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Nos. 15-961 & 15-962

IN THE

Supreme Court of the United States

VISA, INC., *et al.*,
Petitioners,
v.
SAM OSBORN, *et al.*,
Respondents.

VISA, INC., *et al.*,
Petitioners,
v.
MARY STOUMBOS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PUBLIC JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Public Justice is a national public interest law firm dedicated to pursuing justice for victims of corporate and government wrongdoing. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that courthouse doors remain open to all injured plaintiffs with meritorious claims. As part of its access-to-justice work, Public Justice created an *Iqbal* Project in 2009 to, among other things, track developments in the law regarding pleading, educate practitioners about the proper application of the Rule 8 pleading standard, and provide assistance to counsel facing motions to dismiss based on this Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Public Justice has also itself represented clients facing such motions and has appeared as *amicus curiae* in numerous cases addressing disputes about sufficient pleading.[1]

SUMMARY OF ARGUMENT

For nearly a century, it has been a fundamental tenet of American jurisprudence that the courthouse doors should be easy to enter. The

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Petitioners and Respondents consented to the filing of this brief.

success of a case should depend on its merits, not the sophistication of its pleadings.

For that reason, Rule 8 of the Federal Rules of Civil Procedure provides that to get into court, a plaintiff need only provide a "short and plain statement of the claim," such that it "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and alteration omitted). On a motion to dismiss, courts must assume that the factual allegations of a complaint are true. *See id.* at 555. And a complaint is sufficient so long as it states a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Petitioners and their *amici* seek to upend these longstanding principles. They argue that courts should be "skeptical" of plaintiffs' allegations. Am. Soc'y Ass'n Execs. Br. 13. And, they contend, it is not enough for a plaintiff's claims to be plausible; they must be *more* plausible than any possible alternative explanation the defendant might offer. If not, they argue, a plaintiff's complaint must be dismissed, without even requiring an answer.

These contentions have no basis in the Federal Rules or this Court's case law. At the pleading stage, courts are not permitted to act based on skepticism of a plaintiff's allegations. Rather, they must assume the facts alleged to be true. Nor are they permitted to dismiss a plausible claim, simply because they believe defendants' explanation may be more plausible.

Petitioners and their *amici* argue that if courts do not aggressively police antitrust complaints, the cost

of antitrust lawsuits—and particularly class actions—will force defendants to agree to "in terrorem" settlements of even frivolous claims. But they offer absolutely no evidence that this is a significant problem. And, indeed, there is amplef empirical research suggesting that it is not.

Moreover, even if meritless antitrust lawsuits were a common problem, heightened pleading standards would not solve it. Scholars have found that heightened pleading standards do not actually filter out meritless claims. It turns out that the robustness of a complaint is often not a good indicator of the merits of a case.

Furthermore, this Court has no authority to unilaterally change the pleading rules in antitrust cases (or any other category of lawsuits)—even if research demonstrated that doing so would be a good idea. Pleading standards may only be changed through rulemaking or by Congress, not by judicial fiat.

Essentially, the argument of Petitioners and their *amici* is that this Court should impose heightened pleading standards in the guise of interpreting previous precedent. Such a request is unauthorized, unwarranted, and unworkable. This Court should decline their invitation.

ARGUMENT

I. The Emergence of Plausibility Pleading

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint is sufficient if it gives a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). For fifty years, courts' understanding

of this rule remained essentially unchanged. Under this Court's decision in *Conley v. Gibson*, a complaint satisfied the rule as long as it provided notice to the defendant of the nature of the lawsuit. 355 U.S. 41, 47-48 (1957). A motion to dismiss the complaint would not be granted "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 45-46. Such motions were to be invoked only in those rare cases in which no viable legal theory supported a plaintiff's claim.

This Court's decisions in *Twombly* and *Iqbal* changed the understanding of the pleading requirements for the first time in five decades. The Court "retire[d]" the language from *Conley* that held that a motion to dismiss should be granted only where "the plaintiff can prove no set of facts" demonstrating defendant's liability. *Twombly*, 550 U.S. at 563 (internal quotation marks omitted). Instead, the Court held, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *Iqbal*, 556 U.S. at 679.

It is an understatement to say that the introduction of plausibility pleading has been controversial. Lower courts have expressed confusion and even consternation at this Court's formulation. *See, e.g.*, *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43–44 (1st Cir. 2013) (application of plausibility pleading in antitrust contact "has elicited considerable confusion"); *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid.") *see also* Arthur R.

Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 31 (2010) ("[I]nconsistencies and uncertainties of application have arisen, causing confusion and disarray among judges and lawyers.").

They have "struggl[ed]" to determine how high this Court "meant to set the bar" when it held that claims must be plausible—and whether the plausibility standard heralds a departure from this Court's previous pleading decisions, which it did not purport to overrule. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010); *see, e.g.*, *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 & n.2 (10th Cir. 2012) (noting "disagreement" and "confusion" as to whether plausibility standard "requires minimal change or whether it in fact requires a significantly heightened fact-pleading standard"); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard.").

The cases have also earned substantial academic attention. Many have criticized *Iqbal* and *Twombly* for potentially altering the meaning of the Federal Rules outside of the traditional procedures contemplated by the Rules Enabling Act. *See, e.g.*, Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 Akron L. Rev. 1189, 1190 (2010); Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 Geo. Wash. L. Rev.

9, 28–29 (2009); Miller, *supra*, at 84–89; Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev. Lit. 313, 334 (2012) (noting that *Twombly* "short-circuited a preliminary discussion of notice pleading by the Advisory Committee").

Others have lamented that the plausibility standard is vague and difficult to apply. *See, e.g.*, Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1059 (2009) ("The Supreme Court's plausibility paradigm abrogated fifty years of pleading jurisprudence and left in its place a vague and undefined standard."); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 Wash. U.L. Rev. 455, 467 (2014) ("The overly subjective and vague nature of the test fails to properly guide judges.").

And some commentators have expressed concern that if *Twombly* and *Iqbal* are interpreted to require district courts to evaluate plaintiffs' factual allegations, they may raise constitutional concerns by arrogating to judges decisions that the Seventh Amendment commits to a jury. *See, e.g.*, Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 Minn. L. Rev. 1851 (2008); Kenneth Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 Neb. L. Rev. 467, 471–72 (2010).

This Court should take this opportunity to resolve some of the confusion surrounding the meaning of *Iqbal* and *Twombly* by clarifying that

these cases did not effect any great change in the way claims should be pleaded. With the exception of retiring the "no set of facts" language from *Conley*, they did not overrule this Court's previous case law. And they did not alter the basic rule that a complaint is sufficient so long as it provides "a short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted).

This Court should emphasize that plaintiffs at the pleading stage need not provide "detailed factual allegations" or counter every possible argument a defendant might make. *Twombly*, 550 U.S. at 545. And courts at the pleading stage may not dismiss a claim solely because they believe it is unlikely to be proven. *See id.* at 555-56. This Court should make clear that so long as a claim is, in fact, plausible, it may stand.

II. The Pleading Standard Suggested by Petitioners and Their *Amici* Has No Basis in this Court's Case Law.

1. Petitioners' *amici* suggest that courts deciding a motion to dismiss should assess "[p]laintiffs' allegations with . . . a skeptical eye." Am. Soc'y Ass'n Execs. Br. 13 (internal quotation marks omitted). That assertion flies in the face of decades of this Court's precedent, which holds that courts must assume that the factual allegations of a complaint are true. *See, e.g.*, *Iqbal*, 556 U.S. at 678. The advent of plausibility pleading did nothing to change this longstanding rule. *See id.*

To the contrary, while *Iqbal* and *Twombly* provide that courts need not assume the truth of a complaint's *legal* conclusions, these cases reaffirm

that "all of the *factual* allegations" must be taken as true. *Iqbal*, 556 U.S. at 678 (emphasis added); *Twombly*, 550 U.S. at 545; *see Wood v. Moss*, 134 S. Ct. 2056, 2065 n.5 (2014). Indeed, *Twombly* requires courts to assume the truth of a plaintiff's factual allegations, even if they believe there is only a "very remote" chance the allegations are, in fact, true—that is, even if they are skeptical. *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

The principle that a plaintiff's "claim for relief" must be "plausible," therefore, clearly does not—cannot—mean that judges may evaluate the credibility of a plaintiff's *factual* allegations. *Iqbal*, 556 U.S. at 678-79. Rather, it means that judges must determine whether, assuming those allegations are true, it is plausible that the plaintiff's legal claims are also true. *See, e.g.*, *id.* at 679 (explaining that on a motion to dismiss "a court should assume the[ ] veracity" of the plaintiff's factual allegations "and then determine whether they plausibly give rise to an entitlement to relief"); *Twombly*, 550 U.S. at 545 (explaining the plausibility standard as requiring that "[f]actual allegations . . . be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)" (internal citation omitted)).

In other words, the question on a motion to dismiss is not how likely it is that the facts are as the plaintiff says they are, but rather if those facts occurred, would they suggest that so too did the claimed illegal conduct? *See Iqbal*, 556 U.S. at 678.

2. Petitioners and their *amici* suggest that to answer this question, district courts must evaluate not only the plausibility of the plaintiff's claim, but

the plausibility of any competing explanations offered by the defendant. It is not enough, they argue, for a plaintiff's claim to be plausible. *See, e.g.*, Chamber Br. 12. It must be *more* plausible than any other possible explanation for the facts alleged. *See id.* This Court has explicitly rejected that contention.

Both *Twombly* and *Iqbal* make clear that "[t]he plausibility standard is *not* akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556 (emphasis added)). The claim that a defendant acted illegally need *not* be the most likely explanation for the facts alleged in the complaint. *See id.* It need only be a "plausible" one. *Twombly*, 550 U.S. at 545.

Petitioners and their *amici* attempt to circumvent this principle by redefining the term "plausible." They argue that a plaintiff's claims are not "plausible" unless they are "*more* plausible" than any other explanation, Chamber Br. 12 (emphasis added and internal quotation marks omitted). *See, e.g.*, *id.* (arguing that an antitrust plaintiff must "plead facts that make an illegal agreement more plausible than lawful collaboration" (internal quotation marks omitted)); Pet'rs Br. 32, 38 (offering alternative lawful explanations for the facts alleged in the complaints and arguing that the complaints did not state a plausible claim because these explanations are "just as possible" as Respondents' claims).

But that is simply another way of stating that a claim is only plausible if it is probable—precisely the idea this Court has already rejected. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556.

To be sure, in *Twombly* and in *Iqbal*, this Court

dismissed complaints because the only facts the plaintiffs alleged to support their claims had an "*obvious*" lawful explanation. *Iqbal*, 556 U.S. at 682 (emphasis added and internal quotation marks omitted); *Twombly*, 550 U.S. at 567. Taken out of context, this statement may seem to suggest that courts should weigh the parties' competing claims at the pleading stage—that judges should determine, without any facts upon which to base their decision, whether it's more likely that a defendant acted illegally as the plaintiff claims or lawfully as the defendant claims. But a closer examination of *Iqbal* and *Twombly* makes clear that this Court held no such thing.

In *Twombly*, the plaintiffs claimed that several regional telephone carriers unlawfully agreed to prevent other phone and internet companies from competing with them. *Twombly*, 550 U.S. at 551. The plaintiffs' sole factual allegation supporting this claim described several ways in which each defendant carrier had fought to prevent competitors from entering the regional market it controlled. *Id.* at 566. The Court assumed that the allegation was true, but held that it was insufficient to raise a plausible inference that the carriers had unlawfully conspired with each other. *Id.* The Court explained that "resisting competition is routine market conduct." *Id.* Practically every business tries to prevent others from competing with it. *See id.* The fact that the defendant telephone carriers did what businesses always do, the Court held, was not a plausible basis for inferring a conspiracy between them. *See id.*

The Court undertook a similar analysis in *Iqbal*. There, the plaintiff, a Muslim Pakistani man

arrested and detained after September 11th, claimed that the Attorney General and the Director of the FBI "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin." *Iqbal*, 556 U.S. at 666. The majority stated that the only factual allegation supporting this claim of discrimination was that after September 11th, the FBI "arrested and detained thousands of Arab Muslim men." *Id.* at 681 (internal quotation marks omitted).[2] But this fact, the Court held, had an

[2] The plaintiff also pleaded that the defendants "knew of, condoned, and willfully and maliciously agreed to subject him to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest." *Iqbal*, 556 U.S. at 680 (internal quotation marks and brackets omitted). The majority concluded that this was not a factual allegation, but rather a "formulaic recitation of [an] element[] of" the plaintiff's "constitutional discrimination claim"—in other words, a mere legal conclusion. *Id.* at 681 (internal quotation marks omitted). Therefore, the majority held it was not entitled to the assumption of truth, and the Court did not consider it in determining whether the plaintiff's discrimination claim was plausible. *Id.*

This decision appears to conflict with this Court's decision in *Swierkiewicz*, which *Iqbal* did not purport to overrule. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (accepting as true allegation that the plaintiff's age and national origin were motivating factors in his termination); Complaint ¶ 37, *Swierkiewicz v. Sorema N. A.*, No. 99-cv-3917 (E.D. Penn), 2001 WL 34093952, at *27a ("Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment."). Indeed, four members of this Court would have held that the allegation of a discriminatory policy was a factual allegation entitled to the presumption of truth, *see id.* at 695-96 (Souter, J. dissenting)—in which case,

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"obvious" explanation: It was, in the majority's view, entirely expected that a lawful search for those connected to Al Qaeda—a group largely composed of Arab Muslims—would disproportionately result in the arrests of people who were Arab or Muslim. *Id.* at 682.[3] Therefore, the fact that these disproportionate arrests occurred could not shed any light on whether the defendants acted illegally—they would have occurred regardless of whether the defendants discriminated. *Id.* And, as there were no other allegations suggesting illegal conduct, the Court held, the complaint had not plausibly stated a claim. *See id.*

The problem in both *Twombly* and *Iqbal* was that the plaintiffs' only factual allegations were facts that—again, in the majority's view—are virtually always going to be true. Telephone companies are always going to try to fight competition. A search for people connected to an organization largely composed of Arab and Muslim people is always going to turn up a disproportionate number of Arab and

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every member of the Court agreed, the plaintiff would have stated a plausible claim, *see id.* at 686, 695-96.

[3] As numerous scholars have pointed out, this assumption is highly problematic. *See, e.g.*, Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 Buff. L. Rev. 419, 424 (2010) (arguing that "the Court erred in finding unremarkable *Iqbal*'s allegations that the government engaged in blanket racial profiling of Muslims and Arabs" and explaining that this assumption "is substantively problematic, particularly in consideration of *Korematsu v. United States*").

Muslim people. Because these facts are always true, nothing can plausibly be inferred from them. This commonsense observation—that it would not be reasonable to infer illegal conduct from facts that are always going to be true—says nothing about cases where, as here, that is not the case.

It is not always going to be true, for example, that a business will adopt a rule prohibiting itself from trying to attract customers away from its competitors by charging them lower fees. Indeed, there is no real dispute that absent an agreement between competitors, such a rule would not ordinarily be in the business's self-interest. There is, therefore, no "obvious" lawful explanation for the Petitioner banks' adoption of such a rule in this case that would be equivalent to the "obvious" explanations for the facts alleged in *Twombly* and *Iqbal*.

Petitioners argue that the Respondents' complaints should nevertheless be dismissed because they have not demonstrated that their explanation for the banks' deviation from the norm—an unlawful agreement to fix ATM fees—is more likely than the Petitioners' explanations—for example, that each bank made a unilateral decision to abide by the rule because the benefits of participating in Visa and MasterCard's networks outweigh the cost of foregoing the ability to attract customers through lower fees. *See* Pet'rs Br. 32, 38. Respondents' factual allegations, Petitioners explain, are "just as consistent" with Petitioners' purportedly lawful explanations as they are with the Respondents' claim of illegal conduct. Pet'rs Br. 20. Putting aside the substantive question of whether Petitioners' explanations, even if true, absolve the banks of

antitrust liability, this argument does not stand up as a matter of pleading. Contrary to Petitioners' contention, this Court does not allow dismissal of a plausible claim, simply because a defendant can proffer an explanation that is "just as consistent" with the facts alleged.

That would be no different than requiring that a plaintiff's claims be more likely than any alternative explanation—a requirement that, again, this Court has explicitly rejected. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. Petitioners' contention to the contrary is based on a misreading of *Twombly*. In Petitioners' view, *Twombly* holds that a claim of illegal agreement is implausible *whenever* there is some lawful unilateral action that could also result in the facts alleged. *See* Pet'rs Br. 11, 20. But, as explained above, that is not what *Twombly* holds.

This Court did not dismiss the *Twombly* plaintiffs' complaint simply because the facts alleged—that telephone companies tried to keep competitors out—*could have been* the result of unilateral conduct. It dismissed the complaint because it is so common for businesses acting unilaterally to try to keep competitors out that knowing that the telephone companies did this did not make it any more likely that they acted illegally.

A hypothetical example may help clarify this distinction. Imagine Sally sues John for stealing her television. And the only factual allegation Sally pleads to support her claim is that she saw a television at John's house. That fact is perfectly consistent with John stealing Sally's television, but it doesn't make Sally's claim any more plausible. That's because most people have televisions. So John having a television doesn't tell us anything—

the probability of Sally seeing a television at John's house is essentially unaffected by whether John stole Sally's TV.

Now imagine that instead, Sally pleads that she saw *her* television at John's house. This allegation *would* render Sally's theft claim plausible. That's true even though there are plenty of possible lawful explanations for it. For example, John could contend that he bought the television at the local pawn shop. Sally's allegation is "just as consistent" with John buying the television at the pawn shop as it is with John stealing it. It might even be more likely that John bought the TV than that he stole it—perhaps John frequently buys electronics at pawn shops. But under *Iqbal* and *Twombly*, Sally's claim may still proceed. Sally need not demonstrate that her claim is more likely than John's explanation—she need only show that it's plausible.

Twombly is like the first scenario: Alleging that companies conspired based solely on the fact that each company fought against possible competitors is like alleging that someone stole a TV based solely on the fact that they have one. Both facts are so common that they don't provide any relevant information. This case, on the other hand, is like the second scenario. If we know that a company has adopted a rule prohibiting itself from attracting new customers by charging lower fees, that makes it (much) more likely that the company has unlawfully conspired with its competitors. So it would be reasonable to infer such illegal conduct, even if there are other possible explanations.

Any doubt remaining after *Twombly* that the plausibility standard does not require that a plaintiff's claims be more plausible than alternative

explanations was resolved by this Court opinion in *Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007)—decided just one month after *Twombly*.

The issue in *Tellabs* was what constitutes a sufficient claim of illegal scienter for purposes of the Private Securities Litigation Reform Act. *Tellabs*, 551 U.S. at 314. That statute imposes a heightened pleading standard upon securities fraud plaintiffs. *See id.* Under the Act, securities fraud plaintiffs must plead facts that "giv[e] rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2).

The Court first explained that this standard is higher than the ordinary plausibility standard. *See Tellabs*, 551 U.S. at 314. It held that to "qualify as 'strong'" within the meaning of the statute, "an inference of scienter must be more than merely plausible or reasonable," as ordinarily required under the Federal Rules—it must be "at least as compelling as any opposing inference of nonfraudulent intent." *Id.* And even under this heightened standard, the Court held, unlawful scienter need not be "the *most* plausible of competing inferences" that could be drawn from the alleged facts—it need only be *as plausible* as other possible inferences. *Id.* at 314, 324 (emphasis added and internal quotation marks omitted).

It follows directly from *Tellabs* that the ordinary Rule 8 plausibility standard—which, again, is lower than that imposed by the Private Securities Litigation Reform Act—does not require a plaintiff's claim to be more plausible, or even as plausible, as other possible explanations for the facts alleged. *Tellabs* makes clear that *Twombly* means what it says: Claims subject to Rule 8—like the one in this

case—need only be plausible. Nothing more.

Most lower courts have adhered to this rule. *See, e.g.*, *Hassan v. City of New York*, 804 F.3d 277, 297 (3d Cir. 2016) (a complaint can only be dismissed based on an alternative explanation for the plaintiff's allegations if that explanation is "so convincing" that it would "render the plaintiff's explanation" implausible (internal quotation marks omitted)); *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) ("A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible." (internal quotation marks and alterations omitted)); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("A court . . . may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."); *Sepulveda-Villarini v. Department of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J., sitting by designation) ("A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss."); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) ("Plausibility in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not." (internal quotation marks omitted)); *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010) (complaint survived motion to dismiss where inference that supported liability and inference that rebutted liability were both plausible); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Requiring a plaintiff to rule out every

possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party and would impose the sort of probability requirement at the pleading stage which *Iqbal* and *Twombly* explicitly reject." (internal quotation marks and citations omitted)).

There has, however, been some confusion. *See, e.g.*, *Phillips v. Bell*, 365 F. App'x 133, 141 (10th Cir. 2010) (finding complaint implausible because "more plausible" reasons exist for alleged conduct); *Blanchard v. Yates*, No. 06-cv-1841, 2009 WL 2460761, at *3 (E.D. Cal. July 27, 2009) (dismissing Eighth Amendment deliberate indifference claim because the court found it "more likely" that a prison warden relied on the advice of medical professionals than that he was deliberately indifferent). This Court, therefore, should clarify that while a complaint does not state a plausible claim if there is an "obvious" lawful explanation for the facts alleged—such that it would be impossible to draw any inference about the defendant's conduct from those facts—where illegal conduct *can* plausibly be inferred from the facts alleged, district courts should not attempt to determine at the pleading stage whether a plaintiff's claim is *more plausible* than any other competing explanation. Simply stating a plausible claim, this Court should hold, is sufficient.

III. This Court Should Decline Petitioners' Invitation To Impose a Heightened Pleading Standard.

This Court should continue to reject efforts—like those of Petitioners and their *amici*—to impose heightened pleading standards beyond what the Federal Rules require. As explained below, judges

need not—and should not—evaluate the credibility of factual allegations at the pleading stage. Nor should they compare the plausibility of a plaintiff's legal claims with that of other possible explanations. To the contrary, requiring judges to do more than determine whether a plaintiff's claim is plausible would force them to make decisions at the pleading stage that they lack sufficient information to make, inevitably causing the dismissal of meritorious claims—without any attendant benefit in weeding out frivolous lawsuits.

1. Empirical research demonstrates that it is very difficult for courts to evaluate the merits of a case at the pleading stage. Unsurprisingly, decisions based on such limited information are both less reliable and more vulnerable to the impact of cognitive biases than decisions based on more robust evidence. *See, e.g.*, Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DePaul L. Rev. 413 (2011). They are, therefore, more likely to be wrong. *See id.*[4]

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[4] In addition, fewer and fewer claims are being resolved on the merits in court, which means judges have less and less experience to draw upon to evaluate whether a complaint is likely to turn out to be meritorious. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 464 fig.1 (2004) (showing that the number of civil trials across all U.S. district courts dropped from more than 12,000 in the 1980s to less than 5,000 in 2002); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, 9–11 (2010) (reviewing the expansion of arbitration in the twentieth century).

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Indeed, while *Twombly* and *Iqbal* increased the frequency with which cases are dismissed, they did not increase the quality of cases that survive. *See, e.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117, 2162–64 (2015) (demonstrating that while cases were more likely to be dismissed in 2010 (after *Twombly* and *Iqbal*) than in 2006 (before *Twombly* and *Iqbal*), there was "no obvious improvement in the success of [the] lawsuits" that survived dismissal); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119, 127 (2011) (demonstrating that "thin pleading does not correlate with lack of merit"); *see also* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. Econ. & Org. 598, 600 (2007) (suggesting that the even higher standard of the Private Securities Litigation Reform Act—a standard akin to that which Petitioners and their *amici* suggest applies here—has a similar problem).

But that's not to say that dismissal has been

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Furthermore, the prevalence of confidential discovery and sealed settlements makes it even more difficult for judges to evaluate complaints. Andrew D. Goldstein, *Sealing And Revealing: Rethinking The Rules Governing Public Access To Information Generated Through Litigation*, 81 Chi.-Kent L. Rev. 375, 402-03 (2006) (arguing that publicly available discovery has the potential to verify allegations of wrongdoing); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 Mich. L. Rev. 867, 869 (2007) (noting that public settlements are the exception and explaining that examining settlements in similar previous cases makes it easier to estimate the value of a plaintiff's claims).

entirely random. Since *Iqbal*, civil rights and employment discrimination cases have seen a greater increase in dismissals than other cases. *See, e.g.*, Reinert, *Measuring the Impact*, *supra*, at 2157; Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. Rich. L. Rev. 603, 603 (2012). So too have cases brought by individuals, rather than corporate or government plaintiffs. *See* Reinert, *Measuring the Impact*, *supra*, at 2157.[5]

Thus, the advent of plausibility pleading has not had the intended result of filtering out meritless cases. Rather, it seems to disproportionately filter out public law cases brought by individuals—regardless of merit. Further heightening the pleading standards—as Petitioners and their *amici* suggest—will only exacerbate this problem.

Seventh Circuit Judge David Hamilton dramatically illustrated the danger of an overly

[5] These findings are unsurprising. Individuals are likely to have fewer resources to devote to investigating a lawsuit and drafting a robust complaint than corporations or the government. And in many cases, there is an informational asymmetry between the parties, such that critical evidence needed to prove—or even plausibly allege—a plaintiff's claim is in the hands of the defendants. *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1, 28 (2009). This is particularly problematic in cases where "subjective motivations or concealed conditions or activities are key to establishing liability," such as civil rights cases, employment discrimination cases, and antitrust cases. *Id.*; *see* Rakesh N. Kilaru*, The New Rule 12(b)(6):* Twombly*,* Iqbal*, and the Paradox of Pleading*, 62 Stan. L. Rev. 905, 909 (2010) (describing the problem as a "classic Catch-22").

aggressive reading of *Iqbal* and *Twombly* by examining the complaint in *Brown v. Board of Education*, 347 U.S. 483 (1954). *McCauley v. City of Chicago*, 671 F.3d 611, 626-627 (7th Cir. 2011) (Hamilton, J., dissenting in part). The key paragraph of the complaint alleged:

> The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The respects in which these opportunities are inferior include the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors, tangible and intangible, offered to school children in Topeka. Apart from all other factors, the racial segregation herein practiced in and of itself constitutes an inferiority in educational opportunity offered to Negroes, when compared to educational opportunity offered to whites.

Id. at 626–27 (internal quotation marks omitted).

As Judge Hamilton suggests, a strong argument could be made that the first and third sentences are bare legal conclusions that should be disregarded under *Iqbal*. *McCauley*, 671 F.3d at 627. This leaves only the middle sentence.

If judges were not required to assume the truth of

all factual allegations—if they were permitted to approach a plaintiff's allegations "skeptical[ly]," Am. Soc'y Ass'n Execs. Br. 13—some might decline to accept the allegation that "the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors" offered to black students were "inferior" than those offered to white students. *See McCauley*, 671 F.3d at 627. That allegation, as Judge Hamilton explains, might strike some judges as insufficiently detailed to be credited.

And even if a court accepted that allegation as true, Judge Hamilton continues, some judges might think that other possible explanations for the facts alleged were more plausible. *See McCauley*, 671 F.3d at 627. For example, a judge might believe that "[d]isparity in outcome is just as consistent with the natural effects of lower socio-economic status as it is with pernicious effects of racial segregation." *See id.* If courts were permitted to dismiss plausible claims simply because they were not—in the judge's view—*more* plausible than alternative explanations, a judge could easily dismiss *Brown*'s claim of race discrimination on the basis that socioeconomic differences, not racial segregation, was the most plausible explanation for the facts alleged. *See id.*

That can't be the result this Court intended. It goes without saying that this Court should minimize the risk that a case like *Brown* will be dismissed at the pleading stage.

2. Petitioners and their *amici* protest that if courts do not aggressively police complaints at the motion to dismiss stage, the cost of antitrust lawsuits—and particularly class actions—will force defendants to agree to "in terrorem" settlements of

frivolous claims. *See, e.g.*, Pet'rs Br. 20-21; Chamber Br. 11-12. This argument is meritless.

While complaints about the risk of coercive settlements are frequent, there is no evidence that this is actually a problem. Neither Petitioners nor their *amici* present any empirical support for their contention that "in terrorem" settlements of meritless claims is a significant problem in antitrust litigation—or, for that matter, anywhere else. *Cf.* Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 Rutgers L.J. 355, 356 (2009) ("Courts have not cited to any empirical basis for the view that unmeritorious class actions in general, or antitrust class actions in particular, are being brought with any frequency."); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1468 (2009) ("[A]lthough antitrust counsel can identify anecdotes of meritless claims, there does not appear to be any empirical evidence of widespread abuse."); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 887 n.35 (2008) (quoting ABA Antitrust Section Chair Jan McDavid stating that there is no empirical evidence that abusive litigation is a problem).

Petitioners and their *amici* argue that defendants should not be threatened with costly discovery "in cases with no reasonably founded hope that the discovery process will reveal relevant evidence." Pet'rs Br. 20-21; *see, e.g.*, Chamber Br. 11-12. But, again, they provide no evidence that this is a real risk. Indeed, empirical research demonstrates that

despite the frequent lament about discovery costs, most cases do not involve excessive discovery. *See, e.g.*, Reinert, *The Costs of Heightened Pleading*, *supra*, at 162 n.147 (citing recent survey that found that "attorneys consider discovery costs to almost routinely fall below 3.5% of their client's stake in the litigation, and the attorneys generally agree that discovery costs are lower than expected"); Paul D. Carrington, *Moths to the Light: The Dubious Attractions of American Law*, 46 U. Kan. L. Rev. 673, 686 (1998) ("That this was or is a widespread problem is not demonstrable on the basis of empirical evidence, most of which suggests that discovery cost is infrequently a serious problem."); *see also* Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 Loy. U. Chi. L.J. 327, 367 (2011) ("[A]s many as half of all civil actions involve no discovery.").

And the requirement in the Federal Rules that discovery be proportional to the needs of the case is likely to make excessive discovery even more rare. *See* Fed. R. Civ. P. 26(b)(1). It is therefore unsurprising that there is "no empirical evidence demonstrating that high discovery costs in complex litigation operate as a greater inducement to settle than perception of the merits of the case." Reinert, *The Costs of Heightened Pleading*, *supra*, at 162 n.147; *see* Davis & Cramer, *supra*, at 375.

Indeed, one study of antitrust settlements found that the amount of the settlements was "far greater than the cost of defending litigation—suggesting that defendants were responding to a real risk of liability in agreeing to pay damages rather than

merely seeking to avoid the cost of the litigation itself." Lande & Davis, *supra*, at 908.

Moreover, there is evidence that private antitrust enforcement is essential to deterring illegal anticompetitive behavior. *See, e.g.*, Lande & Davis, *supra*, at 884. And one study that examined several antitrust settlements found "frequent and high praise from [the] judges" who approved the settlements, "concerning both the settlements themselves and the lawyers involved." *Id.* at 908.

There is simply no reason to believe that meritless antitrust claims—or "in terrorem" settlements thereof—are a significant problem. Nor is there any evidence that liberal pleading standards in the antitrust context will "chill legitimate and procompetitive cooperation," as Petitioners claim. *See* Pet'rs Br 13. If that were the case, one would have expected to see some evidence that, before *Twombly*'s imposition of plausibility pleading, such cooperation was indeed "chill[ed]," or that post-*Twombly* such cooperation has increased. Neither Petitioners nor their *amici* present any such evidence.

This Court should not base its decision on problems there's no evidence exist.[6]

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[6] In its prior case law, this Court has expressed conflicting views on the ability of district court judges to adequately manage the risk that defendants will be subject to costly litigation on meritless claims. In *Crawford-El*, for example, the Court considered a Section 1983 claim alleging that a government official acted with an improper motive. *Crawford-El v. Britton*, 523 U.S. 574 (1998). Such claims, the Court stated, pose a "potentially serious problem," because

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3. Furthermore, even if there were evidence of such problems, a heightened pleading standard is not the proper solution. As explained above, research demonstrates that heightened pleading standards do not distinguish meritless claims from meritorious ones, but rather individual plaintiffs from corporate ones, and public law claims from private.

And, in any case, this Court has no authority to unilaterally change the pleading rules in antitrust cases (or any other category of lawsuits)—even if

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"state of mind is easy to allege and hard to disprove," so it could be hard to get rid of "insubstantial claims." *Id.* at 584-85 (internal quotation marks omitted). Nevertheless, the Court refused to impose a heightened burden of proof. Rather than imposing a "categorical" heightened standard on all § 1983 claims, which could result in the inequitable dismissal of meritorious claims, the Court held that district court judges could ameliorate any problems through careful case management. *Id.* at 598-601.

But in *Twombly*, this Court stated that "careful case management" could not ameliorate any risk of excessive discovery costs. *Twombly*, 550 U.S. at 559 (internal quotation marks omitted). That conclusion was based not on rigorous empirical evidence, but rather on a single law review article written by an appellate judge—i.e. not a judge with experience supervising discovery. *See id.* (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U.L.Rev. 635, 638 (1989)). Moreover, the article was written over twenty years ago, well before the recent change to the Federal Rules limiting discovery.

For the reasons explained in this section, this Court should return to its position in *Crawford-El*. It makes far more sense to allow district court judges to manage the risks of frivolous litigation than to try to deal with those risks through heightened pleading standards.

research demonstrated that doing so would be a good idea. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." (internal quotation marks omitted)); *see also* Sellers, *supra*, at 364-68 (explaining that amending the rules through formal rulemaking is preferable to changing them through judicial interpretation because the Advisory Committee for the Federal Rules can commission empirical research into any proposed change, gather input from all who might be affected by it, and consider—and make changes to—the rules as a whole, rather than being limited to trying to effect change by interpreting whatever rule happened to be at issue in a particular case).

This Court has repeatedly rejected misguided attempts to carve out particular causes of action for heightened pleading requirements. In *Leatherman*, for example, the Court rejected a Fifth Circuit rule requiring that Section 1983 complaints against municipal corporations "state with factual detail and particularity the basis for the claim." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993). Writing for a unanimous Court, Chief Justice Rehnquist declared this standard "impossible to square . . . with the liberal system of notice pleading set up by the Federal Rules." *Id.* at 168 (internal quotation marks omitted).

Leatherman explained that the adoption of heightened pleading standards in service of perceived policy aims misapprehends the proper judicial role, because changes to pleading standards

must be accomplished through amendment of the Federal Rules "and not by judicial interpretation." *Leatherman*¸ 507 U.S. at 168. *Leatherman* was reaffirmed by this Court just two years ago. *See Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014).

Similarly, a decade after *Leatherman*, this Court struck down the Second Circuit's rule that a plaintiff in an employment discrimination case must allege facts at the pleading stage that, on the merits, would constitute a prima facie case of discrimination. *See Swierkiewicz*, 534 U.S. at 510. The Court rejected the defendant's argument that heightened pleading standards were necessary to prevent "unsubstantiated suits." *Id*. at 514. "Whatever the practical merits of this argument," the Court explained, "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," and the Court has no authority to amend those rules—or interpret them away. *Id.* at 514-15.

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Petitioners and their *amici* ask this Court to adopt a pleading standard that is unwarranted and unworkable. This Court should decline their invitation.

CONCLUSION

For the foregoing reasons, and those stated by the Respondents, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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