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## Debunking Twombly/Iqbal: Plausibility is More than Plausible in Ohio and Other States

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DEBUNKING *TWOMBLY/IQBAL*: PLAUSIBILITY IS MORE THAN  
PLAUSIBLE IN OHIO AND OTHER STATES

*Matthew Marino*\*

I. INTRODUCTION

Access to justice is a cornerstone of the American judicial system.<sup>1</sup> Although justice is promoted through wide access to the courts, this interest must be balanced to prevent lawsuits that are frivolous, revenge-seeking, or unreasonable.<sup>2</sup> Federal Rule of Civil Procedure 8(a)(2) provides that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>3</sup> In *Bell Atlantic v. Twombly*,<sup>4</sup> the Supreme Court abruptly departed from the longstanding “notice pleading” standard developed for Rule 8(a)(2) fifty years earlier in *Conley v. Gibson*. The *Conley* standard was lenient and justified a complaint’s dismissal only if “no set of facts” could be shown to demonstrate a plaintiff’s entitlement to relief.<sup>5</sup> The Court in *Twombly* set a more stringent standard to govern complaints, holding antitrust plaintiffs alleging violations of Section 1 of the Sherman Act must plead sufficient factual matter to support a *plausible* claim for relief.<sup>6</sup> The Supreme Court subsequently extended *Twombly* to all civil cases in *Ashcroft v. Iqbal* in 2009.<sup>7</sup>

A major policy motive behind the *Twombly/Iqbal* standard (“*Twombly/Iqbal*”) is to protect defendants from burdensome discovery requests, especially from plaintiffs who rely almost exclusively on discovery to uncover whether their claims have merit.<sup>8</sup> “Plausibility” therefore requires a complaint to set out “enough facts to raise a reasonable expectation that discovery will reveal evidence” of a claim for relief.<sup>9</sup> This has become more relevant with the advent of e-discovery, where the use of evidence from large, electronically stored databases has

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1. See Hon. Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT’L L.J.* 83, 84 (citing REGINALD HERBER SMITH, *JUSTICE AND THE POOR* (1919)).

2. See Erin Schiller & Jeffrey A. Wertkin, *Frivolous Filings and Vexatious Litigation*, 12 *GEO J. LEGAL ETHICS* 909 (2000-2001).

3. FED. R. CIV. P. 8(a)(2).

4. 550 U.S. 544 (2007).

5. See *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

6. *Id.* at 556.

7. 556 U.S. 662, 685 (2009).

8. *Twombly*, 550 U.S. at 558 (citing *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

9. See *id.* at 556.

become both necessary and commonplace, making discovery more costly and time-consuming.<sup>10</sup>

State courts remain free to follow notice pleading, and indeed most state courts still follow some form of the *Conley* standard.<sup>11</sup> Some Ohio courts have adopted *Twombly/Iqbal* while others have either not decided or expressly rejected plausibility, suggesting the issue is ripe for the Ohio Supreme Court.<sup>12</sup>

This Comment argues that the Ohio Supreme Court should adopt *Twombly/Iqbal*. Although *Twombly/Iqbal* is more stringent than notice pleading, implementing *Twombly/Iqbal* in Ohio and other states will not impair access to the courts as many fear,<sup>13</sup> but rather will serve benefits by encouraging more factually precise complaints and motions at the initial pleading stages of a lawsuit. This will lead to more viable complaints, better case management, and clearer expectations for practitioners, all of which will reduce the costs associated with early pre-trial litigation. Adoption of the standard in Ohio also comports with Ohio's tradition of modeling its own rules of procedure after the Federal Rules of Civil Procedure ("Federal Rules") and relying on federal case law to interpret those rules. Further, plausibility does not mark a drastic departure from notice pleading because it has long been implicitly embedded in early pre-trial litigation.

This Comment will proceed as follows. First, Section II will discuss how states have modeled their own procedural rules after the Federal Rules, examine whether states should rely on federal law at all, and outline Ohio's tradition of modeling its own rules of civil procedure after the Federal Rules and using federal case law to interpret those rules. Section II will also dissect *Twombly/Iqbal* in its entirety. Sections II-C, II-D, and II-E will serve as a guide for practitioners seeking to understand *Twombly/Iqbal*. Next, Section III will argue that adoption of *Twombly/Iqbal* comports with Ohio's tradition of adopting federal procedural law. Section III will also respond to opponents' concerns surrounding state court adoption of the *Twombly/Iqbal*. Section IV will conclude that *Twombly/Iqbal* is as sensible in application as it is in theory,

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10. See Richard L. Marcus, *E-Discovery Beyond The Federal Rules*, 37 U. BALT. L. REV. 321, 322 (2008).

11. See Darcy Jalandoni & David Shouvin, *Ohio and Twombly/Iqbal: Plausible?* OHIO LAW. (Ohio State Bar Ass'n), May/June 2015, at 26 ("Inasmuch as *Twombly/Iqbal* dealt with procedural issues, state courts are not bound to follow their rulings under the Erie Doctrine, and most have not. By our recent count, of the 12 state supreme courts that have substantively examined *Twombly/Iqbal*, only three—Massachusetts, Nebraska and South Dakota—have adopted the plausibility standard or something akin to it. Nevada has declined to decide. The remaining states have declined to shift from established basic notice pleading principles to the plausibility requirement. They are Arizona, Iowa, Minnesota, Montana, Tennessee, Vermont, Washington and West Virginia."). *Id.*

12. See *infra* notes 135-138.

13. See *infra* notes 144-146.

reasserting that Ohio and other state courts should adopt *Twombly/Iqbal* to promote pretrial litigants' best interests.

## II. BACKGROUND

This Section will raise questions surrounding the efficacy of state court adoption of federal procedural law as well as the general workability of *Twombly/Iqbal*. First, Part A of this Section will outline the debate over whether states should adopt or rely on federal procedural law at all, beginning with a discussion of the Federal Rules, the extent to which states have adopted the Federal Rules, and whether it is wise for states to adopt the Federal Rules. Next, Part B will outline Ohio's tradition of adopting federal procedural law. Parts C and D will then discuss *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, respectively. Finally, Part E will discuss the aftermath of *Twombly/Iqbal*.

### A. Controversy over State Adoption of Federal Procedural Law

The Federal Rules were adopted in 1937 to provide uniform rules of procedure for all federal courts, to simplify pleading, and to provide more uniformity in civil litigation.<sup>14</sup> Professor Scott Dodson, an expert on civil procedure and Associate Dean of Research at the University of California Hastings School of Law, explained how the Federal Rules were strongly criticized by some members of the legal community after their initial promulgation.<sup>15</sup> Dodson described how one commentator "repeatedly admonished that the national legal community was an amalgam of different local legal practices and cultures that should not be forcibly unified."<sup>16</sup>

Nonetheless, within a generation, most states had substantially adopted the Federal Rules as a model for their own reforms.<sup>17</sup> A study conducted in 1986 concluded that all state procedure in some way reflected the Federal Rules, and twenty-three states had procedural regimes so similar to the Federal Rules that they were deemed "replica" states.<sup>18</sup> Dodson suggested that the "gravitational force of federal law" can explain state adoption of federal law despite there being no requirement to do so.<sup>19</sup> This refers to the general presumption that federal law is good law and should

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14. See *Burnham v. Cleveland Clinic*, 89 N.E.3d 536, 548 (Ohio 2016).

15. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 708 (2016).

16. *Id.* at 709.

17. *Id.* at 709-10.

18. *Id.* at 708 (Citing John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378 (1986)).

19. *Id.* at 706.

be followed.<sup>20</sup>

For instance, a strong argument in favor of the adoption of federal procedural law is the quality of the process for amending federal rules.<sup>21</sup> The Federal Rules are reviewed by numerous committees, the Supreme Court, and Congress.<sup>22</sup> These review processes include public hearings and opportunities for advocates to offer oral or written testimony on the rules.<sup>23</sup> Most states cannot afford these costly processes.<sup>24</sup> Therefore, it may seem that the Federal Rules are of higher quality because the federal government has more resources.<sup>25</sup> Further, Supreme Court opinions are a product of “deliberative and solemn processes” whereby expert advocates brief and argue issues of strong national importance.<sup>26</sup> Moreover, interest groups and practitioners are welcomed to produce and file amicus briefs.<sup>27</sup> These processes suggest that federal law may reflect a wider-reaching consensus regarding universally-shared policy goals.<sup>28</sup>

Although federal law may seem alluring in this regard, Dodson explained that there are convincing reasons why state courts should not follow federal case law or adopt federal statutes. The following illuminates Dodson’s concerns surrounding state adoption of federal procedural rules absent thoughtful deliberation of the policy goals to be served by those rules:

Federal dockets have different cases and different caseloads. Federal judges have life tenure and are less sensitive to local pressures. State judges are under greater docket congestion and resource pressures than federal judges. Different sets of attorneys appear in the different courts. These differences may suggest that a state rule should be interpreted in light of particular state contexts and norms, even if that results in an interpretation that diverges from the interpretation given in an identically worded federal rule.<sup>29</sup>

Dodson argued that federal law is adopted at the state level simply *because* it is federal law,<sup>30</sup> not because states “exercised rigorous

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20. *Id.*

21. Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67CASE W. RES. L. REV. 501, 502 (2016).

22. *Id.* at 502.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 503.

27. *Id.*

28. *See id.*

29. Dodson, *supra* note 15, at 711.

30. *See id.* at 715 (arguing states get caught in the “Supreme Court’s gravitational pull” and decide without sufficient deliberation to adopt Supreme Court precedent). *Id.*

independent judgment in accordance with state law and policy,”<sup>31</sup> suggesting that blind adoption of federal procedural law is unwise and threatens federalism.

### *B. Ohio’s Tradition of Adopting Federal Procedural Law*

In drafting the Ohio Rules of Civil Procedure (the “Ohio Rules”) in 1968, the Ohio Supreme Court ordered the Rules Advisory Committee to use the Federal Rules as a model.<sup>32</sup> This was a “distinct advantage,” as other states had modeled their own rules of civil procedure after the Federal rules, and there was “a considerable body of decisions” applying the Federal Rules.<sup>33</sup> By 1986, Ohio was the first of the ten most populous U.S. states at the time to have substantially modeled its own rules of civil procedure after the Federal Rules, moving before major states like New York and California.<sup>34</sup> The underlying philosophies behind the Federal Rules and the Ohio Rules are largely the same, and many provisions are identical.<sup>35</sup>

#### 1. Class actions

Ohio Rule 23 was originally modeled after Federal Rule 23, both of which govern class certification in class action lawsuits.<sup>36</sup> The policy goal of both Federal Rule 23 and Ohio Rule 23 was to open the judicial system to more people through the class action mechanism.<sup>37</sup> In *Grubbs v. Rine*, the Ohio Court of Common Pleas for Franklin County denied certification of a proposed class under Ohio Rule 23(B)(3), basing its determination on the Federal Rules Advisory Committee notes to Federal Rule 23 and federal case law.<sup>38</sup>

In *Grubbs*, the proposed class included tenants alleging common injuries resulting from various misrepresentations made through oral

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31. *Id.*

32. *Burnham v. Cleveland Clinic*, 89 N.E.3d 536, 549 (Ohio 2016).

33. *Id.* at 550 (citing Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO ST. BAR ASSN. REP. 727, 728 (1970)).

34. See Subrin & Main, *supra* note 21, at 513 (citing John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1428 (1986)) (data revealed New York, Illinois, California, Texas, Pennsylvania, Florida, North Carolina, Michigan, and Virginia were still non-replica jurisdictions). *Id.*

35. Alvin W. Lasher, *The Ohio Rules of Civil Procedure and Their Effect on Real Property Titles*, 4 AKRON L. REV. 47, 49 (2015).

36. *Grubbs v. Rine*, 315 N.E.2d 832, 836 (Ohio Ct. Com. Pl. 1974); see also FED. R. CIV. P. 23; OHIO. CIV. R. P. 23.

37. *Grubbs*, 315 N.E.2d at 836.

38. See *id.* at 832.

contracts with their landlord.<sup>39</sup> Both Federal Rule 23(b)(3) and Ohio Rule 23(B)(3) require that questions of law or fact common to the proposed class members *predominate* over questions affecting only individual members.<sup>40</sup> Because the proposed members' claims all depended on different oral contracts with their landlord, the court held the class action device was inappropriate because the common claims of the class members did not predominate over their more particularized claims.<sup>41</sup>

In *Grubbs*, the court cited the Federal Rules Advisory Committee note to Federal Rule 23(b)(3), which provided that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made."<sup>42</sup> The court also cited a United States District Court for the Middle District of Pennsylvania opinion explaining that when oral misrepresentations varied between class members and would have to be individually proven for each member, the court would have to deny class action status.<sup>43</sup> Relying on these authorities, the court applied the predominance requirement and prevented certification of the class.<sup>44</sup> Resolving every member's individual contract dispute with the landlord through the class action device would not have promoted "economies of time, effort, and expense," as the drafters of Federal Rule 23 envisioned.<sup>45</sup> The predominance requirement prevents class certification when proposed members' claims would better be resolved in individual lawsuits.<sup>46</sup>

## 2. Discovery

The adoption of Ohio Rule 26(B)(1) was influenced by the federal work product doctrine.<sup>47</sup> Ohio Rule 26(B)(1) carves out an exception for discovery requests for documents and materials prepared in reasonable anticipation of litigation.<sup>48</sup> The Supreme Court developed this standard in *Hickman v. Taylor*, where the Court recognized and established a privilege for an attorney's written statements or materials used in preparation for trial.<sup>49</sup> This became known as the work product doctrine. Ohio courts subsequently adopted the work product doctrine to promote

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39. *Id.* at 836.

40. FED. R. CIV. P. 23(b)(3); OHIO CIV. R. 23(B)(3).

41. *Grubbs*, 315 N.E.2d at 840.

42. *Id.* at 836 (citing 1966 Committee Note, FED. R. CIV. P. 23).

43. *Id.* at 836 (citing *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M.D. Pa. 1973)).

44. *Id.* at 840.

45. *Id.* at 836 (citing 1966 Committee Note, FED. R. CIV. P. 23).

46. *See id.* at 836 (citing *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M.D. Pa. 1973)).

47. *See Burnham v. Cleveland Clinic*, 89 N.E.3d 536, 541 (Ohio 2016).

48. OHIO CIV. R. 26.

49. *Hickman v. Taylor*, 329 U.S. 495 (1947).

the same important policy goal—protecting an attorneys’ mental processes in preparation for litigation from unjustified access by opposing counsel.<sup>50</sup>

Ohio Rule 26 mirrors the Federal Rules in other significant ways. For instance, the 2015 amendments to Federal Rule 26(b)(1) provided that “parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and *proportional to the needs of the case.*”<sup>51</sup> Requiring discovery requests proportional to the needs of a case encourages lawyers to tailor more specifically their discovery demands based on the specific facts and stakes of the case.<sup>52</sup> Similarly, Ohio Rule 26(B)(1) was amended in 2020 to include the italicized language requiring *proportionality* in discovery requests, acknowledging the need for discovery limitations in an era of increasingly complex civil litigation.<sup>53</sup>

Further, Ohio Rule 26(B)(6)(b) provides a mechanism for a party to recover inadvertently produced documents from an opponent, which was also previously adopted in the Federal Rules.<sup>54</sup> Recognizing the need for procedural reform incident to the advent of e-discovery, this “claw-back” provision allows litigants to keep confidential documents that were accidentally disclosed as a result of discovery.<sup>55</sup> Accidental disclosure is all the more likely in the age of e-discovery where thousands of documents may be requested at a time from electronic databases.<sup>56</sup>

As made evident, Ohio has adopted and amended its own rules of civil procedure to reflect the Federal Rules and federal case law, and the Ohio Rules Advisory Committees and Ohio courts have emphasized the same important policy goals envisioned by the drafters of the Federal Rules.<sup>57</sup>

### C. *Bell Atlantic v. Twombly* (2007)

The Supreme Court in *Bell Atlantic v. Twombly* held antitrust plaintiffs alleging violations of Section 1 of the Sherman Act must plead sufficient factual matter to support a *plausible* claim for relief.<sup>58</sup> The Telecommunications Act of 1996 required large telephone carriers to share their networks with smaller carriers.<sup>59</sup> Many consumers believed

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50. See *Burnham*, 89 N.E.3d at 541.

51. FED. R. CIV. P. 26(b)(1) (emphasis added).

52. See Marcus, *supra* note 10, at 357-58 (emphasis added).

53. See OHIO CIV. R. 26, staff note (2020).

54. *Id.*

55. *Id.*

56. See Marcus, *supra* note 10, at 329.

57. See *supra* notes 32-53 and accompanying text.

58. *Bell Atl. v. Twombly*, 550 U.S. 544, 549 (2007).

59. *Id.*

that the larger carriers conspired to eliminate competition between the smaller carriers.<sup>60</sup> William Twombly and Lawrence Marcus brought suit against Bell Atlantic Corporation, Verizon Communications, and other large carriers on behalf of all telephone users for violating Section 1 of the Sherman Act.<sup>61</sup> Plaintiffs alleged the defendants were conspiring with one another to keep prices high and force smaller carriers out of business.<sup>62</sup> Plaintiffs did not have evidence of an agreement to conspire, but they had evidence of parallel conduct between all of the defendant carriers, such as treating smaller competitors unfairly and refraining from doing business in one another's respective territory.<sup>63</sup>

Defendants argued that evidence of parallel conduct alone could not survive a motion to dismiss, as Rule 8(a)(2) of the Federal Rules requires all plaintiffs to clearly state why they are entitled to relief.<sup>64</sup> Plaintiffs argued that their complaint was sufficient under *Conley v. Gibson*, where the Supreme Court held that a complaint should provide *notice* of the lawsuit to the defendant and should only be dismissed if "no set of facts" could possibly be proven to support the claim; hence: *notice pleading*.<sup>65</sup> The Supreme Court granted certiorari after the Court of Appeals reversed the District Court's determination that the complaint was insufficient.<sup>66</sup>

Writing for the majority, Justice Souter devised a new standard to govern Rule 8(a)(2), providing that a complaint must contain enough facts to make the allegations plausible on their face and not merely speculative.<sup>67</sup> Justice Souter explained that a complaint cannot be plausible if it only contains conclusory allegations, recites labels, or lists the elements of a claim.<sup>68</sup> Justice Souter cautioned that plausibility does not require a complaint to contain overly-detailed factual allegations, but there must be *some* facts to demonstrate a claim for relief:

Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a *well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable*, and that a recovery is very remote and unlikely.<sup>69</sup>

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60. *Id.*

61. *Id.* at 550.

62. *Id.*

63. *Id.* at 550-51.

64. *Id.* at 553.

65. *Id.*

66. *Id.*

67. *Id.* at 555.

68. *Id.*

69. *Id.* at 556 (emphasis added, internal quotations omitted).

The Court further reasoned that dismissing implausible complaints saves time, money, and resources by dispensing quickly with groundless claims, especially in the context of an expensive and time-consuming antitrust lawsuit.<sup>70</sup> Justice Souter explained that the plaintiffs' claims did not meet the plausibility standard because parallel conduct alone was not enough to demonstrate that the defendants actually agreed to engage in anticompetitive behavior.<sup>71</sup> Therefore, it was implausible that evidence of such an agreement would become available upon discovery.<sup>72</sup>

Further, the court explained that judges and commentators have not interpreted the *Conley v. Gibson* "no set of facts" language under the *Conley* standard in its literal terms.<sup>73</sup> To the *Twombly* majority, *Conley* did not merely require that *any set of facts* may be used to support a claim, but rather, that any set of facts could be used *once the claim had been sufficiently pled*, so long as those facts were consistent with the elements of the claim.<sup>74</sup>

Justice Stevens dissented, criticizing the majority for reading a plausibility standard into Rule 8(a)(2), stressing that the purpose of a liberal pleading standard in the Federal Rules is to keep litigants in court so they have a chance to test the merits of their claims after collecting evidence through discovery.<sup>75</sup> Justice Stevens also explained that the costs of discovery in expensive and complex antitrust litigation could be avoided with better case management, careful scrutiny when ruling on motions for summary judgment, and clear jury instructions.<sup>76</sup> Justice Stevens concluded that parallel conduct is circumstantial evidence sufficient to state a claim for relief when bringing a claim of conspiracy under Section 1 of the Sherman Act, and the majority overstepped its boundaries in imposing a plausibility requirement under Rule 8(a)(2).<sup>77</sup>

#### *D. Ashcroft v. Iqbal (2009)*

The Supreme Court in *Ashcroft v. Iqbal* extended *Twombly* to all civil cases, holding that a complaint must allege nonconclusory facts that, taken as true, support a claim for relief that is plausible on its face.<sup>78</sup> In the aftermath of the September 11<sup>th</sup> terrorist attacks, Javaid Iqbal was

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70. *Id.* at 573.

71. *Id.* at 559.

72. *See id.*

73. *Id.* at 562.

74. *Id.* at 563.

75. *Id.* at 575.

76. *Id.* at 573.

77. *See id.* at 585-86.

78. 556 U.S. 662, 678 (2009).

arrested on fraud charges and deemed high risk under the Bush Administration's policy of isolating prisoners who may be terrorist threats.<sup>79</sup> He was subject to harsh conditions in prison.<sup>80</sup> Iqbal filed a lawsuit against Attorney General John Ashcroft and FBI Director Robert Mueller alleging that enforcement of the anti-terrorism policy discriminated against him by subjecting him to harsh detention conditions based on his religion, race, and/or national origin.<sup>81</sup> Ashcroft and Mueller filed motions to dismiss, which the District Court denied, finding that Iqbal had pled sufficient allegations to survive a motion to dismiss.<sup>82</sup> The United States Supreme Court approved certiorari after the Court of Appeals upheld the District Court's ruling.<sup>83</sup>

Writing for the majority, Justice Kennedy applied *Twombly* and found that Iqbal had not pled sufficient factual allegations to support a plausible claim for relief.<sup>84</sup> Kennedy found that Iqbal's complaint was conclusory, and the facts he did allege did not support a *reasonable inference* of discrimination.<sup>85</sup> Kennedy found that Iqbal's claim was "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," assuming the petitioners had adopted the post-911 policy "because of, 'not merely in spite of,' its adverse effects upon an identifiable group."<sup>86</sup> Therefore, the majority held that Iqbal did not state a plausible claim for relief.<sup>87</sup>

The majority also held that *Twombly* was not limited to antitrust cases and applied to all civil actions, explaining that the plausibility requirement resembled a sensible middle ground for a pleading standard:

The plausibility standard is not akin to a *probability* requirement, but it asks for more than a sheer *possibility* that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between *possibility* and *plausibility* of entitlement to relief.<sup>88</sup>

The majority also emphasized that pleading sufficient facts is essential in claims against government officials, because lawsuits are time-consuming and divert officeholders' attention away from serving the

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79. *Id.* at 666.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 678.

85. *Id.* at 681.

86. *Id.* (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

87. *Id.* at 685.

88. *Bell Atl. v. Twombly*, 550 U.S. 544, 557 (2007) (emphasis added).

public.<sup>89</sup>

Justice Souter dissented, arguing *Iqbal*'s complaint was not conclusory because it properly stated a discrimination claim on its face under *Twombly*.<sup>90</sup> Justice Souter continued by asserting that nonconclusory allegations should be accepted as true unless completely unrealistic, which confusingly seemed to err on the side of possibility rather than plausibility.<sup>91</sup>

### *E. The Aftermath of Twombly/Iqbal*

The *Twombly* and *Iqbal* decisions prompted immediate controversy.<sup>92</sup> Congress even pursued legislation in 2009 that would have returned pleading to the *Conley* standard.<sup>93</sup> The lenient *Conley* standard reflected the principles that: (1) complaints serve the simple function of putting defendants on notice of the claims against them, and (2) the merits of a claim should not be decided at the pleading stage, but rather through the pre-trial discovery and summary judgment devices.<sup>94</sup> As these ideas became hallmarks of open access to justice through federal and state court systems, the abrupt departure from the *Conley* standard catalyzed a firestorm of research discussing the implications of heightened pleading requirements under *Twombly/Iqbal*.

The context in which *Twombly* and *Iqbal* were both decided may suggest the Court was imprudent in extending plausibility to all civil cases with such haste.<sup>95</sup> The Court in *Twombly* reasoned plausibility was necessary in the context of expensive and time-consuming antitrust litigation.<sup>96</sup> Similarly, the Court in *Iqbal* reasoned plausibility was necessary to insulate government officials from burdensome litigation, which distracts them from their official duties.<sup>97</sup> These facts suggest that extending plausibility to all civil cases, where many of these concerns do not always exist, may have been unwise.<sup>98</sup>

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89. *Iqbal*, 556 U.S. at 685.

90. *Id.* at 690.

91. *Id.*

92. See RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN, & JAMES E. PFANDER, *CIVIL PROCEDURE: A MODERN APPROACH* 198 (West Academic Publishing 7th ed. 2018).

93. *Id.*

94. Alana C. Jochum, *Pleading in Ohio after Bell Atlantic v. Twombly and Ashcroft v. Iqbal: Why Ohio Shouldn't Notice a Change*, 58 CLEV. ST. L. REV. 495, 516 (2010) (citing Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008)).

95. See Danielle Lusardo Schantz, *Access to Justice: Impact of Twombly & Iqbal on State Court Systems*, 51 AKRON L. REV. 951, 984 (2018).

96. *Bell Atl. v. Twombly*, 550 U.S. 544, 573 (2007).

97. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

98. See Schantz, *supra* note 95, at 984.

As of 2018, out of the thirty state jurisdictions that have modeled in large part their own rules after the Federal Rules, twelve state supreme courts have considered adoption of *Twombly/Iqbal*.<sup>99</sup> Five of those jurisdictions have chosen to follow *Twombly/Iqbal*, while the other seven have maintained notice pleading.<sup>100</sup> Studies have been largely inconclusive surrounding the effects of *Twombly/Iqbal*.<sup>101</sup> One thing is certain, however—"implementation of [*Twombly* and *Iqbal*]" can hardly be characterized as seamless or without objections," leading to difficulties for practitioners and litigants in early pleading.<sup>102</sup>

Albeit vague, *Twombly* created some expectation of what a viable complaint requires: (1) the complaint must provide grounds of the plaintiff's entitlement to relief, which requires "more than labels and conclusions;" (2) simply alleging the elements of a cause of action is not sufficient to survive a motion to dismiss; (3) more speculative allegations will be viewed with more scrutiny; and (4) the complaint must include factual allegations presenting "plausible grounds" indicating that the pleader is entitled to relief, or at least that discovery will reveal evidence of a claim for relief.<sup>103</sup>

Aside from extending *Twombly* to all civil cases, *Iqbal* added little to the understanding of plausibility.<sup>104</sup> The majority in *Iqbal* was unclear as to why *Iqbal*'s complaint was conclusory, noting Federal Rule 8

99. *Id.* at 964-65.

100. *Id.* at 965 (Colorado, District of Columbia, Maine, Massachusetts, and South Dakota have all adopted plausibility, whereas Arizona, Minnesota, Montana, New Mexico, Rhode Island, Tennessee, and Washington have chosen to maintain notice pleading).

101. William Hubbard, *The Empirical Effects of Twombly and Iqbal* 1, 2 (Coase-Sandor Working Paper Series in Law & Econ. No. 773, 2016).

102. See Jochum, *supra* note 94, at 516-20 (citing *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (Sixth Circuit reaffirmed that "a naked assertion of antitrust injury is insufficient to state a claim under the Sherman Act, and evidence of agreements between competitors alone cannot demonstrate plausibility of anti-competitive behavior."); *Ferron v. Zoomego, Inc.*, 276 F. App'x 473 (6th Cir. 2008) (In a diversity case involving allegations of consumer protection violations, the Sixth Circuit arguably applied the plausibility requirement despite its confusing use of the "no set of facts" language in *Conley*, ultimately holding that the plaintiff had not set out enough facts to demonstrate that the disputed transactions were "commercial transactions" for purposes of the statutory violations); *Huffman v. City of Willoughby*, 2007-Ohio-7120 (Ohio Ct. App.) (Ohio Court of Appeals affirmed the trial court's denial of a motion to dismiss, citing the *Conley* language, and asserting "because it is so easy for the pleader to satisfy the standard of Ohio Civ. R. 8(A), few complaints are subject to dismissal" (quoting *Id.*); *Gallo v. Westfield Nat'l Ins. Co.*, 2009-Ohio-1094 (Ohio Ct. App.) (Ohio Eighth District Court of Appeals was the first Ohio court to apply a limited form of the plausibility standard); *Williams v. Ohio Edison*, 2009-Ohio-5702 (Ohio Ct. App.) (Ohio Eighth District Court of Appeals applied the limited form of the plausibility standard to affirm a granted motion to dismiss in a case involving a pro se plaintiff who had drafted a mess of a complaint alleging employment violations).

103. See Richard O. Holloran, *The Fact of the Matter: A Return to Fact Pleading? Viable Complaints After Twombly*, 44 ARIZ. ATT'Y 20, 24 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

104. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 861 (2010).

“demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.”<sup>105</sup> However, Professor Roger G. Bone, a leading scholar on civil procedure and complex litigation, described how *Iqbal*’s complaint was viable under plausibility because it described mental states and linked those mental states to a discriminatory policy described in some detail elsewhere throughout the complaint.<sup>106</sup> The complaint described how Ashcroft and Mueller:

knew of, condoned, and willfully and maliciously agreed to impose harsh conditions on the plaintiff as a matter of policy, solely on account of [his] religion, race, or national origin and for no legitimate penological interest, and that Ashcroft was the principal architect of this policy and Mueller oversaw its execution.<sup>107</sup>

Bone argued that although these mental states were described with conventional terminology, it is “not clear what other language the plaintiff could have used and still conveyed his meaning clearly.”<sup>108</sup>

To add to the confusion, Justice Souter dissented in *Iqbal* despite his majority authorship in *Twombly*, arguing that the allegations in *Iqbal*’s complaint were actually quite specific when read in the context of the complaint as a whole.<sup>109</sup> Justice Souter interpreted plausibility more leniently than the majority in *Iqbal*, raising serious questions as to the proper interpretation of plausibility.<sup>110</sup> Professor Bone argued that the conflict between the majority and dissent in their conceptions of “plausible” does nothing to guide the “generality-specificity continuum.”<sup>111</sup> In other words, *Iqbal* drew an even murkier line between what separates a plausible and implausible complaint that would be viable under *Twombly*/*Iqbal*.<sup>112</sup>

### III. DISCUSSION

This Section argues that Ohio and other state courts should adopt *Twombly*/*Iqbal*. Part A of this Section will discuss why it is reasonable for state courts to adopt federal procedural law. Part B will contemplate the difficulty of producing an equitable and just pleading standard and explain how plausibility is a sensible middle ground. Next, Part C will argue that Ohio and other similarly situated states should adopt

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105. *Id.* at 859.

106. *Id.*

107. *Id.* (internal citations omitted).

108. *Id.*

109. *Id.* at 861.

110. *See id.*

111. *Id.*

112. *Id.*

*Twombly/Iqbal* to serve important policy goals, encourage more viable complaints, facilitate better case management, and provide clearer expectations for practitioners, all of which will reduce the costs associated with early pre-trial litigation. Finally, Part D will respond to arguments against the adoption of *Twombly/Iqbal* in Ohio and other states.

*A. Federal Procedural Law Should Not be Discounted at the State Level*

Professor Emeritus Stephen S. Subrin and Professor Thomas Main, both leading experts in the field of civil procedure, have argued that a major reason why states replicate federal procedural law is to “provide uniformity, making it easier for judges, lawyers, law professors, and law students to master civil procedure by studying and utilizing only one procedural regime.”<sup>113</sup> The scholars contended that providing uniformity is not a good reason to adopt federal procedural law and that the sensibility of adopting federal procedural law at the state level should be viewed with more scrutiny.<sup>114</sup>

Subrin and Main observed a “pro-defendant” spirit arising in the Federal Rules in recent amendments, which they attribute to the increased presence of large law firms and corporate attorneys on the Rules Advisory Committees in recent decades.<sup>115</sup> The authors explained how the drafters created a “big business” narrative that plaintiffs’ attorneys had been abusing an overly-liberal civil litigation system.<sup>116</sup> However, this view fails to consider the pro-plaintiff spirit of the early Federal Rules and case law that explains the need to respond with pro-defendant rules.

Subrin and Main failed to acknowledge one of the most significant transformations in civil procedure since the promulgation of the Federal Rules that weighs monumentally in favor of plaintiffs—ease in obtaining jurisdiction over out-of-state defendants. This was necessary in light of the expansion of U.S. interstate commerce, which led to an increased likelihood that a producer’s goods or services would injure someone in a different state.<sup>117</sup> In *McGee v. International Life Insurance*, the Supreme Court held an insurance company with only *one* customer in the forum state could be subject to that state’s jurisdiction based on that single contact.<sup>118</sup> Coincidentally enough, *McGee* and *Conley* were both decided in 1957 and both represented major victories for plaintiffs. The pro-defendant spirit of the recent amendments to the Federal Rules criticized

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113. Subrin & Main, *supra* note 21, at 517.

114. *Id.*

115. *Id.* at 518.

116. *Id.*

117. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

118. *Id.* at 223.

by Subrin and Main should be understood as a limitation of the pro-plaintiff jurisprudence of the mid-twentieth century, such as *Conley* and *McGee*, rather than an attempt by big business rule drafters to quash plaintiffs. Therefore, the Federal Rules should not be viewed as a threat to state court systems because of its pro-defendant spirit in recent decades, but rather a response to changing needs of U.S. courts, which have become flooded with litigation in more recent decades<sup>119</sup> incident to the expansion of interstate commerce.

Pro-plaintiff jurisprudence remained on the federal circuit despite what Subrin and Main have described as the “anti-civil litigation” mentality characteristic of the time periods throughout the Rehnquist and Roberts courts.<sup>120</sup> In *Kozlowski v. Sears*, the United States District Court for the District of Massachusetts held businesses to a higher record-keeping standard in order to ensure plaintiffs’ access to documents upon discovery.<sup>121</sup> In *Corley v. Rosewood Care Center*, the Seventh Circuit held that plaintiff’s counsel’s interviews with nonparty witnesses before trial were not subject to Rule 32 deposition requirements, which would have required opposing counsel and a court reporter to be present.<sup>122</sup> This allows plaintiffs’ attorneys to collect evidence from non-party witnesses without the burden of following formal deposition requirements.

As discussed above, Subrin and Main argued that the recent amendments to the rules were the product of a false narrative, espoused by the pro-business rule drafters, that plaintiffs’ attorneys were abusing civil litigation.<sup>123</sup> The authors relied on the rule drafters’ characterization of discovery as becoming extremely large and complex in civil litigation, despite the lack of empirical support for this claim.<sup>124</sup> Therefore, the authors reasoned that adoption of provisions like the 2015 amendment to Federal Rule 26(b)(1), requiring discovery demands *proportional* to the needs of the case, were unnecessary.<sup>125</sup>

However, there is reason to believe that discovery will become increasingly complex and burdensome in state courts as e-discovery becomes more prevalent.<sup>126</sup> E-discovery and discovery abuses are not exclusive to the high value, prominent lawsuits that arise in the federal courts.<sup>127</sup> Most litigation takes place in state courts; and because most

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119. *Judiciary Makes the Case for New Judgeships*, U.S. COURTS (June 30, 2020), <https://www.uscourts.gov/news/2020/06/30/judiciary-makes-case-new-judgeships>.

120. Subrin & Main, *supra* note 21, at 518.

121. 73 F.R.D. 73 (D. Mass. 1976).

122. 388 F.3d 990 (7th Cir. 2004).

123. Subrin & Main, *supra* note 21, at 518.

124. *Id.*

125. *Id.*

126. *See* Marcus, *supra* note 10, at 333.

127. *Id.*

Americans now utilize email and rely on computers for a variety of activities, e-discovery is just as likely in state courts as it is in the federal courts.<sup>128</sup> The history of federal procedural law also suggests that e-discovery is not a big-city phenomenon, as the first federal district courts to have local rules concerning e-discovery were in Arkansas and Wyoming.<sup>129</sup> Even if state adoption of federal procedural rules may prove inconsequential in the short run because discovery is already largely under control in state courts, as Subrin and Main suggest, it may be highly consequential in the long run by prospectively addressing the issues that arise incident to the increasing presence of complex litigation and e-discovery in state courts.

Lastly, in his essay arguing against state court adoption of federal procedural rules, Professor Dodson conceded that state courts are under larger docket congestion.<sup>130</sup> This suggests that the recent amendments embodying the “pro-defendant” spirit may actually help larger and more populous states monitor plaintiff behavior that leads to docket congestion.

### B. *The Pleading Conundrum*

Developing a workable pleading standard is troublesome. For instance, when complaints require litigants to show only *possible* entitlement to relief, it would ostensibly lead to a gross influx of complaints and little flexibility to screen for illegitimate claims.<sup>131</sup> Even the most far-fetched and elaborate theory of a case is possible. For instance, it is *possible* that a plaintiff’s neighbors conspired with the National Security Administration to spy on him, but this is far from *plausible*, and allowing outlandish cases to proceed to trial would impair access for those with legitimate claims deserving adjudication. The antithesis of that is a system in which litigants would have to state a *probable* entitlement to relief, which is also undesirable.<sup>132</sup> Litigants need discovery to uncover the aspects of their claim that would lead to its *probability*. Requiring probability at the outset of the lawsuit would require most evidence to be identified prior to discovery, which is plainly inconsistent with the purpose of discovery: to collect evidence. Therefore, a *golden mean* is desirable, a standard in between *possibility* and *probability*—namely, *plausibility*.<sup>133</sup>

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128. *Id.*

129. *Id.*

130. Dodson, *supra* note 15, at 711.

131. *See* Bell Atl. v. Twombly, 550 U.S. 544, 555 (2007).

132. *Id.*

133. ARISTOTLE, ARISTOTLE’S NICOMACHEAN ETHICS 40 (Robert C. Bartlett & Susan D. Collins trans., University of Chicago Press 2011) (Aristotle stated that virtue is the golden mean between two

*C. Advocating for Twombly/Iqbal in Ohio and other states*

*Twombly/Iqbal* opponents have argued that the goals of plausibility cannot be realized at the state level and that *Twombly/Iqbal* as a whole is misguided.<sup>134</sup> However, these critics have failed to consider how the standard may evolve with time to produce favorable results in both federal and state courts.

Rule 8 of the Ohio Rules mirrors Federal Rule 8 and requires a complaint to contain “a short and plain statement of the claim showing that the party is entitled to relief.”<sup>135</sup> The meaning of this statement in Ohio is largely unsettled.<sup>136</sup> Some Ohio courts have expressly or implicitly followed the plausibility standard, while others have expressly rejected it.<sup>137</sup> This suggests the issue is ripe for the Ohio Supreme Court.<sup>138</sup>

The Ohio Supreme Court should adopt *Twombly/Iqbal*. Adoption of the standard achieves important policy goals. These goals are common to both state and federal courts, including the encouragement of more viable complaints, better case management, judicial efficiency, and clearer expectations for practitioners, all of which will reduce the costs associated with early pre-trial litigation. Further, plausibility does not mark a drastic departure from notice pleading because, on a general scale, it has long been implicitly embedded in early pre-trial litigation.

*D. Responding to the arguments against state court adoption of Twombly/Iqbal*

Leading experts in civil procedure have identified eight major objections to Ohio and other state court adoption of *Twombly/Iqbal*: (1) plausibility is a confusing and inconsistent doctrine;<sup>139</sup> (2) litigants are unlikely to forum shop for notice pleading jurisdictions;<sup>140</sup> (3) federal and state uniformity will not be achieved because many replica jurisdictions

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vices, “the one of excess and the other of deficiency.” For instance, courage is a virtue because it is a sensible middle-ground between cowardice, the vice of deficiency, and rashness, the vice of excess. This is Aristotelian virtue theory). *Id.*

134. See Dodson, *supra* note 15, at 708; Subrin & Main, *supra* note 21, at 518; Jochum, *supra* note 94, at 510. Schantz, *supra* note 95, at 984; Hon. John P. Sullivan, *Do the New Pleading Standards Set Out in Twombly and Iqbal Meet the Needs of the Replica*, 47 SUFFOLK U. L. REV. 54, 78 (2014).

135. Jalandoni & Shouvlín, *supra* note 11, at 26.

136. *Id.*

137. *Id.*

138. *Id.* at 26-27.

139. Jochum, *supra* note 94, at 525-26; see Schantz, *supra* note 95, at 984; Sullivan, *supra* note 134, at 79-81.

140. Jochum, *supra* note 94, at 524-25.

have departed from the Federal Rules in various ways;<sup>141</sup> (4) *stare decisis* requires adherence to notice pleading;<sup>142</sup> (5) discovery abuses are not a concern at the state level;<sup>143</sup> (6) there are constitutional concerns surrounding the right to a jury trial when the merits of a case are decided before the parties get a chance to engage in discovery;<sup>144</sup> (7) it is likely that cases with merit will be dismissed under *Twombly/Iqbal*;<sup>145</sup> and (8) the standard will result in increased costs of drafting complaints and litigating motions to dismiss.<sup>146</sup> This Part will respond to each of these arguments in favor of Ohio and other state court adoption of *Twombly/Iqbal*.

### 1. Plausibility is confusing, but future clarity is probable

The first argument against Ohio and other state court adoption of *Twombly/Iqbal* is that plausibility is a confusing and inconsistent doctrine. However, both *Twombly* and *Iqbal* were decided just over a decade ago. Expecting absolute clarity under a recently adopted Supreme Court standard after disrupting fifty years of precedent is plainly unreasonable. This does not mean that the standard should be avoided, but rather developed and solidified to serve important policy goals and provide practitioners a clear picture of what a complaint requires.

### 2. Plausibility serves more important policy goals than deterring forum shopping for notice pleading jurisdictions

The second argument against adoption of *Twombly/Iqbal* is that litigants are unlikely to forum shop for notice pleading jurisdictions. This view does not support the argument that state courts should not adopt plausibility. The plausibility standard serves more important policy goals than deterring forum shopping, such as encouraging attorneys to draft more viable complaints, promoting better case management, and creating clear expectations for practitioners.

Viable, well-worded complaints make it easier for defendants and judges to anticipate the nature of the case and prepare responses.<sup>147</sup> More

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141. *Id.* at 521-22.

142. Schantz, *supra* note 95, at 983.

143. Subrin & Main, *supra* note 21, at 517-21; *see* Sullivan, *supra* note 134, at 88-89.

144. Schantz, *supra* note 95, at 983; *see* Sullivan, *supra* note 134, at 81-82.

145. Schantz, *supra* note 95, at 983; *see* Sullivan, *supra* note 134, at 82-84.

146. Subrin & Main, *supra* note 21, at 526; *see* Sullivan, *supra* note 134, at 85-86.

147. David C. Wilkes, *Drafting New York Civil Litigation Documents*, 82 N.Y. ST. B. ASS'N J. 64 (2010) (although tailored specifically to drafting complaints in New York, the author explained how these rules apply to drafting complaints in all civil litigation, and that "clear, concise, and logical documents set the tone to [effectively] interact with opposing counsel." (alteration added)).

effective communication through pleading will also lead to a simplification of the discovery process because plaintiffs will have already specified the anticipated location of the requested materials, as plausibility requires “enough facts to raise a reasonable expectation that discovery will reveal evidence” of a claim for relief.<sup>148</sup> This will provide defendants more time to prepare for discovery requests. This will not burden plaintiffs’ attorneys by requiring them to precisely identify the location of evidence, but only the suspected location of evidence.<sup>149</sup> Therefore, the only added requirement that plausibility establishes for plaintiffs’ attorneys is more effective communication in early pleading.

More effective communication in early pleading will also help litigants refine and tailor their discovery requests to the demands of their case,<sup>150</sup> which will help litigants comply with Ohio Rule 26(B)(1), requiring discovery requests that are *proportional* to the needs of the case. This will also eliminate the need for courts to oversee mandated pre-trial case management meetings.<sup>151</sup> This is very important because state courts have fewer resources than federal courts to expend on the oversight of pre-trial matters.<sup>152</sup> Adoption of the standard will also create clearer expectations for practitioners in states where plausibility has been adopted in some jurisdictions and not others.

### 3. Plausibility promotes more than uniformity

The third argument against adoption of *Twombly/Iqbal* is that federal and state uniformity will not be achieved because many replica jurisdictions have departed from the Federal Rules in various ways. This view does not support the finding that states should not adopt plausibility. *Twombly/Iqbal* will serve other policy goals that are equally if not more important than providing for uniformity. These goals are explained above.<sup>153</sup>

### 4. Stare decisis does not require adherence to notice pleading

The fourth argument against adoption of *Twombly/Iqbal* is that stare decisis requires adherence to notice pleading. This is not a strong

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148. *Bell Atl. v. Twombly*, 550 U.S. 544, 556 (2007).

149. *See id.*

150. Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2215 (2014) (describing the *Twombly/Iqbal* departure from notice pleading reduces plaintiffs’ reliance on discovery to uncover evidence to prove their claim, leading to more controlled discovery demands proportional to the needs of the case).

151. *See* Holloran, *supra* note 103, at 20.

152. *See* Subrin & Main, *supra* note 21, at 502.

153. *See supra* Part III(D)(ii).

argument. Justice Souter in *Twombly* explained that a literal reading of the *Conley* “no set of facts” language would result in a system where a “wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”<sup>154</sup> The Court explained how, in practice, this was not the case, outlining cases where the *Conley*’s “no set of facts language” had been “questioned, criticized, and explained away.”<sup>155</sup>

The Court explained, as the Seventh Circuit had previously held, that *Conley* had never been interpreted literally and “[i]n practice, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.”<sup>156</sup> The Court also pointed to the Ninth Circuit’s previous holding that there is serious conflict between *Conley*’s “no set of facts” language and the requirement that a plaintiff must provide “grounds” for his or her entitlement to relief.<sup>157</sup> Further, the Court explained the First Circuit had previously stated that *Conley* does not require a court to speculate as to facts *not* set out in a complaint in order to turn a frivolous claim into a substantial one.<sup>158</sup> The Court concluded that “*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.”<sup>159</sup>

Richard Halloran, an experienced litigator at the firm Lewis and Roca LLP, reinforced Justice Souter’s assertions, explaining that requiring plausibility in a complaint will not drastically alter early pleading:

Requiring plaintiffs to come forth at the outset with more than mere conclusory allegations is nothing new. And ferreting out patently deficient pleadings makes sense for both litigants and the judicial system. Requiring plaintiffs to come forth in their complaints with enough factual allegations to raise a reasonable expectation that discovery will reveal evidence entitling them to relief is a minor cost compared with the expenses and burdens of litigation noted in *Twombly* and the strain that rising caseloads and tight fiscal constraints have imposed on our courts.<sup>160</sup>

Therefore, experience suggests that most attorneys would not have ever *relied* on the actual “no set of facts” standard, and plausibility has already

154. *Twombly*, 550 U.S. at 561.

155. *Id.* at 562.

156. *Id.* (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (internal quotation marks omitted; emphasis and omission in original)).

157. *Id.* (citing *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989)).

158. *Id.* (quoting *O’Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976)).

159. *Id.* at 563.

160. Halloran, *supra* note 103, at 24.

been implicitly embedded in early pre-trial litigation despite the leniency suggested by the literal reading of *Conley*.

Lastly, Ohio has a long history of adopting federal procedural law.<sup>161</sup> Both the drafters of the Ohio Rules and Ohio courts have expressed agreement with the policy goals envisioned by the drafters of the Federal Rules.<sup>162</sup> These observations suggest that stare decisis does not preclude Ohio from adopting *Twombly/Iqbal*.

5. Plausibility is necessary: Excessive discovery demands are not exclusive to federal courts

The fifth argument against adoption of *Twombly/Iqbal* is that discovery abuses are not a concern at the state level. However, as mentioned, the rise of e-discovery will complicate discovery demands in both state and federal courts,<sup>163</sup> suggesting that Ohio and other states should adopt plausibility to ensure that plaintiffs are making an adequate showing of a viable claim before burdening defendants with extraordinary discovery requests in complex litigation. Further, Ohio is also a large state with a large population, where complex litigation and e-discovery are bound to arise, resulting in burdensome discovery demands.

6. Constitutional issues regarding access to jury trials are no more severe under plausibility

The sixth argument against adoption of *Twombly/Iqbal* is that there are constitutional concerns surrounding the right to a jury trial when the merits of a case are decided before the parties get a chance to engage in discovery. This concern is quickly refuted by the majority opinion in *Twombly* outlining the bevy of cases rejecting a literal interpretation of the *Conley* “no set of facts” standard, suggesting that plausibility has long been embedded in early pretrial litigation.<sup>164</sup> A transition to plausibility does no more than solidify a long-adopted pleading practice.<sup>165</sup>

7. Cases with merit will survive motions to dismiss under plausibility

The seventh argument against Ohio and other state court adoption of *Twombly/Iqbal* is that cases with merit will be dismissed more often under plausibility. However, plausibility may actually decrease granted motions

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161. See *supra* notes 32-53 and accompanying text.

162. *Id.*

163. Marcus, *supra* notes 126-124 and accompanying text.

164. See *supra* notes 73-68 and accompanying text; notes 156-154 and accompanying text.

165. See *id.*

to dismiss in the long run because attorneys will draft more viable, well-worded complaints. Professor William Hubbard, an expert in civil procedure from the University of Chicago Law School, described recent studies that found increases in granted motions to dismiss under the plausibility standard were given with *leave to amend*; but there had been no change in *dismissals with prejudice*, which suggested plausibility had “little effect on the share of cases effectively terminated by a ruling on a motion to dismiss.”<sup>166</sup> Professor Hubbard conducted his own statistical analysis of recent federal court filings. The following outlines Hubbard’s conclusions:

What I find is a fairly detailed and coherent picture of the effects of *Twombly* and *Iqbal*. *Twombly* and *Iqbal* have led to a greater frequency in filings of motions to dismiss and the amendment of complaints. But there is little evidence that *Twombly* or *Iqbal* precipitated a major change in dismissals with prejudice, settlement patterns, or filing rates.<sup>167</sup>

Professor Hubbard’s finding that plausibility has not significantly increased the number of granted motions to dismiss with prejudice suggests that access to the courts will not be compromised under plausibility. Plaintiffs will have the opportunity to file amended complaints. As practitioners adjust to plausibility, more viable, well-worded complaints will result at the outset of a lawsuit, leading to a reduction in granted motions to dismiss, as well as the need to re-file amended complaints.

#### 8. Widescale adoption of plausibility will reduce pre-trial costs

The eighth argument against adoption of *Twombly/Iqbal* is that plausibility will result in increased costs of drafting complaints and litigating motions to dismiss. Professor Hubbard’s finding that plausibility has led in some jurisdictions to an increase in granted motions to dismiss with leave to amend may suggest that plausibility will create higher pre-trial costs for litigants in jurisdictions that adopt *Twombly/Iqbal*, as more complaints will require re-drafting and re-filing.<sup>168</sup> However, this view fails to consider that widescale adoption of plausibility will create clearer expectations for practitioners. As discussed above, this may decrease the success of motions to dismiss in the long run because attorneys will be encouraged to draft more viable, well-worded complaints, leading to better communication in early pleading and better case management, leading to a reduction in the costs associated with

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166. Hubbard, *supra* note 101, at 7.

167. *Id.*

168. *Id.*

litigating pre-trial motions.<sup>169</sup>

#### IV. CONCLUSION

*Twombly/Iqbal* is as sensible in application as it is in theory. Aristotle once stated that virtue is the golden mean between two vices, “the one relating to excess, the other to deficiency.”<sup>170</sup> Notice pleading represents the vice of deficiency: a *possibility* standard, which makes it too easy to get into court. *Probability* represents the vice of excess, where it is too hard to get into court. *Plausibility* is sensible because it is the middle ground. *Twombly/Iqbal* does not represent an impediment to justice or the advent of a “pro-defendant” era of jurisprudence, but rather a response to the early pro-plaintiff spirit of jurisprudence after the initial promulgation of the Federal Rules. *Twombly/Iqbal* marks a shift in judicial philosophy regarding the *purpose* of a complaint. Under *Twombly/Iqbal*, in addition to the *Conley* notice requirement, plaintiffs must communicate detailed information in their complaints to prepare the lawyers and judges involved for the facts and allegations of the case.

More effective communication in early pleading is a benefit regardless of whether litigants are in state or federal court because it speeds up the pretrial process. Scholars have exaggerated the unique characteristics of states rendering them unfit for adoption of *Twombly/Iqbal*. These views have failed to consider plausibility’s potential to facilitate better case management and more effective communication in early pleading, which will speed up litigation and reduce docket congestion. More effective communication in early pleading will lead to more viable complaints, which will reduce granted motions to dismiss as well as the costs associated with litigating them. Therefore, adoption of *Twombly/Iqbal* will not impede access to the courts. Rather, it will promote important policy goals shared by both state and federal court systems. Ohio should adopt *Twombly/Iqbal* to advance these goals.

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169. See *supra* Part III(D)(vi)-(vii).

170. Aristotle, *supra* note 133.