Supreme Court may have necessitated the trial courts' *shifting* discovery to earlier in the litigation process, and *increasing* discovery's gatekeeping function. More specifically, the plausibility pleading standard may require that parties take some limited, preliminary discovery at the pleading stage (“plausibility discovery”) to overcome the informational inequity that exists between parties for civil rights and other substantive claims.

⁵ By “informational inequity” this Article is referring to the difference in knowledge and access to information between the parties. This asymmetry or imbalance is inequitable because of its deleterious impact on civil rights and other types of claims described *infra* Part III.B.1.b.

Although courts should continue to guard against “fishing expeditions,” they should also be open, upon receipt of a Rule 12(b)(6) motion, to allowing plaintiffs some initial discovery focused on those discrete facts necessary to show a plausible claim. This way, discovery would be loaded towards the front end of the lawsuit, and would be doing heavy lifting of a different kind—determining the lawsuit’s *viability* rather than its underlying *merits*. In keeping with an efficient and just trans-substantive process, discovery must evolve to meet the challenges of contemporary civil rights litigation.

Using targeted, pre-merits discovery to resolve threshold issues is not uncommon. Courts are already front-loading discovery and demanding that it do heavy lifting to determine class certification, qualified immunity, and jurisdiction.⁶ Although imperfect, these models demonstrate that courts are willing and able to use discovery in this manner. Post-*Twombly* and *Iqbal*, front loading and heavy lifting may also be the discovery approach needed at the pleading stage of civil rights and other cases vulnerable to informational inequities.

The utility of pre-merits discovery at the pleading stage is an important option for courts to consider. While this option has been mentioned as a potential post-*Twombly* solution, among others,⁷ there has been little examination of how early, targeted discovery can help level the playing field for those claims more vulnerable to the plausibility pleading standard.⁸ This Article attempts to fill that void.

This Article is divided into five parts. Part II sets forth the evolution of the federal pleading standard, with particular emphasis on civil rights cases. Part III critiques the Supreme Court’s new pleading standard, as set forth in *Iqbal*. This Part describes the problems of the plausibility

⁶ See Steven S. Gensler, *Some Thoughts on the Lawyer’s E-evolving Duties in Discovery*, 36 N. KY. L. REV. 521 (2009), for an interesting discussion of how e-discovery has contributed to the front-loading of discovery.

⁷ See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 932–35, 934 n.256 (2009) (describing pleading-stage discovery as “promising”); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 161 (2008) (arguing for limited initial discovery on specific issues at the pleading stage for civil rights cases); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming May 2010) (manuscript at 57–59), available at <http://ssrn.com/abstract=1442786>. Cf., Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 222–23 (2007) (describing pre-suit discovery as an option).

⁸ Professor Edward A. Hartnett’s article, *Taming Twombly*, stands out as an exception to this. See Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010) (manuscript at 44–48), available at <http://ssrn.com/abstract=1452875>. He argues persuasively that the courts have the authority under the Federal Rules to permit discovery while a 12(b)(6) motion is pending. This discovery may be limited to what is necessary to support a particular allegation, or may even be on the merits. *Id.* See also William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. OF COMPETITION L. & ECON. 439, 466–68 (arguing for limited discovery to meet plausibility standard in the antitrust context).

pleading standard for civil actions in general and civil rights cases in particular. Part IV explores the utility of targeted, early discovery at the pleading stage, relying on other pre-merits discovery models. This Part sets forth arguments parties are likely to make in cases involving informational inequities post-*Iqbal* and a roadmap for how courts can equitably respond to such competing interests. Finally, the Article concludes that trial courts can and should consider narrow, targeted discovery to determine plausibility at the pleading stage so that the trans-substantive application of the Rules do not work an injustice against civil rights and other cases involving informational inequities.

II. THE EVOLUTION OF THE FEDERAL PLEADING STANDARD

A. *Conley v. Gibson*

For over half a century, “notice pleading” largely defined the pleading system in the federal courts. The Supreme Court, in *Conley v. Gibson*—a civil rights class action brought by African-American railway employees against their union for its alleged failure to fairly represent their interests on racially discriminatory grounds⁹—set forth the standard upon which the courts have historically relied.¹⁰ In holding the complaint sufficient, the Court stated, “we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹¹ In response to the defendants’ argument that the complaint should be dismissed for failing to support its general allegations of discrimination with specific facts, the Court unequivocally rejected this rigorous standard in favor of a notice pleading paradigm:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.¹²

The Court justified the notice standard on several grounds. First, given the parties’ opportunity to more precisely define the bases for their claims and defenses and to narrow the facts and issues through liberal

⁹ Plaintiffs brought suit under the Railway Labor Act, 45 U.S.C. § 151 (2006).

¹⁰ 355 U.S. 41 (1957).

¹¹ *Id.* at 45–46.

¹² *Id.* at 47 (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2) (1952) (amended 1966)). The Court relied on the Forms accompanying the Rules to demonstrate its point. *Id.* at 47 (“The illustrative forms appended to the Rules plainly demonstrate this.”).

discovery and other pretrial procedures, pleadings need not do more.¹³ Second, Rule 8 requires the pleadings to be construed so as to do “substantial justice,”¹⁴ which the Court concluded was clearly done here. Third, the Rules eschew gamesmanship as a basis for dismissal.¹⁵ Finally, the purpose of pleading, under the Rules, is to enable the case to be decided on the merits.¹⁶ Anchored in these principles, the notice pleading paradigm set forth in *Conley v. Gibson* continued for over fifty years.

B. *Leatherman v. Tarrant County*

The Court has consistently rebuked challenges to notice pleading by the lower courts in civil rights cases.¹⁷ For example, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*—a civil rights case brought by homeowners alleging violations of the Fourth Amendment against police officers and municipalities—Justice Rehnquist held for a unanimous court that a more rigorous pleading standard for civil rights cases alleging municipal liability under § 1983 was impermissible.¹⁸ Defendants contended that, in the Fifth Circuit, the factual specificity required for a complaint hinged on the complexity of the underlying substantive claim.¹⁹ But the Supreme Court concluded that the appellate court’s pleading standard was a heightened one, “impossible to square” with the liberal notice pleading standard set forth in Rule 8(a)(2).²⁰ Referring to Rule 8(a)(2)’s requirement that a complaint include only “a short and plain statement of the claim showing that the pleader is entitled to relief,” the Court made clear that in *Conley*, “we said in effect that the Rule meant what it said.”²¹ If courts wanted to raise the pleadings bar, they would have to do so by amending Rule 9, whose particularized pleading requirement applies solely to claims of fraud and mistake; judicial interpretation would not suffice.²² Absent any amendment to Rule 9,²³ courts would have to continue to rely on procedural devices like

¹³ *Id.* at 47–48.

¹⁴ *Id.* at 48 (quoting FED. R. CIV. P. 8(f) (1952) (amended 1966)).

¹⁵ *Id.* (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . .”).

¹⁶ *Id.*

¹⁷ *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164–65 (1993) (noting circuit split over whether a heightened pleading requirement applied in civil rights cases brought against municipalities under § 1983).

¹⁸ *Id.* at 163–64; 42 U.S.C. § 1983 (2006).

¹⁹ *Id.* at 167.

²⁰ *Id.* at 168.

²¹ *Id.*

²² *Id.*

²³ See FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”).

discovery and summary judgment to distinguish between meritless and meritorious claims.²⁴

C. *Swierkiewicz v. Sorema N.A.*

Swierkiewicz v. Sorema N.A.,²⁵ is also illustrative of the Court's insistence on notice pleading in civil rights cases. In *Swierkiewicz*, a Hungarian employee alleged intentional employment discrimination on the basis of national origin and age, in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) respectively.²⁶ Justice Thomas held, for a unanimous Court, that an employment discrimination complaint did not need to contain specific facts establishing a prima facie case of discrimination under the framework established by *McDonnell Douglas Corp. v. Green*,²⁷ which is required by employees who seek to prove intentional discrimination without direct evidence.²⁸ The courts below held that *Swierkiewicz's* complaint failed to adequately allege circumstances that supported an inference of discrimination—an element of the prima facie showing.²⁹ In response to a circuit split on the matter,³⁰ the Court concluded that the *McDonnell Douglas* framework was an evidentiary standard, inapplicable at the pleadings stage.³¹ The Court stated that an employment discrimination complaint—like all complaints—need only meet Rule 8's criteria of containing a short and plain statement of the claim, showing the plaintiff is entitled to relief.³²

In reaching its conclusion, the Court relied on a holistic understanding of the role of pleadings in the lifecycle of a lawsuit.³³ The Court understood pleadings to play a limited screening role,³⁴ relying

²⁴ *Leatherman*, 507 U.S. at 168–69.

²⁵ 534 U.S. 506 (2002).

²⁶ *Id.* at 508–09.

²⁷ *Id.* at 508, 515 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

²⁸ *McDonnell Douglas Corp.*, 411 U.S. at 802. To successfully make out a prima facie showing of intentional discrimination, a plaintiff must demonstrate by a preponderance of the evidence that he or she is a member of a protected class, was qualified for a vacant job, suffered an adverse employment action, and experienced circumstances that support an inference of discrimination. *Swierkiewicz*, 534 U.S. at 510; *McDonnell Douglas Corp.*, 411 U.S. at 802; *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 & n.6 (1981).

²⁹ *Swierkiewicz*, 534 U.S. at 509.

³⁰ *Id.* at 509–10.

³¹ *Id.* at 510–11.

³² *Id.* at 508, 511–13.

³³ The Court's holding also relied on the fact that the *McDonnell Douglas* test does not apply to all employment discrimination cases and for those cases in which it does apply, its specific criteria are shaped by context. *See Swierkiewicz*, 534 U.S. at 511–12.

³⁴ *Id.* at 511. In particular, “[W]e have rejected the argument that a Title VII complaint requires greater ‘particularity,’ because this would ‘too narrowly constrict[t] the role of the pleadings.’ . . . ‘When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or

instead on liberal discovery and summary judgment to flesh out frivolous claims.³⁵ The Court recognized Rule 8(a)'s simplified notice pleading standard as part of a larger system of rules—*i.e.* the Federal Rules of Civil Procedure—that function together to usher a claim from filing to resolution.³⁶ Again, the Court decried pleadings being used as a form of gamesmanship that deprived claims from being heard on the merits.³⁷

The Court concluded that Swierkiewicz's complaint sufficed, practical considerations notwithstanding.³⁸ More specifically, despite defendant's contentions that Swierkiewicz's allegations were "conclusory," and would only burden courts and encourage frivolous litigation by future disgruntled employees, the Court refused to impose a heightened pleading standard through judicial interpretation.³⁹ Finally, the Court underscored the applicability of Rule 8(a)'s generous notice pleading standard to all claims, no matter what their likelihood of success.⁴⁰

D. Bell Atlantic Corp. v. Twombly

The notice pleading paradigm, anchored in *Conley v. Gibson*, however, was called into question following the Court's seminal opinion, *Bell Atlantic Corp. v. Twombly*.⁴¹ *Twombly* involved an antitrust putative class action brought by local telephone and or high speed internet service subscribers against regional telephone service monopolies.⁴² Plaintiffs

admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' . . . Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case." *Id.* at 511–12 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

³⁵ *Id.* at 512 ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

³⁶ *Id.* at 513–14. In particular, the Court noted an "inextricabl[e] link[]" between Rule 8(a) and Rules 8(e)(1) ("[n]o technical forms of pleading or motions are required"), 8(f) ("[a]ll pleadings shall be so construed as to do substantial justice"), 12(e) (motion for a more definite statement available to defendant), and 56 (summary judgment available to screen out meritless claims before trial). *Id.* at 513–14 (quoting *FED. R. CIV. P. 8(f)* (2002) (amended 2007)). The Court also noted how Rule 9(b) is reserved for those claims requiring pleading particularity. *Id.* at 513.

³⁷ *Id.* at 514.

³⁸ *Id.* at 514–15.

³⁹ *Id.*

⁴⁰ *Id.* at 515 ("Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. 'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.'" (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))).

⁴¹ 127 S. Ct. 1955 (2007).

⁴² *Id.* at 1961–62. Defendants are called "Incumbent Local Exchange Carriers" (ILECs), also known as "Baby Bells." *Id.* at 1961. ILECs were responsible for facilitating the entry of competitors ("competitive local exchange carriers" or CLECs) into the local market under the Telecommunications Act of 1996. *Id.*

alleged that over a seven-year period, defendants conspired to restrain trade in violation of § 1 of the Sherman Antitrust Act⁴³ by: 1) engaging in parallel conduct in their respective service areas to inhibit the growth of upstarts; and 2) agreeing not to compete with one another.⁴⁴ The district court dismissed the complaint on the grounds that plaintiffs alleged parallel business conduct, which by itself did not state a claim under § 1 of the Sherman Act.⁴⁵ The Second Circuit reversed, concluding that the lower court failed to properly apply *Conley*'s standard that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁴⁶ The Second Circuit criticized the lower court for requiring "plus factors" in addition to parallel conduct to allege conspiracy.⁴⁷

In a seven to two decision written by Justice Souter,⁴⁸ the Supreme Court reversed,⁴⁹ setting forth a new pleading paradigm. *Twombly* maintained *Conley*'s standard that a plaintiff must give fair notice of the nature of his claim and the "grounds upon which it rests,"⁵⁰ and need not set out in detail the facts upon which he bases his claim.⁵¹ However, *Twombly* concluded that while factual details were not necessary, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."⁵² *Twombly*

⁴³ Sherman Act, 15 U.S.C. § 1 (2006).

⁴⁴ 127 S. Ct. at 1962.

⁴⁵ *Id.* at 1963. The district court concluded that allegations of parallel business conduct alone were not sufficient for stating a claim under § 1. *Id.* Instead, plaintiffs were required to allege additional facts that would "tend[] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007). "Plaintiffs have . . . not alleged facts that suggest[] that refraining from competing in other territories . . . was contrary to defendants' apparent economic interests, and consequently have not raised an inference that their actions were the result of a conspiracy." *Twombly*, 313 F. Supp. 2d at 188.

⁴⁶ *Twombly*, 127 S. Ct. at 1968 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). "[A] court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Twombly*, 425 F.3d at 114.

⁴⁷ *Twombly*, 127 S. Ct. at 1963. *See also Twombly*, 425 F.3d at 114.

⁴⁸ Justice Souter delivered the Court's opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito. *Twombly*, 127 S. Ct. at 1960. Justices Stevens and Ginsburg dissented. *Id.* Ironically, in *Ashcroft v. Iqbal*—which further built on *Twombly*'s new pleading standard—Justices Souter and Breyer authored dissents. *See discussion infra* Part II.F.

⁴⁹ *Twombly*, 127 S. Ct. at 1963.

⁵⁰ *Id.* at 1964. (quoting *Conley*, 355 U.S. at 47).

⁵¹ *Id.*

⁵² *Id.* at 1964–65. "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair

established that “[f]actual allegations must be enough to raise a right to relief above the speculative level;”⁵³ they must show a “plausibility of ‘entitle[ment] to relief,’” not just a possibility.⁵⁴ Finally, after over a half of a century, the Court simply retired *Conley*’s “no set of facts” standard.⁵⁵

Applying the plausibility standard to the § 1 conspiracy claim, the Court concluded that the complaint must have “enough factual matter (taken as true) to suggest that an agreement was made.”⁵⁶ The Court rejected the notion that the plausibility model was akin to a probability one, stating that the former “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”⁵⁷ The complaint had to contain facts “suggestive enough to render a § 1 conspiracy plausible.”⁵⁸ Therefore, an allegation of parallel conduct and a “bare assertion of conspiracy” or “conclusory allegation of agreement” failed to provide sufficient facts to show illegal conduct.⁵⁹ The allegations of parallel conduct had to occur in a specific context that would raise a suggestion of an illicit agreement.⁶⁰ Where the parallel conduct could “just as well be independent action,” the complaint falls short.⁶¹ The complaint would need “further factual enhancement” to cross the line from possibility to plausibility.⁶²

The Court justified its plausibility pleadings standard on several grounds. First, the Court anchored its plausibility requirement in the language of Rule 8 itself. In order for a complaint to actually “show” a plaintiff is entitled to relief pursuant to Rule 8(a)(2), its allegations have to be plausible, not merely possible.⁶³ Second, the Court cited the

notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” *Id.* at 1965 n.3.

⁵³ *Id.* at 1965.

⁵⁴ *Id.* at 1966.

⁵⁵ *Id.* at 1969. “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.*

⁵⁶ *Id.* at 1965.

⁵⁷ *Id.* (“And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1966.

⁶⁰ *Id.* (“A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory.”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (“The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” (quoting FED. R. CIV. P. 8(a)(2))).

“practical significance” of a plausibility standard, alluding to its potential to save time,⁶⁴ reduce significant costs related to discovery,⁶⁵ diminish federal court backlog, and prevent settlement abuse.⁶⁶ The Court rejected the notion that “careful case management” could instead address such concerns.⁶⁷ Third, to the extent that the plausibility standard conflicted with *Conley*’s “no set of facts” benchmark, the latter should not be taken literally⁶⁸ but instead discarded. To do otherwise would permit a “wholly conclusory” statement of a claim to survive dismissal whenever there was the possibility that a plaintiff might later uncover some undisclosed facts that would support liability.⁶⁹ The Court reasoned that *Conley*’s “no set of facts” rule could not be the baseline for determining pleading adequacy.⁷⁰ Finally, the Court contended that its new plausibility standard did not “heighten[]” the pleading standard or expand the scope of Rule 9’s particularity requirement, a measure that “can only be accomplished ‘by the process of amending the Federal Rules, and not by judicial interpretation.’”⁷¹

Applying the new pleadings paradigm,⁷² the Court concluded that neither of plaintiffs’ antitrust conspiracy theories contained facts suggestive of illegal conduct under § 1.⁷³ Failing to “nudge[] their claims

⁶⁴ *Id.*

⁶⁵ *Id.* at 1967. (“Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.” (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1969 (“[A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.”).

⁶⁹ *Id.* at 1968. The Court concluded: “It seems fair to say that this approach to pleading would dispense with any showing of a ‘reasonably founded hope’ that a plaintiff would be able to make a case”; the plaintiff’s “optimism would be enough.” *Id.* at 1969 (quoting *Dura*, 544 U.S. at 347).

⁷⁰ *Id.* (*Conley* did not describe “the minimum standard of adequate pleading to govern a complaint’s survival”).

⁷¹ *Id.* at 1973 n.14 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)).

⁷² *Id.* at 1968 n.7 (Court concedes “it is time for a fresh look at adequacy of pleading when a claim rests on parallel action”).

⁷³ *Id.* at 1971–72. As to plaintiffs’ first theory, the Court concluded “that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. . . . [T]here is no reason to infer that the companies had agreed among themselves to do what was only natural anyway. . . .” *Id.* at 1971. As to plaintiffs’ second theory, the Court concluded the ILECs’ parallel conduct was not suggestive of conspiracy. *Id.* at 1972. While the Court conceded that sparse competition among the ILECs “could very well signify illegal agreement,” because there was “an obvious alternative explanation” available here, the Court concluded that the former was not plausible. *Id.*

across the line from conceivable to plausible,” plaintiffs’ complaint warranted dismissal.⁷⁴

E. *Erickson v. Pardus*

Not surprisingly, *Twombly* ushered in a wave of confusion and conflict among judges, lawyers, and commentators about its scope and meaning. But even as people tried to understand *Twombly*’s application and its implications, two weeks later, the Court issued another pleading decision, *Erickson v. Pardus*,⁷⁵ that added to the confusion.

In *Erickson*—a case involving a prisoner who filed a pro se complaint under § 1983 against prison medical officials for alleged indifference to his serious medical needs, in violation of the Eighth and Fourteenth Amendments—the Court held that plaintiff’s complaint was sufficient to overcome a 12(b)(6) dismissal.⁷⁶ The magistrate, district, and appellate courts all held that the plaintiff’s complaint set forth “only conclusory allegations” that failed to adequately allege that the prison doctor’s conduct—depriving the prisoner hepatitis C treatment—caused him “substantial harm.”⁷⁷ Because “[t]he holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure,” the Supreme Court granted certiorari.⁷⁸

In this per curiam opinion, the Court reversed, concluding that the lower courts had erred.⁷⁹ Without any mention of the plausibility pleading standard it had expostulated just fourteen days prior, the Court concluded that the plaintiff had satisfied the Court’s “liberal pleading standards set forth by Rule 8(a)(2).”⁸⁰ It explained that Rule 8 required only “a short and plain statement of the claim showing that the pleader is entitled to relief”; that “[s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests;’” and that “a judge must accept as true all of the factual allegations contained in the complaint.”⁸¹ Applying these traditional principles to the complaint at issue, and in reliance on

⁷⁴ *Id.* at 1974.

⁷⁵ 127 S. Ct. 2197 (2007).

⁷⁶ *Id.* at 2200. Justice Scalia would have denied the petition for writ of certiorari and Justice Thomas dissented on grounds unrelated to the pleading standard. *Id.*

⁷⁷ *Id.* at 2199 (quoting *Erickson v. Pardus*, 198 F. App’x 694, 698 (10th Cir. 2006), *vacated*, 127 S. Ct. 2197 (2007), *reinstated in part*, 238 F. App’x 335 (10th Cir. 2007)).

⁷⁸ *Id.* at 2198.

⁷⁹ *Id.* at 2200 (“It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered ‘a cognizable independent harm’ as a result of his removal from the hepatitis C treatment program.” (quoting *Erickson*, 198 F. App’x at 698)).

⁸⁰ *Id.*

⁸¹ *Id.* (quoting FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (2007)).

Twombly, *Swierkiewicz*, and *Conley*, the Court found the complaint sufficed.⁸²

However, the Court took particular exception with the lower court's "departure" from Rule 8(a)(2)'s liberal pleading standard because of the plaintiff's pro se status, noting that his filings should be "liberally construed" and his complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."⁸³ While *Erickson* embraced the notice pleading language that characterized its opinions pre-*Twombly*, *Erickson*'s unique attributes—a per curiam opinion based on a pro se complaint—made its applicability unknown. Not until *Ashcroft v. Iqbal*⁸⁴ did it become clear how widespread the plausibility pleading paradigm would extend.

F. *Ashcroft v. Iqbal*

In May 2009, Justice Kennedy authored *Ashcroft v. Iqbal*, a five to four opinion that made clear the applicability of the new plausibility standard to all civil actions, including civil rights cases.⁸⁵ Recognizing the trans-substantive nature of the Rules—as set forth in Rule 1⁸⁶—the Court clarified that *Twombly* was based on the Court's interpretation and application of Rule 8, an analysis which would apply to pleadings outside of the antitrust context.⁸⁷ Having resolved this initial matter, the Court used *Iqbal* to flesh out the pleading standard enunciated in *Twombly*, this time in the context of a civil rights case brought against high ranking government officials seeking qualified immunity.

Immediately following the September 11th terrorist attack, Javaid Iqbal and a number of Arab Muslim men suspected of involvement in the attack were detained and held on various charges at a New York detention center.⁸⁸ Iqbal and others designated as persons "of high interest" by the FBI and the Department of Justice were segregated in a maximum security unit, where they were kept on lockdown twenty-three hours a day.⁸⁹ Iqbal—a Pakistani who ultimately pled guilty to criminal charges, served his sentence and was returned to Pakistan—alleged that he was mistreated by federal officials while in the special maximum security unit, in violation of his constitutional rights.⁹⁰ In particular, Iqbal

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 129 S. Ct. 1937 (2009).

⁸⁵ *Id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' . . . and it applies to antitrust and discrimination suits alike.")

⁸⁶ *Id.* Rule 1 states, "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

⁸⁷ *Iqbal*, 129 S. Ct. at 1953.

⁸⁸ *Id.* at 1943–44.

⁸⁹ *Id.*

⁹⁰ *Id.*

contended that former Attorney General John Ashcroft and FBI Director Robert Mueller designated Iqbal a person “of high interest” and subjected him to harsh conditions of confinement on account of his race, religion, or national origin, in violation of the First and Fifth Amendments.⁹¹ His complaint alleged that these constitutional violations were a matter of policy, one for which Ashcroft and Mueller were personally responsible.⁹²

Ashcroft and Mueller sought qualified immunity and filed a motion to dismiss the complaint on the grounds that it failed to allege that they were personally involved in clearly established unconstitutional conduct. Based on *Conley*’s “no set of facts” language, the district court denied the motion.⁹³ In the interim, *Twombly* was decided, giving the Second Circuit an opportunity to discern whether the complaint needed to be enhanced with factual allegations so as to render Iqbal’s claim “plausible.” The Second Circuit concluded no such enhancement was necessary and that the complaint sufficed under *Twombly*.⁹⁴ The Supreme Court, however, disagreed.

Iqbal gave the Court the opportunity to clarify *Twombly*, and to demonstrate how the new plausibility paradigm should be understood and applied. Building on *Twombly*, the Court explained that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁹⁵ Plausibility fell somewhere between possibility and probability.⁹⁶ Using this standard, the Court conducted a two step analysis to determine whether Iqbal properly stated a claim against defendants.

First, the Court explained that “legal conclusions” or “mere conclusory” allegations did not enjoy the presumption of truth afforded factual allegations.⁹⁷ As such, the Court culled out those allegations in Iqbal’s complaint that it deemed conclusory and extracted them from the analysis.⁹⁸

Second, the Court explained that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”⁹⁹ This determination is “context-specific,” requiring the district court “to draw on its judicial experience and common sense” to come to an answer.¹⁰⁰ At the second step, the Court assumed the veracity of the remaining factual allegations and concluded that they failed to plausibly show Iqbal was

⁹¹ *Id.* at 1944.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1949.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1949–50.

⁹⁸ *See id.* at 1950–51.

⁹⁹ *Id.* at 1950.

¹⁰⁰ *Id.*

entitled to relief.¹⁰¹ While the Court concluded that the factual allegations, taken as true, were consistent with intentional illegal discrimination,¹⁰² the Court found that they failed to establish a plausible claim for relief because of “more likely explanations” for defendants’ conduct.¹⁰³ More specifically, the Court considered the alternative innocuous explanation that Iqbal was arrested and detained as part of a neutral anti-terrorism policy that had a disparate impact on Arab Muslim men because the September 11th attack was orchestrated and led by a group of Arab Muslim men.¹⁰⁴ The Court concluded, “As *between* that ‘obvious alternative explanation’ for the arrests . . . and the purposeful, invidious discrimination respondent [Iqbal] asks us to infer, discrimination is not a plausible conclusion.”¹⁰⁵ However, even if the facts suggested that Iqbal’s *arrest* could be plausibly explained by intentional discrimination, they did not suggest that there was a *policy* that could do the same.¹⁰⁶ Finding no factual allegation in the complaint that plausibly suggested a discriminatory motive by Ashcroft and Mueller, the Court concluded that Iqbal’s complaint failed to satisfy Rule 8’s requirements.¹⁰⁷

Following *Iqbal*, courts, practitioners, and scholars have been grappling with its impact. After over half a century, the pleadings paradigm has undergone a transformation that may fundamentally change the way in which civil actions, in general, and civil rights cases, in particular, are initiated and litigated. The desirability of this transformation is a normative question addressed in Part III below.

III. PROBLEMS WITH THE PLAUSIBILITY PLEADING STANDARD

Iqbal has ushered in a new pleading paradigm, problematic in a number of ways.

¹⁰¹ *Id.* at 1951–52.

¹⁰² *Id.* at 1951 (“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin.”).

¹⁰³ *Id.* (“But given *more likely* explanations, they do not plausibly establish this purpose.” (emphasis added)); *id.* (“On the facts respondent alleges the arrests Mueller oversaw were *likely* lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.” (emphasis added)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1951–52 (emphasis added).

¹⁰⁶ *Id.* at 1952 (“To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin.”).

¹⁰⁷ *Id.* at 1952, 1954.

A. *Civil Actions in General*

1. *The Court Should Analyze the Complaint as a Whole*

As *Iqbal's* first step in analyzing the sufficiency of a complaint, the Court excised from its plausibility analysis all conclusory allegations and legal conclusions on the grounds that they are not entitled to the presumption of truth. While it is true that only factual allegations are entitled to this presumption,¹⁰⁸ this does not necessitate the Court's eliminating from consideration all other allegations when determining whether a complaint sufficiently states a claim. Legal conclusions create a context in which factual allegations are asserted.¹⁰⁹ Without this foundational structure, factual allegations are devoid of their legal significance—they fail to be anchored in a *claim* for which a plaintiff seeks relief under Rule 8. A complaint is a composite of allegations—some legal and some factual—that build on and interrelate with each other to tell the plaintiff's story of why she believes she is entitled to relief under the law. By culling out those allegations that are conclusory and considering only those that are factual when determining the plausibility of a claim, the complaint is largely stripped of its meaning.

Applying this initial step to *Iqbal's* complaint, it is not surprising the complaint failed to plausibly suggest a policy of intentional discrimination. By the time the Court gutted the complaint of all allegations it deemed “conclusory,” the factual allegations left standing could hardly be expected to support a plausible claim for relief.¹¹⁰ As aptly noted in Justice Souter's dissent, when determining plausibility, the Court should analyze the complaint as a whole rather than analyze allegations in isolation.¹¹¹ So long as the complaint as a whole puts the

¹⁰⁸ See *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (“[F]or the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.”).

¹⁰⁹ The Court states, “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 129 S. Ct. at 1950. However, in practice the Court excises the legal conclusions from the complaint and considers only the factual allegations in isolation to determine if *Iqbal's* complaint sets forth a plausible claim. The legal conclusions must be considered in order to be supported by factual allegations.

¹¹⁰ See *id.* at 1951 (describing those allegations not given the presumption of truth). The dissent explained: “[T]he majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory [¶¶ 10, 11, 96], and is left considering only two statements in the complaint And I agree that the two allegations selected by the majority [¶¶ 47, 69], standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.” *Id.* at 1960 (Souter, J., dissenting); First Amended Complaint and Jury Demand at ¶¶ 10, 11, 47, 69, 96, *Elmaghraby v. Ashcroft*, No. 04 CV 1809 (JG) (JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005). Not surprisingly, the same thing resulted when the Court applied this initial step in *Twombly*. See *id.* at 1950.

¹¹¹ In particular, Justice Souter stated: “But these allegations [¶¶ 47, 69] do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates.”

defendant on notice—as Justice Souter concluded it did here¹¹²—the complaint has carried out its proper purpose. If indeed “fair notice” is the objective of pleadings—as stated by the Court for over half a century now—a complaint that in its entirety provides such notice should survive 12(b)(6) dismissal. To require otherwise would put too great a burden on plaintiff’s counsel and encourage long, repetitive, unwieldy complaints—contrary to Rule 8’s “short and plain” mandate.

2. *Determining Conclusoriness Remains Elusive and Problematic*

Iqbal states that it is not an allegation’s “extravagantly fanciful” or “unrealistic or nonsensical” nature that disentitles the allegation to the presumption of truth; it is only the allegation’s conclusoriness.¹¹³ This emphasis is problematic. The emphasis on the conclusory nature of an allegation requires courts to distinguish between conclusory and non-conclusory allegations in a principled and uniform way. Such an exercise has proven difficult,¹¹⁴ as demonstrated by *Iqbal*.¹¹⁵

Assuming that courts can accurately identify those allegations that are conclusory, the devaluing of such allegations adversely impacts claimants who cannot allege more, at the pleading stage, due to the nature of the underlying substantive claim. At this early juncture in the litigation, legal conclusions may be the best a plaintiff can offer when the requisite proof of plausibility is in the exclusive possession of the defendant and can only be revealed via discovery. Setting aside conclusory allegations during the plausibility determination unfairly

“The majority says that these [¶¶ 10, 11, 96] are ‘bare assertions’ . . . and therefore are ‘not entitled to be assumed true.’ . . . The fallacy of the majority’s position, however, lies in looking at the relevant assertions in isolation. . . . Viewed in light of these subsidiary allegations [¶¶ 47–53], the allegations singled out by the majority as ‘conclusory’ [¶¶ 10, 11, 96] are no such thing. . . . Taking the complaint as a whole, it gives Ashcroft and Mueller “fair notice of what the . . . claim is and the grounds upon which it rests.”” *Iqbal*, 129 S. Ct. at 1960–61 (Souter, J., dissenting) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007)); First Amended Complaint and Jury Demand, *supra* note 110, at ¶¶ 10, 11, 47, 69, 96.

¹¹² See *Iqbal*, 129 S. Ct. at 1961.

¹¹³ *Id.* at 1951–52.

¹¹⁴ See *Twombly*, 127 S. Ct. at 1976 (describing difficulty in distinguishing evidence, facts, and conclusions); see CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 231 (2d ed. 1947) (describing “attempted distinction between facts, law, and evidence” as a “convenient distinction of degree”); Hartnett, *supra* note 8 (manuscript at 18–27) (describing difficulty in making distinctions between evidentiary facts, ultimate facts, and legal conclusions required by code pleading and consequent development of Federal Rules to address difficulty); Bone, *supra* note 7, at 891 (2009) (same); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) (same).

¹¹⁵ Justice Souter demonstrates this in his dissent: “[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. . . . By my lights, there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.” *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting). See also Steinman, *supra* note 7 (manuscript at 6–7).

burdens those claims in which an informational inequity exists between the parties.

3. *In Practice the Court Applied a Probability Rather than a Plausibility Standard*

Iqbal's second step in analyzing the sufficiency of a complaint—determining plausibility—looked more like a probability test. Although the Court asserts that the “plausibility standard is not akin to a ‘probability requirement,’”¹¹⁶ the Court’s conduct belies this assertion. In considering those factual allegations entitled to the presumption of truth,¹¹⁷ *Iqbal* concedes that they are consistent with purposeful discrimination by defendants.¹¹⁸ The Court finds that the arrest and detention of thousands of Arab Muslim men as part of the FBI’s post-September 11th terrorism investigation could mean that Ashcroft and Mueller intentionally designated such detainees as persons “of high interest” on the grounds of race, religion, or national origin.¹¹⁹ Notwithstanding this, the Court surmises that there may be a more benign explanation for the same conduct: Ashcroft and Mueller instituted a legitimate anti-terrorism policy that happened to have a disparate impact on Arab Muslim men because of the connection between the September 11th attack and its perpetrators.¹²⁰ In comparing the plaintiff’s intentional discrimination thesis to the more innocent one, the Court finds plaintiff’s explanation wanting and therefore not plausible.¹²¹ Although the Court denies that the plausibility standard is a probability one, the Court openly compares plaintiff’s theory of the case to other theories, judges them relative to one another, and rejects plaintiff’s as implausible because of the *unlikelihood* of its occurrence.¹²² Justice Souter—the author of *Twombly*—identifies the Court’s conflation

¹¹⁶ See *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 127 S. Ct. at 1965).

¹¹⁷ See *id.* at 1951 (citing First Amended Complaint and Jury Demand, *supra* note 110, ¶¶ 47, 69).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (“The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples.”).

¹²¹ The Court concluded: “On the facts respondent alleges the arrests Mueller oversaw were *likely* lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. *As between* that “obvious alternative explanation” for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible explanation.” *Id.* at 1951–52 (emphasis added).

¹²² *Id.* at 1951 (“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given *more likely* explanations, they do not plausibly establish this purpose.” (emphasis added)).

of plausibility and probability in *Iqbal* as a “fundamental misunderstanding of the enquiry that *Twombly* demands:”¹²³

Twombly does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are *probably* true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.¹²⁴

Rather than clarifying what plausibility means in relation to possibility post-*Twombly*,¹²⁵ *Iqbal*’s analysis suggests that probability is applicable.

4. *The Court Usurped the Jury’s Fact-Finding Role*

Iqbal’s weighing the relative merits of alternative liability theories, on the basis of facts alleged at the pleadings stage, is an improper usurpation of the jury’s fact-finding role. Even at the summary judgment stage¹²⁶—where not only pleadings, but discovery, disclosures, and affidavits are under consideration—a court may not block the jury from determining liability, by granting summary judgment, because the court believes one theory is more likely than another. Instead, a court is limited to determining whether there is any genuine issue of material fact that would entitle the jury to consider the legal question at issue.¹²⁷ Certainly, at the pleadings stage, one would not expect a court to be able to prejudge the merits of a case any more than at the summary judgment stage.¹²⁸ Indeed, at the pleadings stage, a court would be in far less a position to judge the relative merits of alternative case theories when nothing but allegations—factual and legal—are available to tell the story. Concluding that one theory is more likely to have occurred than another arguably constitutes judicial fact-finding which is prohibited at the pleadings stage.¹²⁹

¹²³ *Id.* at 1959 (Souter, J., dissenting).

¹²⁴ *Id.* (emphasis added).

¹²⁵ *See id.* at 1949 (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”).

¹²⁶ Technically, there is no defined summary judgment “stage.” Rule 56(c)(1)(A) permits the defendant to move for summary judgment “at any time until 30 days after the close of all discovery.” FED. R. CIV. P. 56(c)(1)(A). However, practically speaking, defendants will usually move after discovery, once they have had ample opportunity to collect evidence supporting the motion.

¹²⁷ The summary judgment rule states, “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c)(2).

¹²⁸ *See supra* note 126.

¹²⁹ *See* *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (“[R]uling on a motion for dismissal pursuant to Rule 12(b)(6) is not an occasion for the court to make findings of fact.”).

In sum, *Iqbal* poses a number of problems for civil actions in general.

B. *Civil Rights Cases in Particular*

Iqbal has ushered in a new pleading paradigm that threatens the viability of potentially meritorious civil rights claims. In particular, *Iqbal* has set into motion a wave of concern over the future viability of civil rights claims because of the adverse impact the plausibility standard has on such claims.¹³⁰

Central to modern federal civil procedure is the tenet that the Rules are trans-substantive; that is, they apply across the board to all civil actions regardless of the underlying substantive law.¹³¹ Rules 8(a)(2) and 12(b)(6) are no exception. They are applicable unless carved out by statute¹³² or Rule 9.¹³³ Although the desirability of trans-substantivity has been questioned by courts¹³⁴ and commentators,¹³⁵ it nevertheless remains a fundamental principle in modern federal procedure.

¹³⁰ See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. (forthcoming 2010) (manuscript at 111–20); *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6–7 (2009) [hereinafter *Access to Justice Denied*] (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense & Education Fund, Inc.) (“In contrast to *Conley*’s ‘fair notice’ requirement, the stricter plausibility pleading standard in *Iqbal* and *Twombly* compels plaintiffs to provide more of an evidentiary foundation to substantiate their claims in order to withstand a defendant’s motion to dismiss. Yet, because plaintiffs typically can obtain discovery only if they survive a motion to dismiss, many will be denied the very tools needed to support meritorious claims, and thus wrongdoers will escape accountability.”). This concern has led various civil rights organizations to coordinate and introduce legislation aimed at resurrecting the *Conley* “no set of facts” standard. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to the Courts Act of 2009, H.R. 4115, 111th Cong. (2009). Other types of cases, such as antitrust, conspiracy, products liability, and environmental claims face similar hurdles, but are beyond the scope of this Article.

¹³¹ For an examination of the history of trans-substantivity of the Rules from their inception in 1938 to the present, see Marcus, *supra* note 1.

¹³² See, e.g., Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b) (2006).

¹³³ FED. R. CIV. P. 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”

¹³⁴ See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 577–582, 622–23 (2002) (describing lower court resistance to trans-substantivity in pleadings by utilizing heightened pleading standard for certain actions); see, e.g., *Kregler v. City of New York* (Kregler II), 646 F. Supp. 2d 570, 577 (S.D.N.Y. 2009) (noting problem of applying a “one-rule-fits-all” pleading philosophy for various claims).

¹³⁵ See, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716–18 (1988); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–56 (1994) (calling for substance-specific procedural rules). See generally, Marcus, *supra* note 1 (manuscript at 6 n.17) (listing commentators on trans-substantivity).

Despite the trans-substantive application of the Rules, they impact cases differently based on the substantive area of law.¹³⁶ This effect is not unexpected in light of the unique features inherent in certain types of claims. As a result of the new pleading standard, several courts have recently dismissed civil rights claims that would have admittedly survived *Conley's* notice pleading standard.¹³⁷ The Supreme Court's recent interpretation of Rules 8(a)(2) and 12(b)(6) adversely impacts civil rights claims because of the following evidentiary hurdles.

¹³⁶ For example, some have expressed concern over the impact amended Rule 11 has had on civil rights claims. See Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 290–96 (1992) (describing Rule 11's disparate impact on civil rights litigation); Marcus, *supra* note 1 (manuscript at 10) (describing how amended Rule 11 "had a particularly dramatic impact in Title VII and other civil rights cases" because of a "number of recurring features of this type of litigation—[including] the fact that evidence of discrimination is often in the defendant's control"); Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry Into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155 (1999) (discussing studies showing the neutrality of the Federal Rules, and how Rule 11 has had a chilling effect on civil rights filings); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 489–508 (1989) (discussing the adverse impact Rule 11 has had on civil rights cases).

¹³⁷ See *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (allowing amendment of complaint in recognition that *Twombly* and *Iqbal* plausibility standard "is a significant change, with broad-reaching implications"); *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217, 226 n.4 (D.P.R. 2009) ("As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without 'smoking gun' evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations."); *Young v. City of Visalia*, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at *6–7 (E.D. Cal. Aug. 18, 2009) (concluding "In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (*i.e.* 'bare allegations') is no longer viable" and dismissing complaint that lacked facts sufficient to plausibly state a valid *Monell* claim (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978))); *Coleman v. Tulsa County Bd. of County Comm'rs*, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009) (dismissing Title VII hostile work environment and retaliation claims, and noting that "[p]laintiff's second amended complaint may have survived under *Conley v. Gibson*" for a claim that was conceivable but not plausible); *Ansley v. Florida Dep't of Revenue*, No. 4:09CV161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009) (dismissing Title VII employment discrimination case, and concluding: "These allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not."); *Argeropoulos v. Exide Techs.*, No. 08-CV-3760 (JS), 2009 WL 2132443, at *6 (E.D.N.Y. July 8, 2009) (dismissing Title VII hostile work environment claim that might have survived *Conley's* "no set of facts" standard, but fails under *Iqbal* because without more information about national origin, animus claim is conceivable but not plausible); *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) ("*Iqbal* and *Twombly* implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion. . . . Under the Supreme Court's new standard, an allegation of discrimination needs to be more specific.").

1. *How Civil Rights Claims Are More Vulnerable to Dismissal Under the Plausibility Standard*

a. *Plaintiffs Alleging Intentional Discrimination Often Plead Facts that Are Consistent with Both Legal and Illegal Behavior*

First, the plausibility standard works an unfair disadvantage in civil rights cases because plaintiffs alleging intentional discrimination, pre-discovery, can often only plead facts that are consistent with both legal and illegal behavior. The nature of the facts available at this early juncture will often suggest alternative theories of the case,¹³⁸ and under the new standard a plaintiff must allege facts “plausibly suggesting (not merely consistent with)” illegal conduct.¹³⁹ As in *Iqbal*, a complaint may set forth factual allegations that, taken as true, are consistent with both invidious discrimination¹⁴⁰ and a legitimate purpose, such as a policy to combat terrorism.¹⁴¹ The same was true in *Twombly*. The Court concluded that defendants’ parallel conduct could be the result of an illegal agreement to restrain competition or the logical reaction to market conditions.¹⁴² However, because the plaintiff failed to show that it was more likely to be illegal activity rather than legitimate business action, the complaint was dismissed. This result is not unexpected under the new pleading standard. For many situations, an individual’s conduct may suggest an illicit motive or a purely innocuous one—indistinguishable from each other prior to discovery.

Civil rights claims are also particularly vulnerable to dismissal because of the nature of the alleged violation. Intentional discrimination claims require a plaintiff to prove that defendant’s adverse action was taken *because of* plaintiff’s membership in a protected class. She must prove that the defendant was motivated by factors such as race, gender, or age rather than a permissible rationale. Factual allegations in civil rights cases are more likely to be subject to multiple interpretations. This places civil rights cases at greater risk of dismissal.¹⁴³

For example, an employer who denies a female worker a promotion might do so because she is a woman (a violation of Title VII of the Civil Rights Act of 1964) or because she is rude (a legitimate employer

¹³⁸ See, e.g., *Olszewski v. Symyx Techs., Inc.*, No. C08-03657 HRL, 2009 WL 1814320, at *3 (N.D. Cal. June 24, 2009) (dismissing ADEA age discrimination claim where plaintiff “failed to plead facts that raise more than mere possibility that her age was the ‘but-for’ reason for her termination” and not the massive layoff).

¹³⁹ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007).

¹⁴⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin.”).

¹⁴¹ See *id.* (“On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”).

¹⁴² See *Twombly*, 127 S. Ct. at 1972.

¹⁴³ See, e.g., *Olszewski*, 2009 WL 1814320, at *3.

prerogative). The factual allegation of the denial is consistent with two possibilities, neither of which can be confirmed at the pleading stage. Or the employer may have denied the employee because she was both a woman and rude, in which case the plaintiff can allege a mixed motive. Or the employer may have denied her for a different reason altogether—her older age—which would constitute a separate claim under the Age Discrimination in Employment Act. By discounting as implausible factual allegations because they are equally consistent with legal and illegal behavior, the new pleading standard penalizes plaintiffs who seek relief for invidious discrimination because they do not have “further factual enhancement”¹⁴⁴ to cross the line from possible to plausible based on the judge’s “judicial experience and common sense.”¹⁴⁵

By contrast, suppose a plaintiff sues for negligence because defendant struck him with a car. Defendant’s conduct (hitting the plaintiff with a car) is not consistent with legal behavior. It is not the type of occurrence that one would expect to happen if the defendant was acting with the proper standard of care. While the defendant may ultimately be found not liable—otherwise there would be no need for litigation—his alleged conduct alone suggests a breach in the law. Thus, a plaintiff filing a negligence claim may allege only that defendant’s car struck the plaintiff on a certain date at a certain place, and that this conduct was “negligent.” Forms 11 and 12 make this clear.¹⁴⁶ For a negligence claim, plaintiff’s factual allegations more easily nudge the court from believing the claim was possible to plausible.¹⁴⁷ Here, the *Iqbal* standard does not necessarily have a negative impact on the plaintiff’s claim.¹⁴⁸

However, for those doctrinal claims where factual allegations facially suggest alternative theories,¹⁴⁹ plaintiffs have a harder time overcoming

¹⁴⁴ *Twombly*, 127 S. Ct. at 1966.

¹⁴⁵ *Iqbal*, 129 S. Ct. at 1950.

¹⁴⁶ Form 11 states: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff.” FED. R. CIV. P., Form 11. Form 12 states: “On date, at place, defendant name or defendant name or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.” FED. R. CIV. P., Form 12.

¹⁴⁷ See Hartnett, *supra* note 8 (manuscript at 29–30). Professor A. Benjamin Spencer develops a compelling descriptive theory of pleading where a presumption of impropriety determines the level of factual specificity necessary in pleadings post-*Twombly*. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 13–18 (2009). As Professor Spencer recognizes, “it appears that legal claims that apply liability to factual scenarios that otherwise do not bespeak wrongdoing will be those that tend to require greater factual substantiation to traverse the plausibility threshold.” *Id.* at 14.

¹⁴⁸ *But see*, Branham v. Dolgencorp, Inc., No. 6:09-CV-00037, 2009 WL 2604447 (W.D. Va. Aug. 24, 2009) (mem.), available at <http://www.vawd.uscourts.gov/opinions/moon/branhamdolgencorpmtd.pdf> (dismissing negligence claim under 12(b)(6) based on *Twombly* and *Iqbal*).

¹⁴⁹ On a related note, under the *Twombly-Iqbal* approach for properly stating a claim, it is hard to square how a court may dismiss a complaint because there is a

the plausibility threshold. Although this disadvantage is not exclusive to civil rights claims—the antitrust allegations in *Twombly* are a case in point—such claims are especially vulnerable in a climate in which the continued existence of discrimination is being called into question.¹⁵⁰

In sum, because complaints alleging intentional discrimination will often set forth factual allegations consistent with illegal and legal conduct, such complaints are more vulnerable to dismissal under the plausibility standard.

b. Discriminatory Intent Is Often Difficult, and Sometimes Impossible, to Unearth Pre-Discovery

Second, it is more difficult for complaints alleging civil rights violations to overcome the plausibility standard because evidence of illegal motive (intent) or institutional practices is often difficult to unearth absent discovery.¹⁵¹

i. Discrimination Is More Subtle and Institutional

Excavating evidence of discrimination is difficult because of the often subtle and institutional forms it takes.¹⁵² For example, pervasive institutional changes in the contemporary workforce—such as work structure, evaluative models, and relational dynamics—can facilitate bias in employer decision-making that more easily eludes detection and disproportionately works to the detriment of minorities and women.¹⁵³

more likely alternative explanation for defendant's conduct than that alleged by the plaintiff with Rule 8's permissive approach towards pleading in the alternative. Under Rule 8, it is the plaintiff's prerogative to "set out 2 or more statements of a claim . . . alternatively or hypothetically," FED. R. CIV. P. 8(d)(2), and "state as many separate claims . . . as it has, regardless of consistency." FED. R. CIV. P. 8(d)(3). The plaintiff need only properly state a single claim for relief; even if she makes alternative statements, only one has to be sufficient for the complaint to survive a 12(b)(6) dismissal. FED. R. CIV. P. 8(d)(2). The Rule's accommodating language suggests that the notice owed defendant is general and flexible. Given the ease with which notice can conceivably be achieved under provisions 8(d)(2) and (3), it is no wonder some scholars have concluded that notice pleading has died post-*Twombly*. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) ("Notice pleading is dead."); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 121, 124–26 (2007).

¹⁵⁰ See discussion *infra* Part III.B.1.c (regarding perceptions about the existence of race discrimination in a "post-racial" Obama society).

¹⁵¹ See *Access to Justice Denied*, *supra* note 130, at 84–85 (statement of Debo P. Adegbile) ("[T]he stricter plausibility pleading standard in *Iqbal* and *Twombly* compels plaintiffs to provide more of an evidentiary foundation to substantiate their claims in order to withstand a defendant's motion to dismiss. Yet, because plaintiffs typically can obtain discovery only if they survive a motion to dismiss, many will be denied the very tools needed to support meritorious claims . . .").

¹⁵² See *id.* at 86 ("[D]iscovery is a particularly valuable and necessary tool in uncovering the subtle and sophisticated forms of discrimination that have become more commonplace than the more overt examples that once permeated our society.").

¹⁵³ See Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1138–61 (2008); *id.*

And bias in the workplace today is far less overt and transparent, as some courts have recognized.¹⁵⁴ Instead, it takes on greater subtlety in the form of stereotypes and unconscious bias,¹⁵⁵ a phenomenon that turns out to be more pervasive than some initially contemplated.¹⁵⁶

at 1146 (“The reality is that the root of the discrimination remains concealed in the web of modern workplace design, including work teams and collective decision-making processes.”); *see also* Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 646–648 (2005) (work culture may perpetuate discrimination); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 661 (2003) [hereinafter Green, *Targeting Workplace Context*] (class actions can “identify and address organizational sources of discrimination”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (“‘Second generation’ claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decisionmaking, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.”).

¹⁵⁴ For example, the Third Circuit in *Aman v. Cort Furniture Rental Corp.* concluded: “Anti-discrimination laws and lawsuits have “educated” would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind. . . .”

“The sophisticated would-be violator has made our job a little more difficult. Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct” 85 F.3d 1074, 1081–82 (3d Cir. 1996); *see also* Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987) (“Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it”).

¹⁵⁵ *See* Green, *Targeting Workplace Context*, *supra* note 153, at 659 (“Individuals discriminate, but they do so in a situated context. Their discriminatory decisions take place as part of a complex web of interrelated social expectancies and taken-for-granted institutionalized practices that influence their interpretations, constrain their options, and normalize their outcomes.”); *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1268–69 (2000) (addressing the unintended consequences of stereotypes, even positive ones, that result in assumptions about one’s ability to perform a certain skill set and be selected for a specific position); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 957 (1996) (“[I]t appears that by age six, non-white children have internalized the racism of our society. This observation was manifested further in another study where non-white kindergarten and second grade children were found to identify with pictures of white children as those most like themselves, most like they wanted to be, and most like they would want their friends to be.”); Michael Selmi, Response to Professor Wax, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1238 (1999) (describing how encouraging women to act more “feminine” can be a form of subconscious discrimination); Terry Smith,

ii. Evidence Is Often in the Exclusive Possession of the Defendant

Moreover, unearthing discrimination is difficult because evidence of a defendant's intent or practices is often in its exclusive possession.¹⁵⁷ For example, in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁵⁸ the plaintiff Lilly Ledbetter brought suit against her employer Goodyear well after the statute of limitations had expired because she was not aware of her employer's initial discriminatory decision to pay her less based on gender.¹⁵⁹ Like so many employees,¹⁶⁰ she was not privy to the fact that she

Everyday Indignities: Race, Retaliation, and the Promise of Title VII, 34 COLUM. HUM. RTS. L. REV. 529, 540–44 (2003) (detailing the accounts of two African-Americans subjected to subtle discrimination in the workplace).

¹⁵⁶ See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005) ("Contemporary sociological and psychological research reveals that discriminatory biases and stereotypes are pervasive, even among well-meaning people. In fact, recent studies have focused particular attention on the unconscious biases of people whose consciously held beliefs are strongly egalitarian."); see also John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 94 (2002); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 831 (2001); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000) ("[M]any people who explicitly support egalitarian principles and believe themselves to be nonprejudiced also unconsciously harbor negative feelings and beliefs about blacks and other historically disadvantaged groups."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164, 1186–88 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[W]e are all racists."); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901–02 (1993) ("Thus, through personal and cultural experience the individual comes to associate characteristics such as 'intelligence,' 'laziness,' 'honesty,' or 'dirtiness' with classifications of people.' Since our 'categorization' of people is learned and experienced at a very young age, we may not be conscious of having internalized those feelings and beliefs." (quoting Lawrence, *supra*, at 337–39)).

¹⁵⁷ See Roy L. Brooks, Conley and Twombly: *A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 68–69 (2008). Professor Roy L. Brooks explains: "[The Plausibility pleading rule] disadvantages the prosecution of civil rights cases because it imposes a difficult, if not impossible, burden on the plaintiff to make specific factual allegations about evidence (or 'proof') known only to defendants. For example, evidence of discriminatory animus or institutional practices is typically not revealed to the plaintiff until discovery; yet, under the [plausibility pleading rule], the plaintiff is forced to plead such undiscovered evidence or face early dismissal of his or her civil rights claim. Cases are dismissed without ever reaching the merits." *Id.* at 58 (footnotes omitted). See also Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 957 (1990) (discussing *Strauss v. City of Chicago*, 760 F.2d 765, 770 (7th Cir. 1985), and noting that plaintiff would not normally have the requisite factual predicate to show the city had a "custom and practice" of discrimination pre-discovery, thereby making it "nearly impossible" for his civil rights claim to escape 12(b)(6) dismissal).

¹⁵⁸ 127 S. Ct. 2162, 2177 (2007) (holding plaintiff's claim was barred because of the statute of limitations).

¹⁵⁹ *Id.* at 2165–66.

had been systematically underpaid¹⁶¹—an inequity that did not escape Congress.¹⁶² This is an example of an informational inequity.

Another example of informational inequity is where a plaintiff is beaten up by a police officer but unable to identify the individual—a fact clearly within the defendant’s possession in a § 1983 claim. An informational inequity also exists where an African-American couple is steered by a real estate agent to predominantly Black neighborhoods but unable to know the agent’s racial intent—a fact clearly within the defendant’s possession in a Fair Housing Act claim. In sum, in numerous ways, civil rights claimants¹⁶³ suffer informational inequities that unfairly undermine their ability to meet the plausibility standard.¹⁶⁴

c. The Plausibility Standard’s Subjective Nature Fails to Provide Courts Sufficient Guidance When Ruling on 12(b)(6) Motions

Where a judge has only his “judicial experience and common sense”¹⁶⁵ to guide him when determining the plausibility of an intentional discrimination claim pre-discovery, there is the risk of unpredictability, lack of uniformity, and confusion.¹⁶⁶ Based on the differences among

¹⁶⁰ Pay information is often confidential, and disparities in pay may not evince discrimination until years of salary data can be accumulated. *Id.* at 2178–79, (Ginsburg, J., dissenting); see Leonard Bierman & Rafael Gely, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004) (discussing how social norms and corporate policy may discourage discussion of salaries in the workplace and citing, for example, that one-third of U.S. private sector employers have policies prohibiting employees from discussing salaries).

¹⁶¹ *Ledbetter*, 127 S. Ct. at 2182.

¹⁶² The effect of this holding was ultimately reversed by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

¹⁶³ Other claimants may also experience informational inequities and therefore be potentially adversely affected by the plausibility pleading standard. They include those who file antitrust, conspiracy, product liability, and environmental claims. However, a full examination of these other areas is beyond the scope of this Article.

¹⁶⁴ See Spencer, *supra* note 147, at 26 (“[A] standard that dismisses valid claims at the very front end of the system based on an inability to offer facts that claimants are, at this early stage, unlikely or unable to know blocks access to the courts in a way that is fundamentally improper.”); Dodson, *supra* note 149, at 138–39 (noting same in antitrust context); Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 912 (2008); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1261–62 (2008) (criticizing *Twombly* for “informational asymmetries”); see, e.g., Ibrahim v. Dep’t of Homeland Sec., No. C 06-00545, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009) (“A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery.”).

¹⁶⁵ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

¹⁶⁶ *Access to Justice Denied*, *supra* note 130, at 17 (statement of Arthur Miller, Professor, New York University) (“The subjectivity at the heart of *Twombly-Iqbal* raises the concern that rulings on motions to dismiss may turn on individual ideology regarding the underlying substantive law, attitudes toward private enforcement of federal statutes, and resort to extra-pleading matters hitherto far beyond the scope of

judges, one complaint may be dismissed while another survives, solely because of the way a judge applies his “judicial experience and common sense.”¹⁶⁷ Such subjectivity can result in multiple outcomes in cases in which there are comparable pleadings. Plaintiffs and their counsel are left to wonder what factual allegations suffice when pleading intentional discrimination.¹⁶⁸ Without a clear standard, plaintiffs are unable to accurately assess the sufficient quantum or type of facts necessary to overcome a 12(b)(6) dismissal.

The problem is not that a judge may be sympathetic or unsympathetic to discrimination claims, but that his personal perception, rather than the law, threatens to become outcome determinative.¹⁶⁹ For example, studies indicate that there are significant differences in perception among racial groups over the existence and pervasiveness of race discrimination.¹⁷⁰ With the election of the first African-American President of the United States, Barack Obama, there has been a particularly acute focus on whether American society has become “post-

a Rule 12(b)(6) motion to dismiss. As a result, inconsistent rulings on virtually identical complaints may well be based on judges’ disparate subjective views of what allegations are plausible. Courts already have differed on issues that were once settled.”); *see also* *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) (“Post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints.”).

¹⁶⁷ *See* Hartnett, *supra* note 8 (manuscript at 32) (“Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, a matter of common sense.”).

¹⁶⁸ *See Access to Justice Denied*, *supra* note 130, at 90 (statement of Debo P. Adegbile) (“*Iqbal* has provided little guidance as to what factors courts should use to determine ‘plausibility’—apart from a vague instruction to rely on ‘judicial experience and common sense.’”).

¹⁶⁹ *See id.* at 17 (statement of Arthur Miller); *and supra* note 166. *See also* Hartnett, *supra* note 8 (manuscript at 31–38, 55) (describing how judges’ different baseline assumptions may lead to differing perceptions of plausibility, especially in discrimination cases, thereby warranting litigants to provide courts with relevant social science research).

¹⁷⁰ *See* Gary Langer & Peyton M. Craighill, *Fewer Call Racism a Major Problem Though Discrimination Remains*, ABC NEWS, Jan. 18, 2009, <http://abcnews.go.com/PollingUnit/Politics/story?id=6674407&page=1> (“[African-Americans] remain twice as likely as whites to call racism a big problem (44 percent vs. 22 percent), and only half as likely to say African-Americans have achieved equality.”); K.A. DIXON ET AL., CTR. FOR WORKPLACE DEV., *A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB* 8 (2002), *available at* http://www.heldrich.rutgers.edu/uploadedFiles/Publications/work_trends_020107.pdf (finding that African-American employees are five times more likely than their white counterparts to believe that African-Americans are the most likely victims of discrimination; 50% of African-American employees believe employment practices are fair, in comparison to 90% of their white counterparts); Kevin Sack & Janet Elder, *Appendix, The New York Times Poll on Race: Optimistic Outlook But Enduring Racial Division*, in *HOW RACE IS LIVED IN AMERICA* 385 (2001) (44% of African-Americans believe they are treated less fairly than whites in the workplace, while 73% of whites believe African-Americans are treated fairly).

racial.”¹⁷¹ Following this historic election, many Americans have concluded that intentional race discrimination is no longer a significant issue.¹⁷² In a “post-racial” society, judges, like many Americans, may operate from the presumption that discrimination—at least racial discrimination—is a thing of the past.¹⁷³ This perception may contribute to a judge’s concluding that intentional discrimination is implausible, especially in light of other alternative explanations available: “Those who see discrimination as a pervasive and unjust aspect of our society are far more likely to interpret ambiguous events as the product of discrimination, while those who believe, or want to believe, that discrimination has receded in importance will attribute observed inequalities to forces other than discrimination.”¹⁷⁴

¹⁷¹ See, e.g., *PBS Newshour: Debate on Race Emerges as Obama’s Policies Take Shape* (PBS television broadcast Sept. 16, 2009) [hereinafter *PBS Newshour*], available at http://www.pbs.org/newshour/bb/politics/july-dec09/rage_09-16.html; Philip Rucker, *In S.C., One Road Divides Two Ways of Thinking*, WASH. POST, Sept. 22, 2009, at A1 (describing varying opinions on the continued existence of racism after Obama’s election and the role of race in opposition to him).

¹⁷² See Ian F. Haney López, *Post-Racial Racism: Policing Race in the Age of Obama*, (forthcoming 2010) (manuscript at 142, 147), available at <http://ssrn.com/abstract=1418212> (“Partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral and that these institutions produce vast racial disparities.”); see, e.g., *PBS Newshour*, *supra* note 171. For example, in a discussion among columnists and academics with Gwen Ifill, Democratic Polster Cornell Belcher concluded: “We’re two very different countries racially, where right now you have a majority of whites who, frankly, do think we’re post-racial because they think African-Americans have the same advantages as they do, while African-Americans do not. And you have a large swath of whites right now who are just as likely to see reverse discrimination as an issue as classic discrimination.” *Id.* But see Associated Press, *Ex-President Sees Racism in Outburst*, N.Y. TIMES, Sept. 16, 2009, at A14 (attributing Joe Wilson’s outburst during President Obama’s health care speech as “based on racism” and noting that “[t]here is an inherent feeling among many in this country that an African-American should not be president”); Jeffrey M. Jones, *Majority of Americans Say Racism Against Blacks Widespread*, GALLUP, Aug. 4, 2008, <http://www.gallup.com/poll/109258/Majority-Americans-Say-Racism-Against-Blacks-Widespread.aspx>.

¹⁷³ Indeed, this presumption may have germinated far earlier. See Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1180 (1992) (“After a decade of efforts to enforce Title VII, federal judges apparently began to share the general public’s belief that employment discrimination against minorities had been largely eradicated.”).

¹⁷⁴ Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 675 (2003); see also *Access to Justice Denied*, *supra* note 130, at 90 (statement of Debo P. Adegbile) (“Because this new plausibility standard appears dangerously subjective, it could have a potentially devastating effect in civil rights cases that come before judges who may, based on the nature of their personal experiences, fail to recognize situations in which discrimination or other constitutional wrongs require redress.”).

Some courts have been and continue to be hostile to civil rights claims, perceiving them to be largely frivolous.¹⁷⁵ Indeed, federal district courts regularly imposed a heightened pleading requirement for civil rights claims, in part, because of this perception.¹⁷⁶ Consequently, the Supreme Court has had to reign in this practice on several occasions.¹⁷⁷

Recent studies indicate that judicial hostility to Title VII claims in particular continues. For example, a recent study by Professor Kevin M. Clermont and Dean Stewart J. Schwab, analyzing federal civil cases from 1970 to 2006, indicates that plaintiffs challenging employment discrimination do not fare well in federal court.¹⁷⁸ In particular, “employment discrimination cases constitute one of the least successful categories of cases at the district court level, in that plaintiffs win a very small percentage of their actions and fare worse than in almost any other category of civil case.”¹⁷⁹ Moreover, the plaintiff is more likely to lose on appeal.¹⁸⁰ Clermont and Schwab have identified an “anti-plaintiff effect” that they attribute to negative judicial attitudes toward employment cases.¹⁸¹ Judicial resistance to civil rights claims in general has been noted by various scholars.¹⁸²

¹⁷⁵ See, e.g., *Valley v. Maule*, 297 F. Supp. 958, 960–61 (D. Conn. 1968) (“A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.”).

¹⁷⁶ See *Blaze*, *supra* note 157, at 950–51, 956–57 (attributing courts’ creation of “special” pleading rule for civil rights cases in part to perception that such claims were frivolous); see also *Maule*, 297 F. Supp. at 960–61 (citing cases). The courts’ application of a heightened pleading standard for civil rights cases is well documented. See generally *Spencer*, *supra* note 7 (describing historical application of heightened pleading standard in civil rights cases); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1027–32 (2003); Fairman, *supra* note 134, at 576; Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750–52, 1759 (1998); *Blaze*, *supra* note 157, at 956–57; C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 688–89 (1984).

¹⁷⁷ See discussion *supra* Part II.B–C.

¹⁷⁸ See generally, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009).

¹⁷⁹ *Id.* at 113. In particular, from 1979 to 2006, the plaintiff success rate for such cases was 19.62%, while the plaintiff success rate for other types of cases was 45.53%. *Id.* at 130. See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560–61 (2001) (indicating that in employment discrimination cases, plaintiffs are “half as successful when their cases are tried before a judge than a jury, and success rates are more than fifty percent below the rate of other claims”).

¹⁸⁰ Clermont & Schwab, *supra* note 178, at 110. In particular, from 1988 to 2004, the percentage of appeals reversed after plaintiffs’ trial wins was 41.10%, while those after defendants’ trial wins was 8.72%.

¹⁸¹ *Id.* at 115. The perception that civil rights claims are largely frivolous may be fueled in part by the significant number of such claims filed by prisoners, a phenomenon which has diminished but not disappeared under the Prison Litigation

Judges may differ over the extent to which discrimination is a plausible explanation for a defendant's alleged conduct. Without a sufficient legal standard in which to anchor the plausibility determination, judges are vulnerable to the criticism that their decisions are based on factors outside of the law. According to legal realists, despite their best efforts, judges' backgrounds and attitudes already play a significant role in case outcomes.¹⁸³

Reform Act (PLRA). See *Crawford-El v. Britton*, 523 U.S. 574, 597 n.18 (1998) (describing drop in prisoner case filings since the enactment of the PLRA). Assuming arguendo that prisoners' civil rights claims are largely meritless and that they could be more quickly disposed of by a plausibility standard, this does not justify throwing the baby out with the bathwater. Not all civil rights claims should suffer the same fate by way of *Iqbal*, simply because frivolous litigation by prisoners would be curtailed. Moreover, given the generous pleading standard available to pro se prisoners—recently discussed in *Erickson v. Pardus*—it is not at all clear that the *Twombly-Iqbal* pleading standard would have this brush-clearing effect. See discussion *supra* Part II.E.

¹⁸² Hart, *supra* note 156, at 790 (“Unfortunately for Title VII plaintiffs, the hostility of the federal judiciary to employment discrimination claims has been widely recognized.”); see also Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 186 (1997) (describing judicial propensity to assume personality clash as basis for employer’s adverse action rather than unconscious bias and stereotyping); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1179, 1196 (2003) (describing shift in judicial attitude from racism to personal animosity as presumptive explanation for an employer’s adverse action in the absence of evidence); John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 342 (1997) (describing federal judges’ dislike of employment cases); Catherine J. Lancot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546 (2001) (“[C]ourts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits.”); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL’Y J. 37, 63 (2000) (discussing “the reluctance and doubt that greet claims asserted by civil rights plaintiffs” by judges); Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 585 (2003) (describing “unsympathetic” application of Title VII by the courts).

¹⁸³ See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 4–5 (1994). Nugent explains:

“Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors. This ideal, however, while appealing to most judges, does not coincide with the findings of behavioral scientists, whose research has shown that human beings rarely, if ever, conform to such idealistic principles. . . .

“[I]t is exactly through this blind faith in their impartiality that judges may gain a false sense of confidence in their decisions. They may fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections.” *Id.*

See Hart, *supra* note 156, at 789 & n.253 (citing literature); see, e.g., Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932); Karl N. Llewellyn, *A Realistic*

In assessing the sufficiency of the “judicial experience and common sense” standard for determining plausibility, empirical studies on the impact of excessive subjectivity and intuition on decision-making are instructive. Such studies suggest that, where possible, it is important for a standard not to be overly subjective or reliant on intuition.

Sociological and psychological literature explains how excessive subjectivity increases the risk of biased decision-making in the workplace.¹⁸⁴ For example, in the employment context, employers who rely on excessively subjective criteria in hiring, promotions, and other employment actions run the risk of violating the federal civil rights laws because of the propensity of bias to surface.¹⁸⁵ Federal courts have long recognized this risk.¹⁸⁶ The Supreme Court itself, in *Watson v. Fort Worth*

Jurisprudence—The Next Step, 30 COLUM. L. REV. 431, 432, 447 n.12, 452 n.19, (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 275–76, 277–79, 285 (1929); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 358–60 (1925). See also Schultz & Petterson, *supra* note 173, at 1167 (“There is little disagreement that judges’ political, social, and personal values may affect their decisions.”); Howard T. Hogan, *Some Thoughts on Juries in Civil Cases*, 50 A.B.A. J. 752, 753 (1964) (“Our judgment of issues of fact must always be based in part upon what we, as individuals, are—the sum total of our experiences, our backgrounds, our prejudices and our limitations.”).

Formalists, on the other hand, describe judicial decision-making as a mechanical and deliberate application of the law to the facts. See Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999) (book review); Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 420–21 (1992).

¹⁸⁴ See Hart, *supra* note 156, at 745 & n.21 (“Extensive social psychological literature documents the ways in which unconscious racism and sexism, and the consequent stereotyping, operate in employment decisionmaking.” (citing scholarship)); Martin, *supra* note 153, at 1158 (“The complex entanglement of power and stereotyping, particularly in environments imbued with cultural cues, potentially affects engagement and decision-making within organizations in profound ways.”); Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts’ Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 281–82 (1994) (“Because subjective decision-making gives the decision-maker considerably more personal discretion, the process becomes more susceptible to the expression of the unconscious biases . . .”); see also Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOL. 1049, 1050 (1991); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1137 (1999) (“The potential for these types of cognitive mechanisms to play a role would be greatest when assessments have an important subjective component . . .”).

¹⁸⁵ See Baron, *supra* note 184, at 281–82 (addressing how “subjective assessments of the candidate’s previous performance and future potential” allow for biased assumptions that ultimately reinforce the “glass ceiling” and bar women from high-ranking positions); Fiske et al., *supra* note 184, at 1050 (“[S]ubjective judgments of interpersonal skills and collegiality are quite vulnerable to stereotypic biases.”).

¹⁸⁶ Hart, *supra* note 156, at 767 & n.132 (“Every court of appeals in the federal system has recognized that ‘subjective evaluations “are more susceptible of abuse and more likely to mask pretext,” and a demonstration of excessive reliance on subjective criteria has been accepted as evidence supporting an inference of discrimination.’ (quoting *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990)); see also *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002) (“Courts view with

Bank & Trust, did the same, noting that “an employer’s undisciplined system of subjective decisionmaking” does not guarantee “that the particular supervisors to whom this discretion is delegated always act without discriminatory intent.”¹⁸⁷

While mindful of its dangers, it is important to recognize that subjective criteria are not per se impermissible or illegitimate.¹⁸⁸ They are often essential tools for evaluating applicants and employees,¹⁸⁹ especially for supervisory and leadership positions.¹⁹⁰ Courts, including the Supreme Court, have recognized that subjectivity can play an important evaluative and screening function, thereby warranting judicial deference

skepticism subjective evaluation methods”); *Walker v. N.Y. State Office of Mental Health*, No. 97-7367, 1998 WL 639392, at *2 (2d Cir. Apr. 6, 1998) (“[G]reater possibilities for abuse are inherent in the utilization of such subjective values.”); *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 482 (5th Cir. 1989) (noting that using “highly subjective” criteria for promotion decisions “makes it easier to discriminate”); *Bell v. Bolger*, 708 F.2d 1312, 1319–20 (8th Cir. 1983) (“[S]ubjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse.”); *Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004) (“Such subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of”).

¹⁸⁷ 487 U.S. 977, 990 (1988).

¹⁸⁸ Hart, *supra* note 156, at 772 & n.160 (citing cases); *see Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001) (“It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.”); *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 321 (3d Cir. 2000) (“[A] plaintiff can not ultimately prove discrimination merely because his/her employer relied upon highly subjective qualities . . . in making an employment decision.”); *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998) (“[N]othing in Title VII bans outright the use of subjective evaluation criteria.”); *Jauregui v. City of Glendale*, 852 F.2d 1128, 1135 (9th Cir. 1988) (“The use of subjective factors to evaluate applicants for hire or promotion is not illegal per se.”); *Vitug v. Multistate Tax Comm’n*, 88 F.3d 506, 514 (7th Cir. 1986) (“Title VII does not forbid subjective selection processes.”).

Consequently, plaintiffs alleging intentional discrimination often need evidence in addition to subjective criteria to obtain class certification and to prevail on the merits. Hart, *supra* note 156, at 774, 779 (citing cases); *see, e.g., Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002) (“[A]bsent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII.” (internal quotation marks omitted) (quoting *Denney*, 247 F.3d at 1185)); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 149–50 (N.D. Cal. 2004) (stating that “where, as here, [excessive] subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts have not hesitated” to certify the class (emphasis added)).

¹⁸⁹ *See, e.g., Chapman v. AI Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000) (“[S]ubjective evaluations of a job candidate are often critical to the decisionmaking process”); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) (describing subjective criteria as “indispensable” to decision-making process in “many situations”).

¹⁹⁰ Hart, *supra* note 156, at 772 & n.160, 773 & n.164 (citing cases).

to the employer's decision-making.¹⁹¹ It is when such subjectivity is excessive and uncabined that its utility starts to wane and the risk of bias, *inter alia*, surfaces.¹⁹²

Scientific studies also explain how intuition can increase the risk of inaccurate and impartial decision-making. They have found that decisions on the basis of intuition¹⁹³—while beneficial and accurate under some circumstances¹⁹⁴—may also “lead to severe and systemic errors”¹⁹⁵ and biased decision-making.¹⁹⁶ In an empirical study of the judicial reasoning and decision-making of 252 trial judges, along with other studies, the authors concluded:

[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. Today, the overwhelming majority of judges in America explicitly reject the idea that these factors should influence litigants' treatment in court, but even the most egalitarian among us may harbor invidious mental associations.¹⁹⁷

¹⁹¹ See, e.g., *Watson*, 487 U.S. at 999 (“It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing. In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that [c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.” (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978))).

¹⁹² Hart, *supra* note 156, at 788 (“When an employer permits largely uncabined discretion to its supervisors, the risk of the pervasive operation of unconscious biases and stereotypes in decisionmaking is considerable.”).

¹⁹³ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007) (“Despite their best efforts . . . judges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges' decision making.”); *id.* at 6 (“Our results demonstrate that judges, like others, commonly make judgments intuitively, rather than reflectively, both generally and in legal contexts.”); see also R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1420 (2006) (“Deciding judicial cases inescapably requires the exercise of intuition.”). See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

¹⁹⁴ Guthrie et al., *supra* note 193, at 29 (“The intuitive approach to decision making is quick, effortless, and simple, while the deliberative approach to decision making is slow, effortful, and complex. The obvious advantage of the former is its speed; judges with heavy dockets can rely on intuition to make judgments quickly.”).

¹⁹⁵ *Id.* at 31 (quoting Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974)); *id.* at 43 (“The intuitive approach might work well in some cases, but it can lead to erroneous and unjust outcomes in others.”).

¹⁹⁶ *Id.* at 31.

¹⁹⁷ *Id.* (footnote omitted); *id.* at 5 (“[J]udges are predominantly intuitive decision makers, and intuitive judgments are often flawed. . . . [I]ntuition is generally more likely than deliberation to lead judges astray. We suspect this happens with some frequency, but even if it is uncommon, millions of litigants each year might be adversely affected by judicial overreliance on intuition.” (footnote omitted)); see also

The study found that automatic, intuitive judgment is more likely to occur than active deliberation where trial judges labor under heavy docket loads and serious time pressures.¹⁹⁸ The authors noted that such intuitive determinations were unlikely to be corrected by appellate courts whose oversight is rare and limited,¹⁹⁹ and whose standard of review is deferential to discretionary calls.²⁰⁰ While recognizing the prevalence of judges' efforts at making deliberative decisions, the study encourages the legal system to take an active role in helping judges do this:²⁰¹

We believe that most judges attempt to "reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors." Despite their best efforts, however, judges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges' decision making. The intuitive approach might work well in some cases, but it can lead to erroneous and unjust outcomes in others. *The justice system should take what steps it can to increase the likelihood that judges will decide cases in a predominantly deliberative, rather than predominantly intuitive way.*²⁰²

Recognizing that judges may interpret what is plausible through a lens informed by background and experience is not to disparage their character or suggest ill will on their part.²⁰³ To the extent that a standard

Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006) (explaining how the Implicit Association Test reveals that the majority of people make decisions based, at least in part, on biased assumptions of race or gender); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512–14 (2005) (describing implicit bias revealed through association tests performed); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1072 (2006) (75% of men and women did not associate female with career as readily with family).

¹⁹⁸ Guthrie et al., *supra* note 193, at 35 ("Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier.").

¹⁹⁹ *Id.* at 4–5 & nn.16–17.

²⁰⁰ *Id.* at 32.

²⁰¹ *Id.* at 5, 27–29.

²⁰² *Id.* at 43 (emphasis added) (footnote omitted) (quoting Nugent, *supra* note 183, at 4); see also *Access to Justice Denied*, *supra* note 130, at 91–92 (statement of Debo P. Adegbile) ("While experience can inform a judge's assessment of a case, it is precisely because judges come to the bench with differing life experiences that rules promoting greater objectivity and reliance upon the introduction of facts are preferred."). While noting the prevalence of intuition, the authors also concluded that judges can and do override it with deductive reasoning at times, resulting in more just outcomes. Guthrie et al., *supra* note 193, at 3, 9, 13, 18, 19, 27–29. *But see id.* at 37–38 & n.187 (citing studies that conclude deliberation can result in inferior outcomes than those from intuition where aesthetic judgment is involved).

²⁰³ See Nugent, *supra* note 183, at 4 (noting judges' efforts to "reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors"). *But see*

is excessively subjective or promotes intuitive decision-making, judges must guard against relying on extrajudicial factors when ruling on legal matters. The legal system can help by establishing a more objective and clear standard for determining the legal sufficiency of a complaint.

In sum, the new pleadings standard has made civil rights claims more vulnerable to dismissal. The next Part addresses why this must be fixed.

2. *Why the Increased Risk of Dismissal Should Be Addressed*

The new plausibility pleading standard's adverse impact on civil rights claims should be addressed for many reasons.

a. *Civil Rights Enforcement Is Undermined*

First, the new plausibility pleadings standard compromises civil rights enforcement and deterrence objectives.²⁰⁴ Potentially meritorious civil rights claims will be prevented from being heard in federal court, a forum plaintiffs have historically relied upon for relief.²⁰⁵ Meanwhile, those who discriminate will enjoy a windfall. For example, in *Ocasio-Hernandez v. Fortuno-Burset*, the district court dismissed a case brought by fourteen former maintenance and domestic employees of the Puerto Rico Governor's mansion against the Governor and others under § 1983 for alleged violation of due process, equal protection, and freedom of political expression rights under the Constitution.²⁰⁶ With unusual candor, the court explained how the plausibility pleading standard would undermine enforcement and chill political discrimination cases:

The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision construing Rules 8(a)(2) and 12(b)(6). The original complaint . . . filed before *Iqbal* was decided by the Supreme Court, as well as the Amended Complaint . . . clearly met the pre-*Iqbal* pleading standard under Rule 8. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation, did not file a 12(b)(6) motion to dismiss the original complaint because the

Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (describing "bad judges" as those who are "incompetent, self-indulgent, abusive, or corrupt").

²⁰⁴ See *Access to Justice Denied*, *supra* note 130, at 85 (statement of Debo P. Adegbile) ("[W]rongdoers will escape accountability.").

²⁰⁵ See Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 84 (2005) ("[T]he federal judicial system has often protected minorities and other disenfranchised groups from the tyranny of local government and private actors."); see also *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 427 (1964) (Douglas, J., concurring) ("[F]ederal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

²⁰⁶ 639 F. Supp. 2d 217, 219–20 (D.P.R. 2009).

same was properly pleaded under the then existing, pre-*Iqbal* standard. . . .

As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without “smoking gun” evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations. If the evidence was lacking, a case would then be summarily disposed of. This no longer being the case, counsel in political discrimination cases will now be forced to file suit in Commonwealth court, where *Iqbal* does not apply and post-complaint discovery is, thus, available. Counsel will also likely only raise local law claims to avoid removal to federal court where *Iqbal* will sound the death knell. Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.²⁰⁷

Moreover, pursuant to the legislative scheme of various civil rights statutes, plaintiffs are empowered to act as private attorneys general to enforce the law.²⁰⁸ Where the legislative and executive branches have been unwilling or unable to enforce civil rights, the judicial system has played a vital role, which will be compromised.²⁰⁹

A preliminary study of civil rights cases post-*Twombly* suggests that the more rigorous pleading standard has already resulted in a greater

²⁰⁷ *Id.* at 226 n.4.

²⁰⁸ *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269–70 (1992); *Evans v. Jeff D.*, 475 U.S. 717, 745 (1986) (“Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as ‘private attorneys general,’ vindicating the public interest.”).

²⁰⁹ Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L.J. 453, 502–03 (1997). For example, plaintiffs alleging employment discrimination under Title VII of the Civil Rights Act of 1964 have played an important enforcement role in light of the Equal Employment Opportunity Commission’s (EEOC) diminished capacity to handle such claims. The EEOC—the administrative agency tasked with enforcement—has been underfunded and overburdened for over a decade. See *Will Obama’s pledge become reality for people with disabilities?*, 12 FED. EEO ADVISOR, Mar. 1, 2009 (“EEOC is processing the most claims it has had since opening its doors in 1965.”); Steve Vogel, *EEOC Confronts Growing Backlog, Dwindling Staff*, WASH. POST, Feb. 3, 2009, at A13 (declaring that EEOC is “facing its largest caseload in at least a quarter-century” resulting in an “overwhelmed workforce”). Consequently, this “resource starved” institution’s capacity to effectively resolve work place disputes has been severely compromised. See Suzette M. Malveaux, *Is It the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 126–28 (2009) (describing agency problems); see also Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 64 (1996) (concluding in 1996 that “the agency is clearly a failure, serving in some instances as little more than an administrative obstacle to resolution of claims on the merits” and arguing that private attorneys are better at enforcing employment discrimination statutes).

dismissal rate for such cases.²¹⁰ Examples are starting to appear across the country.²¹¹

b. Court Access Is Compromised

Second, the plausibility pleadings standard undermines one of the most fundamental rights upon which our legal system is based—the right to be heard.²¹² The Supreme Court has long recognized the primacy of this value, as expressed in the Constitution: “The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns”²¹³ Depriving someone access to the court system

²¹⁰ See *Access to Justice Denied*, *supra* note 130, at 86 (testimony of Debo P. Adegbile) (“Courts around the country are using *Iqbal* and *Twombly* to dismiss pending civil rights and other cases far more frequently than they had dismissed similar cases under *Conley*.”); Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1838 (2008) (“[A] *Twombly* civil rights action was 39.6% more likely to be dismissed than a random case in the set. This result was statistically significant to the 0.05 level.”); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 UNIV. ILL. L. REV. 1011, 1030, 1041–42 (2% increase in dismissal rate of employment discrimination cases post-*Twombly*).

²¹¹ See, e.g., *Diaz-Martinez v. Miami-Dade County*, No. 07-20914-CIV, 2009 WL 2970468, at *9 (S.D. Fla. Sept. 10, 2009) (Relying on *Twombly*, court dismissed § 1983 claim for conspiracy to deprive plaintiff his civil rights on grounds that allegations of parallel constitutional violations alone did not suggest an agreement between police defendants, and discovery was not appropriate); *Dorsey v. Ga. Dep’t of State Rd. & Tollway Auth. SRTA*, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at *5–7 (N.D. Ga. Aug. 10, 2009) (dismissing § 1983 hostile work environment claim and others on grounds that plausibility standard under *Twombly* not met under Rule 12(c) motion on the pleadings); *Ibrahim v. Dep’t of Homeland Sec.*, No. C 06-00545, 2009 WL 2246194, at *8–10 (N.D. Cal. July 27, 2009) (dismissing claims of discrimination on basis of national origin, religious beliefs, and other constitutional violations because plaintiff did not show discriminatory purpose under *Iqbal*); *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at *1–3 (W.D. Wis. June 29, 2009) (dismissing equal protection claims brought by prisoners against prison officials for alleged racial segregation).

²¹² See *Malveaux*, *supra* note 205, at 82; FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 6.7, at 311 (4th ed. 1992) (“Another characteristic American value is the right to have one’s say, specifically, to have one’s ‘day in court.’”).

²¹³ *Truax v. Corrigan*, 257 U.S. 312, 332 (1921); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962) (“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.”); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) (“[T]here is *intrinsic* value in the due process right to be heard” because “[w]hatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her”).

The right to federal court access is also grounded in the Petition Clause of the First Amendment. See Carol Rice Andrews, *A Right to Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 563 (1999); Spencer, *supra* note 147, at 27 n.124 (citing cases); see also U.S. CONST. amend. I

undermines fundamental notions of fairness and due process that are the cornerstones of the legal system. As recognized by the Supreme Court at the turn of the nineteenth century in *Marbury v. Madison*, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”²¹⁴

Moreover, denying plaintiffs access to the courts undermines the well-established preference that cases be decided on the merits rather than on procedural grounds.²¹⁵ Whenever possible, the merits should not be subordinated to procedural “technicalities.”²¹⁶ Some contend that the more rigorous pleading standard is justified as a screening mechanism to keep out frivolous litigation that blackmails defendants into unwarranted settlements.²¹⁷ However, empirical evidence suggests that this concern for over-frivolous civil rights claims may be overblown.²¹⁸

Not only does the *Iqbal-Twombly* pleading standard threaten to deny plaintiffs with certain types of claims access to the courts, it has a particularly harmful effect on disenfranchised groups, such as minorities, women, and others, because of the disparate reliance on the federal courts’ enforcement of civil rights claims by such groups.

Using an asymmetrical-critical-race-theoretical lens²¹⁹ through which to analyze *Twombly*, Professor Roy L. Brooks concludes that the new

(“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”).

²¹⁴ 5 U.S. (1 Cranch) 137, 163 (1803).

²¹⁵ See ROBERT E. KEETON, *JUDGING* 99 (1990) (providing that “a decisionmaker” prefers to make decisions “squarely on [the] merits”); JAMES ET AL., *supra* note 212, § 1.1, at 2 (“In its day-to-day application, the law of procedure implements substantive law.”); Malveaux, *supra* note 205, at 83; Ochoa & Wistrich, *supra* note 209, at 500–02; see also *Foman*, 371 U.S. at 181 (“It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.”).

²¹⁶ See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 27 (1993) (“No one . . . feels satisfied when a decision announced is based on what seems to be a legal technicality instead of on the real issues.”).

²¹⁷ See Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 114 (2007) (“Conservative pundits assert that employers are being held hostage by the discrimination laws. They are besieged by frivolous claims and forced into nuisance settlements to avoid out-of-control legal fees.” (footnote omitted) (citing several sources)).

²¹⁸ See *id.* at 111–12 (analyzing 1,170 employment discrimination cases settled by federal magistrate judges in Chicago over a six-year period “indicat[ing] that employment discrimination litigation is neither jeopardizing American business nor resulting in undeserved windfalls for disgruntled employees;” rather, plaintiffs’ settlement rates indicate their claims have some merit).

²¹⁹ Professor Brooks analyzes how a judge would analyze the shift from *Conley*’s notice pleading rule to *Twombly*’s plausibility pleading rule under three critical race theory equality models: symmetrical, asymmetrical, and hybrid. Examining the federal pleading rule from the asymmetrical-critical-race-theoretical perspective, a judge would conclude that it results in racial subordination if the rule “adversely impacts African Americans in such a way to suggest insiderness.” Brooks, *supra* note 157, at 58. In other words, the judge would ask if the pleading rule “invalidates an

pleading standard as applied to civil rights cases constitutes racial subordination.²²⁰ He argues that although the pleading standard is facially neutral,²²¹ its detrimental application to civil rights claims²²² makes it particularly problematic for disenfranchised groups. More specifically, because African-Americans are more likely than “insiders”²²³ to bring civil rights claims,²²⁴ and have historically leaned more heavily on such claims and the federal court system in which to advocate for racial equality,²²⁵ the plausibility standard takes a special toll on this group. *Twombly*’s application, under Professor Brooks’s critical race model, rises (or sinks) to the level of racial subordination²²⁶ and therefore results in what he describes as a “racial status harm.”²²⁷

Consequently, the plausibility pleading standard’s adverse impact on certain types of claims and claimants may lead individuals to call into question the institutional legitimacy of the legal system. “Shutting legitimate claims and blameless plaintiffs out of the legal process creates disaffection and disillusionment with the legal process”²²⁸ Democracy is compromised:

[N]o democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens

important African-American value, privileges whites, or in any other way creates a racial status harm.” *Id.* Under the asymmetrical model, the judge would answer yes. *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 59 (“Admittedly, the [plausibility pleading rule] is not race-specific on its face. It applies to whites as well as African Americans, and to insiders as well as outsiders. Anyone who sues under the civil rights statutes must comply with this pleading rule.”).

²²² More specifically, “[Plausibility pleading rule] disadvantages the prosecution of civil rights cases because it impose a difficult, if not impossible, burden on the plaintiff to make specific factual allegations about evidence (or ‘proof’) known only to defendants. For example, evidence of discriminatory animus or institutional practices is typically not revealed to the plaintiff until discovery; yet, under the [plausibility pleading rule], the plaintiff is forced to plead such undiscovered evidence or face early dismissal of his or her civil rights claim. Cases are dismissed without ever reaching the merits.” *Id.* at 58 (footnote omitted).

²²³ *Id.* at 45–46, 54 (describing “insiderism”); *id.* at 33 (describing “people of color, women, and homosexuals” as “outsiders” under critical race theory).

²²⁴ *Id.* at 59 (“Not surprisingly . . . the typical plaintiff in a civil rights case is more likely to be an African American rather than an insider.”).

²²⁵ *Id.* at 59–60 (2008). “[C]ivil rights litigation holds a special place in the hearts and minds of African Americans. Federal litigation in particular has always been the most essential governmental resource in the protracted struggle for racial equality in America. . . .

“[C]ivil rights litigation is an important governmental resource that African Americans have and continue to use in their protracted struggle for racial equality.” *Id.*

²²⁶ *Id.* at 58–61.

²²⁷ *Id.* at 59.

²²⁸ Malveaux, *supra* note 205, at 83–84.

matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least²²⁹

Where victims of justice are selectively excluded and denied the laws' benefits, they may view the legal system as illegitimate and unworthy of respect. Consequently, they may resort to extrajudicial remedies or even illegal behavior.²³⁰

c. Unethical Conduct Is Incentivized

Third, the plausibility standard puts plaintiffs in an untenable position where their claims involve informational inequities. The more rigorous pleading standard creates a perverse incentive for plaintiffs to embellish their complaints with facts lacking evidentiary support, which would violate Rule 11(b)(3).²³¹ Plaintiffs will be concerned that their complaints will be dismissed if they do not furnish facts sufficient to nudge their claim from conceivable to plausible. Often, the only way to get such facts is through discovery, but the court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Plaintiffs are trapped in a catch-22 situation. Faced with this circular reasoning, plaintiffs may be tempted to allege facts lacking evidentiary support in order to overcome this hurdle. To overcome this vulnerability, plaintiffs may need to specifically identify that their factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery, as required by Rule 11(b)(3).²³²

In sum, the plausibility pleading standard's impact on civil rights claims has a number of serious ramifications not only for victims of discrimination, but for the legal system itself and democracy in general.

IV. THE PROMISE OF PRE-MERITS DISCOVERY

Recognizing how civil rights claims are more vulnerable to dismissal under the plausibility pleading standard and its potential impact is an important first step. But it is not enough. This Part moves from a descriptive to a normative examination of the problem.

Judges may conclude that the increased risk of dismissal of civil rights claims is unfortunate, but that this outcome is simply an unintended consequence of the application of neutral procedural rules. It is unfortunate that certain types of claims will be impacted more than others because of informational inequities or other vulnerabilities, but

²²⁹ JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 35 (1990).

²³⁰ See Malveaux, *supra* note 205, at 84.

²³¹ See FED. R. CIV. P. 11(b)(3). It states: "By presenting to the court a pleading . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.*

²³² See *id.*

this is not the business of the courts. It is true that in the absence of any legislative fix,²³³ courts are obligated to apply the plausibility standard to all civil actions not exempted by statute or Rule 9,²³⁴ given the trans-substantivity of the rules and *Iqbal's* statement of the same.²³⁵ However, courts may exercise their broad discretion to grant discovery and manage their cases in such a way as to serve the goals of justice and efficiency, as required by the very first Rule.²³⁶

The Federal Rules of Civil Procedure operate as a system;²³⁷ litigation generally develops in a logical sequence, subject to interdependent and interrelated rules.²³⁸ The lifecycle of a lawsuit takes place in a predictable and rational progression, enabling litigants to effectively use the legal system to resolve disputes. There is an interrelationship and balance between the pleadings, discovery, and dispositive rules. Because of the integrated nature of the federal rules, it is important for judges, scholars, and practitioners to examine not only how the discovery process—as an integral part of the litigation system—will be impacted, but also how it can be utilized to ameliorate some of the detrimental effects of the new plausibility pleading standard.

As discussed *supra*, one immediate and direct impact of the plausibility pleading standard is its elimination of some discovery through dismissals. For claims in which plaintiffs often must rely on discovery to excavate facts necessary to survive dismissal, the plausibility standard will prevent some plaintiffs from obtaining discovery altogether. Preliminary data suggests that this is already happening for civil rights cases, where plaintiffs cannot put forth facts related to a defendant's intent or policy pre-discovery. There is no doubt that one of the Supreme Court's primary rationales for retiring *Conley's* permissive pleading standard was the Court's desire to reduce time-consuming, costly, and burdensome discovery.²³⁹ As more cases are dismissed post-*Iqbal*, there will be a discovery reduction—an outcome many litigants, lawyers, and courts may find appropriate.²⁴⁰

²³³ See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to the Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

²³⁴ See FED. R. CIV. P. 9(b).

²³⁵ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

²³⁶ Rule 1 of the Federal Rules of Civil Procedure states: "These rules govern the procedure in all civil actions . . . in the United States district courts They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

²³⁷ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

²³⁸ See *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) ("The Federal Rules of Civil Procedure are designed to be interdependent. . . . Whenever possible we should harmonize the rules."); *Canister Co. v. Leahy*, 182 F.2d 510, 514 (3d Cir. 1950) ("The Rules . . . must be considered in relation to one another.").

²³⁹ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007).

²⁴⁰ It is important to objectively examine whether discovery costs have in fact spiraled out of control. For a preliminary empirical study of the costs of discovery, see EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY

The plausibility standard may also usher in a different role for discovery.²⁴¹ The primary role of discovery is to permit the parties to discover information about the merits of their claims and defenses, thereby enabling them to narrow the contentions for trial or, more likely, for settlement. The pleadings, on the other hand, are designed to provide general notice to the parties and to enable the court to screen out those cases that are facially insufficient under the law. The pleadings and discovery rules work together, so that a case's worth can be assessed later by the court through summary judgment,²⁴² or by the jury through trial.

Discovery usually does the heavy lifting of merits determination and occurs in the middle of the litigation cycle. However, in light of the more rigorous plausibility pleading standard, discovery may need to do heavy lifting of a different kind—viability determination—towards the *beginning* of the litigation cycle. Post-*Iqbal*, discovery should not be eliminated, but instead *shifted* towards the front of a lawsuit's timeline and *limited* to those issues central to plausibility. Courts should consider narrow, targeted plausibility discovery at the pleadings stage to insure that the trans-substantive application of the Rules does not work an injustice against those cases involving informational inequities.

The following Part examines various contexts in which the courts regularly order pre-merits discovery to resolve threshold matters. This Part then examines plausibility discovery as a potential solution and concludes that it is not only authorized but justified. Finally, this Part examines arguments parties are likely to make in cases involving informational inequities post-*Iqbal* and provides a roadmap for how courts can respond in a way that properly balances the various competing interests.

A. *Available Models for Plausibility Discovery*

There are several models of pre-merits discovery from which courts can draw guidance. The Supreme Court has long recognized the propriety and importance of discovery in resolving a variety of non-merits threshold matters, including class certification, qualified immunity, and jurisdiction.²⁴³ These examples illustrate how courts have structured pre-

COMMITTEE ON CIVIL RULES 35–44 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

²⁴¹ See Bone, *supra* note 7, at 933 n.249 (“Judges routinely allow targeted discovery before deciding a motion to dismiss for lack of subject matter or personal jurisdiction, but rarely before deciding a Rule 12(b)(6) motion.”).

²⁴² See Crawford-El v. Britton, 523 U.S. 574, 600 (1998) (“[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial.”).

²⁴³ Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Specifically, the Court has stated: “Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of

merits discovery in a variety of contexts. While imperfect analogies, the examples demonstrate that the courts are empowered and capable of ordering clearly defined, narrow discovery aimed at preliminary litigation matters.

1. *Class Certification Discovery*

Plaintiffs seeking relief for systemic violations of civil rights and other types of claims are often afforded the opportunity to take discovery aimed at demonstrating the propriety of class-wide relief. A complaint's allegations alone may demonstrate the appropriateness, *vel non*, of class certification,²⁴⁴ but this is rare.²⁴⁵ More commonly, the complaint on its face does not clearly indicate that the class action criteria, as set forth in Rule 23 of the Federal Rules of Civil Procedure, have been met.²⁴⁶

When determining whether a case should be certified as a class action, a court is required to conduct a "rigorous analysis" to determine whether the Rule 23 prerequisites have been satisfied.²⁴⁷ Discovery plays an important role in facilitating such rigor. As recognized by the Supreme Court, "discovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation."²⁴⁸ Amended Rule 23(c)(1)(A) expanded the amount of time a court has to make a class certification determination from "as soon as practicable" to "an early

a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits. *Id.* (citation omitted).

"For example, where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues. Similarly, discovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation." *Id.* at 351 n.13 (citations omitted); *see Crawford-El*, 523 U.S. at 597–99 (qualified immunity).

²⁴⁴ *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiffs claim . . ."), *remanded to* 686 F.2d 261 (5th Cir. 1982), *aff'd*, 815 F.2d 317 (5th Cir. 1987); John Randall Whaley et al., *Precertification Discovery: A User's Guide*, 80 TUL. L. REV. 1827, 1865 (2006) ("[S]ome courts have determined that a certification decision—usually a negative one—can be made on the pleadings, before any discovery is conducted.").

²⁴⁵ Whaley et al., *supra* note 244, at 1864; *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) ("[I]n most cases, 'a certain amount of discovery is essential in order to determine the class action issue and the proper scope of the class action.'").

²⁴⁶ *See, e.g., In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *Pittman v. E. I. duPont de Nemours & Co.*, 552 F.2d 149, 150 (5th Cir. 1977) ("Of course, a certain amount of discovery is essential in order to determine the class action issue and the proper scope of a class action."); *Huff v. N.D. Cass Co. of Ala.*, 485 F.2d 710, 712 (5th Cir. 1973).

²⁴⁷ *Gen. Tel. Co. of the Sw.*, 457 U.S. at 161.

²⁴⁸ *Oppenheimer Fund, Inc.*, 437 U.S. at 351 n.13; *see also* Whaley et al., *supra* note 244, at 1866 ("[D]iscovery is usually allowed before any decision is made by the court on the propriety of certification.").

practicable time,” in part to enable the parties to spend time conducting discovery.²⁴⁹ Thus, it is common practice for courts to permit the parties to take limited, narrow discovery on the question of certification alone.²⁵⁰

Class discovery is instructive for plausibility discovery for a number of reasons. First, one of the reasons plaintiffs are able to take class discovery prior to a court’s dismissal of their class claims is the informational inequity that exists between the parties. Individual personnel records, corporate policies, and statistical data—evidence often used by civil rights plaintiffs to satisfy the certification criteria—are frequently in the exclusive control of the defendant.²⁵¹

Second, class certification is distinct from a lawsuit’s likelihood of success on the merits. When considering the propriety of class certification, the court makes this determination regardless of the court’s views on the plaintiffs’ ultimate chance of succeeding.²⁵²

Third, class discovery illustrates the challenges involved in narrowly defining pre-merits discovery. Disentangling class certification from merits discovery has proved challenging.²⁵³ While class discovery is designed to answer the question of whether the case should be certified as a class action, such discovery often overlaps with the merits.²⁵⁴ In

²⁴⁹ See FED. R. CIV. P. 23(c)(1)(A) advisory committee’s note (amended 2003).

²⁵⁰ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14, at 256 (2004).

²⁵¹ See 8 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 24:80, at 309–10 (4th ed. 2002) (“Timely discovery of the defendants by the plaintiffs may be desirable before the initial class determination when pertinent facts are in dispute, especially when information concerning these facts is exclusively in the control of the defendants.” (footnotes omitted) (citing cases)).

²⁵² See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”). Whether courts should be permitted to make a preliminary inquiry into the merits at the class certification stage is the subject of much debate. See ROBERT H. KLONOFF, EDWARD K. M. BILICH & SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LIT.: CASES AND MATERIALS 325–28 (2d ed. 2006) (discussing conflict).

²⁵³ MANUAL FOR COMPLEX LITIGATION, *supra* note 250, § 21.14, at 256.

²⁵⁴ *Id.* (“There is not always a bright line between the two.”); See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (“Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claim.”); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” (internal quotation marks omitted) (quoting *Coopers & Lybrand*, 437 U.S. at 469)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) (“In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action.”); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 (4th Cir. 1980) (“[T]he class action and merit inquiries essentially coincide.”); *In re Plastics Additives Antitrust Litig.*, No. Civ.A. 03-2038, 2004 WL 2743591, at *4 (E.D. Pa. Nov. 29, 2004) (differentiation between merits and class discovery difficult in price-fixing case because of “substantial overlap”); *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 423 (N.D. Ill. 2003) (“[T]he inquiry into whether the plaintiffs meet the

practice, clean bifurcation between class and merits discovery has been aspirational.²⁵⁵ Consequently, satellite litigation and concomitant costs result as the parties dispute what constitutes merits versus class discovery.²⁵⁶ Such disputes are inefficient and a drain on the judicial system. A court may reject bifurcation altogether because class and merits discovery are so co-mingled that the parties would eventually need to take the discovery anyway, even in the absence of class certification.²⁵⁷

Fourth, once the parties have defined class discovery, the court must satisfy itself that bifurcation from the merits is efficient and fair to the parties.²⁵⁸ The scope of class discovery is governed by balancing the plaintiffs' need to retrieve information relevant to class certification against the risk of overburdening the defendant with such discovery.²⁵⁹ This is especially important because class discovery may negate the need for merits discovery altogether. For example, if class certification is denied, merits discovery is greatly diminished to that of the individually named plaintiffs, assuming the parties do not settle. Alternatively, if class certification is granted, the defendant is exposed to widespread merits discovery, which will likely not come to pass given the preferability of settlement following certification.²⁶⁰ Thus, class discovery may be the *only*

commonality requirement (and to some extent the typicality and adequacy of representation requirements) necessarily overlaps with the merits of the plaintiffs' claim" (footnote omitted)).

²⁵⁵ See Whaley et al., *supra* note 244, at 1866 ("[I]t is usually very difficult to establish a bright line between 'merits' and 'class certification' discovery because of inherent overlap and, in practice, such clear bifurcation normally does not occur."); *Id.* at 1868–70 (describing problem); MANUAL FOR COMPLEX LITIGATION, *supra* note 250, § 21.14, at 256.

²⁵⁶ See, e.g., *In re Hamilton Bancorp, Inc. Sec. Litig.*, No. 01CV0156, 2002 WL 463314, at *1 (S.D. Fla. Jan. 14, 2002) ("[B]ifurcation of discovery may well-increase litigation expenses by protracting the completion of discovery, coupled with endless disputes over what is 'merit' versus [sic] 'class' discovery."); see, e.g., *In re Plastics Additives Antitrust Litig.*, 2004 WL 2743591, at * 4 (court refused to bifurcate, in part, because of delay, time, and expense necessary to resolve disputes over distinguishing merits and class discovery).

²⁵⁷ MANUAL FOR COMPLEX LITIGATION, *supra* note 250, § 21.14, at 256; see, e.g., *In re Plastics Additives Antitrust Litig.*, 2004 WL 2743591, at * 4.

²⁵⁸ MANUAL FOR COMPLEX LITIGATION, *supra* note 250, § 11.213, at 40; *In re Plastics Additives Antitrust Litig.*, 2004 WL 2743591, at *2; see, e.g., *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303, 305 (D. Colo. 1998) ("In managing discovery in cases of this nature, district courts are required to balance the need to promote effective case management, the need to prevent potential abuse, and the need to protect the rights of all parties.").

²⁵⁹ See 8 CONTE & NEWBERG, *supra* note 251, § 24:80, at 310–12 ("While discovery must be broad enough to permit the plaintiffs a real chance to obtain certification, its scope may be limited when it is overly burdensome under all the circumstances." (footnotes omitted) (citing cases)); see, e.g., *Tracy*, 185 F.R.D. at 305.

²⁶⁰ See Hart, *supra* note 156, at 780 ("The vast majority of employment discrimination class litigation succeeds or fails at the moment of the certification decision." (citing empirical studies)); Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416 (2000) ("Once plaintiffs obtain class certification, the defendant's exposure,

significant discovery in which the parties participate. Class discovery often functions as the gatekeeper for plaintiffs alleging discrimination on a class-wide basis.

Due to the centrality of class discovery, its scope is critical. Indeed, it is what *Twombly* sought to avoid.²⁶¹ Because of the burden class discovery alone can impose, the parties must justify such discovery²⁶² and are encouraged to create a “specific and detailed precertification discovery plan,” pursuant to Rule 26(f).²⁶³ Courts have significant managerial power and wide discretion to shape and control class discovery.²⁶⁴

But class certification discovery also differs from plausibility discovery. Prior to a court’s ordering of class discovery, the court has already determined that the complaint sufficiently *alleges* class claims.²⁶⁵ The complaint is not exempt from Rule 8(a)(2)’s requirements simply because it is styled as a class action. The class complaint has admittedly crossed the threshold of facial viability, thereby justifying the court’s ordering of discovery to determine if the plaintiffs may act collectively. The class certification determination is more about the scope and structure of the lawsuit than its very existence.

2. *Qualified Immunity Discovery*

Another context in which parties are permitted narrow, early discovery is to resolve the question of whether a government official accused of wrongdoing enjoys qualified immunity. Qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁶⁶

plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims.”).

²⁶¹ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007).

²⁶² See 8 CONTE & NEWBERG, *supra* note 251, § 24:80; see also MANUAL FOR COMPLEX LITIGATION, *supra* note 250, § 21.14, at 256 (“To make [the class discovery] decision, the court should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed, to reduce the extent of precertification discovery, and to refine the pertinent issues for deciding class certification.”).

²⁶³ MANUAL FOR COMPLEX LITIGATION, *supra* note 250, § 21.14, at 256 (describing what plan should include).

²⁶⁴ *Tracy*, 185 F.R.D. at 304–05; *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 46 (D.D.C. 1998) (court has “substantial discretion under Rule 23(d) to shape the course of discovery in class actions”).

²⁶⁵ See *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985) (plaintiffs “bear[] the burden of advancing a prima facie showing that the class action requirements of Fed.R.Civ.P. 23 are satisfied or that discovery is likely to produce substantiation of the class allegations.”); *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D. Minn. 1991) (plaintiffs must show “some factual basis for [their] claims of class-wide discrimination” prior to class discovery); see, e.g., *Tracy*, 185 F.R.D. at 304–05 (concluding that plaintiffs failed to present sufficient information to persuade court that they ought to be able to conduct extended class discovery).

²⁶⁶ *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Qualified immunity balances two competing interests—holding government officials accountable for abuse of power, while also protecting them from “harassment, distraction, and liability” unreasonably incurred in the line of duty.²⁶⁷ Because qualified immunity is “an immunity from suit rather than a mere defense to liability,”²⁶⁸ the immunity question is dealt with at the earliest possible juncture,²⁶⁹ ideally prior to merits discovery.²⁷⁰

Consequently, in response to a plaintiff’s alleging a violation of a constitutional or statutory right, a government official often files a Rule 12(b)(6) dismissal motion on qualified immunity grounds, contending that the right alleged to be violated was not clearly established at the time of the alleged violation.²⁷¹ In response to party requests, courts have granted limited discovery after denying dismissal, but prior to merits discovery, on the propriety of qualified immunity. This approach may be instructive for courts considering ordering plausibility discovery.

For example, in *Hernandez v. Foster*, plaintiffs brought a § 1983 claim against four state employees for improperly seizing plaintiffs’ child in violation of the Fourth and Fourteenth Amendments.²⁷² The defendants filed a Rule 12(b)(6) motion on qualified immunity grounds.²⁷³ Although Rule 8 notice pleading does not require plaintiffs to plead factual allegations that anticipate and overcome qualified immunity,²⁷⁴ once the defense is asserted, plaintiffs must prove that their constitutional rights were clearly established at the time of the alleged misconduct.²⁷⁵ Relying on *Twombly* and *Iqbal*,²⁷⁶ the court determined that the plaintiffs had

²⁶⁷ *Id.*

²⁶⁸ *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *see also* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945–46 (2009) (qualified immunity “is both a defense to liability and a limited ‘entitlement not to stand trial or face the other burdens of litigation’” (quoting *Mitchell*, 472 U.S. at 526)).

²⁶⁹ *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (“[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”).

²⁷⁰ *Pearson*, 129 S. Ct. at 815 (“[W]e have made clear that the ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that “insubstantial claims” against government officials [will] be resolved prior to discovery.” (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987))); *see also* *Iqbal*, 129 S. Ct. at 1953 (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’” (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (“[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery.”).

²⁷¹ *See Pearson*, 129 S. Ct. at 816 (“Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.”).

²⁷² *Hernandez v. Foster*, No. 09 C 2461, 2009 WL 1952777, at *1 (N.D. Ill. July 6, 2009).

²⁷³ *Id.* at *2.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at *3, *6.

²⁷⁶ *Id.* at *2.

sufficiently alleged constitutional violations under the plausibility standard,²⁷⁷ but that “at the pleading stage, there are simply not enough facts to determine whether qualified immunity applies.”²⁷⁸ While plaintiffs’ allegations were sufficient to support a reasonable inference that their rights were clearly established at the time of defendants’ misconduct,²⁷⁹ the district court noted that further factual development could reveal otherwise.²⁸⁰ Consequently, although the court denied defendants’ Rule 12(b)(6) motion, it concluded that “limited discovery may be necessary before a court can resolve the issue”²⁸¹ and left open the possibility of considering the issue later on summary judgment.²⁸²

The same utilization of limited, early discovery occurred in *Argueta v. U.S. Immigration and Customs Enforcement*, in which immigrants brought a *Bivens* claim²⁸³ against four supervisors from the Office of Homeland Security, alleging abusive treatment and unlawful search and seizure of their homes in violation of the Fourth and Fifth Amendments.²⁸⁴ In response, the defendants filed a Rule 12(b)(6) motion on qualified immunity grounds.²⁸⁵ Relying on *Twombly*, the court concluded that the complaint’s allegations were sufficient to overcome the defense,²⁸⁶ but that “there [was] an insufficient record to shut the door on a qualified immunity defense” entirely.²⁸⁷ In the absence of discovery, the court could not properly discern whether the government officials were entitled to qualified immunity.²⁸⁸ While the district court denied the defendants’ motion, it ordered limited discovery on the immunity issue so that the parties could revisit the issue through summary judgment

²⁷⁷ *Id.* at *3–6.

²⁷⁸ *Id.* at * 7.

²⁷⁹ *Id.* at *7–9.

²⁸⁰ *Id.* at *7.

²⁸¹ *Id.* at *10 (citing *Crawford-El v. Britton*, 523 U.S. 574, 597–99 (1998)).

²⁸² *Id.*

²⁸³ A *Bivens* action is one where a plaintiff sues a federal government official in federal court for damages stemming from an alleged constitutional violation. A *Bivens* action refers to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), in which the Supreme Court recognized an implied right of action for damages against government officials in their individual capacities. *Bivens* involved the Fourth Amendment. It has since been expanded to the Due Process clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 248–49 (1979), and the cruel and unusual punishment prohibition of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14, 19–20 (1980).

²⁸⁴ *Argueta v. U.S. Immigration & Customs Enforcement*, No. 08-1652 (PGS), 2009 WL 1307236, at *1–2 (D.N.J. May 7, 2009).

²⁸⁵ *Id.* at *1, *21.

²⁸⁶ *Id.* at *23. The court relied on allegations in the complaint that were admittedly hearsay at this juncture. *See id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* (“[P]rior to discovery, this Court is reluctant to deny Defendants’ claim about qualified immunity where controversy exists. . . . More evidence is needed before this Court can more capably decide whether defendants were personally involved.”).

prior to embarking on merits discovery.²⁸⁹ This approach has been approved of by the Supreme Court²⁹⁰ and replicated by numerous courts.²⁹¹

Alternatively, where a defendant files an answer asserting a qualified immunity defense, courts may order the plaintiff to respond by filing a reply under Rule 7. Pursuant to Rule 7(a), a court may require the plaintiff to “put forward specific, nonconclusory factual allegations” to overcome the qualified immunity defense at the pleading stage.²⁹² To analyze the defense, the court may order limited discovery under these circumstances.

Morgan v. Hubert provides an example of a federal court of appeals approving of early, limited discovery to resolve the qualified immunity

²⁸⁹ *Id.* at *24; *see also id.* at *23 (“Rather than overreach on granting motions to dismiss, courts should rely on control of discovery and summary judgment to ‘wed [sic] out unmeritorious claims.’” (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993))).

²⁹⁰ *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 598, 600 (1998) (finding that once a plaintiff proves a viable claim, the judge has “broad discretion to tailor discovery narrowly” and “should give priority to discovery concerning issues that bear upon the qualified immunity defense . . . since that defense should be resolved as early as possible”).

²⁹¹ *See, e.g., Torres v. White*, No. 08-CV-196-JHP-FHM, 2009 WL 37617, at *4 (N.D. Okla. Jan. 6, 2009). In *Torres*, in the absence of discovery, the court denied police officer’s Rule 12(b)(6) motion based on qualified immunity grounds. Under *Twombly*, the plaintiff plausibly alleged a Fourth Amendment violation of unreasonable use of excessive and deadly force. *Id.* at *2–3. However, without discovery, the court could not ascertain whether the law was clearly established. *Id.* at *3 (“[T]he Court finds it premature to rule on the qualified immunity issue until the facts are sufficiently established.”). Consequently, the court granted limited discovery solely on the immunity issue, leaving open the possibility of defendant’s filing a summary judgment motion afterwards. *Id.* at *4. *See also Dawe v. Rogers*, No. 8:09-cv-620-T-30AEP, 2009 WL 2579359, at *4–5 (M.D. Fla. Aug. 18, 2009) (finding that plaintiff sufficiently pled § 1983 claims for Fourth and Fourteenth Amendment violations under *Twombly* and *Iqbal*, denying 12(b)(6) motion on qualified immunity grounds, and ordering limited discovery on issue for summary judgment consideration); *cf. Henshaw v. Wayne County*, No. 2:09-CV-152-TC-SA, 2009 WL 3226503, at *5 (D. Utah Oct. 1, 2009) (granting limited discovery on quasi-judicial immunity issue for later consideration under summary judgment where record was insufficient to justify Rule 12(c) dismissal); *Hollman v. Lindsay*, No. 08-CV-1417 (NGG), 2009 WL 3112076, at *16 (E.D.N.Y. Sept. 25, 2009) (ordering limited discovery on qualified immunity issue where record was insufficient to grant summary judgment).

²⁹² *Crawford-El*, 523 U.S. at 598 (quoting *Siebert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)); *see also Schulte v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (“By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations.”). In *Schulte*, the Fifth Circuit recognized that “ordering a reply to the affirmative defense of qualified immunity is one of those . . . instances” where “an additional pleading by the plaintiff may be helpful to the defendant in laying the groundwork for a motion to test the sufficiency of the claim.” *Id.* (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1185, at 33 (3d ed. 2004)).

issue.²⁹³ In *Morgan*, a prisoner brought a § 1983 claim against a prison warden for failing to provide protective custody, in violation of the Eighth Amendment.²⁹⁴ The defendant filed a 12(b)(6) motion on immunity grounds, prompting the magistrate judge to hold a hearing on the issue.²⁹⁵ The magistrate ordered the plaintiff to file an amended complaint or a Rule 7 reply.²⁹⁶ The plaintiff filed both, which adequately alleged a violation of a constitutional right clearly established at the time of the defendant's conduct, prompting the magistrate to deny the defendant's dismissal motion.²⁹⁷ The defendant appealed the district court's affirmance of the magistrate's order.²⁹⁸ In a per curiam opinion relying on *Twombly* and *Iqbal*, the Fifth Circuit vacated the court's denial of qualified immunity and remanded for limited discovery on the issue.²⁹⁹

Qualified immunity discovery is justified by its narrow scope and early occurrence in the life cycle of the lawsuit.³⁰⁰ Narrow and early discovery on the qualified immunity issue has enabled courts to strike the right balance between protecting government officials from potentially meritless litigation and giving plaintiffs with potentially meritorious claims court access. Such discovery is an important compromise. As recognized by the courts, "qualified immunity does not shield government officials from *all* discovery but only from discovery which is either avoidable or overly broad."³⁰¹

Qualified immunity discovery is also justified by the informational inequity that exists between the parties. For example, while recognizing that the plaintiff's allegations lacked the specificity required of Rule 7,³⁰²

²⁹³ 335 F. App'x 466 (5th Cir. 2009).

²⁹⁴ *Id.* at 468. Following Hurricane Katrina, the plaintiff in protective custody was transferred and put into a correctional center with the general prison population. *Id.* at 469. Shortly thereafter, he was "beaten and stabbed in his head and neck." *Id.*

²⁹⁵ *Id.* at 468.

²⁹⁶ *Id.* Courts may require a plaintiff whose complaint suffices under Rule 8 to file a reply in response to a defendant's answer or motion pleading the qualified immunity defense. *See Schulte*, 47 F.3d at 1433–34.

²⁹⁷ *Morgan*, 335 F. App'x at 468 ("The judge found that [plaintiff] adequately alleged violation of a constitutional right and that, if the facts in the complaint were accepted as true, [defendant] acted unreasonably and was not entitled to qualified immunity.").

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 470, 472–73.

³⁰⁰ *See, e.g.,* Maxey v. Fulton, 890 F.2d 279, 283–84 (10th Cir. 1989) (holding that district court did not properly cabin discovery to qualified immunity question and remanding for protective order to protect defendant from merits discovery).

³⁰¹ *Id.* at 282 (emphasis added) (quoting *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987)); *Crawford-El v. Britton*, 523 U.S. 574, 588, 598 (1998) (qualified immunity meant to avoid "burdens of *broad-reaching* discovery" and "*unnecessary* and *burdensome* discovery" (emphasis added)).

³⁰² *See Schulte* v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995) (requiring "sufficient precision and factual specificity" in a Rule 7 reply to an answer pleading qualified immunity defense). Where plaintiff is required to file a reply, the court may stay all discovery on the merits, and instead order limited discovery on the sole question of the propriety of qualified immunity, at the pleadings stage. If the plaintiff fails to

the Fifth Circuit—in *Morgan v. Hubert*, discussed *supra*—recognized that in the absence of discovery, the plaintiff could not be blamed.³⁰³ “Because key facts are unknown, and because these facts are solely within [defendant’s] possession,” the Fifth Circuit ordered the district court to revisit the immunity issue following tailored discovery on the issue.³⁰⁴ Mindful that the prison warden should be protected from *full* discovery,³⁰⁵ but that the plaintiff should be given an opportunity to defend against the immunity defense, the Fifth Circuit concluded that targeted, early pre-merits discovery was the answer.

In sum, the qualified immunity model provides courts with a useful example of how discovery can be used as an effective and fair screening device early in the litigation. Plausibility discovery can do the same.

3. Jurisdictional Discovery

In response to a defendant’s motion to dismiss a case based on the allegation that a court lacks jurisdiction over the subject matter of the litigation or personal jurisdiction over the defendant, courts often permit limited discovery on the threshold question of jurisdiction. At first glance, this suggests that the jurisdictional discovery model could provide a blueprint for pre-merits discovery under a similar Rule 12 motion. However, as illustrated below, careful examination reveals otherwise. Because a Rule 12(b)(6) motion challenges a complaint on its face only, plausibility discovery’s ability to borrow from the jurisdictional jurisprudence is limited.

a. Subject Matter Jurisdiction

Where a defendant files a Rule 12(b)(1) motion to dismiss, *facially* challenging the sufficiency of the complaint for failing to sufficiently aver subject matter jurisdiction,³⁰⁶ the court undergoes a similar analysis to a Rule 12(b)(6) challenge.³⁰⁷ A court’s ruling on a Rule 12(b)(1) facial

support his claim “with sufficient precision and factual specificity,” the court need not grant merits discovery. *Id.*

³⁰³ *Morgan*, 335 F. App’x at 472 (“[W]e do not require a plaintiff to plead facts ‘peculiarly within the knowledge of defendants.’” (quoting *Schultea*, 47 F.3d at 1432)).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See *Stalley ex rel. United States v. Orlando Reg’l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232–33 (11th Cir. 2008); *Torres-Negrón v. J & N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007). A defendant may also substantively challenge the court’s subject matter jurisdiction by calling into question the underlying factual allegations that provide the basis for court’s jurisdiction. See *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939); *Stalley*, 524 F.3d at 1232–33; *Torres-Negrón*, 504 F.3d at 162 n.8.

³⁰⁷ *McElmurray v. Consol. Gov’t of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007). However, plaintiff’s burden of proof is greater. The plaintiff must prove by a preponderance of the evidence that the court has subject matter jurisdiction. The party invoking the jurisdiction of the court has the burden of proof on this matter. *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007); *Skwira v. United States*, 344 F.3d 64, 71 (1st Cir. 2003); *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1383 (Fed. Cir. 2002); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995).

challenge is distinct from the plaintiffs' likelihood of prevailing on the merits.³⁰⁸ A court assumes all of the well-pled factual allegations are true,³⁰⁹ makes all reasonable inferences in favor of the plaintiff,³¹⁰ and gives conclusory statements of law no presumption of truth.³¹¹ Some courts have even imported the plausibility standard into the Rule 12(b)(1) analysis, requiring the plaintiff to set forth facts plausibly suggesting his right to the court's jurisdiction, "rather than facts that are merely consistent with such a right."³¹² The court relies solely on the complaint and its attachments when determining a motion to dismiss for lack of subject matter jurisdiction on facial grounds.³¹³

On the other hand, where a defendant files a Rule 12(b)(1) motion to dismiss, substantively challenging a court's subject matter jurisdiction by calling into question the veracity of the complaint's *facts*, the parties are entitled to discovery on the jurisdictional issue.³¹⁴ This is especially true where the facts are "peculiarly within the knowledge of the opposing

³⁰⁸ *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.").

³⁰⁹ *Newell Operating Co. v. Int'l Union of United Auto., Aerospace, & Agric. Implement Workers of Am., U.A.W.*, 532 F.3d 583, 587 (7th Cir. 2008); *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

³¹⁰ *See Newell Operating Co.*, 532 F.3d at 587; *Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008) ("finding that 'the non-moving party receives the same protections [for facial attacks under 12(b)(1)] as it would defending against a motion brought under Rule 12(b)(6)' (quoting *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)); *Torres-Negrón v. J & N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007); *McElmurray*, 501 F.3d at 1251.

In *Scheuer v. Rhodes*, the Supreme Court stated that "it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236. However, the Court relied upon *Conley's* "no set of facts" language as support for this assertion. *Id.* With the *Conley* mantra now retired, the Court's deference to the complaint may arguably have waned.

³¹¹ *Stalley ex rel. United States v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007).

³¹² *Id.*; *see also Lane*, 529 F.3d at 557 (applying plausibility standard in Rule 12(b)(1) facial challenge); *see, e.g., Foresta v. Centerlight Capital Mgmt., LLC*, No. 3:08-cv-1571 (WWE), 2009 WL 928356, at *1-2 (D. Conn. Apr. 3, 2009).

³¹³ *See Lane*, 529 F.3d at 557 (stating that only complaint and attachments reviewable under a Rule 12(b)(6) motion, while additional materials are reviewable under Rule 12(b)(1), where challenge is substantive and not facial); *see, e.g., McElmurray*, 501 F.3d at 1251.

³¹⁴ *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (explaining that in response to a Rule 12(b)(1) substantive challenge, "[i]t then becomes *necessary* for the party opposing the motion to present affidavits or any other evidence" proving "subject matter jurisdiction" (emphasis added) (citations omitted)); *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981) (discussing the court's limited procedural discretion when deciding a Rule 12(b)(1) factual challenge, concluding that court "must give the plaintiff an opportunity for discovery and for hearing that is appropriate to the nature of the motion to dismiss," and citing cases where courts have refused to grant 12(b)(1) substantive challenges where plaintiff has not had opportunity to take discovery).

party.”³¹⁵ A refusal to permit limited discovery may even constitute an abuse of discretion, where it causes prejudice.³¹⁶ Where the parties dispute the underlying *factual* predicate for the court’s jurisdiction, a court “enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.”³¹⁷ A court may consider, in addition to the complaint, undisputed facts in the record and the court’s own resolution of disputed facts.³¹⁸ When determining whether it has the authority to hear a case, a court’s power is unmatched,³¹⁹ enabling it to weigh evidence and find facts—conduct that would be impermissible when ruling on Rule 12(b)(6) and Rule 56 motions.³²⁰ The only limitation to a court’s power is its inability to make factual findings on jurisdictional questions that overlap with the merits. Where the jurisdictional facts and merits are intermingled, a court must treat the Rule 12(b)(1) motion like one for summary judgment,³²¹ whose genuine issues of material fact get resolved by the fact-finder at trial.³²²

The Rule 12(b)(1) model is instructive. The robust discovery permitted in response to a Rule 12(b)(1) *factual* challenge illustrates the lengths to which a court can go when determining its jurisdiction over the subject matter of a lawsuit. While a court’s power is unique under such circumstances, this example demonstrates the breadth of a court’s power to use discovery to resolve a critical threshold matter. Plaintiffs requesting plausibility discovery would be requesting the court to play a more circumscribed role than the one described here.

The more apt comparison is between a Rule 12(b)(6) motion and a Rule 12(b)(1) *facial* challenge because both contest the legal sufficiency

³¹⁵ *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004). *See also* *Roswell Capital Partners LLC v. Alternative Constr. Techs.*, 638 F. Supp. 2d 360, 372 (S.D.N.Y. 2009) (applying *Gualandi*).

³¹⁶ *See* *Sizova v. Nat’l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002).

³¹⁷ *Skwira v. United States*, 344 F.3d 64, 71–72 (1st Cir. 2003).

³¹⁸ The court has the power to grant a Rule 12(b)(1) motion on three bases: 1) the complaint; 2) the complaint plus undisputed facts from the record; or 3) the complaint, undisputed facts, and disputed facts resolved by the court. *Lane*, 529 F.3d at 557; *McElmurray*, 501 F.3d at 1251 (“matters outside the pleadings, such as testimony and affidavits are considered” for factual attacks on the existence of subject matter jurisdiction); *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

³¹⁹ *See* FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

³²⁰ *Torres-Negrón v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007).

³²¹ *Id.* at 164; *see, e.g.,* *Foresta v. Centerlight Capital Mgmt., LLC*, No. 3:08-cv-1571 (WWE), 2009 WL 928356, at *2–3 (D. Conn. Apr. 3, 2009) (explaining that Rule 12(b)(1) motion converted into Rule 56 motion where defendant attached affidavits to its motion).

³²² *Skwira*, 344 F.3d at 72 n.10.

of the complaint.³²³ Because pre-dismissal discovery does not arise in response to this 12(b)(1) analog, there is scant direct guidance on how pre-dismissal discovery might work in the 12(b)(6) context. Given that courts have applied the plausibility standard in the 12(b)(6) context to the 12(b)(1) context, plausibility discovery may also be appropriate to resolve subject matter jurisdictional issues where informational inequity exists.

b. Personal Jurisdiction

Similarly, personal jurisdictional discovery can inform plausibility discovery in broad strokes. Courts regularly grant targeted, limited discovery to determine whether they have personal jurisdiction over the defendant. The courts enjoy significant discretion in determining whether to grant such discovery and how to define its scope.³²⁴

Discovery should generally be granted where a “colorable case” for jurisdiction has been made,³²⁵ “pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.”³²⁶ To facilitate such discovery, a court may order the parties to meet, confer, and formulate a discovery plan.³²⁷

A trial court’s decision whether or not to grant personal jurisdictional discovery receives significant deference from the appellate courts. A discovery denial is reversed only “upon the clearest showing” that the denial resulted in “actual and substantial prejudice to the complaining litigant.”³²⁸ A trial court need not grant discovery where

³²³ SEC v. Founding Partners Capital Mgmt., 639 F. Supp. 2d 1291, 1293 (M.D. Fla. 2009) (“[T]he facial attack standard is similar to the Rule 12(b)(6) standard.”).

³²⁴ See Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 139–40 (1st Cir. 2006); United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 625–26 (1st Cir. 2001) (“[E]ven when the plaintiff has been diligent and has made a colorable claim for personal jurisdiction, the district court still has ‘broad discretion to decide whether discovery is required.’” (quoting Crocker v. Hilton Int’l Barb., Ltd., 976 F.2d 797, 801 (1st Cir. 1992))).

³²⁵ *Swiss Am. Bank, Ltd.*, 274 F.3d at 625 (“We have long held that ‘a diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of *in personam* jurisdiction may well be entitled to a modicum of jurisdictional discovery if the corporation interposes a jurisdictional defense.” (quoting Sunview Condominium Ass’n v. Flexel Int’l, Ltd., 116 F.3d 962, 964 (1st Cir. 1997))); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n, 107 F.3d 1026, 1042 (3d Cir. 1997) (“Our rule is generally that jurisdictional discovery should be allowed unless the plaintiff’s claim is ‘clearly frivolous.’” (quoting Nehemiah v. The Athletics Congress, 765 F.2d 42, 48 (3d Cir. 1985))).

³²⁶ *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986); see also, *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1283 (Fed. Cir. 2005); *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351–52 (D.C. Cir. 2000); *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 45 (1st Cir. 1999) (“A timely and properly supported request for jurisdictional discovery merits solicitous attention.”).

³²⁷ See, e.g., *Doe v. Unocal Corp.*, 248 F.3d 915, 921 (9th Cir. 2001).

³²⁸ *Butcher’s Union Local No. 498*, 788 F.2d at 540; *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009); *Negrón-Torres v.*

plaintiff's motion is untimely,³²⁹ based on speculation,³³⁰ or is poorly justified by the plaintiff.³³¹

Like the subject matter jurisdictional model, the availability of discovery to determine personal jurisdiction is governed by the nature of the defendant's jurisdictional challenge. Where a defendant challenges the plaintiff's *theory* of jurisdiction under Rule 12(b)(2), the court's analysis is very much like a Rule 12(b)(6) one.³³² For purposes of the 12(b)(2) motion, the court accepts the well-pled factual allegations as true and determines whether the complaint on its face sufficiently establishes jurisdiction.³³³ Making this determination does not involve a court's engaging in fact-finding or conducting an evidentiary hearing.³³⁴

On the other hand, a defendant may challenge the *facts* on which personal jurisdiction is predicated under Rule 12(b)(2). In response to a *factual* challenge, a court has the discretion to order discovery and to determine the type and amount necessary to resolve the personal jurisdiction question.³³⁵ Or, a court may choose to receive only affidavits

Verizon Commc'ns, Inc., 478 F.3d 19, 23 (1st Cir. 2007) (declaring discovery denial should be overturned only where there has been "clear showing of manifest injustice, that is, . . . discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party" (quoting *Crocker*, 976 F.2d at 801)); *Swiss Am. Bank, Ltd.*, 274 F.3d at 626 (standard for reversing discovery denial is "high").

³²⁹ See, e.g., *Platten*, 437 F.3d at 139–40 (discovery denial not an abuse of discretion where plaintiff's request was untimely).

³³⁰ See, e.g., *Boschetto*, 539 F.3d at 1020 (stating that denial was not abuse of discretion where plaintiff's request for discovery was "based on little more than a hunch that it might yield jurisdictionally relevant facts"); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255 (2d Cir. 2007) (concluding that where plaintiff failed to make out a prima facie case of jurisdiction, denial of discovery was not an abuse of discretion); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402–03 (4th Cir. 2003) (deciding that plaintiff's speculation and conclusory statements about contacts with forum state justified discovery denial); *Mass. Sch. of Law at Andover, Inc.*, 107 F.3d at 1042 (clarifying that where jurisdictional claims were "clearly frivolous," denial of discovery was not an abuse of discretion); *Butcher's Union Local No. 498*, 788 F.2d at 540 (observing that denial was not an abuse of discretion where plaintiffs "state only that they 'believe' that discovery will enable them to demonstrate" sufficient minimum contacts).

³³¹ See *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995) (finding that discovery denial not an abuse of discretion where plaintiff failed to show discovery would satisfy jurisdiction).

³³² See *Credit Lyonnais Secs. (USA), Inc. v. Alcantara*, 183 F.3d 151, 153–54 (2d Cir. 1999).

³³³ See *id.*; *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003). Of course, plaintiff still must ultimately prove, by a preponderance of the evidence, that the court has personal jurisdiction over the defendant. *Credit Lyonnais*, 183 F.3d at 154; *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001).

³³⁴ See *Credit Lyonnais*, 183 F.3d at 153.

³³⁵ See *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 241 (5th Cir. 2008) ("When the defendant disputes the factual bases for jurisdiction, . . . the court may receive interrogatories, depositions, or 'any combination of the recognized methods of discovery' to help it resolve the jurisdictional issue." (quoting *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir.1985))).

from the parties. By limiting itself to affidavits and/or discovery, the court requires the plaintiff to make only a prima facie case of personal jurisdiction at this juncture.³³⁶ The court accepts all uncontroverted facts in the complaint and construes all disputed facts in favor of the plaintiff.³³⁷

Alternatively, a court may convene a pretrial evidentiary hearing,³³⁸ where the parties may testify and fully present their positions on the personal jurisdictional issue.³³⁹ At this juncture, the plaintiff is required to prove jurisdiction by a preponderance of the evidence.³⁴⁰ The court may find facts and resolve the personal jurisdiction issue pre-trial. Otherwise, the court may choose to defer resolution of the personal jurisdiction issue until trial. For example, where the jurisdictional facts are intertwined with the merits, the court may defer fact-finding and instead let the jury do so.³⁴¹

In sum, the personal jurisdictional model is not sufficiently analogous to provide a blueprint for plausibility discovery. But, like subject matter jurisdictional discovery, the model provides another example of how courts have used discovery to aid in screening cases and enhancing their gatekeeping function.

In conclusion, the examples of pre-merits discovery demonstrate the broad discretion courts have to conduct discovery to resolve threshold issues. Where there are compelling rationales for the early, inexpensive, and equitable resolution of issues, courts have adeptly managed pre-merits discovery.

³³⁶ See *id.*; *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008); *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 549 (6th Cir. 2007) (where court relied solely on written submissions and affidavits, prima facie burden is all that is required).

³³⁷ See *Walk Haydel & Assocs., Inc.*, 517 F.3d at 241; *Boschetto*, 539 F.3d at 1015; *Negrón-Torres v. Verizon Commc'ns, Inc.*, 478 F.3d 19, 23 (1st Cir. 2007); *Unocal Corp.*, 248 F.3d at 922. However, conclusory allegations and "far fetched inferences" need not be credited. *Negrón-Torres*, 478 F.3d at 23.

³³⁸ The court need not actually hold a hearing, but instead may enable the parties to be fully heard through the evidentiary record. See *Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998) ("Every circuit to consider the issue has determined that the 'hearing' requirements of Rule 12 . . . do not mean that an oral hearing is necessary, but only require that a party be given the opportunity to present its views to the court.").

³³⁹ See, e.g., *Walk Haydel & Assocs., Inc.*, 517 F.3d at 242 (conceding that where parties were limited in discovery and not permitted a full-blown evidentiary hearing, the court erred in requiring more than a prima facie showing of jurisdiction).

³⁴⁰ See *id.* at 241-42.

³⁴¹ See *id.* at 241 n.9.

B. *Plausibility Discovery as a Model for the Future*

1. *Courts Have the Authority to Order Plausibility Discovery*

a. *Plausibility Discovery Is in Compliance With the Discovery Rules*

Outside of a court's broad discretion to order pre-merits discovery in a variety of contexts, discussed *supra*, the discovery rules themselves do not foreclose such discovery.³⁴² Rule 26(b)(1) defines the scope of discovery as follows: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense"³⁴³ On the one hand, plausibility discovery is relevant to the plaintiff's claim; such discovery directly targets the claim by requiring the plaintiff to unearth facts that would nudge the claim from conceivable to plausible. The discovery is also relevant to the defense that no such claim has been stated.

On the other hand, if a judge *grants* a 12(b)(6) motion, he has concluded that the plaintiff has failed to state a claim, so any subsequent discovery would be to develop a claim not pleaded, an impermissible approach under the rules.³⁴⁴ Hence, a court intending to order plausibility discovery would need to defer the 12(b)(6) ruling.

A court may also anchor its authority to order plausibility discovery in Rule 26(b)(1)'s discretionary discovery provision. It states: "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."³⁴⁵ Although a court cannot use this

³⁴² See Hartnett, *supra* note 8 (manuscript at 44–48), for a persuasive argument that courts have the authority under the Federal Rules to permit discovery while a 12(b)(6) motion is pending. See also Page, *supra* note 8, at 466 (arguing same). *But see* Bone, *supra* note 7, at 934–35 ("If pleading-stage discovery is a good way to deal with the uninformed plaintiff, the Federal Rules should be revised to authorize it explicitly. Allowing pleading-stage discovery fits the current Rules awkwardly at best."). Some courts have suggested that discovery is not permitted pre-dismissal. See *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009) ("A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court."); *Kyle v. Holinka*, No. 09-cv-90-sl, 2009 WL 1867671, at *2 (W.D. Wis. June 29, 2009) (refusing to stay ruling on defendants' Rule 12(b)(6) motion so that plaintiff can conduct discovery to determine if prison officials implemented a policy of segregation in violation of equal protection).

³⁴³ FED. R. CIV. P. 26(b)(1).

³⁴⁴ See FED. R. CIV. P. 26(b)(1) advisory committee's note (2000) ("The rule change . . . signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978) ("[I]t is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken"); *cf.* *Sallis v. Univ. of Minn.*, 408 F.3d 470, 477–78 (8th Cir. 2005) (stating that, after the amendment to Rule 26 in 2000, "discovery must relate more directly to a 'claim or defense' than it did previously" (quoting *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 968 (9th Cir. 2004))).

³⁴⁵ FED. R. CIV. P. 26(b)(1); *Castillo v. Norton*, 219 F.R.D. 155, 160 n.2 (D. Ariz. 2003) (noting that, while the scope of discovery in a discrimination suit does not

provision as an end-run around the general discovery rule, it demonstrates that where there is “good cause,” a court may permit even broader discovery than usual. Ordering discovery to overcome informational inequities would seem to constitute “good cause” for the reasons described *infra*.

Finally, the timing of plausibility discovery does not violate the Rules. Rule 26(d)(1) states: “A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), *except . . . when authorized . . . by court order.*”³⁴⁶ A court is free to diverge from the general timing rule and order discovery prior to when the parties’ meet and confer.³⁴⁷ Indeed, in response to a request for plausibility discovery, a court may order the parties to participate in a meeting to draft a proposed discovery plan, relying on Rule 26(f) as a model.

In sum, the discovery rules in particular and case law in general suggest the court has the authority to order plausibility discovery.

b. Plausibility Discovery Does Not Require a Rule 12(b)(6) Conversion to Rule 56 Summary Judgment

Plausibility discovery does not require a court to convert a defendant’s 12(b)(6) motion into a Rule 56 summary judgment motion. If a defendant takes some limited discovery to counter plaintiff’s evidence of a plausible claim, and the judge considers such extrinsic evidence, he will be required under Rule 12(d) to convert the Rule 12(b)(6) motion into a Rule 56 summary judgment motion.³⁴⁸ However, a court has considerable discretion whether or not to take into account defendant’s extrinsic evidence. If the defendant attaches outside evidence to its Rule 12(b)(6) motion, conversion can be avoided by the

necessarily extend to a retaliation claim, the court could order such discovery upon a showing of good cause).

³⁴⁶ FED. R. CIV. P. 26(d)(1) (emphasis added).

³⁴⁷ See, e.g., *Arista Records LLC v. Does 1–19*, 551 F. Supp. 2d 1, 6–7 (D.D.C. 2008); *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal. 2002).

³⁴⁸ See Rule 12(d), which states: “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” FED. R. CIV. P. 12(d). See *Spencer*, *supra* note 7, at 161 (expressing concern that initial limited discovery would transform Rule 12(b)(6) into a Rule 56 summary judgment motion).

court expressly ignoring such evidence³⁴⁹ or finding it irrelevant to the court's dismissal determination.³⁵⁰

Moreover, a court may consider a variety of materials without risking conversion when testing the complaint's legal adequacy. In particular, in addition to the complaint, a court may rely on documents attached to the complaint as exhibits,³⁵¹ documents incorporated into the complaint by reference,³⁵² matters subject to judicial notice,³⁵³ matters of public record,³⁵⁴ court orders,³⁵⁵ and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit."³⁵⁶ A

³⁴⁹ See, e.g., *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (finding no conversion occurred where court chose to "ignore" supplementary materials attached to Rule 12(b)(6) motion); *Jones v. City of Cincinnati*, 521 F.3d 555, 561–62 (6th Cir. 2008) (finding no abuse of discretion where court "disregarded" defendants' public document and videotape attached to Rule 12(b)(6) motion).

³⁵⁰ See, e.g., *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003); *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 558 (9th Cir. 1995) (ruling that where court did not rely on defendant's affidavit, court's Rule 12(b)(6) dismissal was not error).

³⁵¹ FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); see also *Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO v. Exelon Corp.*, 495 F.3d 779, 782 (7th Cir. 2007) (relying on Rule 10(c), court considered arbitration award attached to complaint in Rule 12(b)(6) analysis).

³⁵² *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007). A document need not be attached to the complaint if it is "integral to or explicitly relied upon in the complaint." *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000) (citation omitted).

³⁵³ *Tellabs, Inc.*, 127 S. Ct. at 2509.

³⁵⁴ See *Levy v. Ohl*, 477 F.3d 988, 990–91 (8th Cir. 2007); see also *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (finding that it was appropriate for the court to consider SEC public records not attached to complaint in Rule 12(b)(6) determination).

³⁵⁵ See *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994).

³⁵⁶ *Brass*, 987 F.2d at 150; see also *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) ("[W]hen . . . a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." (quoting *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1998))); *Roth*, 489 F.3d at 509 ("[E]ven if not attached or incorporated by reference, a document 'upon which [the complaint] solely relies and which is integral to the complaint' may be considered by the court in ruling on such a motion." (alteration in original) (emphasis omitted) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991))); *Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir. 1997) ("[A] court ruling on a motion to dismiss may consider the full texts of documents which the complaint quotes only in part."); *Hines v. City of Albany*, 542 F. Supp. 2d 218, 230 n.7 (N.D.N.Y. 2008) ("While normally the letters could not be considered by the court in deciding a Rule 12(b)(6) motion, because they are 'documents either in plaintiff's possession or of which plaintiffs had knowledge and relied on in bringing suit[,] they are properly considered." (alteration in original) (quoting *Mueller-Paisner v. TIAA*, 446 F. Supp. 2d 221, 226–27 (S.D.N.Y. 2006))). *But see Sira v. Morton*, 380 F.3d 57, 67

court may even consider a document attached solely to defendant's dismissal motion if the document's contents are alleged in the complaint and its authenticity is not questioned.³⁵⁷ Thus, much of what can be unearthed through targeted plausibility discovery may fall within the confines of the Rule 12(b)(6) examination.

2. *Plausibility Discovery Is Justified on Policy Grounds*

Prior to the plausibility pleading standard—first established in the antitrust context by *Twombly* and later unequivocally expanded to all civil actions in *Iqbal*—there was very little need for a court to give a plaintiff an opportunity to discover facts showing he was entitled to relief. The generous notice-pleading standard under *Conley* enabled plaintiffs to plead cases more easily and to more likely survive dismissal, as many courts readily admit.³⁵⁸ The informational inequity between the parties, while always there, did not have the same deleterious effect on a plaintiff's capacity to overcome a Rule 12(b)(6) challenge. The veracity of his allegations could later be fleshed out in discovery and ultimately tested through summary judgment or trial.³⁵⁹ But post-*Iqbal*, this is not the case. The same plaintiff today may find his complaint vulnerable to premature dismissal because of the more rigorous pleading standard.³⁶⁰ Consequently, a different approach is needed.

The primary objection to allowing plaintiffs discovery at the pleading stage is that courts have held where a complaint does not meet the minimum pleading standard under Rule 8(a)(2), a plaintiff is not

(2d Cir. 2004) (finding that “[l]imited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint” for Rule 12(c) consideration).

³⁵⁷ See *Cooper*, 137 F.3d at 622–23. More specifically: “[A] document is not “outside” the complaint if the complaint specifically refers to the document and if its authenticity is not questioned. . . . [W]hen [the] plaintiff fails to introduce a pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his motion attacking the pleading. . . . [D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Id.* (alterations in original) (emphasis added) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994)); see also *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir. 2007) (finding that documents which are undisputedly authentic, central to plaintiff's claim, and sufficiently referenced in the complaint may be considered by the court under Rule 12(b)(6) “even when the documents are incorporated into the movant's pleadings”).

³⁵⁸ See discussion *supra* Part III.B.2.

³⁵⁹ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). As noted by the Supreme Court: “Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint . . . were the principal tools by which factually insufficient claims . . . could be isolated and prevented from going to trial But with the advent of ‘notice pleading,’ the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.” *Id.*

³⁶⁰ See discussion *supra* Part III.B & notes 138–40.

entitled to discovery.³⁶¹ *Iqbal* itself concluded that “[b]ecause respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”³⁶² Although this language may suggest disapproval of plausibility discovery, *Iqbal* does not require this conclusion.³⁶³

First, *Iqbal*’s language does not address the discovery proposed here. The Supreme Court has not had occasion to specifically address the utility of using pre-dismissal discovery to determine plausibility. Instead, historically courts have prohibited *merits* discovery where a plaintiff has not met the minimum pleading standard.

Second, in *Iqbal*, the Court’s unwillingness to permit plaintiff even cabined discovery³⁶⁴ was in the context of plaintiff’s asking the Court to relax the pleading standard on the ground that subsequent merits discovery would be limited.³⁶⁵ In response to this request, the Court declined the invitation and explained that even limited, sequential, court supervised discovery³⁶⁶ would still expose high-level government officials

³⁶¹ See *First Commercial Trust Co., N.A. v. Colt’s Mfg. Co.*, 77 F.3d 1081, 1083 n.4 (8th Cir. 1996) (“Litigants, of course, have no right to discovery in the absence of a plausible legal theory.”); see also *Mitchell v. McNeil*, 487 F.3d 374, 379 (6th Cir. 2007) (finding no error in denying discovery where plaintiffs did not state cognizable claim); *Tucker v. Union of Needletrades, Indus. & Textile Employees*, 407 F.3d 784, 787–88 (6th Cir. 2005) (stating that Rule 12(b)(6)’s “very purpose” is to challenge a complaint’s legal sufficiency absent discovery (quoting *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003))); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“It is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.”).

³⁶² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

³⁶³ See Hartnett, *supra* note 8 (manuscript at 48–49) (distinguishing *Iqbal* on grounds that it dealt with qualified immunity, not “motions to dismiss generally”); but see Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010); Scott Dodson, *New Pleading, New Discovery*, 49–51 (William & Mary Law Sch., Research Paper No. 09-20), available at <http://ssrn.com/abstract=1525642> [hereinafter Dodson, *New Pleading*].

³⁶⁴ In recognizing the importance of protecting government officials from non-meritorious claims early in the litigation process, the Second Circuit noted how a district court could achieve this objective while still allowing a complaint to survive. In particular, the Circuit Court stated: “[E]ven though a complaint survives a motion to dismiss, a district court . . . may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct.” *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

³⁶⁵ *Iqbal*, 129 S. Ct. at 1953–54 (explaining how petitioners Ashcroft and Mueller would be burdened by discovery of lower level governmental officials); *id.* (“We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.”).

³⁶⁶ *Id.* In particular, the Second Circuit described various options available to the district court: “[A] district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the

to the burdens of discovery, in contravention of the qualified immunity doctrine.³⁶⁷ The Court rejected conditioning a complaint's survival on the availability of limited merits discovery later on.³⁶⁸ It did not address—much less reject—permitting pre-dismissal discovery solely to discern if a complaint makes a plausible claim where informational inequity exists.

The Supreme Court's concern about permitting a complaint to survive because merits discovery would be limited stemmed from the Court's "rejection of the careful-case-management approach."³⁶⁹ The Court's apprehension over the district court's ability to check abuse of merits discovery led the Court to conclude that 12(b)(6) survival should not be conditioned on cabined merits discovery.³⁷⁰ This is especially true where qualified immunity is asserted.³⁷¹

The Court's concern over district courts' inability to prevent discovery abuse through case management could apply to pre-dismissal discovery as well. The Court might conclude that district courts would do no better at controlling this discovery either. However, if this were the case generally, the Court would not endorse the myriad ways in which district courts already use discovery to resolve a variety of threshold issues, as discussed *supra*. On the contrary, the Court recognizes with approval the broad power and discretion of district courts to manage discovery to address various preliminary litigation matters.³⁷²

need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval." *Iqbal*, 490 F.3d at 158; *see also id.* at 178.

³⁶⁷ *Iqbal*, 129 S. Ct. at 1953–54. The Court was particularly mindful of the need to protect high-level officials via qualified immunity. *Id.* at 1954. ("[The Second Circuit's] promise [of minimally intrusive discovery] provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.").

³⁶⁸ *Id.* at 1953 ("We have held . . . that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process . . ." (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007))).

³⁶⁹ *Id.*

³⁷⁰ *See Twombly*, 127 S. Ct. at 1967 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." (citation omitted)); *see also id.* at 1967 n.6 ("Given the system that we have, the hope of effective judicial supervision is slim . . .").

³⁷¹ *Iqbal*, 129 S. Ct. at 1953 ("[O]ur rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.").

³⁷² Moreover, the Court may be diminishing the extent to which district courts can, and do, successfully manage their cases and concomitant discovery through a variety of tools. *See Twombly*, 127 S. Ct. at 1987 n.13 (Stevens, J., dissenting) ("The Court vastly underestimates a district court's case-management arsenal."); *Iqbal*, 129 S. Ct. at 1961–62 (Breyer, J., dissenting) (describing various case management tools for protecting government officials from unwarranted interference); Brief of Professors

The pre-dismissal plausibility discovery contemplated here furthers, rather than contravenes, the Supreme Court's goal of prohibiting defendants from being forced to engage in burdensome discovery and expending significant time, resources, and attention on meritless litigation. By permitting the parties plausibility discovery, district courts can more easily resolve those cases that are close calls—resulting in early dismissals that protect defendants from burdensome merits discovery where appropriate. This approach benefits defendants as well as plaintiffs.

For example, in *Kregler v. City of New York*,³⁷³ the district court permitted plausibility discovery where a former firefighter's First Amendment § 1983 retaliation claim was a close call.³⁷⁴ Rather than deny the defendant's motion to dismiss outright and subject the defendant to potentially expensive and time consuming merits discovery,³⁷⁵ the court instead permitted the parties to engage in targeted discovery on the plausibility issue.³⁷⁶ Although the court ultimately granted defendant's 12(b)(6) motion on the pleadings alone, its consideration of additional evidence—through documents and testimony by the plaintiff—persuaded the court that plaintiff's retaliation claim was implausible.³⁷⁷ But for this targeted plausibility discovery, the defendant might have had to engage in full blown merits discovery prior to challenging plaintiff's retaliation claim again through summary judgment—a more time consuming and costly alternative.³⁷⁸

of Civil Procedure and Federal Practice as Amici Curiae Supporting Respondents at 31–32, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) (describing various case management approaches available under the Rules).

³⁷³ 608 F. Supp. 2d 465 (S.D.N.Y. 2009).

³⁷⁴ In particular, the court concluded: “The Court finds that under *Twombly*'s plausibility standard, [the plaintiff] Kregler's amended complaint remains at best borderline in stating a First Amendment retaliation claim. To survive the new motion to dismiss the pleadings as modified would require the Court to accept as true numerous conclusory allegations, to make substantial inferential leaps, and to resolve considerable doubts in Kregler's favor.” *Id.* at 474; *see also id.* at 476 (complaint would “barely survive dismissal at this point”).

³⁷⁵ *See id.* at 476–77 (describing how denying defendants' dismissal motion would likely lead to extensive merits discovery that would “culminate—many months, or even years from now, and at a financial cost of tens if not hundreds of thousands of dollars in a motion for summary judgment that in all probability would turn on resolution [of] the same threshold issues . . .”).

³⁷⁶ *Id.* at 475 (“[A]cknowledging that this case presents a close call, to minimize additional motion practice at this stage and avert potentially unnecessary extensive discovery,” the court permitted the parties to present affidavits, depositions, documents, live testimony, and other evidence at a pre-trial hearing “limited to Defendants' objections to the pleadings, specifically the threshold legal issues upon which, under the . . . plausibility test, the sufficiency of Kregler's retaliation claim is grounded.”); *see also* *Kregler v. City of New York* (*Kregler II*), 646 F. Supp. 2d 570, 581 (S.D.N.Y. 2009) (documents).

³⁷⁷ *See Kregler II*, 646 F. Supp. 2d at 574–75, 578–81.

³⁷⁸ *See id.* at 581.

Another objection to plausibility discovery is the valid concern that plaintiffs should not be permitted to go on fishing expeditions³⁷⁹ and at a defendant's expense.³⁸⁰ Plaintiffs are expected to conduct an adequate pre-suit investigation prior to filing suit, in compliance with Rule 11(b)(3).³⁸¹ Plaintiffs must exercise the requisite due diligence and pre-filing effort required by the rules.

However, where plaintiffs seek plausibility discovery because of an informational inequity, plaintiffs' shortfall does not arise from any ethical or professional flaw on their part. Where a plaintiff labors under such an inequity, a Rule 11(b)(3) "inquiry reasonable under the circumstances" may produce a complaint lacking in facts sufficient to overcome the plausibility standard.³⁸²

A similar rationale justifies the more liberal construction given to complaints filed by prisoners who proceed *in forma pauperis*. For example, in *Rodriguez v. Plymouth Ambulance Service*, a prisoner who filed a § 1983 claim pro se was given the "opportunity to engage in limited discovery to ascertain the identity" of certain individual medical staff members who were allegedly deliberately indifferent to his serious medical condition, in violation of the Eighth Amendment.³⁸³ Recognizing the prisoner's "opportunities for conducting a precomplaint inquiry" as "virtually nil,"³⁸⁴ the court refrained from dismissing the complaint and instead ordered

³⁷⁹ See *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) ("[If] the complaint proves to be solid save for perhaps a single soft element for which evidence would normally be outside the reach of plaintiffs' counsel without discovery, then it may be that a narrowly-directed and less burdensome discovery plan should be allowed with leave to amend to follow," but if "the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied.").

³⁸⁰ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.").

³⁸¹ Rule 11(b) states: "By presenting to the court a pleading . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . ." FED. R. CIV. P. 11(b)(3).

³⁸² Post-*Iqbal*, it behooves a plaintiff facing this type of evidentiary inequity to specifically identify those factual contentions that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," FED. R. CIV. P. 11(b)(3), in the event they are lacking at filing. This explicit acknowledgment places the court on notice that plausibility discovery is warranted, and potentially shields plaintiffs from a Rule 11(b)(3) challenge. See, e.g., *Kregler v. City of New York* (Kregler I), 608 F. Supp. 2d 465, 475 (S.D.N.Y. 2009) (deciding to hold a pre-dismissal preliminary hearing to flesh out the complaint's plausibility and to discern if plaintiff properly conducted a pre-suit investigation required by Rule 11(b)(3)).

³⁸³ 577 F.3d 816, 819, 821–22, 832 (7th Cir. 2009).

³⁸⁴ *Id.* at 821 (quoting *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 789 (7th Cir. 1995)).

pre-dismissal discovery.³⁸⁵ The Seventh Circuit explained that the “principle is not limited to prisoner cases” but instead “applies to any case in which . . . identification of the responsible party may be impossible without pretrial discovery.”³⁸⁶ The court recognized that while eventually the plaintiff would have to discover the information sufficient to overcome a Rule 12(b)(6) dismissal under *Twombly* and *Iqbal*, his initial inability did not warrant immediate dismissal.³⁸⁷

Other courts have ordered similar pre-dismissal discovery.³⁸⁸ For example, in *Hines v. City of Albany*,³⁸⁹ in response to a Rule 12(b)(6) motion, the district court permitted plaintiffs limited discovery to identify the individual police officers accused of constitutional violations under § 1983.³⁹⁰ Even pre-*Twombly*, some courts have permitted limited, focused discovery during the pleadings stage for those cases subjected to a heightened pleading standard where the defendant had exclusive control of information.³⁹¹

Some may contend that plausibility discovery as a solution is over-inclusive because plaintiffs who bring claims involving informational inequities may get the benefit of such discovery, whether or not they exercised diligence pre-suit. To assuage itself that a plaintiff acted diligently, a court may order the plaintiff to explain what efforts he made pre-filing and why he should get pre-dismissal discovery to bridge the plausibility gap.³⁹² To facilitate this process, a court may require the

³⁸⁵ *Id.* (“[I]f the circumstances are such as to make it infeasible for the prisoner to identify . . . someone before filing his complaint, his suit should not be dismissed as frivolous.” (quoting *Billman*, 56 F.3d at 789)).

³⁸⁶ *Id.* (quoting *Billman*, 56 F.3d at 789).

³⁸⁷ *Id.*; see also *id.* (“Dismissal would gratuitously prevent him from using the tools of pretrial discovery to discover the defendants’ identity.” (quoting *Billman*, 56 F.3d at 789)).

³⁸⁸ See Page, *supra* note 8, at 465 (“[B]oth before and after *Twombly*, courts have specifically permitted limited merits discovery to allow the plaintiff the opportunity to frame a sufficient complaint.”). See, e.g., *Int’l Audiotext v. AT&T*, 62 F.3d 69, 70 (2d Cir. 1995) (affirming district court’s 12(b)(6) dismissal after “limited pre-answer discovery conducted pursuant to a stipulation and order” pre-*Twombly*); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051–52 (9th Cir. 2008) (affirming district court’s 12(b)(6) dismissal of amended complaint after court permitted plaintiffs to conduct discovery to collect facts necessary to adequately plead antitrust violation after dismissal of initial complaint); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (allowing for limited discovery under *Twombly*).

³⁸⁹ 542 F. Supp. 2d 218 (N.D.N.Y. 2008).

³⁹⁰ *Id.* at 222, 232 n.8.

³⁹¹ See Bone, *supra* note 7, at 933 n.249 (citing cases); see, e.g., *Cordero-Hernández v. Hernández-Ballesteros*, 449 F.3d 240, 244 (1st Cir. 2006); *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987); *Parish v. Beneficial Ill., Inc.*, No. 94 C 4156, 1996 WL 172127, at *4–5 (N.D. Ill. Apr. 10, 1996); cf. *Reints v. Sheppard*, 90 F.R.D. 346, 347 (M.D. Pa. 1981) (recognizing a willingness to grant limited discovery in some cases, but declining to do so in this case).

³⁹² See discussion *supra* at Part III. See also Bone, *supra* note 7, at 933–34. Professor Bone makes this point in his discussion of the issue: “As a threshold matter, the plaintiff should be required to file an affidavit with her complaint describing in detail

parties to establish a discovery plan, using Rule 26(f) for guidance, discussed *infra*.

In light of Rule 1's mandate to "construe[] and administer[]" the rules so as "to secure the just, speedy, and inexpensive determination of every action,"³⁹³ judges are not only encouraged, but *required*, to exercise their discretion to fulfill this mission.³⁹⁴ Litigants³⁹⁵ and their lawyers³⁹⁶ have a similar obligation. Rule 1 requires that a court interpret and construe the rules to promote justice and efficiency for *all* civil actions. These "touchstones of federal procedure"³⁹⁷—as described by the Supreme Court—can be accomplished by utilizing and structuring discovery to address the plausibility pleading standard.

C. *Plausibility Discovery in Practice*

The following Section sets forth arguments the parties are apt to make in cases where informational inequities threaten to undermine a plaintiff's ability to survive dismissal post-*Iqbal* and a roadmap for how a court can equitably address these arguments within the scope of its authority.³⁹⁸

What triggers this process is a defendant's filing a Rule 12(b)(6) dismissal motion, a more likely occurrence in light of the more rigorous pleading standard. A court must then ascertain whether the complaint fails to plausibly state a claim upon which relief can be granted in compliance with Rule 8(a)(2).³⁹⁹ Defense attorneys will likely argue that plaintiffs' claims are implausible, dissecting the complaint and labeling allegations as conclusory. Plaintiffs' attorneys will likely counter that the claims are plausible, and argue, in the alternative, that should the claims fall short because of informational inequities, plaintiffs should be

all the steps she took to investigate the merits before filing and stating what she learned [prior to engaging in limited pre-dismissal discovery]. This requirement would help assure that the plaintiff does not substitute discovery for a pre-filing investigation and impose costs on the defendant without good reason." *Id.*

³⁹³ FED. R. CIV. P. 1 (emphasis added).

³⁹⁴ See *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882–83 (9th Cir. 2005) ("The first of the Federal Rules of Civil Procedure mandates construing the rest of the rules 'to secure the just, speedy, and inexpensive determination of every action.'" (quoting FED. R. CIV. P. 1)), *aff'd*, 270 F. App'x 484 (9th Cir. 2008) (mem.); cf. *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1230 (D. Colo. 1994) (explaining that the court is obligated to raise sua sponte ethical issues related to compliance with Rule 1, even where parties do not (citing *Schmidt v. Ford Motor Co.*, 112 F.R.D. 216, 221 (D. Colo. 1986))), *aff'd in part and disapproved in part*, 85 F.3d 489 (10th Cir. 1996).

³⁹⁵ *Hill v. MacMillan McGraw-Hill Sch. Publ'g Co.*, C 93-20824 RPA, 1995 WL 317054, at *1 (N.D. Cal. May 22, 1995) ("[L]itigants have an obligation to the court to refrain from conduct that frustrates the aims of [Rule 1].").

³⁹⁶ *Reebok Int'l Ltd. v. Sebelin*, 959 F. Supp. 553, 558 n.1 (D.P.R. 1997).

³⁹⁷ *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

³⁹⁸ Professor Hartnett suggests a similar approach. See Hartnett, *supra* note 8 (manuscript at 46–47).

³⁹⁹ FED. R. CIV. P. 8(a)(2) requires that the complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

granted limited discovery on the plausibility issue. How should the court respond?

1. Establish That Informational Inequity Exists

Because plausibility discovery is justified where there is an informational inequity,⁴⁰⁰ the threshold inquiry for a court is whether such an inequity exists.⁴⁰¹ An informational inequity exists where the defendant has exclusive or primary control over the information necessary for the plaintiff to make a plausible showing to the court.⁴⁰² Examples include facts about a defendant's state of mind (such as intent to discriminate), secret agreements (such as conspiracies), and companywide policies and statistics. Claims most likely implicated include civil rights (such as § 1983 and employment discrimination), antitrust, products liability, and environmental law.

Where a plaintiff has clearly identified the possible factual shortcomings of his complaint and the facts he will seek that can only be obtained through targeted discovery,⁴⁰³ the court may exercise its discretion to order pre-dismissal discovery. A discovery order that describes the facts necessary to overcome the plausibility threshold would inform not only the immediate litigants, but future ones, of what is necessary for a complaint to survive a Rule 12(b)(6) motion.⁴⁰⁴ Given the

⁴⁰⁰ See discussion *supra* Part IV.B.2.

⁴⁰¹ Courts have the authority and discretion to order pre-dismissal discovery for a variety of reasons. Therefore, the presence of an informational inequity is a justification, not a pre-requisite, for a court's ordering plausibility discovery. Thus, a court is not required to make a factual finding that there is an informational inequity in order to permit plausibility discovery.

⁴⁰² An "informational inequity" refers to the difference in knowledge and access to information between the parties. This asymmetry or imbalance is inequitable because of its deleterious impact on civil rights and other types of claims, described *supra* Part IV.B.2.

⁴⁰³ The court may consider using an iteration of some or all of the criteria for a Rule 56(f) request for discovery: "To request discovery under Rule 56(f), a party must file an affidavit describing: (1) what facts are sought and how they are to be obtained; (2) how these facts are reasonably expected to raise a genuine issue of material fact; (3) what efforts the affiant has made to obtain them; and (4) why the affiant's efforts were unsuccessful." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004). See, e.g., *Roswell Capital Partners LLC v. Alternative Constr. Techs.*, 638 F. Supp. 2d 360, 371-72 (S.D.N.Y. 2009) (discovery request denied on bare assertion that defendant had the evidence). Courts have borrowed, by analogy, these criteria when determining if jurisdictional discovery should be permitted in response to a Rule 12(b)(1) motion. See *Gualandi*, 385 F.3d. at 245.

⁴⁰⁴ Similarly, when a court grants a motion to dismiss, it normally describes why and how the complaint is insufficient and grants leave to amend the complaint. This enables a plaintiff to try to address the deficiencies identified by the court. A plausibility discovery order would do the same.

Likewise, a court may grant class certification, provided that certain measures are taken. For example, a court may condition certification on plaintiffs' dividing the class into subclasses or narrowing the class definition. Again, this enables a plaintiff to try to address the issues identified by the court. While a court must remain impartial

embryonic stage of the plausibility pleading standard, building a body of case law in this area would be invaluable. This would promote clarity, uniformity, and predictability in an understandably confusing arena.

2. *Defer Ruling on the Motion to Dismiss*

In response to a plaintiff's motion or sua sponte, a court should defer ruling on a defendant's Rule 12(b)(6) motion until after plausibility discovery is complete.⁴⁰⁵ Dismissing the complaint without allowing such discovery would work an injustice against those plaintiffs who bring civil actions involving informational inequities. Such a denial would contravene the letter and spirit of the rules.⁴⁰⁶ The better procedure is to defer ruling because if the court grants the motion to dismiss, the court may lack the jurisdiction to order discovery.⁴⁰⁷

and not attempt to help any party, a court must provide sufficient transparency to inform the parties and enable the appellate courts adequate review.

⁴⁰⁵ Similarly, it is not uncommon for courts, in the Rule 12(d) context, to defer ruling on the sufficiency of the complaint's allegations until after the development of a fuller record. Rule 12(d) states: "If, on a motion under Rule 12(b)(6), . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." FED. R. CIV. P. 12(d).

See, e.g., Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA, 857 F. Supp. 1137, 1145 (M.D.N.C. 1994) (deferring determination of legal sufficiency of Due Process claim "until the next dispositive stage of litigation," rather than granting Rule 12(b)(6) motion, so that parties could develop the factual record), *partial summary judgment granted*, 4 F. Supp. 2d 435 (M.D.N.C. 1998), *vacated*, 313 F.3d 852 (4th Cir. 2002); *Evello Invs., N.V. v. Printed Media Servs., Inc.*, 158 F.R.D. 172, 173 (D. Kan. 1994) (deferring determination of sufficiency of defendant's Rule 12(b)(6) defense at "early stage" of litigation where determination of "[w]hether or not plaintiffs have stated a claim turn[ed] on complicated factual and legal questions"); *see also* *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990) (declining to affirm court's dismissal of liability claim on alternative theory where "court did not develop the factual record required for determination" of claim).

⁴⁰⁶ *See* *United States v. High Country Broad. Co.*, 3 F.3d 1244, 1245 (9th Cir. 1993) ("Rule 1 prevents party from flouting spirit of rules, even if party fits within their literal meaning." (citing *Marquis Theatre Corp. v. Condado Mini Cinema*, 846 F.2d 86, 89 (1st Cir. 1988))); *see also* *Foman v. Davis*, 371 U.S. 178, 181 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."); *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 20 (1st Cir. 2004) ("The view that the pleading of cases is a game in which every miscue should be fatal is antithetic to the spirit of the federal rules."); *Marquis Theatre Corp.*, 846 F.2d at 89 (concluding that defendant's refusal to turn over documents solely in his possession and necessary for plaintiff to prove case "offend[ed] the court and the spirit of the rules of procedure" (citing FED R. CIV. P. 1)). *But see* *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co.*, 69 F.3d 1312, 1314-15 (7th Cir. 1995) ("[T]he need to consider the objectives in [Rule] 1 when construing all of the rules does not justify disregarding limitations explicitly built into them . . .").

⁴⁰⁷ The courts are divided over whether a district court that grants a motion to dismiss with leave to amend can order discovery. *See* Hartnett, *supra* note 8 (manuscript at 50-51). *Compare In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (although plaintiffs' claims were dismissed for failure to sufficiently

3. *Order Plausibility Discovery*

If a court defers ruling on defendant's dismissal motion, and has been persuaded that some discovery could tip the complaint over the viability line, the court should grant plaintiff's motion for plausibility discovery.⁴⁰⁸ Of course, to justify plausibility discovery there must be some reasonable expectation that it will yield fruit.⁴⁰⁹ Such discovery would be very narrow, focused exclusively on unearthing the facts identified as necessary for demonstrating plausibility.⁴¹⁰

a. *The Scope of Plausibility Discovery*

Unlike other pre-merits discovery models, in which the subject matter of the discovery is more distinct from the merits, for plausibility discovery bifurcation on this basis is not as clear. For example, in the class certification and qualified immunity contexts, these inquiries are separate and distinct from the merits, thereby allowing a court to bifurcate merits discovery from class certification and qualified immunity discovery. While this does not mean that there is *no* overlap and that the courts do not struggle to cleanly disaggregate the merits from the other inquiries,⁴¹¹ bifurcation is often possible and preferable under these models. For example, a defendant may argue that the discovery plaintiff characterizes as pertaining to class certification goes to the merits and thus should not be permitted. Indeed, there are often occasions where facts pertain to both class certification and merits. But under these models this disagreement takes place at the edges.

By contrast, for plausibility discovery, those facts necessary to plausibly show a plaintiff is entitled to relief would naturally overlap with those going to the merits. For example, a plaintiff may need the identity of a defendant to meet the plausibility threshold, a fact which would also

plead the claims, "narrowly-tailored discovery" was "permitted to go forward" post-*Twombly*), with *In re Flash Memory Antitrust Litig.*, No. C 07-0086, 2008 WL 62278, at *5 (N.D. Cal. Jan. 4, 2008) ("Discovery in the absence of any operative pleading [here, amended consolidated complaints] . . . does not fit easily within the framework established by the Federal Rules.").

⁴⁰⁸ Following plausibility discovery, plaintiff will undoubtedly request leave to amend the complaint, potentially prompting defendant to renew its motion to dismiss.

⁴⁰⁹ See *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) ("[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."); see, e.g., *Henshaw v. Wayne County*, No. 2:09-CV-152-TC-SA, 2009 WL 3226503, at * 3 (D. Utah Oct. 1, 2009) (where plaintiff "ha[d] not shown that even with discovery, he could muster factual support for his claims" court denied pre-dismissal discovery request and dismissed claims).

⁴¹⁰ Giving the court the discretion to determine on a case-by-case basis what is required ensures that the scope of plausibility discovery is appropriate. *But see* Bone, *supra* note 5, at 934 (expressing concern over judge's ability to determine appropriate amount of pre-dismissal discovery and therefore contending that "the amount of discovery should be defined by general rule").

⁴¹¹ See discussion *supra* at III.A.1 (class certification).

pertain to liability. In *Iqbal*, had the plaintiff been able to take some limited discovery pre-dismissal, he might have unearthed documents plausibly suggesting that the defendants had personal knowledge or involvement in the alleged wrongdoing. These documents would also be directly relevant to the question of liability.

The difference between plausibility and merits discovery is more its scope than its subject matter. Care must be taken to insure that plausibility discovery does not become merits discovery. To protect the defendant from the cost and burden of unwarranted merits discovery,⁴¹² plausibility discovery must be narrowly-defined and limited to just what is necessary to cross the viability threshold. To facilitate this process, a court may request that the parties meet and confer and create a proposed discovery plan, using Rule 26(f) for guidance, which the court can approve or modify as needed.

A similar procedure, “phased discovery,”⁴¹³ is based on the same concept of protecting the defendant from merits discovery while permitting the parties some threshold discovery, which follows the denial of a Rule 12(b)(6) motion. In Justice Stevens’s dissent in *Twombly*, he suggested that had he been the district court judge, he would have permitted plaintiffs to take some targeted depositions of executive defendants rather than summarily dismissing plaintiffs’ claims.⁴¹⁴ In *Twombly*, the plaintiffs had proposed a plan of “phased discovery,” comprised of an initial phase of discovery “limited to the existence of the alleged conspiracy and class certification,” to be followed by “more expansive, general discovery” if the class claims survived summary judgment.⁴¹⁵ This phased discovery proposal was, according to Justice Stevens, “an appropriate subject for negotiation.”⁴¹⁶

Similarly, the Second Circuit, in *Iqbal*, was receptive to a phased discovery plan that would have protected senior government officials from premature merits discovery by requiring front-line officials to be subjected to discovery first.⁴¹⁷ The Second Circuit noted that even if a complaint survives a Rule 12(b)(6) challenge, the district court may “exercise[] its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe” issues pertaining to qualified immunity.⁴¹⁸ In Justice Breyer’s dissent in *Iqbal*, he cited with approval the ways in which discovery can be structured and cases managed to protect

⁴¹² See *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989) (stating that the Rule 12(b)(6) procedure “streamlines litigation by dispensing with needless discovery and factfinding”).

⁴¹³ See *Bone*, *supra* note 7, at 933 n.251.

⁴¹⁴ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1986–87 (2007) (Stevens, J., dissenting).

⁴¹⁵ Brief for Respondents at 25, *Twombly*, 127 S. Ct. 1955 (No. 05-1126).

⁴¹⁶ *Twombly*, 127 S. Ct. at 1987 (Stevens, J., dissenting).

⁴¹⁷ See *Iqbal v. Hasty*, 490 F.3d 143, 158, 178 (2d Cir. 2007).

⁴¹⁸ *Id.* at 158.

government officials from unwarranted litigation, as described by the Second Circuit.⁴¹⁹

b. The Form of Plausibility Discovery

Plausibility discovery may take various forms and should be governed on a case-by-case basis, at a court's discretion. Some courts may chose to limit the type of discovery (*i.e.* interrogatories rather than depositions), the amount of discovery (*i.e.* three depositions), the persons subjected to discovery (*i.e.* only lower level officials), and the time period for discovery (*i.e.* one month limitation). Some courts may chose to actively manage discovery. One court, *Kregler v. City of New York*, conducted a kind of supervised discovery,⁴²⁰ at a pretrial hearing⁴²¹ pursuant to Rule 12(i), where he entertained live testimony and other evidence limited to addressing whether plaintiff plausibly alleged a claim for retaliation.⁴²² In an effort to avoid continued motions practice and potentially onerous and needless discovery against government officials accused of violating § 1983, the court exercised its discretion to hold such a hearing.⁴²³ The hearing—designed to resolve the threshold question of the complaint's legal sufficiency⁴²⁴—could conclude with the court's granting the Rule 12(b)(6) motion, denying it, or ordering additional limited discovery.⁴²⁵ The court also scheduled a conference with the parties to discuss the structure, scope and procedure of the hearing itself.⁴²⁶

⁴¹⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961–62 (2009) (Breyer, J., dissenting).

⁴²⁰ *Kregler v. City of New York* (*Kregler II*), 646 F. Supp. 2d 570, 581 (S.D.N.Y. 2009) (describing defendant's live testimony at Rule 12(i) hearing as "equivalent of Court-supervised testimony at depositions").

⁴²¹ *Kregler v. City of New York* (*Kregler I*), 608 F. Supp. 2d 465, 475 (S.D.N.Y. 2009) (describing plan); *Kregler II*, 646 F. Supp. 2d at 577–81 (describing hearing held). Although the court heard testimony from the plaintiff and defendants to "preserve the widest range of options and fullest flexibility in its resolution of this matter," it ultimately concluded that defendants were entitled to dismissal on the pleadings alone. *Id.* at 578 n.2.

⁴²² Rule 12(i) states: "If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." FED. R. CIV. P. 12(i). The court may order a preliminary hearing to determine Rule 12 threshold issues *sua sponte*. See *Kregler I*, 608 F. Supp. 2d at 475 (citing *Rivera-Gomez v. de Castro*, 900 F.2d 1, 2 (1st Cir. 1990) ("[W]e are confident that a federal district court has the authority to set a preliminary evidentiary hearing *sua sponte* when . . . the balance of practical and equitable considerations so dictates.")).

⁴²³ *Id.* at 475–76; see also *Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998) ("[D]ecision whether or not to hold an oral hearing on a motion to dismiss lies in the sound discretion of the trial court.").

⁴²⁴ The court also held the hearing to determine whether the plaintiff was reasonable in alleging retaliation under Rule 11(b)(3). *Id.* at 475, 477. While useful, this approach should be followed cautiously because of the chilling effect it could have on the filing of potentially meritorious claims.

⁴²⁵ *Id.* at 477. Ultimately, the court concluded that the plaintiff failed to state a plausible claim of retaliation and dismissed the case. The court also denied leave to replead on the grounds of futility. *Kregler II*, 646 F. Supp. 2d at 581–82.

⁴²⁶ *Kregler I*, 608 F. Supp. 2d at 477.

The court concluded that the hearing was beneficial to its plausibility determination. The court found the direct, cross, and court examinations of the plaintiff far more beneficial in fleshing out the complaint's factual allegations than written motions practice would have been.⁴²⁷ The hearing produced a "fuller and clearer record" which enhanced the court's and possibly the parties' understanding of the case⁴²⁸ and enabled the court to decide the 12(b)(6) motion in "far shorter time" than usual.⁴²⁹ The novelty of this approach was not lost upon the court:

Admittedly, the approach the Court proposes here entails passage through relatively uncharted ground. Difficulties are bound to arise along the way. At this point some of the bumps and detours are entirely unknown, while others, though likely in the repertory of anticipated legal argument, do not appear insurmountable. But such challenges go with the territory in any form of exploration for new paths and different ways of doing things.⁴³⁰

4. Grant Plaintiff Leave to Amend the Complaint

If a plaintiff files a motion for leave to amend the complaint after incorporating the facts uncovered through plausibility discovery, the court should grant leave to amend, unless it would be futile. Pursuant to Rule 15(a)(2), "[t]he court should freely give leave when justice so requires"⁴³¹ and Rule 8(e), "[p]leadings must be construed so as to do justice."⁴³² Courts promote a liberal leave policy, permitting leave whenever possible.⁴³³ A court can grant such leave even in the absence of

⁴²⁷ *Kregler II*, 646 F. Supp. 2d at 581.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Kregler I*, 608 F. Supp. 2d at 477. A bit of caution is warranted. While a court may hold a Rule 12(i) hearing—in response to a party's request or *sua sponte*—to determine whether to grant a defendant's 12(b)(6) motion, it is not clear if such a hearing is the proper vehicle to use here. When read in conjunction with Rule 43(c)—which explicitly authorizes oral testimony to be taken when a motion relies on facts outside the record—an argument can be made that the court's taking oral testimony to resolve a 12(b)(6) challenge was not contemplated by Rule 12(i). In any event, the appropriateness of plausibility discovery does not rest on the propriety of *Kregler's* use of the Rule 12(i) hearing in this manner.

⁴³¹ FED. R. CIV. P. 15(a)(2).

⁴³² FED. R. CIV. P. 8(e).

⁴³³ See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Laurie v. Ala. Court of Criminal Appeals*, 256 F.3d 1266, 1274 (11th Cir. 2001) ("There must be a substantial reason to deny a motion to amend."); *Martin's Herend Imps., Inc. v. Diamond & Gem Trading U.S.A. Co.*, 195 F.3d 765, 770 (5th Cir. 1999) (Rule 15(a) "evinces a bias in favor of granting leave to amend" (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981))). But see *Lee v. MBNA Long Term Disability & Benefit Plan*, 136 F. App'x 734, 746 (6th Cir. 2005) (stating that, despite Rule 1's support of liberal pleading, it does not condone transforming a clearly stated ERISA claim into a state claim).

a plaintiff's motion,⁴³⁴ and the burden falls on the defendant to contest such leave.⁴³⁵ Justice requires amendment where there is, *inter alia*, no undue delay, hardship or prejudice against the defendant.⁴³⁶ Here, because of the proscribed nature of the discovery and its occurrence at the beginning of the lawsuit's lifecycle, amendment is most likely justified.

Under the new pleading standard, as complaints fail to meet the plausibility test, some courts are liberally granting plaintiffs leave to amend. For example, in a case similar to *Twombly*, *In re Graphics Processing Units Antitrust Litigation*,⁴³⁷ direct and indirect purchasers contended that producers of graphics processing units (GPUs) engaged in a price-fixing conspiracy, in violation of section 1 of the Sherman Act.⁴³⁸ Plaintiffs alleged that defendants' parallel pricing and parallel releasing of products indicated an illicit agreement not to compete with one another.⁴³⁹ Relying on *Twombly*, the court concluded that plaintiffs' allegations of parallel conduct were equally consistent with illegal and legal behavior, thereby failing to reach the plausibility threshold.⁴⁴⁰ The court found the complaint wanting where it alleged that defendants attended certain trade shows and conferences which provided an *opportunity* to conspire, but did not specifically allege that the defendants actually met and conspired.⁴⁴¹ While the court did not require "specific back-room meetings between specific actors at which specific decisions were made," it found the plaintiffs' allegation of a price-fixing agreement too conclusory.⁴⁴²

⁴³⁴ See, e.g., *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

A plaintiff should file a motion for leave to amend the complaint with an attached proposed amended complaint. See *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361–62 (11th Cir. 2006); see also *Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003); *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913–14 (8th Cir. 2002).

⁴³⁵ Cf. *Foman*, 371 U.S. at 182 (stating that leave should be freely given absent an "apparent or declared reason" like "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . .").

⁴³⁶ *Id.*

⁴³⁷ *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007).

⁴³⁸ *Id.* at 1013, 1017–18.

⁴³⁹ *Id.* at 1021–22.

⁴⁴⁰ *Id.* at 1023.

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 1024. Plaintiffs alleged that the changes in pricing before and after the alleged conspiracy were unprecedented, which the court also found conclusory. However, in response to the court's dissatisfaction with the "before" evidence, plaintiffs contended that such information could then be culled from public records, if necessary. *Id.* at 1024–25.

Although the *In re Graphics Processing Units Antitrust Litigation* court granted defendants' motion to dismiss,⁴⁴³ it left the door open for plaintiffs to potentially amend their complaint, with the possibility of some narrow pre-repleading discovery.⁴⁴⁴ Specifically, the court permitted the plaintiffs to "file motions to propound limited discovery and for leave to amend" the complaint.⁴⁴⁵ The court required them to "identify what plaintiffs intend to find through discovery and how their proposed amendments to the complaint will remedy the problems identified in this order."⁴⁴⁶ Defendants were given the opportunity to file opposition briefs to challenge the proposed amended complaint and to state Rule 12 objections.⁴⁴⁷ Plaintiffs could reply, and the court would hold a hearing.⁴⁴⁸

Numerous courts, while permitting the plaintiffs leave to amend because of a plausibility problem, have not accompanied this with targeted discovery. Where the complaint's implausibility is due to an informational inequity, an opportunity to re-plead does little good without some narrow discovery to ameliorate the problem.

5. *Rule on the Motion to Dismiss*

Upon granting leave to amend, a court would rule on any renewed Rule 12(b)(6) motion, judging the proposed amended complaint which would be enhanced by facts revealed through plausibility discovery. Moreover, as recognized by the Supreme Court, providing the plaintiff an opportunity to amend his complaint, prior to his being subjected to a Rule 12(b)(6) ruling, enhances appellate review of dismissals because there is a more robust record upon which to rely.⁴⁴⁹

In sum, the courts are in uncharted territory post-*Iqbal*. Although not insurmountable, the challenge of dealing with civil rights and other

⁴⁴³ *Id.* at 1025, 1032. It is not clear whether a court may order plausibility discovery following dismissal. The courts disagree on this matter.

⁴⁴⁴ *Id.* at 1024, 1033.

⁴⁴⁵ *Id.* at 1032–33.

⁴⁴⁶ *Id.* at 1033. Plaintiffs were tasked with identifying those facts that could be asserted in the complaint even in the absence of additional discovery, explaining why they would make a difference, and attaching an amended complaint that highlighted them. The court specifically recognized the possibility that such additional facts could negate the need for pre-repleading discovery altogether, and admonished plaintiffs to "take nothing for granted and make the best case for a sustainable complaint." *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Neitzke v. Williams*, 490 U.S. 319, 329–30 (1989). The Court stated: "Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case." *Id.* (footnote omitted) (citing *Brandon v. D.C. Bd. of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984)).

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cases involving informational inequities in a “just, speedy, and inexpensive”⁴⁵⁰ manner is great. The proposal set forth above is a modest start on that path.

V. CONCLUSION

In conclusion, this is an important moment in the history of modern civil procedure. The new plausibility pleading standard may inadvertently threaten the viability of claims that protect fundamental American values such as civil rights and others. The time is right to examine the role that targeted, pre-merits discovery can play in ameliorating this threat. The courts are empowered and encouraged to consider how discovery’s role can evolve to meet the challenges of contemporary civil litigation.

⁴⁵⁰ FED. R. CIV. P. 1.