No. 07-1015

In The
Supreme Court of the United States

JOHN D. ASHCROFT, et al.,

Petitioners,

v.

JAVAID IQBAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL PRACTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of a group of law professors who teach and write in the areas of Civil Procedure and Federal Practice. *See* Appendix A (listing *amici*). Our interest is in promoting an approach to pleading practice under the Federal Rules of Civil Procedure that comports with this Court's precedents, with the text of Rules 8(a)(2) and 9, and with the formalities of the rulemaking process.

Our focus here is not on the merits of the controversy between the Petitioners and the Respondent. Rather our interest lies in preserving both the structure of the Federal Rules and the framework for establishing and amending those rules under the Rules Enabling Act, 28 U.S.C. § 2072 – a framework the Government here seeks to circumvent.*

SUMMARY OF ARGUMENT

This case presents this Court with an ideal opportunity to clarify the scope of its decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). The

* The parties, including all parties to the Second Circuit proceedings, have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Loyola Law School, Los Angeles, California, paid for the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation and submission of this brief.

Bell Atlantic opinion has been cited over 6,500 times by lower federal courts, many of which have expressed confusion over the proper interpretation and application of that decision. The basic question confronting those courts is whether the *Bell Atlantic* decision created a new, heightened pleading standard. The answer, we submit, was supplied by the Court itself in *Bell Atlantic* when it said, "[W]e do not apply any 'heightened' pleading standard . . . ," 127 S.Ct., at 1973 n.14, and, "[W]e do not require heightened fact pleading of specifics." *Id*., at 1974. Yet despite the clarity of the Court's pronouncement, the confusion persists. As a consequence, a clarification may be necessary to prevent the erosion of long-standing pleading standards and to reaffirm this Court's oft-stated commitments both to a consistent interpretation of Rule 8(a)(2) that does not vary from case to case, and to an insistence that the rules may be changed only though the processes established by law.

The essence of our argument is that *Bell Atlantic* did not alter pleading standards, and, specifically, did not apply or endorse in any manner the use of variable or heightened pleading standards. That is, after all, what the *Bell Atlantic* Court said. Indeed, it is our view that this Court's entire pleading jurisprudence under Federal Rule of Civil Procedure 8(a)(2), including its decision in *Bell Atlantic*, emphatically rejects the imposition by judicial decision of variable or heightened pleading standards. As we explain below, the *Bell Atlantic* "plausibility standard" works no

change in this jurisprudence. The Government here, however, asks this Court to impose a heightened pleading standard – a variable specificity standard – in the context of lawsuits alleging constitutional claims against "high-level government officials" who assert a qualified immunity defense. In our view the Government's invitation is inconsistent with Rule 8(a)(2)'s pleading standards and with this Court's numerous admonitions against the judicial creation of variable or heightened standards under the Federal Rules.

In addition, we submit that the Government has adopted an amorphous approach to qualified immunity that muddies the waters of both the qualified immunity defense and long-established pleading standards under Rule 8(a)(2). Finally, it is the view of *amici* that the Second Circuit, in the decision below, properly and carefully accommodated accepted pleading standards, as well as other components of the Federal Rules, to the policies underlying the actual doctrine of qualified immunity. We, therefore, urge this Court to affirm that decision.

ARGUMENT

I.
Introduction

This Court's opinion in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), has generated a lively debate regarding the current status of pleading

standards under Federal Rule of Civil Procedure 8(a)(2). The opinion has been cited over 6,500 times by lower federal courts. Many of those courts have expressed uncertainty as to the intended scope of the Court's opinion, particularly with respect to what some have perceived to be *Bell Atlantic*'s new "plausibility" standard. Included among those expressions of uncertainty is the opinion of the Second Circuit issued in this case. *Iqbal v. Hasty*, 490 F.3d 143, 155-157 (2d Cir. 2007) (considerable uncertainty and conflicting signals regarding "the plausibility standard"); *accord Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007).

Out of this uncertainty, a variety of opposing interpretations of *Bell Atlantic* have emerged. Some courts have read the opinion as an unremarkable application of long-standing pleading principles, while others have discovered the outlines of a variable or heightened "plausibility" standard within the contours of the Court's opinion. *Compare Aktieselskabet AF 21. November 2001 v. Fame Jean Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("*Twombly* leaves the long-standing rules of notice pleading intact."), *with Brotherhood of Locomotive Engineers v. Union Pacific RR Co.*, 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, J., and Posner, J., concurring) ("In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier."); *see also Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 974 (11th Cir.

2008) (holding allegation that plaintiffs were "denied promotions . . . and treated differently than similarly situated white employees solely because of . . . race" to be inadequate because it "epitomizes speculation" under *Bell Atlantic* standard). Although, as we explain below, we believe that the Court's opinion in *Bell Atlantic* did not alter pleading standards, we do agree that certain aspects of the opinion's text might suggest to the contrary. *See Iqbal*, *supra*, 490 F.3d, at 155-157. Given the resulting uncertainty, coupled with the significant gatekeeping function of federal pleading practice, a clarification by this Court would be more than beneficial.

But more is at stake here than the clarification of a recent decision. An interpretation of *Bell Atlantic* that invites a case-by-case evolution of variable and heightened pleading standards not only threatens simple and long-established pleading standards, but would work an amendment to the texts of Rules 8(a)(2) and 9 outside the rulemaking process under which those rules were adopted. The perception that the Court has shaped a new and variable heightened pleading standard in *Bell Atlantic* thus opens a jurisprudential window that has the potential to destabilize the carefully constructed rulemaking process envisioned by Congress under the Rules Enabling Act and painstakingly administered by the Court since 1934.

This Court has consistently reaffirmed its commitment to that rulemaking process and to the textual integrity of the individual rules, and, more

specifically, to the general standard of pleading established by Rule 8(a)(2) and the specific standards provided by Rule 9. *See*, *e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 504 U.S. 163, 168 (1993). Given the percolating uncertainty as to the intended scope of *Bell Atlantic*, a reaffirmation of these commitments is imperative.

This case presents a particularly good vehicle through which to accomplish these ends. First, as will be explained below, the pleading standards described and applied in *Bell Atlantic* fully justify the decision below without the need for nuance or caveat and without introducing any notion of a variable or heightened pleading standard. Second, although the Government denies that it is seeking to alter pleading standards, the actual standard it asks the Court to impose – a specificity standard – is a new pleading requirement that is heightened in everything but name. As a consequence, this case squarely presents the question of whether *Bell Atlantic* invites lower federal courts to adopt an *ad hoc* variable pleading standard. That approach should be firmly rejected. Third, the Court can accomplish the mission of clarification and reaffirmation without in any manner undermining the policies underlying the doctrine of qualified immunity. Indeed, the Second Circuit's opinion provides a commendable example of a court adhering to traditional pleading standards and, at

the same time, honoring the policies at the heart of the qualified immunity defense.

II.
The "Substantive Law" Interpretation of *Bell Atlantic v. Twombly*

The Government invites this Court to interpret *Bell Atlantic* as endorsing the development by judicial decision of variable and heightened pleading standards. Brief for the Petitioners, at 28 ("specific, nonconlusory factual allegations" needed in suits against "high-level government officials"); *but cf*. *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) ("[s]pecific facts are not necessary" under Rule 8(a)(2)). While there is some language in the *Bell Atlantic* opinion that, read in isolation, might support the Government's invitation, we think that the clear import of the *Bell Atlantic* opinion is to the contrary, and properly so, given the text of Rules 8(a)(2) and 9 and given this Court's consistent and *unanimous* rejection of heightened pleading standards other than those specifically provided in Rule 9 or by superseding congressional enactment. *See*, *e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002) (unanimous opinion delivered by Justice Thomas); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 504 U.S. 163, 168 (1993) (unanimous opinion delivered by Chief Justice Rehnquist).

The Court in *Bell Atlantic* certainly did not endorse or apply any type of a variable or heightened

pleading standard. Indeed, it expressly denied that it was doing any such thing. 127 S.Ct., at 1973 n.14 & 1974. Moreover, the overarching concern of the *Bell Atlantic* Court was not the technicalities of pleading, but the substantive law of the Sherman Act. In this respect, the *Bell Atlantic* Court's statement of the issue presented is revealing: "whether a § 1 [Sherman Act] complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action?" 127 S.Ct., at 1961. As the issue presented itself suggests, the rationale for the Court's negative answer was a product of the law of the Sherman Act and not a consequence of novel pleading standards. Indeed, the statement of the issue tells the reader that the case is more about the elements of a Sherman Act claim than it is about pleading.

Consistent with the foregoing, in Part II A of its opinion in *Bell Atlantic*, the Court explains that the presence of an anticompetitive agreement is a critical element of a § 1 Sherman Act claim. 127 S.Ct., at 1964. The existence of such an agreement can be established through direct evidence – the so-called smoking gun – or though inferences drawn from circumstantial evidence such as "parallel conduct," *i.e.*, parallel patterns of anticompetitive conduct undertaken by like-situated market actors. Under the law of the Sherman Act, however, parallel conduct by such market actors is presumed to be the product of

independent, market-driven behavior premised on "common perceptions of the market." *Id.* Therefore, at the proof stage of litigation, evidence of parallel conduct cannot support the inference of an anticompetitive agreement in the absence of other evidence "tending to exclude the possibility of independent action." *Id*. In short, proof of parallel conduct, standing alone, cannot establish a § 1 Sherman Act violation, either directly or by inference. At issue in *Bell Atlantic* was whether this "proof stage" standard should be applied at the pleading stage. In other words, are allegations of parallel conduct, standing alone, sufficient to avoid a Rule 12(b)(6) motion to dismiss? Logically, the answer would seem to be no; and the Court followed that logic.[1]

Part II B of the Court's opinion applies the substantive law of the Sherman Act in determining the adequacy of the plaintiffs' complaint. The pleading standard employed by the Court in this process is unremarkable: A complaint need not contain "detailed factual allegations," but must contain sufficient factual allegations (1) to transcend a "formulaic recitation" of the elements of a claim, (2) to supply fair notice of the claim and the grounds on which it is asserted, and (3) to provide a basis from which to determine whether the purported claim is one on which relief can be granted. *Id.*, at 1964-1965 & n.3.

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[1] One impediment to the Court's rationale was the factual-impossibility interpretation of the "no set of facts" standard, which the Court respectfully retired. 127 S.Ct., at 1968-1969.

In *Bell Atlantic*, we believe that neither of the first two aspects of the Court's pleading standard was at issue. The question presented, as indicated above, was whether the *Bell Atlantic* complaint stated a claim on which relief could be granted – a classic Rule 12(b)(6) question that focuses on the relationship between the plaintiff's allegations and the substantive elements of the claim.

As noted, the presence of an anticompetitive agreement is an essential element of a Sherman Act claim. The *Bell Atlantic* complaint rested its assertion that the defendants had entered such an agreement exclusively on the inference to be drawn from the alleged parallel conduct engaged in by the defendants; and this is precisely how the Court characterized the complaint. *Id*., at 1970. The *Bell Atlantic* plaintiffs did not disagree with the Court's characterization. Rather, they argued that the complaint included sufficient allegations of "plus factors" to rebut the presumption that the alleged parallel conduct was a product of independent action. The Court rejected these plus factor allegations as insufficient as a matter of the law of the Sherman Act and not as a matter of pleading deficiency. *Id*., at 1972-1973. The net result of the Court's analysis was that the *Bell Atlantic* complaint contained a fatal substantive gap. In the Court's view, the essential element of an unlawful agreement was not supported by any allegations from which the inference of such an agreement could be drawn. That being the case,

plaintiffs had failed to state a claim on which relief could be granted.

Thus, the plaintiffs' complaint was deficient, not because of any technical rule of pleading, but as a result of the fatal substantive gap created by plaintiffs' exclusive reliance on agreement-neutral parallel conduct. The implausibility of the complaint, therefore, was a product of substantive law filtered through unremarkable pleading standards. Since the plaintiffs had alleged no "plausible" grounds for relief, *i.e.*, no claim on which relief could be granted, the only remedy was dismissal of the complaint. *See id.*, at 1966 (a claim "shy of a plausible entitlement to relief" does not trigger a right to discovery).

On the way to its substance-driven conclusion, the *Bell Atlantic* Court used a variety of phrases to describe pleading standards, some of which could be construed as altering the pleading landscape. *See Iqbal v. Hasty*, *supra*, 490 F.3d, at 155-157 (discussing "conflicting signals"). We think, however, that an interpretation of *Bell Atlantic* that focuses on what the Court actually held in that case will contextualize the language used and go a long way toward eliminating any potential ambiguity or "conflicting signals" derived from the Court's opinion. However, given that many lower courts have focused on what they describe as *Bell Atlantic*'s new "plausibility standard," a closer examination of "plausibility" is in order.

III.
Understanding the *Bell Atlantic* "Plausibility Standard"

As noted, after a detailed examination of plaintiffs' complaint in light of the underlying law of the Sherman Act, the *Bell Atlantic* Court concluded that the plaintiffs had failed to allege a "plausible" claim for relief under the Act. 127 S.Ct., at 1974. As a consequence, the Court explained, "their complaint must be dismissed," for it failed to cross the line that separates the "conceivable" from the "plausible." *Id*. Implicitly, only plausible claims can survive a Rule 12(b)(6) motion to dismiss.

The Court used the words "plausible" and "plausibility" some fifteen times in its opinion, including a direct reference to a "plausibility standard," *id.,* at 1968, leading some lower courts and commentators to speculate as to whether the Court had injected a heightened "plausibility" standard into Rule 8(a)(2) pleading doctrine. The Government, in this proceeding, takes the affirmative position on that question, arguing for a heightened pleading standard, a point to which we will return in the next section.

The *Bell Atlantic* Court did not, however, invoke or endorse any type of heightened pleading standard. In the Court's words, "[W]e do not apply any 'heightened' pleading standard . . . ," 127 S.Ct., at 1973 n.14, and, "[W]e do not require heightened fact pleading of specifics." *Id*., at 1974. The Court reiterated this point two weeks later in *Erickson v. Pardus*, 127 S.Ct. 2197

(2007), when it pointedly cited *Bell Atlantic* for the proposition that under Rule 8(a)(2) "[s]pecific facts are not necessary." 127 S.Ct., at 2200. We take the Court at its word: plausibility neither establishes nor invites the creation of a heightened pleading standard. Our reading of the *Bell Atlantic* opinion confirms one's confidence that the Court meant what it said.

In its discussion and application of pleading principles, the *Bell Atlantic* Court used the concept of plausibility in three different but related contexts. First, it used the concept as a modifier of the grounds from which one might draw an inference of conspiracy – "plausible grounds," 127 S.Ct., at 1965; second, it used it to modify the inference one might draw from those grounds – "facts suggestive enough to render a . . . conspiracy plausible," *id*.; and third, it used it as a descriptive modifier of those claims that satisfy pleading standards – "plausibility of entitle[ment] to relief," *id*., at 1967. In short, the Court insisted on: 1) the plausibility of particular allegations; 2) the plausibility of inferences drawn from otherwise plausible allegations; and 3) the plausibility of the claim itself.

1. The first of these requirements does not seem to have been at issue in *Bell Atlantic*. The Court did, however, make it clear that implausibility in this context, *i.e*., the claim of an unlawful conspiracy in violation of the Sherman Act, was not to be equated with improbability. Thus, the implausibility of an allegation could not be established solely because "a savvy judge" might conclude "that actual proof of

those facts [was] improbable, [or] 'that a recovery [was] very remote and unlikely.'" 127 S.Ct., at 1965. On the other hand, implausibility might be established if the plaintiff were to allege a state of affairs that was so beyond the common understanding as to be virtually, if not literally, incredible. And a judge might be particularly wary of such seemingly "incredible" allegations when those allegations might operate as an end-run around the applicable substantive law.

For example, were a plaintiff to allege, in general terms and without further factual elaboration, that a high government official, such as the Attorney General of the United States, was directly responsible for the fact-specific violation of Fourth Amendment rights by a street-level government operative, a court might well conclude that the allegation was implausible in the absence of further factual elaboration. Not only is the allegation wholly inconsistent with the usual understanding of how the various levels of a government agency interact, it posits a scenario that may well operate as an end-run around the applicable substantive law, namely, the limited scope of supervisory liability in a *Bivens* action. A court could, therefore, rightfully demand that plaintiff allege some connective facts to fill in the large, "implausible" blank between the policy-making realm of the high-level government official and the *ad hoc* activities of street-level operatives.

This is the approach to "plausible grounds" adopted by the Second Circuit in its opinion below:

> [W]e believe the [*Bell Atlantic*] Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations *in those contexts where such amplification is needed to render the claim plausible.*

490 F.3d, at 157-158 (emphasis added except as to the word "plausible").

No such "implausible" grounds are at issue in this case. The plaintiff's complaint does not allege that either Attorney General Ashcroft or Director Mueller were responsible for the *ad hoc* behavior of government officials working at the "street" level. In fact, plaintiff Javaid Iqbal's twenty-one count complaint carefully avoids making any such allegations. Thus, while the complaint does charge several individuals with *ad hoc* violations of the plaintiff's rights, *see, e.g.,* Plaintiffs' Second Amended Complaint ("Complaint"): Fourth and Fifth Causes of Action (Excessive Force), neither Ashcroft nor Mueller is named in any of those fact-specific counts. Thus, when Iqbal alleges that he was subject to physical abuse, he names only the specific participants in that abuse and, pointedly, neither Ashcroft nor Mueller is included on that list. *Id*.

By way of contrast, the four surviving claims against Ashcroft and Mueller pertain to constitutional deficiencies in specific policies and directives alleged to have been mandated and overseen by them.

See Complaint: Eleventh, Twelfth, Sixteenth and Seventeenth Causes of Action (claims of intentional religious and racial discrimination embedded in system-wide policies). Those policies and directives, it is alleged, were purposefully designed to discriminate on the basis of religion and race. *See, e.g.,* Complaint, at ¶ 96 ("Defendants ASHCROFT [and] MUELLER . . . each knew of, condoned, and willfully and maliciously agreed to subject plaintiffs to these conditions of confinement as a matter of policy, solely on account of [Plaintiffs'] religion, race, and/or national origin and for no legitimate penological interest."); *see also* ¶¶ 49, 97, 232, 235 & 250 (to the same effect). These allegations may or may not be accurate, and they may or may not be subject to various defenses. A "savvy judge" might even think their proof improbable. They are not, however, implausible. They do not seek to place responsibility on Ashcroft or Mueller for *ad hoc* street level activity or to impose on them any other form of counterintuitive responsibility. Rather, they seek to premise liability on actions undertaken by them within the expected realm of their official capacities, *i.e.*, for creating and overseeing policies within the commonly understood ambit of their respective roles as administrators in high office.

Consistent with the foregoing, the Second Circuit, in its opinion below, concluded that the plaintiff's allegations pertaining to the personal involvement of Ashcroft and Mueller were, from a pleading perspective, "plausible":

> [T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.

490 F.3d, at 175-176; *see also id.*, at 166 (to the same effect). We think the Second Circuit was correct. And to conclude otherwise would move the standard beyond plausibility and into the realm of heightened pleading.

2. The second context in which the Court referred to the requirement of plausibility – the plausibility of the inferences to be drawn from otherwise plausible allegations – was at issue in *Bell Atlantic*, but that reference was limited and highly specialized. In the Court's words, "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." 127 S.Ct., at 1966. The Court then explained that the inference of an anticompetitive agreement cannot, as a matter of law, be drawn from unembellished parallel conduct, despite the consistency of that conduct with the possibility of such an agreement, for under the Sherman Act such parallel

conduct is presumed to be agreement-neutral. Therefore, in this specific context, to draw the inference of an agreement there must be additional allegations that supplement the parallel conduct allegation with allegations from which an anticompetitive agreement can be inferred.

The Court's pleading discussion was thus closely tied to the specific requirements of § 1 claims under the Sherman Act and to the particular problem of parallel conduct as proof of an agreement. One could generalize from that reasoning, however, and conclude that a "neutral" allegation, *i.e.*, an allegation that is simply consistent with an element of a claim, cannot alone support an *inference* of that particular element in the absence of some other claim-supportive allegation that takes the neutral allegation out of neutral territory. For example, a bare allegation that defendant was driving a car near the scene of an accident would not, without more, support an inference of defendant's negligence, much less that defendant had caused the accident.

The plaintiff in this case, however, does not ask the Court to draw any inferences from his allegations. Rather, he alleges directly that Attorney General Ashcroft and Director Mueller created and oversaw the implementation of a policy that, in purpose and effect, discriminated on the basis of religion and race and that the plaintiff was subjected to that policy in action. These allegations stand on their own footing in support of Iqbal's claim and require no inferential

elaboration. Hence, the second aspect of plausibility is not at issue here.

On this point, the presumptively adequate Form 11 Complaint for Negligence found in the Appendix of Forms to the Federal Rules of Civil Procedure is instructive. That complaint alleges, in conclusory terms, that "the defendant negligently drove a motor vehicle against the plaintiff" causing "physical injuries" to the plaintiff. No inferences need be drawn from these allegations, for in and of themselves they state a *claim* of negligence. Just as Form 11 contains no "neutral" allegations in need of additional support, Iqbal's claims against Ashcroft and Mueller are not dependent on the drawing of inferences to adumbrate the elements of those claims.

3. Finally, the third context in which the *Bell Atlantic* Court spoke of plausibility – the plausibility of one's entitlement to relief – incorporates the first two aspects of plausibility into the requirement that the plaintiff must state a claim for which relief can be granted. Thus, one might say that the plausibility of one's entitlement to relief is dependent on whether one's plausible allegations, coupled with any plausible inferences drawn therefrom, state a legally recognized claim. The *Bell Atlantic* Court explained that the *Bell* plaintiffs' complaint fell shy of "plausible entitlement" and thus could not be salvaged through further discovery or careful case management. *Id*., at 1967. In short, the *Bell* plaintiffs had failed to state a claim for which the law affords relief, and the solution was not further litigation but dismissal.

"Plausibility of entitlement" is not an issue in this case. As explained above, there is no argument that any allegation by Iqbal is implausible; and there is no argument that Iqbal's complaint relies on implausible inferences, for it requires no inferences whatsoever. Finally, there can be no argument that Iqbal's claims under the Free Exercise Clause and the equal protection component of the Fifth Amendment Due Process Clause fail to state a claim on which relief can be granted. These are standard and long-recognized claims, unique only in their factual setting. Given the foregoing, Iqbal's complaint more than adequately alleges his "plausible entitlement" to relief.

The Government addresses and applies the plausibility standard in Part I of its brief. We think that there are two significant errors in the Government's approach, both of which have implications that transcend the immediate case. First, while the Government correctly observes that plausibility is contextual, it applies the plausibility standard to the incorrect context. Thus, while the Government is undeniably correct when it observes that "high-ranking officials . . . ordinarily tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command," Brief for the Petitioners, at 28, it misses the mark when it assumes that this case falls into that presumptively implausible context. Rather, as noted above, the claims asserted by Iqbal against Ashcroft and Mueller are not chain-of-command or as-applied

claims; nor are they claims of supervisory liability. Rather Iqbal's claims are that the defendants *themselves created and oversaw* a policy that was intentionally designed to discriminate on the basis of race and religion.

The second error arises, we submit, when the Government turns its attention to the actual claims asserted. Here the Government argues that implausibility is not a product of the context, but of the lack of specificity in the allegations of race-based or religion-based discrimination. In the Government's words, "But such bare-bones, conclusory allegations are insufficient to survive a motion to dismiss." *Id*., at 32. In other words, something more specific is required to connect the dots between motive and action. That something more specific, regardless of how one describes it, can only be the product of a heightened pleading standard, a position this Court emphatically rejected in *Bell Atlantic*.[2] The Government's actual argument here is not one of implausibility but one of a failure to allege facts with sufficient factual or

[2] The Government's insistence on a heightened pleading standard (in all but name) may, at least in part, be a product of the "conflicting signals" in the *Bell Atlantic* opinion, including the Court's somewhat ambiguous reference to "the line between the conclusory and the factual." 127 S.Ct. at 1966 n.5. But in our view, the true focus in *Bell Atlantic* was on drawing a line between the implausible and the plausible; in that context, where a claim might inherently be implausible, specificity operates functionally to move a claim from the former category to the latter.

evidentiary detail, a point that we explore in the next section.

* * *

In sum, *Bell Atlantic*'s use of the words "plausible" and "plausibility" did not signal any change in the traditional pleading standards embodied in Rule 8(a)(2). Rather, these words operate as descriptive terms used to illuminate established pleading standards pertaining to the adequacy of allegations, the permissible scope of inferences, and the requirements for stating a well-recognized claim for which relief can be granted. Moreover, plausibility, in any of these aspects, is not at issue in this case other than as an affirmation that Iqbal's complaint satisfies traditional pleading standards and, from a substantive perspective, "plausibly" states claims on which relief can be granted.

IV.
The Heightened-Pleading Standard Proposed by the Government is Inconsistent with Rules 8(a)(2) and 9 and with the Federal Rulemaking Process

In *Leatherman v. Tarrant County Narcotics Intelligence and Co-ordination Unit*, 504 U.S. 163 (1993), this Court defined a "heightened pleading standard" as "a more demanding rule for pleading a complaint" in a particular context than is generally required under Rule 8(a)(2). *Id*., at 167. In applying this definition, the *Leatherman* Court concluded that

a judge-made "particularity" requirement in a § 1983 case was a heightened pleading standard and therefore inappropriate as a measure of pleading sufficiency under Rule 8(a)(2). *Id.*, at 168.

The Government, in its brief, says that it is not asking this Court to impose a heightened pleading standard. Brief for the Petitioners, at 28. But its brief belies that assertion. If one begins with the *Leatherman* Court's definition of a heightened pleading standard, *i.e.*, a standard that is more demanding than otherwise required by Rule 8(a)(2), that is precisely what the Government now seeks when it insists, time after time, on specific factual allegations pertaining to the motives of Ashcroft and Mueller. Indeed, the Government's argument begins with a description of "several principles that govern the resolution of this case." Brief for the Petitioners, at 15. The third of those principles is described as follows:

> [D]istrict courts *should* "insist" that a plaintiff "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury" before allowing a suit "to survive a prediscovery motion for dismissal or summary judgment."

Id. (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)). (Emphasis added.) We note in passing that the Government's brief misstates and mischaracterizes both the principle and the decision in

Crawford-El.[3] But more significantly, the key (and obvious) point is that the Government begins its argument by insisting on a pleading standard that is "more demanding" than the general pleading standard of Rule 8(a)(2). Quite clearly, Rule 8(a)(2) does not require "specific factual allegations," a principle this Court has consistently reaffirmed, most recently

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[3] The Government's "third principle" misrepresents *Crawford-El* in two significant ways (both of which permeate the Government's brief). First, *Crawford-El* was not a pleading case, but one pertaining to the standard of proof on summary judgment. Moreover, the language quoted by the Government had nothing whatsoever to do with Rule 8(a)(2); rather, the Court was describing (by way of dicta) the pleading standard a district court *might* apply in ordering a reply under Rule 7(a) or a more definite statement under Rule 12(e). Second, although the Government uses the mandatory "should" to describe this pleading standard, the *Crawford-El* Court used permissive language – "the court may insist. . . ." *Id.*, at 598. Hence, the Government seeks to convert the Court's description of a discretionary judgment pertaining to what a district court *might* do under Rules 7(a) and 12(e) into a *mandatory* heightened pleading standard under Rule 8(a)(2).

The Government's reliance on *Crawford-El* is also somewhat peculiar given the *Crawford-El* Court's admonition:

> As we have noted, the Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.

Id., at 595 (citing *Leatherman*, *supra*).

in *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (under Rule 8(a)(2) "[s]pecific facts are not necessary"), a case the Government buries in a footnote with no reference to the above-quoted language. Brief for the Petitioners, at 40-41 n.7.

The Government's insistence on a heightened pleading standard – accurately and fairly described as a "variable specificity" standard – permeates its brief. *See id*., at 12, 15, 19, 20, 21, 27, 28, 31, 32, 33 & n.4, 36. This more demanding standard is, in the Government's view, "critical to promoting the policies underlying the qualified immunity defense," *id*., at 21, and especially so in "the context of personal-capacity suits against high-ranking government officials," *id*., at 27. Moreover, the need for specificity is said to be particularly acute in cases involving allegations of "unconstitutional motive." *Id*., at 20. Finally, the Government argues for a variable standard of specificity that is keyed to both the context of the claim and the rank of the government official being sued. *Id*., at 27, 33 n.4.

Regardless of how one assesses the Government's policy arguments, the invocation of those arguments in the context of a pleading controversy, coupled with the Government's focus on the need for specificity in a particular type of lawsuit, merely underscores the fact that the Government is seeking a more demanding pleading standard, which will be applied on an *ad hoc* basis and in disregard of the Federal Rules.

The Government's reference to claims involving "unconstitutional motive" is particularly telling since Rule 9(b) of the Federal Rules expressly provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." So not only is the Government asking this Court to alter the standards of Rule 8(a)(2), it is also asking the Court to ignore the text of Rule 9. The words of the *Leatherman* Court are directly relevant:

> [T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius.*

507 U.S., at 168. The case against a heightened pleading standard for "unconstitutional motive" is even stronger since Rule 9 specifically provides that such allegations "may be alleged generally."

In short, the Government asks this Court to ignore the Federal Rules, to disregard the carefully constructed rulemaking process, and to adopt a pleading standard – variable specificity – that this Court has consistently and unanimously rejected, most recently in 2007.

V.
The Qualified Immunity Defense Can be Fully Honored Within the Standards of the Federal Rules

Qualified immunity is a waivable defense, applicable in cases in which a government actor is alleged to have violated a plaintiff's constitutional rights. As a waivable defense, it is, unquestionably, the defendant's prerogative to raise it or not. Consistent with the foregoing, nothing in the Federal Rules suggests that the plaintiff bears any pleading burden in anticipation of that defense. Rather, under Rule 8(a)(2), the plaintiff's pleading burden in all cases is to provide a "short and plain statement of the *claim*" she wishes to assert. (Emphasis added.) It is logically and textually anomalous, therefore, to contend that the plaintiff's initial pleading burden somehow includes an obligation to anticipate a qualified immunity defense, much less to do so under a heightened pleading standard. Yet this appears to be the Government's contention.

On pages 16-19 of its brief, the Government describes the substantial policy considerations that animate the qualified immunity defense. We agree with much of what the Government says here, and particularly with the Government's assertion that the qualified immunity defense is designed to safeguard effective governance by ensuring government actors a reasonable range of discretion within the bounds of objective good faith. We agree too that once the qualified immunity defense is raised these policy concerns

require a federal court to assess the asserted defense at the earliest possible stage of the litigation.

We part company with the Government, however, when its argument tacitly moves from the policies that animate qualified immunity to the standards of pleading. The move is swift, but it comes at the cost of clarity. Brief for the Petitioners, at 19. Instead of addressing the qualified immunity defense in its particulars and then examining the role that pleading might play in the evaluation of that defense, the Government rests its argument on the abstraction of qualified immunity. It then treats the abstraction as a free-floating concept that permeates any case to which it might attach. In essence, the standards of pleading are virally infected by the concept, but not necessarily by the actual defense. As such, the Government's argument is not premised on the defense of qualified immunity, but on the raw idea of qualified immunity, untethered to any particular doctrine. Such an approach muddies the waters of both pleading standards and the actual doctrine of qualified immunity.

A more effective approach, in our view, begins with a careful description of the actual qualified immunity defense, and then proceeds to a determination of how that defense should or might be processed through the Federal Rules.

Qualified immunity shields a government actor from liability when she has acted under an objectively

good-faith belief that her conduct was within constitutional bounds. In the words of this Court:

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.

Brosseau v. Haugen, 543 U.S. 194, 198 (2004). This is a carefully focused defense, keyed to a government actor's objective good faith. Thus, while qualified immunity is properly described as a "defense against suit," it is not a generalized policy against suit. Rather, it is a waivable defense tied exclusively to the question of objective good faith.

In *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), this Court instructed lower courts to approach the question of qualified immunity through a two-step process, asking, first, whether the plaintiff has stated a legally recognized claim for the violation of a federal right, and, second, whether the right in question was one that was "clearly established" at the time of the challenged conduct. This "two-step" formulation is being reconsidered by this Court during the present term, *see Pearson v. Callahan*, 128 S.Ct. 1702 (2008) (*certiorari* granted), but whether or not the Court decides to change or modify the required approach, what is now described as the first step is, in fact, only a reflection of the plaintiff's standard obligation to show her entitlement to relief under Rule 8(a)(2). As a matter of trans-substantive procedural law, a failure to make such a showing in any case would

trigger a Rule 12(b)(6) motion to dismiss for failure to state a claim. No different rule applies to constitutional claims, for nothing in this Court's qualified immunity jurisprudence suggests that the first element should be accorded any specialized treatment or scrutiny. Indeed, in determining whether the plaintiff has stated a recognized constitutional claim, the Court has adopted the standard view under Rule 12(b)(6) that the allegations in the complaint must be viewed in a "light most favorable" to the plaintiff. *Saucier*, 533 U.S., at 201. There is not a hint of a requirement of factual specificity.

The second step, *i.e.*, the question of whether the claimed violation was clearly established at the time of the challenged incident, *is* the qualified immunity defense. It presents a question unique to that defense and one that is completely dispositive of the defense. More to the point, the second step is especially designed to determine the question of the defendant's objective good faith and, thereby, to promote the policies of effective governance by limiting a government actor's liability to those constitutional violations that could have been reasonably known at the time of the incident. Resolving these intermingled questions of objective good faith and clearly established law, however, has nothing to do with pleading. While the plaintiff does bear the burden of persuasion on this issue, the burden here will be met, if at all, by reference to legal arguments premised entirely on the substantive content of constitutional law as established at the time of the challenged incident.

That is the qualified immunity defense. What the Court described in *Saucier* as the "second step" presents a unique law-driven inquiry pertaining to objective good faith. And as this Court has admonished, once raised, the defense must be resolved at the earliest possible phase of the litigation. But this does not mean that the district court must dispose of the case as quickly as possible in derogation of the Federal Rules. Rather, it means that the district court must process the defense as quickly as possible under the guidance of the Federal Rules, unaltered and undiminished by *ad hoc* policy judgments pertaining to specific types of cases or particular types of issues.

Most importantly, a United States District Court, operating within the Federal Rules, has ample authority to promote the policies underlying the qualified immunity defense, including the policy of an early resolution, through a careful and sensitive management of those cases in which the defense has been raised. *See Crawford-El v. Britton*, *supra*, 523 U.S., at 597-600. Among the vast array of possibilities, a district court may grant a motion for a more definite statement under Rule 12(e). This might occur if the allegations were such that the actual contours of the constitutional claim cannot be ascertained. *Id.*, at 598. Similarly, Rule 7(a)(7) empowers the district court to order a reply to an answer, and if the answer includes a qualified immunity defense, the court may direct the plaintiff to respond to that defense in the reply for reasons similar to those that might trigger a Rule 12(e) order. *Id*. Next, the district court has

"broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," and may do so in the particular context of a qualified immunity defense. *Id*. That is not to say that the district court can order discovery on a claim that is just "shy of a plausible entitlement to relief," *Bell Atlantic*, *supra*, 127 S.Ct., at 1966. Rather it is to say that a plausible claim, which exists here, does not automatically open the door to the full range of discovery. In addition, having ordered limited discovery, the district court can accelerate the litigation process toward an early consideration of summary judgment under Rule 56. Finally, and more generally, the district court can exercise its full range of managerial skills toward a quick, but fair resolution of the qualified immunity defense, always keeping in mind that the defense pertains to objective good faith and should not be confused with a decision on the merits of the plaintiff's claim.

Nothing in the Government's brief suggests that district courts are incapable of exercising their power and discretion under the Federal Rules in a manner that fully comports with the policies underlying the qualified immunity defense. While the Government correctly observes that the qualified immunity defense must be decided in an expeditious manner, Brief for the Petitioner, at 17-18, it seems to be arguing that the defense should be decided in a precipitous, on-the-face-of-the-complaint manner without reference to the standards of practice under the Federal Rules. That position is untenable and well

beyond the scope of the qualified immunity defense as presently understood by bench and bar.

Significantly, the Second Circuit took pains to instruct the district court to be attentive to the qualified immunity defense on remand. In that court's words:

> We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El,* 523 U.S. at 597-98, 118 S.Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. *See Harlow,* 457 U.S. at 821, 102 S.Ct. 2727 (Brennan, J., concurring) ("[S]ummary

> judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

Iqbal v. Hasty, *supra*, 490 F.3d, at 159.

In our view, this careful and demanding approach reflects an appropriate balance that comports with the Federal Rules and, at the same time, fully honors the important policies at the heart of the qualified immunity defense. The approach suggested by the Government, we submit, alters the contours of the qualified immunity defense and transforms that defense into a right to an immediate judgment on the merits without adherence to the procedural standards and protections carefully crafted in the Federal Rules. The system for reconsidering and amending those rules – a system designed to guarantee full and careful consideration and debate, as well as legislative oversight – should not be circumvented.

CONCLUSION

In sum, we urge this Court to resist the Government's invitation to impose a heightened pleading requirement in lawsuits in which a high-level government official has been sued for an alleged violation of the plaintiff's clearly established constitutional rights. The invitation comes at the cost of

clarity both to long-accepted pleading standards and to the specifically defined elements of the qualified immunity defense.

The judgment below should therefore be affirmed.

Respectfully submitted,

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